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## The Athletic Scholarship and the College National Letter of Intent: A Contract By Any Other Name

Michael J. Cozzillio



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## THE ATHLETIC SCHOLARSHIP AND THE COLLEGE NATIONAL LETTER OF INTENT: A CONTRACT BY ANY OTHER NAME<sup>1</sup>

Michael J. Cozzillio†

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1. The Letter of Intent is a document executed by a high school student-athlete notifying a particular undergraduate institution of a commitment to attend and participate in intercollegiate athletics, usually in exchange for a promise of financial aid. The Letter of Intent was primarily developed to accomplish a two-fold purpose of reducing college recruiting costs and insulating high school athletes from a seemingly infinite number of suitors. An underlying purpose was to discourage student-athletes from "jumping schools," i.e., renegeing on a commitment to attend one school in favor of another. *See* Sturup v. Mahan, 290 N.E.2d 64, 68 (Ind. 1972), *modified*, 305 N.E.2d 877 (1974). A copy of the 1989 Men's National Letter of Intent is attached as Appendix A. The background, component parts, and consequences of the Letter of Intent are explored in detail, *infra* notes 33-63 and accompanying text.

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Throughout this Article, reference to the male gender will be presumed to include the female gender, where appropriate. Such presumption is not intended to demean women's athletics, but rather reflects the fact that most issues arising in this context have involved male scholarship athletes.

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### I. INTRODUCTION

On November 18, 1986, Los Angeles high school basketball star Sean Higgins<sup>2</sup> signed a National College Letter of Intent (Letter or Letter of Intent)<sup>3</sup> to attend the University of California at Los Angeles (UCLA).<sup>3</sup> After tendering the Letter, Higgins reconsidered and decided that the University of Michigan was better suited to his needs and unique abilities. He recanted his commitment to UCLA and signed a second Letter of Intent—to the University of Michigan.<sup>4</sup>

Higgins' indecision was prompted by a great deal more than the fickleness of adolescence. He claimed that he had signed his initial Letter of Intent to UCLA under duress. Allegedly, Higgins' stepfather had verbally and physically induced him to enroll at UCLA so that he would remain close to his mother in the southern California area. Higgins eventually apprised UCLA officials of his desire to rescind the Letter of Intent and return to his native Michigan.<sup>5</sup> After some debate, the NCAA, through the Letter of Intent's sponsor organization, the Collegiate Commissioners Association (CCA), and UCLA released Higgins from his "obliga-

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2. Higgins' high school performance made him one of the most heavily recruited basketball players in the country. Colleges often recruit players of Higgins' caliber as early as junior high school. See J. FEINSTEIN, *SEASON ON THE BRINK* (1986); see also Brubaker, *Dear Chris*, *SPORTS ILLUSTRATED*, Nov. 26, 1984, at 120-24. Wolff, *High School Confidential*, *SPORTS ILLUSTRATED*, Jan. 8, 1990, at 20-28.

3. Keteyian & Wolff, *Signed, Sealed and Sorry*, *SPORTS ILLUSTRATED*, Feb. 23, 1987, at 24-26.

4. *Id.*

5. Bonk, *Higgins is Released from UCLA Letter*, *L.A. Times*, Mar. 11, 1987, pt. III, at 1, col. 5.

tion'' with no compromise of his rights to participate in intercollegiate athletics.<sup>6</sup> The conciliatory posture doubtless was a direct result of UCLA's belief that Higgins' promise to attend UCLA was the tainted result of his stepfather's duress and undue influence.<sup>7</sup>

The Higgins incident is by no means isolated. On other occasions, high school athletes have pledged their "services" to a particular university only to change their minds and commit to other institutions.<sup>8</sup> These recalcitrant signings have often proceeded

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6. *Id.*

7. Subtle distinctions are drawn between duress and undue influence, each of which renders the "coerced" agreement voidable and, in certain cases, void. "Duress" involves any wrongful act or threat that negates a party's free will in the formation of a contract. *See generally* J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-2, at 336 (3d ed. 1987). "Undue influence" is a form of duress that is characterized by unfair or excessive persuasion. 13 S. WILLISTON, *WILLISTON ON CONTRACTS* § 1605 (W. Jaeger 3d ed. 1970). A key element is either the exercise of dominance over a subservient party or use of a position of trust or confidence to cajole the weaker party into entering a contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979). *See also* *Kase v. French*, 325 N.W.2d 678 (S.D. 1982).

Sean Higgins could argue either duress or undue influence justifying avoidance or reformation of any contractual obligations that he may have assumed through the Letter of Intent. The intriguing twist in Higgins' case is that the domination or excessive urging may have come from the "victim's" cosigner, rather than the promisee. Yet, the source of the duress should have no effect upon the victim's prerogative to disaffirm the contract, unless the "beneficiary" of the duress is unaware of the coercion exercised by a third party. *See* 13 S. WILLISTON, *supra*, § 1622A; RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1979). *See generally infra* notes 211-27 and accompanying text.

8. For example, high school standout Bobby Martin recently reconsidered a decision to attend Villanova University and enrolled at the University of Pittsburgh. Martin had verbally committed to Villanova but had not yet signed a Letter of Intent. Telephone interview with Craig Miller, Assistant Athletic Director for Communications, Villanova University (Dec. 1, 1988). Several years ago, high school quarterback Vince Ferragamo signed and mailed a Letter of Intent to attend Stanford University. He abruptly reconsidered and retrieved the letter from the post office, opened the letter, deleted his signature, and re-dispatched the letter. Smith, *It's Time to Sign on the Dotted Line, It's the Moment of Truth, Letter of Intent Day Weighs on Recruits*, L.A. Times, Feb. 13, 1985 at pt. III, p. 12, col. 1. This incident shows that the characterization of the Letter of Intent is often critical. Ferragamo's recanting may have been ineffective if the signed letter was the acceptance of the university's scholarship offer. Under the majority view, acceptance of a bilateral contract offer is generally effective upon dispatch (the "mailbox rule"). *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818); RESTATEMENT (SECOND) OF CONTRACTS § 63 (1979). Here, the mailbox rule will largely be an academic curiosity because most Letters of Intent are hand-delivered and signed in the presence of university officials. Smith *supra*.

without sanction, and the jilted university has consciously waived apparent prerogatives arising under the Letter of Intent.<sup>9</sup> Presumably, the university has deemed strict enforcement of the Letter as unworthy of the effort or unwarranted by the underlying circumstances. The student-athlete's Letter may have been perceived as a gentlemen's agreement—enforceable as a point of honor but not a matter for judicial intervention. In any event, the Letter of Intent can hardly be characterized as a sacrosanct document.<sup>10</sup> Higgins' own words offer the most telling commentary:

I don't give a hoot about UCLA. . . . And I never did, either. I didn't even read [the letter]. I knew it committed me to UCLA, but I didn't know I'd get all this hassle to get out of it. I just signed the thing so he would leave me alone. I had a game that night; that's all I was worried about.<sup>11</sup>

While university officials are frequently more discreet about their apparent indifference to commitments than Sean Higgins, they are often nonetheless blase about their contractual obligations to student-athletes. Institutions have seduced and abandoned unsophisticated student-athletes in a variety of ways, including premature termination of scholarships<sup>12</sup> and changes in athletic

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9. Telephone interview with Kevin Lennon, Assistant Commissioner, Collegiate Commissioners Association (Dec. 1, 1988).

10. Of course, when the student-athlete's signature on the Letter has been prompted by duress or an intrusion upon his capacity to consent freely, the Letter should be nullified and reconsideration permitted. Conventional morality and pertinent theories of contract law reinforce this conclusion. Certainly, no university desires to hold hostage a student who is already the victim of untoward outside influence, possibly even excessive persuasion by the university's own agents. Thus, in the Higgins situation, debate over application of contract law principles is merely an abstraction. However, if the university feels no moral compunction to let bygones be bygones—for example, when the student has a change of heart or, worse, secures a better scholarship package from another university—then the relevance of traditional contract law tenets is obvious. See, e.g., Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769 (1985); Sharp, *The Ethics of Breach of Contracts*, 45 INT'L J. ETHICS 27 (1934); see also Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

11. Keteyian & Wolff, *supra* note 3, at 26.

12. The recent decision of the University of Maryland to rescind the basketball scholarship of sophomore Phil Nevin is an example of a university's indifference to its moral, if not legal, commitments. The university, through

department personnel that directly contradicted representations made to student-athlete recruits.<sup>13</sup> This renegade conduct intimates that both universities and student-athletes are showing manifest disregard for their promises—almost as if the entire process is entered with fingers crossed, destined to remain vital only so long as the parties are willing participants.

This cavalier attitude toward contractual obligations certainly is unsurprising. Some student-athletes view the university experience as merely a waystation on the road to a career in professional sports. The seriousness with which they approach the college academic experience and the respect for the institutions and their

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former head basketball coach Bob Wade, recommended that Nevin transfer because the reserve center would not fit in the coach's future plans. Nevin's response was vehement, and his family immediately retained counsel to appeal the university's decision. *See Asher, Sturtz: Playing Time Key on Nevin*, Wash. Post, May 7, 1987 at B1, col. 1. The Nevin matter was settled without litigation and the parties' contract rights were never fully explicated. A judicial decision would have turned on many of the factors addressed herein, particularly the duration of Nevin's scholarship commitment. *See infra* notes 178-90 and accompanying text.

13. Former Providence College basketball coach Rick Pitino, after assuring recruits, team members, and university officials that he had no interest in the New York Knicks' head coaching position, turned an abrupt about-face and signed a lucrative multi-year contract with the National Basketball Association (NBA) club. Shortly before this transaction, Pitino had signed a five-year contract to continue as Providence's basketball coach. *See Pitino Decides to Leave Providence and Accept Knicks' Coaching Job*, L.A. Times, July 14, 1987, pt. III, at 2, col 1.

When questions were raised about the student-athletes who had signed a National Letter of Intent (NLOI) to attend Providence based on the understanding that Pitino would be the head coach, Pitino "graciously" recommended that those student-athletes be released from their commitment to Providence College. *See McCallum, Not First Class, Coach*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 86. Under one contract model posited herein, the student-athlete would be released as a matter of law because an arguable condition precedent to his duty to attend Providence, Pitino as head coach, had not been met. The duty to attend would be discharged and the release effected. However, if the continuation of Pitino as head coach were construed as a university promise, then damages for breach could be available, particularly if the student-athletes were unable to secure another scholarship commitment after being released.

The matters raised in the Pitino case have been resurrected recently at the University of Miami, where football coach Jimmy Johnson resigned to become the head coach of the National Football League's Dallas Cowboys. Several Miami recruits asked to be released from their Letters of Intent as a result of Johnson's migration. In each instance, the University of Miami refused. *See Kornheiser, Freedom for Recruits, A Matter of Fairness*, Wash. Post, Mar. 7, 1989 at E-1, col 1.

rules leave a great deal to be desired.<sup>14</sup> In the same vein, many universities see the student-athlete as an income producer,<sup>15</sup> i.e., grist for the college athletic mill first, and student second. Once athletic eligibility has been exhausted, the university's concern for the student-athlete's academic well-being is similarly spent.<sup>16</sup> At

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14. See *infra* notes 367-68 and accompanying text. See also Kirshenbaum, *An American Disgrace*, SPORTS ILLUSTRATED, Feb. 27, 1989, at 16.

15. See Woods & Mills, *Tortious Interference with an Athletic Scholarship: A University's Remedy for the Unscrupulous Sports Agent*, 40 ALA. L. REV. 141, 159-63 (1988). See also Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96 (1985) [hereinafter Note, *Student Athletes*]. The correlation between a successful athletic program and university economic prosperity is self evident. Season ticket sales, television packages, revenues from post season tournaments and bowl games, and similar income sources defy the imagination. See, e.g., National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984). This wealth is by no means limited to traditional "powerhouses." Indeed, a small school's athletic department, which is able to garner a high school superstar, may very well change the direction and economic fortunes of the entire university. It will also promote the school's appeal to future recruiting targets.

The benefits to the student-athlete able to demonstrate his skills, particularly at an upscale, high profile institution, are obvious. One need only peruse the salary structures in professional sports to understand the "vocational" advantages that a college athletic program affords student-athletes with professional potential. See, e.g., 1 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 49 (1986); Callahan, *The Penalties for Delay of Game*, TIME, Oct. 5, 1987, at 59-60. In many respects, the NCAA is a no-expense farm system, recruiting, cultivating, and showcasing the best talent for the various professional sports leagues. It is not surprising that the economics of recruiting and the attendant pressures are staggering. See generally Cross, *The College Athlete and the Institution*, 38 LAW & CONTEMP. PROBS. 151 (1973).

16. See generally Koch, *The Economics of "Big-Time" Intercollegiate Athletics*, 52 SOC. SCI. Q. 248 (1971); Telander & Sullivan, *You Reap What You Sow*, SPORTS ILLUSTRATED, Feb. 27, 1989, at 20.

The late Paul "Bear" Bryant, former football coach at the University of Alabama, bluntly stated:

I used to go along with the idea that football players on scholarship were "student-athletes," which is what the NCAA calls them. Meaning a student first, an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.

S. KIRBY, FUMBLE: BEAR BRYANT, WALLY BUTTS, AND THE GREAT FOOTBALL SCANDAL 85 (1986). See also Hall v. University of Minn., 530 F. Supp. 104, 109 (D. Minn. 1982).

Many institutions and conferences have acted to inject a new spirit of concern into the university/student-athlete relationship, particularly with respect to the student's academic and social development. For example, the University of Notre

some schools, the likelihood of seeing a student-athlete use up his full athletic eligibility without graduating, or abandon a program altogether, far outweighs the probability that he will complete the institution's degree requirements.<sup>17</sup>

The overall benefit of the National Letter of Intent Program (NLIP) and the relationship between the student-athlete and the university would be significantly enhanced if the parties' representations were construed as duties to be performed, much like the promises made in the typical commercial arrangement. Without such treatment, the relationship between the university and the student-athlete lacks accountability at its inception—a result totally at odds with the objective manifestation of the parties' intent at the time the relationship is created.

If the commitments were more clearly defined at the outset, both parties would enter the relationship with the understanding that games are to be played only on the field or on the court, and not with careers or livelihoods. The student-athletes that make the Letter of Intent commitments are young adults equipped to recognize their responsibilities and deserving of corresponding respect from the institutions that have agreed to educate them. To provide these individuals with the franchise to elect a president and at the same time adopt a patronizing and paternalistic approach to their ability to understand the legal ramifications (if not the subtleties) of an agreement is ludicrous. It is even more inane to indulge moral bankruptcy and crass indifference to legal obligations by the upper echelons of the academic hierarchy. Such paternalism and indulgence is particularly indefensible when the parties have taken pains to commit themselves to an agreement that is the product of a well-conceived, nationwide program, and that in all relevant respects possesses contract properties totally enforceable in any other context. Given the substantial financial investment in college athletic departments and the formalistic trappings that typify pre-enrollment commitments, viewing the Letter of Intent as a binding contract hardly seems subversive.

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Dame has become a bulwark in the movement toward assuring that athletics occupy the proper role in the student's collegiate experience. Notre Dame's football team graduated the highest rate of participants in the country in 1988. *The Sporting News*, Nov. 14, 1988, at 34, col. 3. See also Howard, *Incentives Are Needed to Increase Graduation Rates of Scholarship Athletes*, 10 SETON HALL LEGIS. J. 201 (1987); Note, *Student Athletes*, *supra* note 15, at 123 n.158.

17. See, e.g., Feinstein, *The Ordeal of Jim Valvano*, *SPORTS ILLUSTRATED*, Jan. 30, 1989, at 34.

This Article argues that the typical National Letter of Intent (NLOI) explicitly contains both language and broad institutional policy which makes it impossible to construe the resulting relationship between the university and the student-athlete as anything but contractual. The Letter of Intent discredits the tenuous argument that the financial aid arrangement is part of a "gentlemen's agreement" or a gratuitous grant of scholarship monies.<sup>18</sup> Notwithstanding its noncommittal title, the Letter of Intent is not an "agreement to agree" or a similar hybrid formation that historically has been discounted by the courts as a nonbinding gossamer.<sup>19</sup> Rather, it is, alone or in conjunction with the university's financial aid package, a bilateral contract enforceable through traditional contract machinery.

Many courts have acknowledged that the university-student partnership is contractual in nature, particularly when financial

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18. Erudite scholars such as Professors Weistart and Lowell have questioned the legal significance of a university's scholarship award. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 1.06 (1979). While acknowledging that arguments can be advanced to support the view that a scholarship arrangement is contractual, these commentators urge that it would be more appropriate to characterize the financial aid as an educational grant:

[I]t seems preferable that the [scholarship award] be viewed as educational and not contractual, at least where its language specifies only that the athlete must maintain eligibility under applicable rules and regulations. Such characterization would be consistent with the conventional understanding of both athletes and institutions. There is no reason to believe that institutions assume a contractual relation to exist. Indeed, if such a relation did exist it would give the institution power to compel the athlete to perform the undertaking—for example, to preclude an athlete from leaving the institution.

*Id.* at 11-12. Viewing the university/student-athlete relationship as "academic" rather than "contractual," they explain that the student-athlete's responsibilities under the scholarship arrangement (e.g., maintenance of eligibility pursuant to pertinent rules and regulations) are nothing more than conditions qualifying the "gift." *Id.* at 9-10. In this sense, Weistart and Lowell analogize the scholarship athlete to a music student who has been provided financial aid with the understanding that he will "engage in public performances as part of his educational program." *Id.* However, having articulated this preference for an "academic" approach, they concede that differentiating a contract from a gift in this context is difficult, and admit that, "where there is language in an award, or an institutional policy indicating that the athlete specifically undertakes to perform in exchange for the amount in question, then it may not be possible to construe it as a non-contractual arrangement." *Id.* at 12. *See also* G. SCHUBERT, R. SMITH & J. TRENTADUE, *SPORTS LAW* 16-20 (1986).

19. *See infra* notes 105-23 and accompanying text.

aid has induced a student's commitment to attend the institution.<sup>20</sup> However, the courts have never fully explicated the nuances of this contractual relationship and the parameters of each party's rights and duties. This Article attempts to fill that gap by dissecting the contract between a university and a student-athlete from the pre-contractual negotiation phase through the ultimate performance or nonperformance of the agreement.

Part II of the Article details the history of the Letter of Intent program, the fundamental relationship between university and student-athlete, and the general state of intercollegiate athletics. The remainder of the Article uses this factual backdrop as a foundation for application of general contract principles.

Part III explores the "formation" stage of contract development, including the parties' mutual expressions of assent,<sup>21</sup> the surprisingly difficult identification of offeror and offeree,<sup>22</sup> the

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20. Although many cases have identified the relationship between a university and student-athlete as contractual, no decision has explored the myriad questions spawned by such a dramatic conclusion. See *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973); *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117, 191 S.E.2d 379, cert. denied, 282 N.C. 307, 192 S.E.2d 196 (1972); *Barile v. University of Va.*, 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981); *Waters v. University of S.C.*, 280 S.C. 572, 313 S.E.2d 346 (1984); Note, *Student Athletes*, supra note 15. But see *Ewing v. State*, 69 Misc. 2d 923, 331 N.Y.S.2d 287 (Ct. Cl. 1972) (granting of scholarship or fellowship not contractual). See generally 2 R. BERRY & G. WONG, supra note 15, at 137-40.

The financial aid commitment of the institution may, in itself, create a binding contract. The Letter of Intent, offered in exchange for a scholarship, serves only to reinforce the conclusion that the relationship is contractual and offers abundant evidence of a bilateral agreement with a clear exchange of promises. Courts have even found a contractual relationship to exist in university-student arrangements lacking this additional commitment. See, e.g., *Steinberg v. Chicago Medical School*, 41 Ill. App. 3d 804, 354 N.E.2d 586 (1976); *Hanson v. Kynast*, 24 Ohio St. 3d 171, 494 N.E.2d 1091 (1986); Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?* 7 J.C. & U.L. 191 (1980-81); Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1972).

21. The question of mutual assent is crucial in the Letter of Intent scenario because a promise to attend a particular university hardly rises to the level that binding contracts typically attain. This promise may be viewed as similar to social obligations, election campaign promises, some intramarital agreements, and other informal contracts that have the components of an offer and acceptance, but that implicitly suggest the parties do not intend legal consequences. See *Balfour v. Balfour*, 2 K.B. 571 (C.A. 1919). See also McDowell, *Contracts in the Family*, 45 B.U.L. REV. 43 (1965).

22. An offer has been defined as the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his

definiteness,<sup>23</sup> duration<sup>24</sup> and characterization<sup>25</sup> (bilateral or unilateral) of the typical Letter of Intent, and collateral problems of voidability (e.g., incapacity).<sup>26</sup> At the "validation" stage, Part IV

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assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979). An offer grants the offeree a legal power to close the deal. An acceptance is defined as a "voluntary act of the offeree whereby he exercises the power conferred upon him by the offer and thereby creates . . . a contract." Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 199 (1917). It appears that the promise of financial aid is an offer rendering the university susceptible to an acceptance via the Letter of Intent. Yet, certain factors suggest that the Letter may be viewed as the offer, inviting acceptance by the university's commitment of scholarship funding. Paradoxically, the university would be the offeree who has "drafted" the terms of the offer. See, e.g., *International Filter Co. v. Conroe Gin, Ice & Light Co.*, 277 S.W. 631 (Tex. App. 1925). The importance of the characterization clearly lies in the power of revocation and the point at which it may be extinguished. See, e.g., *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717 (S.D. Cal. 1960).

23. A contract can fail for indefiniteness or uncertainty in several contexts, including purported agreement to a material term that remains vague or imprecise, silence as to a material term, and agreements to agree as to a material term. See generally J. CALAMARI & J. PERILLO, *supra* note 7, § 2.9, at 54.

The Letter of Intent does not specify what the student-athlete is to do beyond enrollment and attendance at the pledged institution. In this sense, the Letter may be compared to a contract from which specific terms have been omitted. In another sense, the Letter's title places it in a different category—analogue to an agreement in principle, an agreement to agree, or similar para-contract. See *infra* notes 105-23 and accompanying text; see also Farnsworth, *Pre-Contractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987); Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969); Lake, *Letters of Intent: A Comparative Examination Under English, U.S., French and West German Law*, 18 GEO. WASH. J. INT'L L. & ECON. 331 (1984).

24. See *infra* notes 178-90 and accompanying text.

25. The character of the contract has a profound impact on the duties or putative duties of the parties. The characterization of the Letter of Intent as a bilateral agreement, in which a promise is exchanged for a counter promise, would create binding obligations on each party. If the university's scholarship is construed as an offer to a unilateral contract, the student-athlete's acceptance is manifested by his performance, presumably enrollment and attendance at the university. Under this approach, the student has no duty to enroll and the Letter of Intent would constitute only a notification of an intention to accept or, at most, part performance. *United States v. O'Brien*, 220 U.S. 321 (1911). See *infra* notes 164-77 and accompanying text.

26. Contracts frequently have been voided for a variety of reasons relating to incapacity, including infancy, mental infirmity, and intoxication. J. MURRAY, MURRAY ON CONTRACTS §§ 11-16 (2d rev. ed. 1974). See generally, Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1

treats consideration,<sup>27</sup> both in its traditional sense and as a more liberal, flexible subspecies of evolving contract jurisprudence. Consideration is discussed as it pertains to various provisions of the Letter of Intent that, on the surface, may contain illusory promises or representations without adequate support.<sup>28</sup> To complement the consideration analysis, Part V discusses the companion doctrine of promissory estoppel and similar equitable devices.<sup>29</sup> Finally, Part VI focuses upon the "performance" component, and examines the complex questions surrounding the parties' duties to fulfill their various contractual obligations. Primary emphasis is upon the classification of the agreement's various representations as promises or conditions (or both).<sup>30</sup>

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GA. L. REV. 205 (1966); Mehler, *Infant Contractual Responsibility: A Time for Reappraisal and Realistic Adjustment?* 11 U. KAN. L. REV. 361 (1963). Infancy problems could be significant in the Letter of Intent arrangement, particularly because the ages of majority may vary from state to state.

A collateral issue that warrants attention is whether a disaffirmance by a signing "infant" will discharge the duties of an adult cosigner. In all probability, the disaffirmance by the infant student-athlete will not excuse the cosigning parent or guardian. See *Campbell v. Fendor*, 218 Ark. 290, 235 S.W.2d 957 (1951). See *infra* notes 194-210 and accompanying text. Finally, no discussion of infancy is complete without consideration of the various doctrines relating to an infant's ability to contract independent of his parents, such as the Rule of Necessaries. These issues are addressed at notes 194-210 and accompanying text.

27. See *infra* notes 229-82 and accompanying text.

28. See *infra* notes 251-82 and accompanying text.

29. See *infra* notes 283-317 and accompanying text. Even those commentators who have suggested that the scholarship commitment is an educational grant emphasize that failure to honor the commitment may result in an action by the student-athlete under the doctrine of promissory estoppel. See J. WEISTART & C. LOWELL, *supra* note 18, § 1.06, at 10 n.31.

30. The distinction between promises and conditions is a perennially vexing one in contract law. A promise is generally defined as a "manifestation of intention to act or refrain from acting in a specified way so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1979). A condition is "an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Id.* § 224. Labeling various provisions as promises or conditions could dramatically affect the rights and duties of the parties in the Letter of Intent scheme. For example, if the "commitment" to attend a particular institution were construed as a condition precedent, then failure to attend may only discharge the university's scholarship obligations, but it would not provide the university an action for breach. On the other hand, if the letter is viewed as a promise or set of promises, then a failure by the student-athlete to enroll at and attend the university may be a breach of promise together with a failure to meet (substantially perform) the constructive condition created by the promise. See *infra* notes 318-66 and accompanying text.

Throughout the somewhat mechanical analysis of the Letter of Intent, the Article considers the public policy concerns endemic to any conclusion of possible contractual liability for both the university and the student-athlete. In particular, this Article discusses the role played by the academic abstention doctrine and the degree to which the university-student relationship warrants or permits judicial intervention.<sup>31</sup> While academic abstention is primarily a policy issue, it is closely related to the question of whether the parties to the Letter of Intent truly contemplate legal consequences—a key element of mutual assent.<sup>32</sup>

## II. HISTORY OF THE NATIONAL LETTER OF INTENT PROGRAM

The National Letter of Intent Program (NLIP) was spawned by concerns for both the participating institutions and the student-athletes they recruited. In the early stages of intercollegiate athletics, recruiting efforts were circumscribed to high schools geographically proximate to the university.<sup>33</sup> Advances in transportation, communications, and technology had not yet shrunk the country to the point where transcontinental recruiting would become a way of life. The typical high school student did not contemplate uprooting and relocating to another part of the country.<sup>34</sup> The universities could not justify the higher costs of recruiting beyond a small area because intercollegiate athletics had not evolved into the huge revenue producing industry that it is today.<sup>35</sup>

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31. Academic abstention is a catch-all term describing a judicial disposition to defer to institutions of higher learning in matters of academic policy. The judicial mindset is decidedly averse to intruding upon the academic prerogative, as evidenced by recent comments of Justice Stevens: "Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'" *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Keyishan v. Board of Regents*, 385 U.S. 589, 603 (1967)). See also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

32. See *infra* notes 68-77 and accompanying text.

33. See Collegiate Comm'rs Ass'n, *History of the National Letter of Intent* [hereinafter *History*] (on file at *The Wayne Law Review*).

34. *Id.*

35. *Id.* Prior to World War II, participation in intercollegiate athletics was considered primarily an extension of the student's academic growth; it was thought of as "an incidental undertaking," theoretically "subordinate to what is perceived to be the essential task of providing education." Note, *Student Athletes*, *supra* note 15, at 106 (quoting Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 168 (1983-84)). Today, it is undisputed that intercollegiate athletics have become a form of business entertainment, and a large source of revenue for the institution through gate receipts, radio and television contracts, as well as alumni contributions.

After World War II, returning veterans ballooned college enrollments and injected new vitality into languishing athletic programs. This factor, together with the increased popularity of television, spurred college athletics' rise to national and international prominence.<sup>36</sup> School administrators quickly saw college sports as big business and perceived the development of their athletic programs as mealtickets.<sup>37</sup> Success on the gridiron was viewed as a critical revenue source—rather than a financial windfall. Thus, aggressive recruiting was sometimes rationalized as the first step in the refinement of an athletic program that would eventually fund the universities' laboratories, computer rooms, and related facilities.<sup>38</sup> It is no mystery that recruiting became a monster that soon began to gorge itself on its creator.

Fierce recruiting for the best athletes presented difficulties for universities, students, parents, and high school faculties.<sup>39</sup> A coaching staff commonly began its recruiting crusade searching for the next year's holy grail while the current athletic campaign was still in progress.<sup>40</sup> On the receiving end, the student-athlete was constantly besieged with a "hard sell" by an athletic department's most persuasive salespeople. Sales pitches varied from sincere coach-to-mother conversations about the student-athlete's education and general well-being<sup>41</sup> to slick self-promotion of a univers-

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36. *History, supra* note 33.

37. *See Note, Student Athletes, supra* note 15, at 106. "In 1981 alone, these benefits approximated total . . . revenues for NCAA member institutions in the amount of \$718,000,000." *Id.* at 106 n.58. *See also* Woods & Mills, *supra* note 15, at 159-63.

38. *See Note, Student Athletes, supra* note 15, at 106-07. "Administrators at [Boston] College have in recent years sought to upgrade its athletic program as a means of attracting contributions to pay for improvements in the school's academic environment." *Id.* *See also History, supra* note 33.

39. The recruiters, recognizing the influence that high school coaches and teachers have over their athletes, would coax these faculty members to apply additional pressure on the student. *See generally*, M. WOOTTEN & B. GILBERT, FROM ORPHANS TO CHAMPIONS 76-102 (1979).

40. *See History, supra* note 33. Due to the competitive nature of college athletics and the limited number of "blue-chip" student-athletes available each year, coaching staffs are pressured to rebuild their team immediately upon completion of each season. *See, e.g.*, Brubaker, *supra* note 2, at 120-24; *Sports Page Sleuths Hit Their Stride*, U.S. NEWS & WORLD REPORT, Nov. 11, 1985, at 16.

41. There is some merit to a sales pitch that includes the possibility of financial aid for the student-athlete who otherwise would be unable to attend college. However, the institution's first priority may no longer be the student-athlete's education, but the contribution that individual can make to the institution's athletic program. *See Note, Student Athletes, supra* note 15, at 98-99, 106.

ity's glorious athletic history and the perquisites that such success had engendered.<sup>42</sup> Pressure on the student-athlete and his parents, high school coaches, friends, and teammates was overwhelming. The student-athlete's schedule, already crowded with studies, practice, games and post-season tournaments, was disrupted to the breaking point.<sup>43</sup> The economic exigencies, especially for small institutions, reached prohibitive proportions as competition for quality student-athletes intensified.<sup>44</sup>

The need for some solution was indisputable. The seminal concept for a Letter of Intent germinated on a conference by conference basis at the end of World War II. In the early 1960s, momentum gathered for a more formal, national Letter of Intent structure.<sup>45</sup> However, initial NCAA suggestions of a compulsory system were met with vigorous dissent.<sup>46</sup> Accordingly, the current voluntary program was adopted in 1964.<sup>47</sup> Thirty-five conferences and seventy-nine independent institutions now participate in the NLIP.<sup>48</sup> The group comprises almost every four year undergraduate institution in the country.<sup>49</sup>

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42. See generally W. MORRIS, *THE COURTING OF MARCUS DUPREE* (1986).

43. See *History*, *supra* note 33.

44. See generally W. MORRIS, *supra* note 42.

45. See *History*, *supra* note 33.

46. *Id.* Opposition to the program was partly due to "apprehension expressed by institutions with less developed athletic programs that the letter of intent favored the more established athletic programs." See 2 R. BERRY & G. WONG, *supra* note 15, at 145; Note, *Student Athletes*, *supra* note 15, at 118 n.125. See also Goldpaper, *Harvard Basketball Gains New Respect*, N.Y. Times, Dec. 30, 1984, at 13, col. 1.

47. *History*, *supra* note 33.

48. See Letter of Intent, *infra* Appendix A.

49. While the NLIP has been characterized as a compulsory, NCAA program, it is theoretically neither. It is administered by the Collegiate Commissioners Association (CCA), an organization consisting of representatives from 13 major conferences of the NCAA. The NCAA does not require universities to participate in the NLIP. However, a university must be a member of the NCAA to participate in the NLIP, and the Letter applies only to NCAA member institutions. 2 R. BERRY & G. WONG, *supra* note 15, at 145. The NCAA's bylaws also specifically refer to the NLOI and regulate its member institutions' participation in commitment plans that do not comply with the NLIP. 1989-90 NCAA MANUAL, Art. 13.1.4 [hereinafter NCAA MANUAL].

This Article does not address the potential antitrust ramifications of the universities' cooperative efforts to govern recruiting and college selection procedures. While such a combination (e.g., the development and use of the standardized letter by all participating institutions) presents myriad questions regarding potential restraints of trade and monopolization, resolution of such issues is

Under the NLIP, an athletic director of the university typically will, in writing, offer the prospective student-athlete a scholarship in exchange for the student-athlete's commitment to attend the institution and participate in intercollegiate athletics. The manifestation of commitment is contained in the National Letter of Intent (NLOI), which must be executed first by the athletic director, then by the student and the student's parent or guardian.<sup>50</sup> The university must file the executed Letter with the appropriate conference commissioners within twenty-one days.<sup>51</sup> A prospective student-athlete can sign only one Letter. The Letter is valid only if the student-athlete has received an "award or recommendation for athletic financial aid" (when pertinent) at the time the Letter is to be executed.<sup>52</sup> The financial aid representation must list the terms and conditions of the award, as well as its amount and duration.<sup>53</sup> The student-athlete who signs the Letter of Intent agrees to enroll at that institution and waives the right to participate in any intercollegiate athletics with another NLIP member institution. This contractual injunction is effective for two calendar years. The "renegade" athlete, regardless of the date of his transfer, will be eligible for only two years of intercollegiate activity in any sport.<sup>54</sup>

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beyond the scope of this Article. See generally *Board of Regents v. NCAA*, 468 U.S. 85 (1984); *Board of Regents v. NCAA*, 561 P.2d 499 (Okla. 1977); *College Athletic Placement Services, Inc. v. NCAA*, 1975 Trade Cas. (CCH) ¶ 60,177 (E.D. Va. 1975); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975). For a general discussion of the contractual relationship between the NCAA and its member institutions, see Dickerson & Chapman, *Contract Law, Due Process and the NCAA*, 5 J.C. & U.L. 107, 111 (1978-79). See also *Tarkanian v. NCAA*, 109 S. Ct. 454 (1988).

50. Letter of Intent, *infra* Appendix A, at paras. 2, 6-8.

51. *Id.* at para. 9. If this regulation is not followed, the Letter becomes invalid. However, it may be reissued as long as the reissuance is within the specified deadlines.

52. *Id.* at para. 2.

53. *Id.* The NCAA also requires any member institution providing an athletic scholarship to establish a Financial Aid Review Board, which serves as court of first resort for the resolution of university/student-athlete disputes over the scholarship program, particularly revocation of a financial aid package. NCAA MANUAL, *supra* note 49, Arts. 2.10, 15.3.5.

54. Letter of Intent, *infra* Appendix A, at para. 1. The Letter provides for a procedure wherein the student-athlete forfeits only one year of eligibility if he and the university agree to a mutual release. Letter of Intent, *infra* Appendix A, at para. 11. If the university declines to release a student-athlete, he may seek review before the CCA, which purports to be the "final adjudication body." Letter of Intent Policies and Interpretations, *infra* Appendix B, at para. 3. While paragraph three may raise questions of exhaustion of remedies and judicial

Although the deadlines for signing and submitting the Letter of Intent vary from sport to sport, the Letter is a commitment to the university generally, as evidenced by the student-athlete's statement, "I understand that I have signed this Letter with the *institution* and not for a particular sport."<sup>55</sup> The scholarship commitment on the university's part is normally characterized as a yearly obligation renewable on an annual basis for up to four years, or five years in certain circumstances.<sup>56</sup>

The Letter of Intent and its restrictions are rendered nugatory if the student-athlete does not meet the admission requirements, financial aid eligibility requirements, or NCAA prerequisites to admission or scholarship assistance.<sup>57</sup> Other actions that nullify the

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review, not addressed herein, it will be assumed that aggrieved parties would not be denied eventual access to a reviewing court. *See generally* Shaughnessy v. Pedreiro, 394 U.S. 48 (1955); Keffe v. Citizens Bank, 808 F.2d 246 (2d Cir. 1986).

55. Letter of Intent, *infra* Appendix A, at para. 4 (emphasis in original). Interestingly, the recently released 1990 Letter of Intent adds the following phraseology to paragraph 3: "For example, if a coach leaves the institution, I am still bound by this Letter." 1990 Men's National Letter of Intent, at para. 3 (on file at *The Wayne Law Review*). In addition, the 1990 Letter adds the following caveat, "My signature on this Letter nullifies any agreement, all or otherwise, which would release me from the condition stated on this Letter." *Id.* at para. 4. Doubtless, this amendment reflects university concerns that student-athletes will attempt to escape their commitments as a result of changes in the coaching hierarchy. However, if a university states that a coach or other athletic department official will remain in place for a designated period of time, or if the student-athlete explicitly conditions his commitment upon such representations, the disclaimer of the new paragraph 3 may be unavailing—notwithstanding the putative merger language of new paragraph 4. *See infra* notes 345-46 and accompanying text. Of course, evaluation of the possible inclusion of prior agreements into the body of the Letter of Intent agreement will necessitate analysis under the parol evidence rule. *See generally* Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L.Q. 1036 (1968).

56. Whether this arrangement constitutes a four year commitment (with a series of yearly performances) or an annual commitment will be discussed at notes 178-90 and accompanying text.

57. Letter of Intent, *infra* Appendix A, at para. 1(a). Many financial aid packages contain explicit language requiring the student-athlete to comply with NCAA rules and regulations. *See, e.g.,* Begley v. Corporation of Mercer Univ., 367 F. Supp. 908 (E.D. Tenn. 1973). Language suggesting an incorporation of NCAA rules into a contract between a university and a student-athlete raises several questions. An important issue is whether provisions protecting a student-athlete (such as prohibitions against scholarship cancellation for lack of skill or injury) would be made a part of any contract, either expressly or by inference. Under a bilateral contract model, incorporation of NCAA regulations could result

commitment include: attendance and graduation from a junior college after signing the Letter during high school or in the first year of junior college; service on active duty for eighteen months in the armed forces or as a religious missionary; discontinuation of the student-athlete's sport by the institution; failure to attend any institution for one year, and subsequent denial of an athletic scholarship by the institution to whom a Letter of Intent was originally addressed.<sup>58</sup> Other circumstances, such as incapacity<sup>59</sup> or duress,<sup>60</sup> may render voidable obligations incurred under the Letter of Intent. A material breach of a promise or a failure to comply strictly with express conditions may also warrant discharge of the parties' commitments.<sup>61</sup>

The NLIP was designed to be a measure that would accommodate the concerns of *all* parties.<sup>62</sup> Most commentators agree that

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in contractual liability for a student who fails to observe NCAA rules. Likewise, a university's failure to adhere to the appropriate regulations could constitute a breach of contract, with damages available to the student-athlete.

Resolution of these issues depends upon the language of the scholarship arrangement and the circumstances surrounding the university/student-athlete relationship. For purposes of this Article, it will be assumed that the NCAA rules are legislative in character and any sanctions imposed upon transgressing members will come from the NCAA. Any derivative relief or liability in contract would be foreclosed unless the regulations themselves were specifically incorporated into the agreement. *See generally* Dickerson & Chapman, *supra* note 49.

58. Letter of Intent, *infra* Appendix A, at para. 1(b-f).

59. *See infra* notes 194-210 and accompanying text.

60. *See infra* notes 211-28 and accompanying text.

61. *See infra* notes 318-66 and accompanying text.

62. *See History, supra* note 33. *See also* 2 R. BERRY & G. WONG, *supra* note 15, § 2.15-1(c), at 145. The Letter solves two problems: (1) it allows the student-athlete to make a timely decision and to be theoretically free of further recruiting hassles; and (2) it allows the institution to save time and money by ceasing recruitment efforts after a student-athlete signs a Letter of Intent. This second solution presumes to resolve the collateral problem of contract-jumping. *See Woods & Mills, supra* note 15, at 141 n.1.

Student-athlete piracy, i.e., one university's attempt to coax a student-athlete to renege on his commitment in favor of the raider institution, poses interesting questions. Theoretically, no student may be contacted after the letter has been signed. Yet, the CCA, the reviewing body of first resort, does not provide formal sanctions against an institution tampering with a high school student-athlete who has already executed a Letter of Intent. Further, the Policies and Interpretations of the Letter of Intent characterize such tampering as a breach of ethics, but no reprisals are suggested. *See Letter of Intent Policies and Interpretations, infra* Appendix B, at para. 17 [hereinafter Policies and Interpretations]. However, should the Letter of Intent be a binding bilateral contract, the interloper could be liable in tort for interference with advantageous contractual relationships. *See, e.g., Winnipeg Rugby Football Club v. Freeman*, 140 F. Supp. 365 (N.D. Ohio 1955); *see also Woods & Mills, supra* note 15.

the program has been a qualified success.<sup>63</sup> The recruitment process has been improved to the point where it is only moderately maddening to all participants. If nothing else, the university recruitment methods have been streamlined and the incidence of continued overtures after the student-athlete reaches a decision has been considerably ameliorated.

### III. CONTRACT FORMATION

The determination of mutual assent and the parties' intent to be bound legally are the threshold questions in contract formation.<sup>64</sup> Manifestation of mutual assent is the *sine qua non* of any enforceable contract.<sup>65</sup> However, the parties need not express an intent to be bound or explicitly evince their contemplation of legal consequences. Such intentions can be gleaned from the parties' expressions and actions during the process of offer and acceptance.<sup>66</sup> The entire transaction may be aborted if a party manifests an intent not to be bound, by either explicitly agreeing that the arrangement is nonbinding or by implicitly conveying such intent by his conduct. The circumstances surrounding the "agreement" may also compel the conclusion that the parties have no desire to elevate their relationship to a legally enforceable contract.<sup>67</sup> Thus, any extended discussion of the types of contractual configurations presented by the Letter of Intent, and the possible factors that may disturb the establishment of a binding agreement, must be prefaced by consideration of the parties' intent to be bound.

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63. See Smith, *supra* note 8.

64. Most commentators emphasize the intent *not* to be bound and declare that generally "a party's intention to be legally bound is irrelevant." E.A. FARNSWORTH, *CONTRACTS*, § 3.7, at 116. However, this characterization is misleading. A more intellectually satisfying approach is that the parties must intend to be bound, and such intent is presumed from an offer and acceptance or similar manifestation, except when the parties' words, actions, or the surrounding circumstances dictate otherwise. See, e.g., *Balfour v. Balfour*, 2 K.B. 571 (C.A.) (1919). Of course, offer and acceptance are typical manifestations of assent, but they are not always evident or identifiable as discrete components of a transaction.

65. See generally E.A. FARNSWORTH, *supra* note 64, §§ 3.6-7, at 113-19 (1982). Mutual assent is evaluated under an objective test. A party's subjective intent is irrelevant if his words or conduct, from the perspective of a reasonable person in that position, manifest the requisite assent. *Id.* See also *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954).

66. See J. CALAMARI & J. PERILLO, *supra* note 7, § 2-4, at 28.

67. *Id.* See also Kahn-Freund, *Pacta Sunt Servanda—A Principle and Its Limits*, 48 TUL. L. REV. 894 (1948) (British collective labor agreements not intended to be contracts).

The gravamen of the entire "formation" stage question is whether a reasonable person in the position of a student-athlete who signs a Letter of Intent would believe that his signature is of legal consequence, and whether the university as a "reasonable person" perceives its scholarship commitment to be legally binding. On the surface, the university and the student-athlete have executed a document that looks like a contract. Thus, the key issue is whether the parties to the Letter of Intent, either by their expressions or the circumstances surrounding the transaction, have manifested an intent not to be bound by their apparent promises. Because nothing in the terms of the agreement or other expressions of the parties reflects a negative intent, the only factors that might suggest such an intent are the academic environment in which the transaction takes place or the title of the document itself. Neither factor yields the conclusion that a demonstrable negative intent exists.

#### *A. Intent to be Bound*

It is well settled that a contract will not be enforced if the parties intend not to be bound or held legally accountable for failure to satisfy their promises. Such intent will be measured by a reasonable person's interpretation of the other party's representations. The nature of a transaction, the words of the parties, and the surrounding circumstances will dictate judicial evaluation of intent. Claims that a deal was made in jest or that an agreement was signed without a clear understanding that any legal obligation would be attached are assessed in accordance with the objective standard. Promises may be enforced despite the promisor's remonstrations that he subjectively never contemplated entering a binding contract.<sup>68</sup> Indeed, while parties often enter agreements without the slightest worry about the possibility of a breach and without the remotest idea of judicial enforcement mechanisms, this mindset does not necessarily signify that mutual assent is lacking or that the parties are not absolutely serious in their commitments.

"Intent to be bound" questions often arise when there is doubt about the parties' seriousness. Although the basic rudiments of

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68. See, e.g., *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954). *But see* *Chiles v. Good*, 41 S.W.2d 738, 739 (Tex. Ct. App. 1931) ("It is well settled that an offer and an acceptance, although complete, cannot be the foundation of a binding contract where the offer is made and accepted, not with the intention of making a contract, but as a mere jest or joke.").

offer and acceptance may be present, some outward manifestation may indicate that the parties never intended legal consequences. The parties can consummate an agreement, replete with all the trappings of a contract, but express an intention not to be legally bound. In these instances, the majority of courts will, under the prevailing objective theory, presume that there was no intention to be bound, and refuse to enforce the contract. Courts will indulge the parties' express manifestations of intent that the arrangement is nothing more than a sham or gentlemen's agreement.<sup>69</sup>

A more difficult question arises when the parties' intent is not obvious, but must be gleaned from surrounding circumstances. For example, a husband who promises his spouse that he will take out the garbage in exchange for her agreement to attend a social event is unlikely to prevail in court on a claim that failure to perform constitutes a breach of contract.<sup>70</sup> Likewise, an invitation to dinner in exchange for a return invitation will generally not rise to the level of a binding contract. It is a safe assumption that, in either event, the parties do not contemplate judicial enforcement of their agreements. Here, comparisons to the broader issues of contracts in academia are irresistible. In such contexts, courts may perceive an institutional framework in which problems will be handled "in-house," without any need for judicial intermeddling. Enforcement is left to the parties themselves, as a contract matter, because they have not manifested an intent of legal consequences and, as a policy matter, because courts believe that their involvement may be inappropriate or improvident.

### 1. *Academic Abstention*

Mutual assent cannot be fully addressed without a brief discussion of the categorically distinct, but practically related doctrine of "academic abstention."<sup>71</sup> This doctrine refers to a judicial policy of deferring to decisions of academic institutions, particularly where such decisions do not involve significant due process claims,

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69. See, e.g., *Hirschhorn v. Severson*, 319 N.W.2d 475, 478 (N.D. 1982). But see *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969).

70. See, e.g., *Balfour v. Balfour*, 2 K.B. 571 (C.A. 1919).

71. See Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141, 145-49 (1981-82). See also Note, *Student Athletes*, *supra* note 15, at 101-02; Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1972).

but do involve an institution's proper exercise of discretion.<sup>72</sup> However, academic abstention does not automatically preempt a court from deciding issues that rise to more substantial levels in terms of the student-university relationship.<sup>73</sup>

Academic abstention and intent to be bound are different concepts—the former involving primarily a question of judicial exercise of the prerogative to assert jurisdiction, and the latter constituting a critical substantive component of contract formation.<sup>74</sup> Thus, in a sense, academic abstention can be characterized as a procedural variation on the central theme of mutual assent—words or circumstances manifesting a party's intent not to be bound will negate the enforceability of an apparent contract. A kinship exists because they stem from the same source—a belief that the transaction or relationship is properly beyond the reach of courts and their remedial powers.

Courts adjudicating disputes in academic environments have repeatedly acknowledged that the university-student relationship has contractual underpinnings.<sup>75</sup> Contractual issues have frequently

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72. See generally *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In assessing the breadth of the academic abstention doctrine, one commentator has declared:

One reason for the courts' failure is their tendency to apply the doctrine of academic abstention to student's rights [sic] cases. . . . But academic abstention especially where student rights are concerned, has eroded in the courts in recent decades. The courts have shown a willingness to become involved, particularly in issues which concern the administrative or business function of the university. The failure of the courts to articulate a coherent legal theory respecting legal rights of students has led to considerable confusion. Yet, a close examination of the body of decisions the courts have handed down on student's rights suggests that a coherent theory is not only possible, but necessary. It is the contract theory of student's rights.

Nordin, *supra* note 71, at 141-42.

73. See Note, *Student Athletes*, *supra* note 15, at 101-02, 108-09. Recent authority in the nonathletic context suggests that academic abstention is inapplicable to enforcement actions for breach of the contractual relationship between university and student. See *Napolitano v. Trustees of Princeton Univ.*, 186 N.J. Super. 576, 453 A.2d 279 (1982); *Lowenthal v. Vanderbilt Univ.*, No. A-8525 slip op. at 2 (Tenn. Ch. Ct., Davidson County, Aug. 15, 1977) (students compensated for tuition and miscellaneous expenses, but denied full expectation damages for university's violation of curricular duties as described in catalog); see also Olivas & Denison, *Legalization in the Academy: Higher Education and the Supreme Court*, 11 J.C. & U.L. 1 (1984).

74. See *supra* notes 71-73 and accompanying text.

75. See generally *Hanson v. Kynast*, 24 Ohio St. 3d 171, 494 N.E.2d 1091 (1986); Note, *Student Athletes*, *supra* note 15.

arisen in the arena of intercollegiate athletics when a student-athlete has been stripped of his scholarship due to injury, alleged nonperformance, or failure to satisfy the university's expectations.<sup>76</sup> Recent authority suggests that a scholarship commitment in exchange for a promise to attend school reflects the parties' understanding that legally enforceable rights and duties have been created.<sup>77</sup> These cases demonstrate that academic abstention will not automatically pitch the promisor or breaching party out of harm's way. Likewise, the occurrence of their disputes in an academic arena will not serve as a *de facto* manifestation of the parties' intent not to be bound, a la intramarital pacts or social arrangements. The following three cases, dealing with scholarship terminations and attempts by student-athletes to recover injury benefits from universities, are pertinent illustrations.

## 2. *A Sampling of Scholarship Cases: Contracts in Academia*

In *Taylor v. Wake Forest University*,<sup>78</sup> the plaintiff, Taylor, sought recovery of educational expenses after the university had terminated his athletic scholarship. Taylor alleged that the Wake Forest coaches had breached their oral agreement to "limit or eliminate" his involvement in the athletic program should a conflict develop between educational achievement and athletics.<sup>79</sup> Taylor had been recruited on the strength of his outstanding performance as a high school football player,<sup>80</sup> and he eventually applied for a football scholarship at Wake Forest. He presumably signed a Letter of Intent, was granted the scholarship, attended the university, and participated in the football program his freshman year.<sup>81</sup> His grade point average at the end of his first semester was below the required level,<sup>82</sup> barring his participation in spring practice during

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76. *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117, 191 S.E.2d 379, *cert. denied*, 282 N.C. 307, 192 S.E.2d 197 (1972); *Barile v. University of Va.*, 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981).

77. *See supra* note 20 and accompanying text.

78. 16 N.C. App. 117, 191 S.E.2d 379, *cert. denied*, 282 N.C. 307, 192 S.E.2d 197 (1972).

79. 16 N.C. App. at 121, 191 S.E.2d at 381.

80. Taylor had been the object of recruitment by Wake Forest since his sophomore year in high school. *Id.* at 118, 191 S.E.2d at 380.

81. It is unclear whether Taylor actually had signed a Letter of Intent. However, the Court did refer to NCAA rules permitting termination of an athletic scholarship for fraudulent representations on the Letter of Intent. *Id.* at 119, 191 S.E.2d at 381.

82. *Id.*

the second semester. His second semester performance raised his cumulative first-year grade point average above the minimum standard.<sup>83</sup> However, he refused to participate in football his sophomore year, prompting the university to terminate his scholarship.<sup>84</sup> Taylor continued to attend Wake Forest and, upon graduation, sought recovery for his last two years' expenses of approximately \$5,500.<sup>85</sup>

In affirming the lower court's grant of Wake Forest's motion for summary judgment, the appellate court held that Taylor had failed to comply "with his contractual obligations."<sup>86</sup> The court further found the plaintiff's assertion that he should judge whether there was a conflict between his academics and athletics to be "a strained construction of the *contract*."<sup>87</sup> Implicit in the court's opinion was a conclusion that the plaintiff's agreement to participate in the athletic program in exchange for a scholarship formed a contract, which he violated when he refused to participate.<sup>88</sup> His lack of performance constituted a failure to substantially perform the constructive condition precedent to the university's duty to pay. Thus, the university's obligations were excused.<sup>89</sup>

Another circumstance that has engendered indirect judicial commentary on the Letter of Intent is the claim by a disabled student-athlete or the beneficiary of a deceased student-athlete that recovery is warranted under contract for disability or death benefits. In *Rensing v. Indiana State University Board of Trustees*,<sup>90</sup> the plaintiff, Rensing, signed both a Letter of Intent and a financial aid agreement. Rensing received an athletic scholarship for football, attended the university, and participated in the football program. During spring football practice he suffered a crippling

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83. *Id.*

84. *Id.* at 120, 191 S.E.2d at 381.

85. *Id.*

86. *Id.* at 121, 191 S.E.2d at 382.

87. *Id.* (emphasis added).

88. *Id.* The court declared:

Gregg Taylor, in consideration of the scholarship award, agreed to maintain his athletic eligibility and this meant both physically and scholastically. . . . Participation in and attendance at practice were required to maintain his physical eligibility. When he refused to do so in the absence of any injury or excuse other than to devote more time to studies, he was not complying with his *contractual* obligations.

*Id.* (emphasis added) See also *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908, 909-10 (E.D. Tenn. 1973).

89. 16 N.C. App. at 121-22, 191 S.E.2d at 382.

90. 437 N.E.2d 78 (Ind. App. 1982).

injury, resulting in his attempt to collect disability benefits under the university's employee benefits plan. The court of appeals, reversing the Indiana Industrial Board's denial of benefits, found that an employment contract existed between Rensing and the university. The court concluded that the financial aid agreement, the Letter of Intent, and the entire scholarship transaction evinced a bargained-for "exchange . . . [of the plaintiff's] football talents for certain scholarship benefits."<sup>91</sup> The court reasoned that because the benefits were conditioned upon Rensing's athletic ability, the scholarship constituted a *de facto* contract for hire.<sup>92</sup> The university's apparent ability to terminate the contract at will suggested a master-servant or employer-employee relationship.<sup>93</sup> As an "employee" of the university, Rensing was eligible for disability benefits.<sup>94</sup> The Indiana Supreme Court later reversed the court of appeals' holding that an employer-employee relationship existed. However, the court nonetheless reinforced the conclusion that some type of contractual arrangement had been effected.<sup>95</sup>

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91. *Id.* at 86.

92. *Id.* at 87. The court noted that "[t]he evidence in the case at bar clearly demonstrates that the benefits received by Rensing were conditioned upon his athletic ability and team participation." *Id.*

93. *Id.*

94. *Id.* at 85.

95. 444 N.E.2d 1170 (1983). The Indiana Supreme Court stated that "[w]hile there was an agreement between Rensing and the Trustees which established certain obligations for both parties, the agreement was not a contract of employment." *Id.* at 1174. *See also* *Coleman v. Western Mich. Univ.*, 125 Mich. App. 35, 336 N.W.2d 224 (1983). *But see* *University of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953); *Van Horn v. Industrial Accident Comm'n*, 219 Cal. App. 2d 451, 33 Cal. Rptr. 169 (1963).

A conclusion that the student-athlete is an employee would have significant consequences. For example, if the student-athlete qualified as an employee under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), he theoretically could unionize and engage in protected concerted activity, such as strikes and collective bargaining. The finding of an employer-employee relationship would necessitate a dramatic reevaluation of the university/student-athlete relationship in terms of fair labor standards, occupational safety and health, equal employment, and labor-management relations as a whole. *See, e.g.,* Note, *Rensing v. Indiana State University Board of Trustees: The Status of the College Scholarship Athlete—Employee or Student?* 13 CAP. U.L. REV. 87 (1983). In any event, given the nature of large-scale college athletics, it is difficult to rebut the growing number of critics who argue that college athletes should receive a regular stipend, in compensation for their part-time employment. For a general discussion of the de-amateurization of college sports, see Weistart, *supra* note 35. *See also* NCAA MANUAL, *supra* note 49, Art. 15.1 (payments beyond traditional scholarship awards prohibited).

In *Barile v. University of Virginia*,<sup>96</sup> Barile, an Ohio resident, initiated suit and sought damages in an Ohio state court for disabling injuries sustained while playing varsity football. The court dismissed his action for lack of personal jurisdiction over the defendant university.<sup>97</sup> The plaintiff appealed, contending that the university, by recruiting Ohio residents for its athletic programs, was subject to personal jurisdiction in Ohio.<sup>98</sup> The Ohio Court of Appeals agreed. Barile had been recruited in Ohio and had signed a Letter of Intent in Ohio indicating his decision to enroll at the University of Virginia (UVA). Thus, the court reasoned that UVA had satisfied a minimum contacts test by entering Ohio and contracting with an Ohio resident.<sup>99</sup> The court held that "[i]t is well established in law that the relationship between a student and a college is contractual in nature,"<sup>100</sup> and that "contract doctrine is particularly applicable to college athletes who contract by financial aid or scholarship agreement to attend college and participate in intercollegiate athletics."<sup>101</sup> The court reversed and remanded, holding that UVA was subject to personal jurisdiction in Ohio through its Letter of Intent contract with Barile.<sup>102</sup>

Thus, the Letter of Intent, while not yet an independent basis for a university's action to hold a student-athlete to his commitment, or vice versa, has served as a partial predicate for judicial recognition of the contractual relationship between university and student.<sup>103</sup> Such recognition seems wholly appropriate.<sup>104</sup> One can

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96. 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981).

97. *Id.*

98. *Id.*

99. *Id.* at 236, 441 N.E.2d at 614. See also *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

100. 2 Ohio App. 3d at 238, 441 N.E.2d at 615.

101. *Id.* The court noted that "[i]t cannot be seriously maintained that college football is not a business, or that the relationship between a college and a student-athlete is not a business relationship." *Id.*

102. *Id.* at 239, 441 N.E.2d at 616. In an appendix to the majority opinion, the Ohio court further explored authority that a contractual and business relationship exists between a student-athlete and a university under a Letter of Intent. The court declared: "The national letter of intent is properly seen as a . . . contract which, if not fulfilled by either party to the contract, results in substantial penalties being levied . . ." *Id.* at 240, 441 N.E.2d at 617 (quoting Koch, *The Economics of "Big-Time" Intercollegiate Athletics*, 52 Soc. Sci. Q. 248, 250-53).

103. This authority does not demand that every exercise of academic prerogative rests within the purview of the contractual obligations embraced by such an agreement. For example, a professor's failure to award a particular grade,

only conclude that a direct assault by a party seeking relief in the event of a breach of the Scholarship/Letter of Intent commitment will find courts hospitable to arguments advanced in favor of applying traditional contract theory. At the very least, it is clear that a line of demarcation exists between university-student agreements and those arrangements evincing, by their nature, an intent not to be bound.

### 3. *Letters of Intent in General*

The remaining question regarding the intent not to be bound centers on the characterization of the transaction as a "Letter of Intent"—terminology that conjures images of a deal with a consciously uncertain future. However, the title of the document is not indicative of the spirit with which the parties generally approach the exchange. The phraseology is merely the university's attempt to provide a title sounding less ominous than a typical commercial document, giving due attention to the lofty goals of academia.<sup>105</sup> Attempts to invoke this genteel terminology should not be construed as the parties' belief that the Letter is nothing

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present a certain type of examination, or cover a discrete, minor block of instruction, will probably lie purely within the academic prerogative that the abstention doctrine was designed to insulate. *See generally* Board of Curators v. Horowitz, 435 U.S. 78 (1978); Napolitano v. Trustees of Princeton Univ., 186 N.J. Super. 576, 453 A.2d 279 (1982); Marquez v. University of Wash., 32 Wash. App. 302, 648 P.2d 94 (1982). *But see* Steinberg v. Chicago Medical School, 41 Ill. App. 3d 804, 354 N.E.2d 586 (1976). Similarly, coaching decisions regarding a student-athlete's positioning, playing time, practice schedules, or curfews will not be subject to the strictest judicial scrutiny. *See generally* Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987); Comment, *Authority of a College Coach: A Legal Analysis*, 49 OR. L. REV. 442 (1970); Note, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions*, 110 CONN. L. REV. 318 (1978). Still, it is uncontroversial that some type of contract can exist in the context of a university-student relationship, and academic abstention will not ipso facto nullify such a contract's enforcement. This doctrine will only serve to qualify certain elements of the university-student relationship that rest outside the bounds of the agreement. Thus, courts will not decline to enforce an NLOI simply because it embraces an agreement between a university and a student. On the contrary, the NLOI rightfully should be evaluated under traditional contract principles, with due attention given to the intent of the parties, the nature of the transaction, the environment within which it was negotiated, and pertinent considerations of public policy.

104. *See generally* Note, *Student Athletes*, *supra* note 15, at 102 nn.30-31.

105. *See generally* Nordin, *supra* note 71. *See also* Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79.

more than a paper tiger. The negative covenant that leaves a "renegade" student-athlete with no more than two years of athletic eligibility should dispel any doubts about the seriousness with which the parties approach the transaction and ensuing relationship.<sup>106</sup> Nonetheless, because the words "Letter of Intent" represent the prevailing terminology, and because such nomenclature has been part of the rationale for finding that the parties desire to forestall the formation of a binding agreement in other contexts,<sup>107</sup> the following discussion is warranted.

The term Letter of Intent has been employed in a variety of contexts to describe written instruments manifesting the intent of one or both parties to consummate a formal agreement at some future time.<sup>108</sup> Ordinarily, the Letter of Intent is a handshake substitute that serves as a temporary memorialization of agreed-upon details.<sup>109</sup> The Letter provides some type of ongoing performance ledger by which each party understands what his respective duties will be if a final commitment eventuates. Often, it is prepared without anticipation of legal consequences and without participation of legal counsel.<sup>110</sup> In many instances, the underlying

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106. See Letter of Intent, *infra* Appendix A, at para. 1.

107. See *Hill v. McGregor Mfg. Corp.*, 23 Mich. App. 342, 345, 178 N.W.2d 553, 555 (1970). *Hill's* facts are easily distinguishable from circumstances surrounding the Letter of Intent. In *Hill*, the Memorandum of Understanding referred to several complex lawsuits involving patents, manufacturing rights, use and ownership of hardware, and contributions of the parties. The court stated that "[w]e find the one-page . . . 'Memorandum of Understanding' so cursory in its treatment of these matters as to convince us that the parties did not intend that document to be an enforceable agreement." *Id.*

108. See generally Lake, *supra* note 23. Lake has suggested that Letters of Intent can be catalogued as follows: (1) letters designed to provide information; (2) framework agreements intended to govern only the negotiation process; (3) memorializations of partial agreements developed during bargaining; and (4) documents erroneously entitled "letters of intent" that are, in actuality, legally enforceable contracts. *Id.* at 331-32. The first three categories plainly involve some type of transaction that has not ripened into a contractual agreement. The fourth category embraces several putative letters of intent that will operate to bind the parties. In this latter category, one may find an intent to memorialize an agreement in a more formal document, where the initial transaction itself creates a binding contract, or an agreement that is complete in all respects except for ultimate approval by a third party. See generally Farnsworth, *supra* note 23; Knapp, *supra* note 23.

109. Lake, *supra* note 23, at 331.

110. *Id.* at 334; McCauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). See also Temkin, *When Does the "Fat Lady" Sing?: An Analysis of "Agreements in Principle" in Corporate Acquisitions*, 55 FORDHAM L. REV. 125, 127 (1986).

purpose is simply to visit some moral obligation upon the parties who have indicated a willingness to negotiate in good faith with an eye toward closing a deal.<sup>111</sup> Thus, the true Letter of Intent is tentative and lacks the ultimate commitment that generally characterizes a binding contract.<sup>112</sup> Indeed, to members of the business community and much of the commercial law bar, the words "Letter of Intent" have an almost talismanic effect, tending to negate any implication that a binding contract has been executed.<sup>113</sup>

Traditional jurisprudence in this area seemed to indulge a rebuttable presumption that "preliminary instruments" bearing a label of uncertainty (e.g., letters of intent, contracts to contract) were nonenforceable.<sup>114</sup> The presumption was undoubtedly based

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111. Krauss, *Letter of Intent—An Agreement to Agree*, 50 N.Y. ST. B.J. 474 (1978) ("[The letter of intent] apparently has replaced an oral agreement to work toward a common goal or purpose, because business transactions have become much more complex under our tax and regulatory requirements.") *Id.* at 475.

112. One commentator has declared that "[t]he letter of intent should merely express the intention of the parties and not constitute a binding agreement. It may be very brief or quite detailed, and usually contains escape clauses . . . ." G. MCCARTHY, *ACQUISITIONS AND MERGERS* 130 (1963). *See also* *Dunhill Securities Corp. v. Micro-Thermal Applications*, 308 F. Supp. 195, 198 (S.D.N.Y. 1969); Wheat & Blackstone, *Guideposts for a First Public Offering*, 15 BUS. LAW. 539 (April 1960). Wheat and Blackstone note that "[a]n informal expression of the basic terms of the underwriting is sometimes (but by no means always) drawn up at the outset of the proceedings in the form of a letter from the originating underwriter to the company, usually referred to as the 'letter of intent.' Although signed by representatives of both the company and underwriter, such a letter is rarely more than an agreement to agree." *Id.* at 553-54. *But see* *Garner v. Boyd*, 330 F. Supp. 22 (N.D. Tex. 1970), *aff'd*, 447 F.2d 1373 (1971). In *Garner*, the court found "the instrument designated as a letter of intent" to be a contract. 330 F. Supp. at 25. "Even where a later and formal writing is contemplated by the parties, a contract may nonetheless arise before the execution of that writing." *Id.*

113. The testimony of one commercial law attorney is illustrative: "A letter of intent is basically the way I would express it an agreement to agree [sic]. It is a letter that generally represents—another synonymous word for it is a memorandum of understanding. It means, 'We will sit down and actively and seriously try to come to a firm understanding . . . .' I think the words 'agreement to agree' or 'the commencement of formalization of serious negotiations' is the best way I can express it." *Itek Corp. v. Chicago Aerial Indus.*, 274 A.2d 141, 143 (Del. 1971). *See also* Lake, *supra* note 23, at 338 n.56.

114. *See generally* A. CORBIN, *CORBIN ON CONTRACTS* § 29, at 45 (1952). The early English common law cases reveal ample authority that no such presumption should be dignified absent some expression of intent not to be bound. *See, e.g.,* *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; *see*

on the rationale that the normal commercial expectations of the parties were reflected in how they titled their correspondence and documentation. If they truly believed that their transactions were to be binding, they would not have diluted their impact with waffling terminology, such as "Letter of Intent" or "agreement in principle."<sup>115</sup>

Recent authority has changed the tenor of any presumptions that may have arisen from the label attached to the transaction.<sup>116</sup> Under prevailing doctrine, the characterization of the instrument or verbal transaction is only one factor in determining whether an enforceable agreement has been formed.<sup>117</sup> For example, one court explains that a letter of intent is sometimes "an enforceable legal instrument and sometimes it is not. It all depends on the intentions of the parties as shown from the words of the instrument and from what the parties said and did in connection with executing the instrument."<sup>118</sup>

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*also* British Steel Corp. v. Cleveland Bridge & Eng'g Co., [1884] 1 All E.R. 504. ("There can be no hard and fast answer to the question whether a letter of intent will give rise to a binding agreement: everything must depend on the circumstances of a particular case.") *Id.* at 509. *See also* Lake, *supra* note 23, at 337.

115. Professor Farnsworth, who correctly explains that titles are not presumptively reflective of intent and that form is subservient to substance, acknowledges that "though courts reject contentions that the mere designation of a preliminary agreement as a 'letter of intent' or a 'memorandum of understanding' deprives it of binding effect, they may find it persuasive that a document prepared by lawyers was captioned 'memorandum of understanding' rather than 'settlement agreement' or 'contract.'" Farnsworth, *supra* note 23, at 259 (footnotes omitted). *See, e.g.*, Hill v. McGregor Mfg. Co., 23 Mich. App. 342, 178 N.W.2d 533 (1970); *see also* Pennington, *Letters of Intent*, 3 INT'L TRADE & PRAC. 519 (1977).

116. *See, e.g.*, Frank Horton & Co. v. Cook Elec. Co., 356 F.2d 485 (7th Cir. 1966), *cert. denied*, 384 U.S. 952 (1966); *see also* 2 R. SCHLESINGER, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 1625 (1968).

117. Lake, *supra* note 23, at 339-41. A wealth of case law suggests that courts should evaluate the enforceability of a letter of intent or similarly titled document on the basis of the parties' demonstrable intent as manifested by the language of the "agreement," and any relevant extrinsic factors. *Id.*

118. Itek Corp. v. Chicago Aerial Indus., 274 A.2d 141, 143 (Del. 1971). In Dunhill Securities Corp. v. Microthermal Applications, Inc., 308 F. Supp. 195 (S.D.N.Y. 1969), the trial court articulated a cogent accommodation of the need to appreciate the inherent uncertainties in an instrument titled "letter of intent" with the importance of determining the parties' manifest intent: "A letter of intent is a customary device used within the financial community, and it is clear that the financial community does not regard such a document as a binding agreement, but rather, an expression of tentative intentions of the parties." *Id.*

Of course, if a document labeled "Letter of Intent" contains specific disclaimers of contractual liability or other indicia of intent not to be bound, it is unlikely to be blessed as an enforceable agreement.<sup>119</sup> For obvious reasons, courts are extremely hospitable to arguments that an "agreement" is merely precatory when such contentions are buttressed by explicit language evincing the parties' intent to preserve an escape route.<sup>120</sup> While courts have occasionally found that the parties' overall manifestations of assent can overcome specific disavowals of contractual liability, such instances are quite rare.<sup>121</sup>

The NLOI is manifestly dissimilar from the letters of intent and agreements in principle that have been subject to a plethora of recent litigation. The most crucial distinction between the classic letter of intent and the NLOI is that the former usually anticipates future memorialization, third party approval, or a more detailed agreement down the road. It could also constitute an agreement to bargain in good faith with an eye toward closing a deal. With the NLOI, there is no contemplation that the Letter of Intent is a precursor for something more formal, or an "agreement to agree," or a reflection of the parties' desires to engage in com-

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at 198. However, "even where a formal writing is contemplated by the parties, a binding contract may nevertheless arise before execution of the writing. The intention of the parties is crucial." *Id.* (citation omitted). *See also* Lake, *supra* note 23, at 338 n.56.

119. Again, the early English cases are illustrative. *See, e.g.,* Rose & Frank Co. v. J.R. Crompton & Bros. Ltd., [1925] A.C. 445 (P.C. 1924); *see also* Interway, Inc. v. Alagna, 85 Ill. App. 3d 1094, 407 N.E.2d 615 (1980); Bottineau Public School Dist. #1 v. Currie, 259 N.W.2d 650 (N.D. 1977); Lake, *supra* note 23, at 336-39.

120. *See generally* Terracom Dev. Group Inc. v. Coleman Cable and Wire Co., 50 Ill. App. 3d 739, 365 N.E.2d 1028 (1977). Professor Williston aptly declares: "It is indeed true that if the parties to an agreement undertake that no legal obligation shall be created, their undertaking in this regard will be respected by the law, as would any other term of their agreement, provided neither the agreement nor the stipulation itself is illegal." 1 S. WILLISTON *supra* note 7, § 21, at 39-40 (footnotes omitted).

121. *See, e.g.,* Arnold Palmer Golf Co. v. Fuqua Indus., 541 F.2d 584 (6th Cir. 1975). In *Palmer*, a "Memorandum of Intent" had been negotiated by the parties reciting that a "general understanding" had been reached regarding an eventual manufacturing and distribution agreement. The Sixth Circuit found that "[b]ecause the facts and the inferences from the facts . . . indicate that the parties may have intended to be bound by the Memorandum of Intent, we hold that the district court erred in determining that no contract existed as a matter of law." *Id.* at 590. *See also* Greene v. Howard Univ., 412 F.2d 1128 (D.C. Cir. 1969).

prehensive bargaining in the future. Moreover, material terms are also not absent and there is no need for judicial "gap-filling." Finally, with the possible limited exceptions discussed below, the NLOI does not generally contemplate the need for third party approval.<sup>122</sup> The NLOI stands as a reflection of the student-athlete's commitment to attend an institution in exchange for the institution's commitment to provide scholarship monies and an education.

If the Letter of Intent fails to qualify as a binding contract, it does not do so exclusively on the strength or weakness of its title. While the label may suggest a certain vagueness or reservation of commitment, the language employed and other surrounding circumstances compel a contrary inference. The title is only one of many factors for the court to consider in assessing the parties' intent.<sup>123</sup> The evaluation of the arrangement's enforceability and

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122. See *infra* notes 151-63 and accompanying text.

123. The term "Letter of Intent" is often interchanged with, embraced within, or deemed a broader category of, agreements in principle, gentlemen's agreements, letters of understanding, etc. See, e.g., Farnsworth, *supra* note 23, at 250; Knapp, *supra* note 23, at 673-85; Lake, *supra* note 23, at 331 n.2; Temkin, *supra* note 110, at 125-26. This terminology is often misleading, as the agreement to agree may be a binding contract, cloaked in a title suggestive of more uncertainty than actually exists. For example, a contract may exist on all material terms with the ultimate written consummation amounting to nothing more than a convenient memorialization. See *Gundersen & Son, Inc. v. Cohn*, 596 F. Supp. 379 (D. Mass. 1984). It may represent agreement as to all material terms with ultimate closure conditioned upon such factors as shareholder approval or financing contingencies. In this situation, a definite binding contract probably has been formed and will be recognized by the courts. See Temkin, *supra* note 110, at 128 n.14. In other arrangements the parties will mischaracterize their transaction as an agreement in principle, even though they both owe no duty and rightfully feel "free to walk away from the discussions for any or no reason." *Id.* at 128.

A persistent question is whether the characterization of a Letter of Intent is limited either to a finding that the Letter is a formal contract binding on all material terms, or a finding that no contract exists. Developing jurisprudence suggests that there is a third category of transaction that, while not maturing into a fully completed agreement, represents a "contract to contract," or an agreement to negotiate in good faith to consummate a final contract. Several scholars have attempted to differentiate the various types of precontractual agreements. Farnsworth, *supra* note 23, at 250-69; Knapp, *supra* note 23, at 679-84; Temkin, *supra* note 110, at 127-30. A detailed discussion of the various models used to explore the complex "contract to contract" hybrid is beyond the scope of this article. Briefly, three possibilities exist in each model: (1) no contract of any type due to fatal indefiniteness, manifestations of an intent not to be bound, or lack of critical approval of a third party; (2) a binding contract on all material terms with any future action merely pro forma and irrelevant to the

the nature of the agreement necessitates consideration of several factors. These factors include the process of offer and acceptance, the parties' capacity and freedom to contract, the existence of consideration to support the parties' promises, and the levels of performance within the university's and student-athlete's expectations.

*B. The Process of Offer and Acceptance: An Overview*

The "formation" stage of a commercial agreement essentially involves the elements of offer and acceptance that comprise the circle of assent—although these elements are not always necessary or readily identifiable as discrete entities.<sup>124</sup> The offer is a demonstration of a desire to enter an agreement and represents the first volley in the formation process.<sup>125</sup> It renders its maker vulnerable to an acceptance that creates a binding contract. An acceptance is described as "the manifestation of assent to the terms

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formation of the parties' agreement; and (3) the elusive, hybrid contract to bargain with an eye toward the eventual negotiation of an agreement.

Several courts reject the "hybrid" theory, concluding that this third category does not merit its own discrete niche, and that such notions are offensive to appropriate contract analysis. These courts have eschewed enforcing agreements in principle by manipulating contract principles to avoid finding a hybrid contract. They characterize the "almost agreement" as a binding contract by supplying missing terms, when arguably no gap-filling prerogative should have been exercised. *See, e.g.,* Bornstein v. Somerson, 341 So. 2d 1043 (Fla. App. 1977). Alternatively, they find that no contract exists due to fatal indefiniteness. *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984).

An approach that would render such agreements unenforceable on any level, misperceives the obvious intent of the parties, and unrealistically weds itself to a rigid application of traditional contract doctrine. Recent authority, which develops a middle category of agreement in which the parties are held to perform further negotiations with an eye toward an eventual contract settlement, is more plausible. *See, e.g.,* Thompson v. Liquichimica of Am., Inc., 481 F. Supp. 365, 366 (S.D.N.Y. 1979). *See also* Opdyke Inv. Co. v. Norris Grain Co., 413 Mich. 354, 359, 320 N.W.2d 836, 838 (1982). ("A contract to make a subsequent contract is not per se unenforceable; in fact, it may be just as valid as any other contract."); U.C.C. § 2-305 comment 1 (1977). The remedy, in most instances, will be limited to an order to engage in good faith bargaining. The comparison to the National Labor Relations Act and other statutes that require parties to bargain in good faith is irresistible. 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1982). In these contexts, courts must assiduously avoid setting the terms and conditions for the parties, and to limit their enforcement power to establishing the parameters of future, bona fide negotiations.

124. *See generally* J. CALAMARI & J. PERILLO, *supra* note 7, at 25.

125. RESTATEMENT (SECOND) OF CONTRACTS, § 24, at 71 (1979).

thereof made by the offeree in a manner invited or required by the offer."<sup>126</sup> Ascertaining whether an offer is susceptible to an acceptance or invites an act that will conclude the transaction presents many problems.<sup>127</sup> For years, courts have attempted to distinguish true offers from preliminary negotiations, physicians' opinions, and offers to accept offers.<sup>128</sup> Case law often reflects post hoc, outcome determinative decision making. Thus, the distinctions presented are quite artificial, providing little predictive value. Nonetheless, several factors are repeatedly considered in the offer/nonoffer calculus, including the language of commitment, the identity of the offeror and offeree, and the specificity of quality, quantity, and overall description of the goods or services involved.<sup>129</sup> Yet, there is no litmus test that can measure the weight to be accorded each factor. As Professor Murray has noted:

Many cases can be found in which it has been held that no offer was made, even though the circumstances surrounding the transaction could reasonably lead to the opposite conclusion. . . . On the other hand, offers have been found to exist in cases where the proposal involved could reasonably be characterized as a mere announcement or willingness to negotiate.<sup>130</sup>

Once it has been determined that an offer has been made, it is essential to identify the character of the offer to ascertain whether a particular response constitutes a valid acceptance.<sup>131</sup> This determination will depend upon the method of acceptance that the offer invites.

When an offer explicitly seeks performance as the mode of acceptance, then a promise to perform generally will not suffice.<sup>132</sup>

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126. *Id.* § 50, at 128.

127. See generally J. CALAMARI & J. PERILLO, *supra* note 7, § 2-6, at 33.

128. *Id.* § 2-6(i), at 46.

129. *Id.*

130. J. MURRAY, *supra* note 26, § 24, at 41 n.52 (citations omitted). See also *Owen v. Tunison*, 131 Me. 42, 158 A. 926 (1932); *Harvey v. Facey*, [1893] App. Cas. 552; A. CORBIN, *supra* note 114, § 23, at 40.

131. L. SIMPSON, *CONTRACTS* § 46 (2d ed. 1965); 1 S. WILLISTON, *supra* note 7, § 73, at 238-39. See also *Becker v. Missouri Dep't of Social Serv.*, 689 F.2d 763 (8th Cir. 1982).

132. RESTATEMENT (SECOND) OF CONTRACTS § 53 (1979); see also *Allied Steel & Conveyors, Inc. v. Ford Motor Co.*, 277 F.2d 907 (6th Cir. 1960); *Vermillion v. Marvel Merchandising Co.*, 314 Ky. 196, 234 S.W.2d 673 (1950); Note, *Acceptance by Performance When the Offeror Demands a Promise*, 52 S. CAL. L. REV. 1917 (1979).

Likewise, when an offer seeks a promise and an offeree begins to accept by performing, this acceptance may fall short of the response necessary to form a contract.<sup>133</sup> Of course, the beginning of performance may be deemed an implied promise to complete, particularly when the partial performance occurs in the offeror's presence.<sup>134</sup> When an offer is silent as to the mode of acceptance, or invites *either* type of acceptance, the modern view gives the offeree an opportunity to choose the appropriate method of acceptance.<sup>135</sup>

An offer that seeks either a performance or a return promise is typically revocable by the offeror any time prior to an effective acceptance. However, the offeree may seek to forestall a spontaneous revocation by securing an option or a promise not to revoke. In most option contracts, the offeree, generally in exchange for some consideration, is provided an agreed upon or reasonable time period within which to accept an offer.<sup>136</sup> The option contract has been characterized as a separate agreement, or a contract "preliminary to another one, that is, a contract entered in contemplation of another contract that may come into existence later if the

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133. Full performance prior to expiration of an offer that invites a promise as acceptance has been deemed to constitute a valid acceptance if accompanied by appropriate notification. *See generally* 1 S. WILLISTON, *supra* note 7, § 78A; RESTATEMENT OF CONTRACTS § 63 (1932). Notification of an intent to accept by promise is generally required. Therefore, when the offer seeks only a promise, but the offeree chooses to accept by performance, such performance should logically be an effective acceptance only if the proper notification has been tendered. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 54, 56, 63 (1979); U.C.C. § 2-206 (1977); Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964). In other circumstances, the notice may be a condition precedent to the promisor's duty to perform, but it is not a necessary component of acceptance. *See* Murray, *A New Design for the Agreement Process*, 53 CORNELL L. REV. 785 (1968).

134. *See, e.g.*, J. CALAMARI & J. PERILLO, *supra* note 7, § 2-26, at 129 n.80.

135. RESTATEMENT (SECOND) OF CONTRACTS § 62 (1979). When there was some question as to whether an offer had invited an acceptance by promise or by performance, courts often inferred that a bilateral contract offer had been made, and that a promissory acceptance had been invited. *See, e.g.*, *Davis v. Jacoby*, 1 Cal. 2d 370, 4 P.2d 1026 (1934); RESTATEMENT OF CONTRACTS § 31 (1932).

136. *See* *Troutman v. Erlandson*, 44 Or. App. 239, 605 P.2d 1200 (1980); RESTATEMENT (SECOND) OF CONTRACTS § 25 (1979). The option may be secured and irrevocability guaranteed even without consideration, provided there is some type of consideration substitute, e.g., partial performance, or statutory mandate dispensing with the need for consideration. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 25 comment c, 45, 87 (1979); U.C.C. § 2-205 (1977); N.Y. GEN. OBLIG. LAW § 5-1109 (Consol. 1977).

grantee so elects."<sup>137</sup> Although each option has its own nuances, its principal purpose is to freeze the offeror's prerogative to revoke for the designated period.<sup>138</sup> Normally, the optionee has no duty to accept and is free to abort the transaction at any time.

In many traditional unilateral and bilateral contracts, courts have imposed a constructive option contract in an effort to place the parties in the most equitable position.<sup>139</sup> For example, when an offer invites performance, a partial performance may operate much like independent consideration to freeze the offer for a reasonable period of time, thereby precluding the offeror from revoking. This approach represents a refreshing alternative to the often inequitable and restrictive choices of either making full performance a necessary element of the acceptance, or making the beginning of performance the functional equivalent of a promise to complete.<sup>140</sup> Each choice is intellectually infirm. In the former, the offeror would retain the right to revoke after an offeree has expended considerable effort to complete; in the latter, the partial performance would be deemed a promise when the offer did not indicate any indulgence of a promissory acceptance. In the constructive option contract, the offeror is not free to revoke, yet the offeree is free to reject. However, the offeror evokes little sympathy because he is the master of the offer and with limited exceptions could avoid the problem by demanding a promissory acceptance.<sup>141</sup> The judicially constructed option contract is the most favorable solution and does justice to the true intent of the parties.

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137. Litvinoff, *Consent Revisited*, 47 LA. L. REV. 699, 746 (1987). In fact, there is an infinite variety of option contracts. Their bilateral or unilateral character, as well as their independence from the underlying transaction, will turn on the particular option agreement. See, e.g., A. CORBIN, *supra* note 114, § 62.

138. Some commentators have taken pains to distinguish an option contract from an "irrevocable offer." See McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644 (1914); Litvinoff, *supra* note 137, at 747-48, 751, 753. However, these terms are generally fungible and will be used interchangeably here. See J. CALAMARI & J. PERILLO, *supra* note 7, § 2-22, at 123-24.

139. *Marchiondo v. Scheck*, 78 N.M. 440, 432 P.2d 405, 407 (1967); see also RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979).

140. See J. CALAMARI & J. PERILLO, *supra* note 7, § 2-22, at 112.

141. See Ballantine, *Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94, 97 (1921). As discussed below, even when a party has invited a promissory acceptance, courts may construct an irrevocable offer to achieve equity. See *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958).

C. *Formation of the Scholarship/Letter of Intent Contract*

1. *The Scholarship As Offer*

The typical scholarship proposal tendered by a university to a student constitutes an offer in traditional contract terms. The necessary language of commitment is present in the scholarship proposal. Standard scholarship letters illustrate the university's overall commitment to provide financial aid to the prospective student-athlete.<sup>142</sup> In fact, the recruit is generally instructed to refrain from signing the Letter of Intent without a scholarship proposal in hand. Further, the proposal is addressed to the recipient of the scholarship, and the scholarship terms are delineated in great detail. In virtually all respects, the requisite language and detail satisfies the requirements of the traditional "offer." Thus, at first blush the scholarship proposal, as conveyed to the student-athlete and embraced in the Letter of Intent, invites a response that would seemingly form a contract.<sup>143</sup>

Yet, it may be too sanguine to assume that the scholarship proposal is an "offer" susceptible to immediate contract formation by a proper student-athlete acceptance. Two problems arise that cloud the issue: first, does the person tendering the scholarship offer have authority to bind the university; and second, does the qualifying language in paragraph two of the Letter negate the crucial "language of commitment" factor.

Individuals often make representations that constitute offers or promises; yet, such persons may have no actual authority to bind the parent organization that is the putative promisor.<sup>144</sup> The proposal may manifest all the necessary indicia of an "offer," but there may be no bona fide "offeror." However, when the parent organization demonstrates to the reasonable person that the agent is empowered to act on its behalf, the doctrine of apparent authority may operate to bind the parent.<sup>145</sup>

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142. See *Rensing v. Indiana State Univ. Bd. of Trustees*, 437 N.E.2d 78, 80 n.2 (Ind. App. 1982). See also NCAA MANUAL, *supra* note 49 (requirements of scholarship letter).

143. See Letter of Intent, *infra* Appendix A.

144. See generally RESTATEMENT (SECOND) OF AGENCY § 8 comment f; § 27 comment c (1958).

145. See *Jacobson v. Leonard*, 406 F. Supp. 515 (E.D. Pa. 1976); see generally *Simon v. H.K. Porter Co.*, 407 Pa. 359, 364, 180 A.2d 227, 230 (1962); H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 26 (1979) (regarding "sister" doctrine of "inherent authority").

The scholarship offer could be attacked as unenforceable on the grounds that the athletic director or other university representative lacked the requisite authority. However, this suggestion is tenuous, given the nature of college athletic scholarships and the well-established role of the athletic directors and coaching staffs.<sup>146</sup> If these personnel do not have the requisite authority to bind an institution, then a similar argument could be made with respect to admissions directors, registrars, and others, wreaking havoc upon a university-student relationship that already is fraught with uncertainty.<sup>147</sup> Admittedly, this question is not free from doubt, because what authority is apparent is no longer so readily apparent. One article posits that "[t]he expansive scope and hierarchy of modern enterprise make [such] limitations on authority unavoidable. Because agency law has all but disappeared as a separate legal discipline, attorneys, judges, and law clerks are ill-equipped to perceive agency issues."<sup>148</sup> Nonetheless, for present purposes, it will be assumed that the university has vested its athletic department officials with actual authority and that the scholarship commitment has been made de facto by the upper echelons of the university hierarchy.

The second problem is not so readily resolved. The indefiniteness of the offering—the vague or "open" language—does not appear in the offer itself. Rather, paragraph two of the Letter qualifies or modifies the university's commitment:

I MUST RECEIVE IN WRITING AN AWARD OR RECOMMENDATION FOR ATHLETIC FINANCIAL AID FROM THE INSTITUTION AT THE TIME OF MY SIGNING FOR THIS LETTER TO BE VALID. The offer or recommendation shall list the terms and conditions of the award, including the amount and duration of the financial aid. If such recommended financial aid is not approved within the institution's normal time period for awarding financial aid, this letter shall be invalid.<sup>149</sup>

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146. Yet, it is noteworthy that paragraph 5 of the Letter of Intent's Policies and Interpretations specifically prohibits coaches from *cancelling* a Letter of Intent. See Letter of Intent Policies and Interpretations, *infra* Appendix B, at para. 5.

147. See generally Note, *Contract Law and the Student-University Relationship*, 48 Ind. L.J. 253 (1972).

148. Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 917 (1985).

149. Letter of Intent, *infra* Appendix A, at para. 2.

Arguably, the rider language is a manifestation to the reasonable person that the university has not made a bona fide offer. Although the entire tone of the document, especially the mandate that the Letter not be signed without a scholarship commitment, compels a contrary conclusion, paragraph two may be construed as a clause akin to standard commercial language conditioning an entire transaction upon "home office approval."<sup>150</sup> If so, there are several plausible interpretations of the clause's impact upon the formation question.

On one hand, the initial scholarship offer and execution of the Letter of Intent may comprise the entire agreement, with approval of the recommendation constituting pro forma terminology of no legal consequence. Under this interpretation, the approval of the recommendation is a foregone conclusion, rendering the initial transaction a binding offer and acceptance.<sup>151</sup> This suggestion is eminently plausible because over ninety-nine percent of all scholarship commitments tendered at the initial stage are eventually approved. In a related sense, paragraph two may be a condition precedent to the effective performance of the agreement; technically not a modification or corruption of the offer, but rather a provision similar to a financing contingency in real estate contracts, or a typical condition of satisfaction.<sup>152</sup> This type of proviso serves

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150. See *International Filter Co. v. Conroe Gin, Ice & Light Co.*, 227 S.W. 631 (Tex. App. 1925); see also *Temkin*, *supra* note 110, at 127 n.14. The clause could also dim the clarity of the parties' apparent commitments to such a degree that the contract could be fatally indefinite. See, e.g., *Burgess v. Rodom*, 121 Cal. App. 2d 335, 263 P.2d 655 (1953).

151. This point responds to the argument that the entire agreement is fatally indefinite in that it mimics the traditional "agreement to agree," long held by the courts as unenforceable. In the Letter of Intent exchange, the ultimate approval is obtained with such regularity that the language seems to be retained more as a function of form rather than the parties' desire to reserve a right to escape. Thus, the ultimate approval or formalization is not the *sine qua non* of the contract's formation. True agreement has been achieved prior to this point, and eventual closure is expected and assumed. Similar arguments were advanced in *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717 (S.D. Cal. 1960).

152. See, e.g., *Carlton v. Smith*, 285 Ill. App. 380, 2 N.E.2d 116 (1936); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973); see also *Morin Bldg. Prod. v. Baystone Constr.*, 717 F.2d 413 (7th Cir. 1983); Note, *Contingency Financing Clauses in Real Estate Contracts in Georgia*, 8 GA. L. REV. 186 (1973). In the "financing contingency" line of cases, courts will often find that the condition carries an implied promise to exert best efforts to secure the necessary monetary commitment. In the typical condition of satisfaction case, the party's satisfaction will be determined by a good faith standard when the contingency

as a prerequisite to the agreement's enforceability—but does not preclude the agreement's formation.<sup>153</sup> A contract would exist, but the conditional duty would not be triggered until the qualifying condition was either met or excused.

On the other hand, paragraph two may suggest that the initial scholarship "offer" is nothing but a form of preliminary negotiations or an invitation for offers. The Letter of Intent would, thus, become the offer, and the acceptance would be the university's approval of the scholarship recommendation. This would create the unusual, though not unique, phenomenon of the offeree setting the terms of the offer.<sup>154</sup> This situation is illustrated in *International Filter Co. v. Conroe Gin, Ice & Light Co.*,<sup>155</sup> where the seller had presented the buyer with a bilateral contract "offer" containing "kicker" language that a contract would exist upon approval by the home office. The court concluded that the party preparing the agreement had not made an "offer" because it had reserved to itself the ultimate power to close the agreement.<sup>156</sup> Thus, the buyer became the de facto offeror giving back to the seller its own

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involves "personal aesthetics," or a "reasonable person" objective standard when the contingency involves fitness, value, etc. *Compare* *Davis v. General Foods Corp.*, 21 F. Supp. 445 (S.D.N.Y. 1937) *with* *Action Eng'g v. Martin Marietta Aluminum*, 670 F.2d 456 (3d Cir. 1982).

153. *See, e.g.*, *Omaha Public Power Dist. v. Employers' Fire Ins. Co.*, 327 F.2d 912 (8th Cir. 1964). The condition should not render the commitments illusory, as the parties' future liberty of action is to some degree circumscribed by the implied promises of good faith and other standards employed to insure that the condition is not abused. *See generally* *Mattei v. Hopper*, 51 Cal. 2d 119, 330 P.2d 625 (1958); A. CORBIN, *supra* note 114, § 156; E.A. FARNSWORTH, *supra* note 64, § 8-4.

154. There are numerous instances in which the offeree sets the terms of the offer. The classic example is catalogue sales, in which consumers order from an advertising brochure. In that example, the buyer is the offeror, but the terms of his offer (with the exception of quantity) are normally identical to the terms described in the catalogue. *See generally* E.A. FARNSWORTH, *supra* note 64, § 3.21 (battle of forms). The task of identifying the offeror and offeree in a university-student relationship has historically generated considerable discussion, with no definitive resolution. *See* *Jennings*, *supra* note 20, at 217.

155. 277 S.W. 631 (Tex. App. 1925).

156. *Id.* at 632-33. Similar arguments could be advanced with regard to paragraph nine of the Letter of Intent, which requires the university to file the Letter within 21 days. Paragraph nine provides that failure to file will render the agreement invalid. Through this language, the university could urge that it has tacitly retained the power to prevent the circle of assent from closing. For the reasons discussed in this section, together with the analysis of the clause in the "consideration" section of this Article, these arguments would probably be found wanting. *See infra* notes 229-50 and accompanying text.

terms.<sup>157</sup> This case clearly shows that, even though the offeree actually drafted the terms of the “agreement” and started negotiations, the “home office approval” language vested him with the acceptance prerogative.<sup>158</sup>

In the analogous situation of professional sports, courts have wrestled with the impact of contract language that gave the league commissioner authority to approve the agreement between a player and his club. The following language, previously appearing in the NFL’s standard player contract, is illustrative: “This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner.”<sup>159</sup> The debate over this clause frequently centered on the club’s contention that the player was bound upon signing, with performance obligations postponed until approval,<sup>160</sup> versus the players’ argument that, absent league approval, there was no binding contract.<sup>161</sup> Under the latter approach, the player is the offeror with all rights to revoke prior to acceptance—as ultimately manifested by the Commissioner’s approval. The language of the NFL contract, which has since been amended, and the surrounding circumstances, led courts to conclude that the player’s interpretation was more plausible:

This clause is too definite to be ignored. It jumps out at you. The words employed are too strong to permit of ambiguity. Their selection was obviously made with great care so that there would be no dispute about their meaning, and this court attaches to them the only meaning it can—that is, that the agreement shall only become valid and binding if, as and when approved by the Commissioner.<sup>162</sup>

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157. 277 S.W. at 632-33.

158. While this type of reasoning and conclusion would wreak havoc with the entire offer/acceptance approach advanced above, it would certainly eliminate the first issue involving the athletic director’s authority to close the deal. That is, there would be no principal-agent problem because the putative agent would have been relegated to the position of messenger, carrying the university’s “invitation of offer” to the student-athlete, but not presenting a true offer susceptible to closure by the student-athlete’s “acceptance.”

159. *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717, 721 (S.D. Cal. 1960).

160. *Id.* at 721. See generally *J. WEISTART & C. LOWELL*, *supra* note 18, § 3.02.

161. 185 F. Supp. at 721.

162. *Id.* at 722.

In the present context, the "approval" language does not command the same disposition. The overall tenor of the Letter of Intent supports the conclusion that the university is the offeror and the student-athlete the offeree. The Letter itself requires a scholarship offer before the student-athlete's acceptance is effective. Throughout the entire process, the university is the suitor, laying financial incentives at the feet of the *object d'amour*. A reasonable person could only believe that, at the time of the signing of the Letter, all other would-be suitors are precluded from negotiating with or extending an offer to the student-athlete. A contrary conclusion does violence to the rationale underlying the Letter of Intent program. There is also no language in the Letter of Intent suggesting that the student-athlete's "commitment" is a revocable offer until receipt of the scholarship approval. Couching the student-athlete's Letter as the first step in the offer/acceptance scenario is theoretically possible, but practically unthinkable. Neither the law nor the "industry" should indulge this interpretation and its consequences upon the actors.<sup>163</sup>

## 2. *The Letter of Intent As Acceptance*

Assuming *arguendo* that the scholarship presentation in the Letter of Intent exchange is an offer,<sup>164</sup> the next step in formation is to determine whether an adequate acceptance has been tendered. It has been suggested that offers similar in form to the typical university scholarship pledge do not provide a clear signal as to the desired method of acceptance. If so, the arguably ambiguous

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163. See generally, Note, *Student Athletes*, *supra* note 15.

164. See Nordin, *supra* note 71. If the university were the offeree, the analysis would change, particularly with regard to the power of acceptance. Yet 99% of the scholarship recommendations are approved, and the Letter of Intent is a complete package. The contract is formed, and each party, upon scholarship approval, has promised a certain performance to the other. Thus, in either scenario (student or university as offeror), the issues of validation and performance remain to be explored.

There is some support for the proposition that the financial aid agreement may evince a binding contractual relationship. See *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973). This conclusion may be warranted in some cases, because the financial aid arrangements vary from school to school. However, without the commitment pledge contained in the Letter of Intent, the financial aid agreement may amount to little more than a statement of terms. For purposes of this Article, it will be assumed that the financial aid package is part of a larger agreement represented by the Scholarship/Letter of Intent.

nature of the scholarship offer could invite several types of acceptance. While the doubtful offer traditionally was viewed as inviting an acceptance by promise, the better view suggests that, when the offer is unclear or invites either type of acceptance, the offeree may choose the mode of acceptance.<sup>165</sup> In either event, the Letter of Intent is a promissory acceptance—a wholly appropriate response to the scholarship offer. The Letter, signed by the student and his parents or guardian, satisfies the concluding stage in the bilateral contract pattern.<sup>166</sup>

Some might argue that the student-athlete has promised nothing by executing the Letter of Intent and that the university has presented an offer that seeks performance. Under this argument, the Letter merely manifests the student-athlete's intention to perform. The Letter provides formal notice suggesting future performance in response to a unilateral contract offer.<sup>167</sup> The student-athlete's performance would only be a condition precedent to the university's duty to provide the scholarship. He would have no duty to perform, and his refusal to attend school or participate in intercollegiate athletics would constitute nonsatisfaction of the

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165. See RESTATEMENT (SECOND) OF CONTRACTS §§ 9, 32, 62 (1979). This bilateral contract conclusion is not without its problems. If the Letter of Intent constitutes the power to close the agreement, what has the student-athlete promised to do? Has he promised merely to attend the university, or to attend the university *and* ply his athletic skills? If the student has promised to attend and to participate, how meaningful must the participation be? Most important, can the student's failure to meet these responsibilities result in a lawsuit by the victimized university?

These problems are neither limited to the formation stage nor peculiar to the NLOI. They are resurrected in later discussions of consideration (i.e., has any real commitment been made and is there any detriment to be suffered); performance (has the student-athlete satisfied all duties and conditions that trigger the university's continued scholarship funding); and remedy (is the student-athlete vulnerable to claims of breach with possible monetary liability, as well as enforcement of the Letter of Intent's negative covenant?) All personal services contracts, particularly those involving sports and entertainment, are necessarily vague in terms of the *level* of performance that has been bargained-for and expected. The problems inherent in distinguishing performance from nonperformance in personal services contracts are discussed *infra* notes 334-67 and accompanying text.

166. RESTATEMENT (SECOND) OF CONTRACTS §§ 32, 50, 56, 60 (1979); see *id.* § 50 comments a-c, illustrations 1-5. The author sees no real ambiguity in the normal scholarship offer, and concludes that a bilateral contract exists based on the exchange of promises instigated and sought by the university.

167. RESTATEMENT (SECOND) OF CONTRACTS § 56 (1979); see also Calhoun, *Acceptance of Offer for Unilateral Contract—Necessity of Notice to Offeror*, 4 U. CIN. L. REV. 57 (1930).

condition. Thus, the university would be excused from paying—tempered, of course, by pertinent NCAA regulations. Under the unilateral contract model, the student-athlete would have no duty to perform and would be immune from damages for breach of contract stemming from his nonperformance.

Despite the unilateral contract's reassuring features to those who cringe at the thought of a defendant student-athlete, the approach is intellectually infirm. The Letter of Intent is the consummation of a binding, executory pact between the university and the student. There is little to indicate that the university has bargained for the individual's performance without any prior commitment, nor is there any evidence that the scholarship pledge can be abbreviated at will.<sup>168</sup> The university does intend to secure a promise from the student. This intent is evidenced by the various types of preparations and decisions made depending upon the athletes who have accepted Letters of Intent, and also by the fact that universities are permitted to offer a limited number of scholarships. With the exception of the scholarship approval language addressed above, it would be difficult for a student to argue that the Letter of Intent package expressly allows the student to reserve the right to revoke or rescind his commitment. Nothing in the Letter suggests that the student has secured an option on the scholarship while preserving his right to attend, or at least barter with, another institution.<sup>169</sup> Moreover, even if the manifestations of the parties reflect no clear indication of a bilateral contract, courts have historically favored a presumption of bilaterality. This presumption is derived from the belief that a party to be advantaged by a performance will generally desire assurances that such

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168. *See, e.g.*, *Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623 (Fla. Dist. Ct. App. 1982); *see also Hay v. Fortier*, 116 Me. 455, 102 A. 294 (1917). Professors Weistart and Lowell declare that the normal contract between the sports team and the player does not exist "at will": "The typical two party sports contract is bilateral, each side making definite promises and agreeing that the contract will run for a definite period, albeit subject to an early termination." J. WEISTART & C. LOWELL, *supra* note 18, § 3.07.

169. Consider the words of George Raveling, nationally prominent head basketball coach at the University of Southern California:

If you've spent a lot of time and effort and money on the recruitment of the player, I think you have an obligation to the institution to do everything humanly possible to see that he attends because you have spent a lot of the school's money. My mindset would be one of great reluctance to let a player out of his obligation.

Howard-Cooper, *Discontent with Letter of Intent*, L.A. Times, May 15, 1988, at pt. III, p.1, col. 1.

performance is forthcoming.<sup>170</sup> Therefore, the Letter of Intent is most logically characterized as an acceptance of a bilateral contract offer, manifested through the student-athlete's promise to attend.

The immediate question that arises is whether this conclusion places all student-university relationships on a precipice, whereby *any* student who sends a deposit to hold his or her seat will contractually be committed to attend that institution.<sup>171</sup> It is very unlikely that a prospective student, who changes his mind after sending a tuition deposit, could be sued for breach of contract. A more plausible assumption is that the university's promise of a slot to a particular student creates an option contract. The student's deposit would be deemed consideration to secure a place in the incoming class until the student should decide not to accept.<sup>172</sup> The period to exercise the option expires either at the beginning of the school year, the last date for enrollment, or the deadline for tender of the requested tuition to the university.<sup>173</sup>

There is ample evidence upon which to distinguish the Letter of Intent and the typical student payment of a tuition deposit.<sup>174</sup> First, the limited number of scholarships and the relatively small number of students likely to receive such scholarships differentiates the Letter of Intent from routine admission decisions where the "bid to application" ratios are high. Second, nonathlete students are not bound by any written regulations outside the implicit contractual terms in student handbooks and catalogues. Finally, student-athletes owe a duty to perform.<sup>175</sup> They "influence potential students, induce media attention and attract sources of revenue."<sup>176</sup>

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170. A. CORBIN, *supra* note 114, § 635.

171. A student who has been accepted by a particular university will typically be required to tender a nominal deposit to hold a place in the incoming class. See generally Jennings, *supra* note 20, at 195-98; Nordin, *supra* note 71, at 158-63.

172. See *Anthony v. Syracuse*, 231 N.Y.S. 435 (1928). See generally Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 573 (1983).

173. Pettit, *supra* note 172, at 573.

174. This distinction would survive even if the comparisons were drawn between a scholarship athlete and other scholarship students. The latter is expected to do no more than exert best efforts to excel in the classroom—a presumption that applies (at least in theory) to all other students. Further, the classic scholarship commitment in the nonathletic context does not exact the commitment and attendant sanctions of the Letter of Intent. See Letter of Intent, *infra* Appendix A.

175. Note, *Student Athletes*, *supra* note 15, at 104-05.

176. *Id.* at 105.

Certainly, no talismanic words are required for the judiciary to conclude that the tuition deposit forms an option contract. As discussed above, courts, "to avoid injustice," have frequently construed contracts that have the *form* of either a bilateral or unilateral contract as option contracts.<sup>177</sup> These courts refuse to be enslaved by the rule that a unilateral contract offer can be revoked until all performance has been completed, or, similarly, that a bilateral contract offer is *always* revocable prior to receipt of a counter-promise, even though there has been detrimental reliance. Progressive jurists instead build the option contract from the remnants of the "damaged" unilateral or bilateral accords.

There are ample practical justifications to distinguish a typical student acceptance from the Letter of Intent, and solid legal foundations for these distinctions. The former plainly does not envision legal reprisals against the student who recants an "acceptance." Thus, the option contract is an eminently plausible construction. The latter, with equal clarity, seeks binding commitments from both parties. Accordingly, it can only be catalogued as a bilateral contract.

### 3. *The Duration of the Agreement Between University and Student-Athlete*

The final subissue is whether the contract establishes a precise length of time for performance and, if not, whether a period can be judicially supplied.<sup>178</sup> NCAA regulations provide that the stan-

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177. *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); see also E.A. FARNSWORTH, *supra* note 64, §§ 3.24-.25; RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979). *But see* *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

178. Some courts have been reluctant to supply missing terms when the duration of the contract is at issue. See, e.g., *Feola v. Valmont Indus.*, 208 Neb. 527, 304 N.W.2d 377 (1987). However, courts have provided these terms when a reasonable basis for judicial intervention exists. The predicate for supplying the missing term may include the language of the agreement, the surrounding circumstances, the relationship of the parties, and trade usage. See generally *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979); U.C.C. § 2-204 (1977). Simply stated, "the law leans against the destruction of contracts because of uncertainty." *Bettancourt v. Gilroy Theater Co.*, 120 Cal. App. 2d 364, 367, 261 P.2d 351, 353 (1953). *But see* *Eisele v. Ayers*, 63 Ill. App. 3d 1039, 381 N.E.2d 21 (1978). This approach triggers the question of when the court's role begins and ends. The line between reasonable gap-filling and judicial intermeddling to the point of subverting the bargaining prerogatives of the parties is often difficult to draw. See *Rego v. Decker*, 482 P.2d 834 (Alaska 1971). See also MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-classical and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978).

dard scholarship commitment is renewable on a yearly basis,<sup>179</sup> and most scholarship commitment letters indicate that the duration of the financial aid package is one year. This annual scholarship is exchanged for the student-athlete's pledge to attend and play.

If the scholarship is a yearly proposition, then the university can argue that each year it may withhold offering a scholarship. The common parlance suggesting that a student-athlete's scholarship has been "revoked" may be a mischaracterization because a new offer eventuates each year.<sup>180</sup> Accordingly, the bilateral contract configuration describing the initial Scholarship/Letter of Intent arrangement would exist only for the student-athlete's freshman year. Absent a promissory equivalent to the Letter of Intent, the university's scholarship proposal for subsequent years would be a unilateral contract offer, accepted by the student-athlete's performance.<sup>181</sup> This offer/acceptance by performance process would con-

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179. The NCAA Manual states: "Where a student-athlete's ability is taken into consideration in any degree in awarding unearned financial aid, such aid shall not be awarded for a period in excess of one *academic year*." NCAA MANUAL, *supra* note 49, Art. 15.3.3.1 (emphasis added). In most other respects, the schools are free to develop their own scholarship terms; there is no boilerplate language that applies across the board to all scholarship commitment letters. See *supra* note 9; see also Waicukauski, *supra* note 105, at 99; Note, *Student Athletes*, *supra* note 15, at 115.

180. See *Koblitz v. Western Reserve Univ.*, 11 Ohio C.C. 515, 21 Ohio Cir. Dec. 144 (1901); NCAA MANUAL, *supra* note 49, Art. 15.3.5, which states, "The renewal of a scholarship or grant-in-aid award shall be made on or before July 1 prior to the academic year it is to be effective. The institution promptly shall notify each student-athlete who receives an award the previous academic year and who is eligible to receive an award . . . for the ensuing academic year *whether the grant has been renewed or not renewed*." *Id.* (emphasis added). Almost all scholarships are renewed if the student-athlete: (1) meets the minimum academic requirements; (2) complies with pertinent regulations; and (3) participates in the assigned sport (assuming no physical disability). See *supra* note 9.

181. Under this scenario, the first academic year is a bilateral contract in which the institution promises to award the student-athlete athletic financial aid for one academic year in exchange for the student-athlete's promise to attend the institution for one academic year. The second academic year would be a unilateral contract, or possibly an option contract, in which the institution promises to renew the student-athlete's athletic financial aid for another academic year, NCAA MANUAL, *supra* note 49, Art. 15.3.5, in exchange for the student-athlete's performance (i.e., maintaining academic eligibility, remaining free from school disciplinary sanctions, and participating in the chosen sport). Generally, the student-athlete does not promise to attend the institution for the second academic year; in fact, the student-athlete can leave freely and not breach any of his obligations to the institution. Of course, this conclusion is subject to the argument that partial performance constitutes an implied promise or otherwise

(1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive.<sup>219</sup>

These elements are glowingly illustrated when a heavily recruited high school athlete selects a college. The time constraints inherent in the process, the use of multiple persuaders, the absence of third-party advisers who do not have such an intimate stake in the outcome as to be negative rather than positive influences, and the limitations on the number of scholarship offers available to most student-athletes, which convinces students that any delay in their decision could result in withdrawal of the offer, are particularly evident. These examples demonstrate that the entire recruiting process is rife with potential abuse through both blatant coercion and subtle coaxing. Duress and undue influence, particularly of a kind so subtle as to be unrecognizable and so internecine as to be undiscoverable, are legion. The fawning and gentle arm-twisting by college coaches, athletic directors, alumni, and parents often creates a blurred line between friendly persuasion and cajolery that impinges upon the student-athlete's ability to contract freely.<sup>220</sup>

Duress presents a unique subissue that centers on the extent to which an individual can seek to disaffirm an agreement based on the undue influence, not only of the other contracting party, but also of the cosigner. In this regard, if the "victim" can disaffirm

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219. *Odorizzi*, 246 Cal. App. 2d at 130, 54 Cal. Rptr. at 541.

220. *See generally* W. MORRIS, *supra* note 42. Though somewhat humorous, nothing is more telling of the potential victimization of a high school athlete's naivete and the outrageous efforts at persuasion by recruiters than the following:

"If I wanted a kid bad enough," Bear Bryant once said, "I used every trick I could think of. Frank Leahy used to tell everybody that when I was at Kentucky I dressed our manager, Jim Murphy, in a priest's outfit to recruit Gene Donaldson away from Notre Dame. Maybe Jim Murphy did tell Donaldson he was a priest. Shucks, I'd have told him Murphy was Pope Pius if I'd thought we would get Donaldson that way."

*Id.* at 51.

based on his cosigner's coercion, does the contract remain vital between the university and the "guilty" parent or guardian?

The student-athlete certainly should be able to disavow an agreement due to duress or undue influence, whether the source of the duress was the university or the student-athlete's cosigners.<sup>221</sup> There is little doubt that the third party's influence can provide a basis for disavowing an agreement, and that result certainly should not change when the "third party" is a cosigner and an actual party to the agreement.<sup>222</sup> It is undeniable that a parent can exert a significant influence on the student-athlete.<sup>223</sup> Moreover, the fact that the "coercing" party is a parent, relative, or guardian should not diminish the student-athlete's ability to disaffirm. These very relationships may have provided the most fertile ground for the seeds of unreasonable and excessive persuasion.<sup>224</sup>

Yet, it is remotely possible that a student-athlete could be saddled with a contract visited upon him by the improper influencing of a third party. If the university, as "beneficiary" of the duress, were an innocent bystander and unaware of the third party's coercion, the student-athlete may be precluded from disaffirming. The university may occupy a position roughly equivalent to a good faith purchaser, insulated from the victim's power of avoidance.<sup>225</sup> Thus, the student-athlete would be compelled to pursue the third party for redress. Although this possibility cannot be ignored, it is unlikely that the student-athlete's disaffirmance prerogative would be extinguished under normal circumstances. The good faith purchaser analogy would not be valid at the contract's executory stage—the point at which most student-athletes would seek disaffirmance. Without surrender of something of value

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221. The basic principle pertinent to capacity cases and a cosigner's continued liability in the face of an infant's disaffirmance is suitable to resolution of this issue. *See supra* notes 196-99 and accompanying text.

222. *See* E.A. FARNSWORTH, *supra* note 64, § 4.19, at 267 n.1; RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1979).

223. *See supra* notes 196-99 and accompanying text.

224. *See, e.g.*, *Eckstein v. Eckstein*, 38 Md. App. 506, 379 A.2d 757 (1978); *Ruggieri v. West Forum Corp.*, 444 Pa. 175, 282 A.2d 304 (1971).

225. *See* E.A. FARNSWORTH, *supra* note 64, § 4.19, at 267 n.1; RESTATEMENT (SECOND) OF CONTRACTS § 175(2) comment e (1979). *But see* *Barry v. Equitable Life Assurance Soc'y*, 59 N.Y. 587 (1874). In the Letter of Intent, the fact that the university has insisted upon a cosigning parent or guardian should militate against any argument that the university is an innocent beneficiary of any duress or undue influence exercised by such person. This determination naturally would turn on the facts of each case, particularly with regard to the university's actual or constructive knowledge of the cosigner's influence.

or other material reliance, there is no basis to justify enforcement of the contract to the disservice of the duress victim.<sup>226</sup> Further, the unique setting of the NLOI compels the conclusion that a student-athlete should be able to disaffirm whenever an agreement with the university is the product of duress—regardless of the source.

While this approach seems fair and theoretically sound, it is not without its practical problems. For example, a student-athlete who decides to recant his decision to attend a particular university could falsely contend that it was the result of a parent's undue influence. The parent, seeking to indulge the wishes of the offspring student-athlete to transfer schools, might fabricate an excessive persuasion argument, thereby justifying disaffirmance. Obviously, the university, not the allegedly coerced student-athlete, would be the victim of any decision to permit disaffirmance. In all probability, the student-athlete's disaffirmance will not discharge the "duty" of the cosigning parent. But, so what? The cosigning parent is functionally "judgment-proof" in terms of giving the university the fruits of its bargain. Even the two-year negative covenant prohibiting participation in college athletics at other member schools obviously is of no utility vis-a-vis the student-athlete's parents. This problem emphasizes the need to preserve a university right to recover in a damage action against the cosigning parent who has engaged in duress or undue influence. The source of the relief may be the surviving enforceable contract, with expectation or reliance damages,<sup>227</sup> or it may be enforcement of the cosigner's promise under a promissory estoppel theory.

This discussion has focused on capacity and duress/undue influence as potential causes for finding a contract voidable. The Letter of Intent, as any other contract, is fraught with possibilities that the agreement reflects misrepresentations or fraudulent non-disclosures, results from mutual mistake of the parties in the negotiation of the scholarship terms, or contains unconscionably long negative covenants. In most instances, traditional contract principles will obtain in light of the courts' recognition that such agreements in academia are to be treated as typical commercial arrangements. At the same time, the illustrations of infancy and duress should alert even the casual reader to the rarefied atmos-

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226. E.A. FARNSWORTH, *supra* note 64, § 4.19, at 267 n.1.

227. *See, e.g., Boston Professional Hockey Ass'n, Inc. v. Cheevers*, 348 F. Supp. 261 (D. Mass.), *rev'd on other grounds*, 472 F.2d 127 (1st Cir. 1972).

phere that a contract between a university and a student occupies, and the peculiar subissues that must be contemplated.

Having explored the formation stage of the contract and possible situations in which formation can be corrupted to the point of voidability, the Article now addresses whether consideration exists to justify the conclusion that a valid contract between university and student-athlete is established by the Letter of Intent. Without such "validation,"<sup>228</sup> the agreement will be void and unenforceable save for possible quasi-contractual relief.

#### IV. VALIDATION

##### A. Consideration Generally

The proposition that the law does not enforce all promises is unassailable. The traditional method of identifying those promises entitled to legal enforcement as part of a binding contract requires a determination of whether the promise is supported by consideration.<sup>229</sup> Promises unsupported by consideration will not be enforced, barring activation of some equitable enforcement machinery.

Consideration has been defined as involving some benefit to the promisor or detriment to the promisee.<sup>230</sup> Many courts, however, have given little credence to the importance of demonstrating benefit to the promisor. For example, in the classic case of *Hamer v. Sidway*,<sup>231</sup> an uncle promised his nephew a small fortune to abstain from smoking, drinking, and other vices. The court declared:

Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him."<sup>232</sup>

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228. See generally J. MURRAY, *supra* note 26, § 58. Murray aptly catalogues the various issues of consideration as the "validation" process.

229. See generally Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); J. MURRAY, *supra* note 26, § 58.

230. J. CALAMARI & J. PERILLO, *supra* note 7, § 4.2, at 188 n.20.

231. 124 N.Y. 538, 27 N.E. 256 (1891).

232. *Id.* at 545, 27 N.E. at 257 (quoting Anson's Prin. of Con. 63).

In a similar vein, Professors Calamari and Perillo place little emphasis upon the "benefit" variable.<sup>233</sup> Their formula, adopted from Justice Cardozo's landmark opinion in *Allegheny College v. Chataqua National Bank*, determines consideration by a three part test:

(a) The promisee must suffer legal detriment; that is, do or promise to do what he is not legally obligated to do; or refrain from doing or promise to refrain from doing what he is legally privileged to do.

(b) The detriment must induce the promise. In other words the promisor must have made the promise because he wishes to exchange it at least in part for the detriment to be suffered by the promisee.

(c) The promise must induce the detriment. This means in effect . . . that the promisee must know of the offer and intend to accept it.<sup>234</sup>

Because courts traditionally have avoided examining the adequacy of consideration or the amount of detriment suffered by the promisee,<sup>235</sup> some commentators have suggested that any terminology embracing detriment or benefit is superfluous.<sup>236</sup> They would instead emphasize the importance of a bargained-for exchange, the transaction motivator. The Second Restatement defines consideration as "a performance or a return promise [that] must be bargained for. . . . A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that prom-

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233. J. CALAMARI & J. PERILLO, *supra* note 7, § 4.2. Professors Calamari and Perillo place substantial emphasis upon the legal detriment variable in assessing whether the exchange is validated. They explain that "[s]ince we are talking about *legal* benefit and *legal* detriment the result is invariably the same . . . . If the promisee suffers legal detriment the promisor obtains a legal benefit." *Id.* at 188. While I would concur that often the legal detriment to the promisee is the legal benefit of the promisor, this result is not automatic. For example, in *Hamer v. Sidway*, the uncle's promise to pay his nephew \$5,000 to give up fast living did not redound to the uncle's benefit—except in the most attenuated sense. *Id.*

234. J. CALAMARI & J. PERILLO, *supra* note 7, § 4.2, at 187-88 (citing *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927)).

235. *Black Indus., Inc. v. Bush*, 110 F. Supp. 801 (D. N.J. 1953); Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 600 (1969).

236. RESTATEMENT (SECOND) OF CONTRACTS §§ 71, 79 (1979).

ise.”<sup>237</sup> The Second Restatement also disdains any emphasis upon the traditional consideration vernacular, explaining: “If the requirement of consideration is met, there is no additional requirement of a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee.”<sup>238</sup>

Recent authority illustrates the judicial gymnastics employed to stretch the definition of consideration to fit a particular transaction. When faced with promises that by their own terms plainly manifest no commitment whatsoever, courts have often engrafted implied promises of “good faith” or “best efforts.”<sup>239</sup> For example, Party A’s promise to grant Party B a percentage of any sales of B’s product, in exchange for Party B’s promise to give Party A the exclusive right to market the product, is facially illusory, and theoretically is not consideration for Party B’s counterpromise. Yet, the consideration problem is erased by judicially engrafting an implied promise to exercise best efforts on Party A’s apparently empty representations.<sup>240</sup> Similarly, an absolute

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237. *Id.* § 71, at 172.

238. *Id.* § 79, at 200. Calamari and Perillo state that both Restatements “may” have embraced an approach that finds legal benefit and legal detriment irrelevant to consideration. J. CALAMARI & J. PERILLO, *supra* note 7, § 4.2, at 188 n.20. Their use of the term “may” is entirely appropriate because the Restatement is not clear. *See, e.g.*, Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984). As Professor Murray suggests, “There is a significant problem in discovering definitive terminology which will encompass all that is meant by the concept known as consideration.” J. MURRAY, *supra* note 26, § 73, at 142. Murray concedes that there is consensus on two elements that comprise consideration: (1) a “bargained-for” exchange; and (2) benefit or detriment. *Id.* The definition of consideration has expanded and contracted considerably, as part of judicial attempts to fashion a means to validate contractual agreements without making the process so rigid as to frustrate the clear attempts of the parties to reach an accord. Today, the three prong test fostered by Calamari and Perillo, even though it speaks in terms of “detriment,” seems to be an appropriate articulation of the exchange principle advanced by the Second Restatement. *See generally* Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983). It certainly is a useful mechanical formula to evaluate most consideration issues. The test also appears to do no violence to Professor Murray’s consensus. Accordingly, this calculus is employed to determine whether the promises in the Letter of Intent scheme are supported by consideration. *See infra* notes 243-50 and accompanying text.

239. *See, e.g.*, Furrer v. International Health Assurance Co., 256 Or. 429, 474 P.2d 759 (1970).

240. In *Wood v. Lucy, Lady-Duff Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), a landmark decision finding enforceable an exclusive employment contract

also support the university's promise to provide the student with financial aid. The consideration in this exchange is represented by the student-athlete's promise to attend that university as evidenced by the executed Letter of Intent.

Given the bilateral nature of the Letter of Intent arrangement, the consideration issue must now be addressed from the standpoint of the student as promisee. The first element of the three part consideration test requires that the student suffer legal detriment. Prior to the time the student-athlete signs the Letter of Intent, he is under no legal obligation to attend any university. By signing the Letter, the student-athlete has obligated himself to attend a university with which he otherwise had no legal relationship. The promisee can also suffer legal detriment by refraining from doing what he is otherwise legally able to do—attend a different university and participate in that university's athletic program. Paragraph one of the Letter of Intent provides that the student-athlete must "understand that if [he] enroll[s] in another institution participating in the National Letter of Intent Program prior to the completion of one academic year, [he] may not represent that institution in intercollegiate athletic competition" until he has attended the second institution for a two-year period.<sup>247</sup> Thus, the student, the promisee, has suffered the required legal detriment.

The second element of the consideration test requires the student-athlete's detriment to induce the university's promise. The university must have promised to provide financial aid to the student in exchange for the student's detriment. The university has committed scholarship funding to the student-athlete because it wishes to attract him to the university in the hope that his athletic skills will enhance the university's athletic program. Therefore, the student-athlete's detriment has induced the promise by the university, satisfying the second component of the consideration regime.

Third, the promise must induce the detriment; the promisee must know of the offer and intend to accept. Paragraph two of the Letter of Intent mandates that the student-athlete receive the university's financial aid award or recommendation when he signs the Letter.<sup>248</sup> This representation must be in writing and contain the "terms and conditions of the award, including the amount and duration of the financial aid."<sup>249</sup> When the student signs the Letter of Intent, thereby providing the detriment, he has before him the

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247. Letter of Intent, *infra* Appendix A, at para. 1.

248. *Id.* at para. 2.

249. *Id.*

full terms of the offer made by the promisor university.<sup>250</sup> The student-athlete knows of the offer and manifests an intent to accept the offer by signing the Letter of Intent. This procedure satisfies the third element of the consideration test.

Thus, on the surface, the student-athlete's promise to attend the university and the university's promise to provide financial aid are each supported by consideration. However, the Letter of Intent is not without potential escape hatches, illusory-like promises, and other infirmities that may raise doubts about the document's "validity" or "substance." Examples of such potential "invalidators" are addressed below.

### C. *Illusory Promises and the Letter of Intent*

#### 1. *NLOI Filing Requirement*

Paragraph nine of the NLOI provides: "This Letter must be filed with the appropriate conference by the institution with which I sign within 21 days after the date of final signature or it will be invalid. In that event, this Letter may be reissued."<sup>251</sup> Thus, paragraph nine arguably permits the university to nullify the Letter by letting the filing period pass without action. This possibility raises several issues: (1) does the language of paragraph nine, *on its face*, give the university the option to withdraw its scholarship offer and abort the entire agreement; (2) if the university can withdraw its offer, does an implied promise by the university to file the Letter within the appropriate time frame exist; and (3) what is the meaning of the tag sentence, "In that event, this Letter may be reissued?" The sentence gives no clue as to when or to whom the NLOI will be reissued.

The university's broad license to sit on its obligations and allow the twenty-one days to expire under paragraph nine of the NLOI poses a serious problem. Taken at face value, the clauses, "it [the Letter] will be invalid" and "this Letter may be reissued,"<sup>252</sup> could allow the university to let the time lapse and refuse to "reissue"

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250. Generally, if an outright award is not made at the time of signing, the recommendation for financial aid will contain all the appropriate terms and conditions of the award, including the amount and duration. *See supra* notes 178-90 and accompanying text. For all practical purposes this recommendation is "almost as good as a scholarship" because it is approved almost "99.9%" of the time. *See supra* note 9. *But see infra* notes 251-61 and accompanying text.

251. Letter of Intent, *infra* Appendix A, at para. 9.

252. *Id.*

the Letter, thus removing the acceptance arc from the circle of assent. The wording is peculiar, as the offeror could arguably be deemed master of both the offer and the acceptance.<sup>253</sup> Further, the promises of a promisor who possesses such absolute power to perform or refuse to perform his duties could be illusory and the agreement void.<sup>254</sup> Yet, several arguments suggest that the university has no such window of opportunity.

First, the provision explicitly declares that the university *must* file the Letter within twenty-one days. The clause does not qualify the university's offer (or acceptance, depending upon the identification of offeror and offeree), or reserve the university's prerogative to negate the agreement by passively watching the twenty-one days trickle away. The language arguably reflects an express promise to file the Letter within a designated time frame.<sup>255</sup> Moreover, the failure to file negates only the validity of the Letter; it does not, by its terms, nullify the scholarship offer. The university has assumed a duty, the failure of which would give the student-athlete the option to sue for breach and, if the breach is material, to refuse to perform.<sup>256</sup>

Second, interpretation of the provision as an express condition upon which the promise to pay a scholarship depends would not raise an illusoriness problem because the promisor's ability to act in the future has been circumscribed. "A promise is not rendered

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253. It is a contract axiom that the offeror is master of the offer. *See, e.g.,* Langellier v. Schaefer, 36 Minn. 361 (1887). However, this unassailable tenet has been statutorily eroded or qualified. *See, e.g.,* U.C.C § 2-207 (1977); *see also* Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307 (1986).

254. *See supra* notes 240-42 and accompanying text; Jennings, *supra* note 20; Wilkinson & Rolapp, *The Private College and Student Discipline*, 56 A.B.A. J. 121, 125 (1970); *see also* Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1377 (1963). Professor Corbin's imagery artfully explains the illusory promise: "If what appears to be a promise is an illusion, there is no promise; like the mirage of a desert with its vision of flowing water which yet lets the traveller die of thirst, nothing is there." A. CORBIN, *supra* note 114, § 145, at 211.

255. The university may argue that the 21-day language is a condition precedent to contract formation, the *sine qua non* of any acceptance. The 21-day language may give further credence to the argument that the university is the offeree—retaining the ultimate power of acceptance, but suggesting the offer's terms. *See supra* notes 155-64 and accompanying text. In all likelihood, however, if this clause is language of condition, it would be a condition affecting performance obligations, with no impact upon the existence of a valid contract. *See infra* notes 257, 342 and accompanying text.

256. *See infra* notes 318-31 and accompanying text.

insufficient as consideration by being made expressly conditional upon some voluntary act of the promisor himself . . . ."<sup>257</sup> It is certainly plausible to construct an implied promise by the university to exercise good faith or best efforts to file the Letter within the appropriate time frame.<sup>258</sup> This construction negates any argument that the express condition is an unqualified exculpatory clause giving the university the unbridled option to "cancel." Of course, the margin between requiring the letter to be filed and requiring best efforts or good faith in filing the letter is extremely slim. The

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257. A. CORBIN, *supra* note 114, § 148, at 216. Professor Corbin offers the following illustration:

Thus, where A promised to charter a ship to B at a stated rate, if A should thereafter buy the ship; B promised in return to pay the stated rate if the ship should be delivered to his use. This was held to be a valid bilateral contract. A's promise bound him either to charter the ship to B or not to buy it.

*Id.* (footnote omitted). If the 21-day filing period were deemed to be an express condition precedent to the student-athlete's duty to perform, or alternatively, a condition subsequent discharging the student-athlete's duty, then no breach would occur because no promise giving rise to a duty exists. The student-athlete, however, as manifested by the language of the Letter, would have the prerogative to suspend or terminate his obligations if the Letter is not reissued. Of course, the student-athlete conceivably could waive the condition and activate the remainder of the parties' performance obligations that are dependent upon the satisfaction of such condition. The efficacy of the waiver would depend upon several factors, including the materiality of the condition and the benefit for whom the condition was devised. *See generally* J. MURRAY, *supra* note 26, § 189; J. CALAMARI & J. PERILLO, *supra* note 7, §§ 11-30, at 492-93. If the 21-day period is for the student-athlete's benefit and a nonmaterial part of the exchange, then it could be waived. *See* *Prestige House, Inc. v. Merrill*, 51 Or. App. 67, 624 P.2d 636 (1981). An argument could be made that the benefit inures to the student because the clause merely states that the letter will be invalid. This intimates that the scholarship commitment survives and the student need only sign the Letter again to revive the contract. *See deFreitas v. Cote*, 342 Mass. 474, 174 N.E.2d 371 (1961). If, however, the benefit is construed to benefit the university or both parties (i.e., conditions the performance of the university as well as the student-athlete), the student clearly would not have a unilateral prerogative to waive it and demand performance. *See* *Omaha Pub. Power Dist. v. Employers' Fire Ins. Co.*, 327 F.2d 912 (8th Cir. 1964); *Wallstreet Properties, Inc. v. Gassner*, 53 Or. App. 650, 632 P.2d 1310 (1981). For a more detailed discussion of promises and conditions, see *infra* notes 318-66 and accompanying text.

258. Courts will infer an implied promise of good faith when construing typical conditions of satisfaction (where the condition involves matters of personal taste or artistic integrity) or will apply a reasonable person standard (where the question centers upon utility or general fitness) to ascertain whether the condition has been satisfied.

university, either by the strict language of the filing requirement or through the implied promise, has undertaken a duty to file that it will be hard pressed to avoid. Any suggestion that the provision could be employed at the whim of the university to avoid its contractual commitment is at best tenuous.

Finally, a finding that the filing language is illusory because of the indefiniteness of the university's obligations might present a problem only at the contract's executory stage. The illusoriness can be cured if the gratuitous promisor actually performs. A "good" unilateral contract can be forged out of the "bad" bilateral contract that may have been rendered illusory by the putative twenty-one day escape hatch:

Although a contract is lacking in mutuality at its inception, such defect may be cured by the subsequent conduct of the parties. Want of mutuality is no defense in the case of an executed contract, and a promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee.<sup>259</sup>

The filing of the Letter would conceivably cure the illusory promise problem and preempt any afterthought argument that the agreement lacked consideration. Thus, paragraph nine probably does not present a barrier either to the formation or validation of the contract. This conclusion is compelled by the express language, the implied promise to use best efforts to file the Letter and, where appropriate, the actual filing of the Letter.

## 2. *NLOI Scholarship Approval*

Paragraph two of the NLOI declares:

**I MUST RECEIVE IN WRITING AN AWARD OR RECOMMENDATION FOR ATHLETIC FINANCIAL AID FROM THE INSTITUTION AT THE TIME OF MY SIGNING FOR THIS LETTER TO BE VALID. The offer or recommendation shall list the terms and conditions of**

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259. *Wright & Seton, Inc. v. Prescott*, 420 So. 2d 623, 627 (Fla. App. 1982) (quoting 17 C.J.S. *Contracts* § 100(2) (1963)). See generally Leibman & Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1512-13 (1987); Finn, *The Forging of Good Unilaterals Out of Bad Bilaterals*, 3 BROOKLYN L. REV. 6 (1933).

the award, including the amount and duration of the financial aid. If such recommended financial aid is not approved within the institution's normal time period for awarding financial aid, the letter shall be invalid.<sup>260</sup>

The final sentence of paragraph two could be construed as giving the university total control over the purse strings and the contract's validation. Even though most recommendations are eventually approved, the paragraph does not suggest that the university must adhere to the financial aid recommendations. Certainly, the wording of the Letter suggests that the continued vitality of the agreement is a function of the university's continuing satisfaction with the bargain.<sup>261</sup>

Many of the responses to paragraph nine of the Letter have equal utility in the resolution of potential consideration problems raised by paragraph two. The language seems to give the university carte blanche to disapprove any recommended financial aid package and thereby nullify the entire Letter of Intent arrangement. The absence of any meaningful commitment again raises the spectre of illusoriness that could render the agreement void for want of consideration.<sup>262</sup> However, such a result is unlikely today given judicial predilections to infer promises of best efforts or good faith.

Courts have frequently rejected arguments that clauses requiring approval of a board of directors or similar ratification devices render a contract void for lack of consideration.<sup>263</sup> The judicial rationale is that the need for approval does not, in itself, moot the promises or give the promisor free rein to reject the contract. Some element of reasonableness or good faith, logically derived from such broad approval prerogatives, circumscribes the promisor's freedom and negates the appearance of illusoriness.

The scholarship approval component can be analogized to a condition of satisfaction, the failure of which operates to suspend or terminate any duties dependent upon compliance with that condition. Such conditions, though apparently unfettered, require

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260. Letter of Intent, *infra* Appendix A, at para. 2.

261. See generally RESTATEMENT (SECOND) OF CONTRACTS § 77 (1979); 1 S. WILLISTON, *supra* note 7, § 100; A. CORBIN, *supra* note 114, § 145; E.A. FARNSWORTH, *supra* note 64, § 8.4, at 557 nn.37-38.

262. See *supra* notes 240-42 and accompanying text.

263. See, e.g., Moreland Dev. Co. v. Gladstone Holmes, Inc., 135 Cal. App. 3d 973, 186 Cal. Rptr. 6 (1982). But see Silver v. Safra, 79 Misc. 2d 919, 361 N.Y.S.2d 250 (1974).

at least a showing of good faith.<sup>264</sup> Similarly, typical real estate transactions contain a promise to purchase that is contingent upon the purchaser's ability to secure necessary financing. The promise to purchase may appear to be wholly illusory because the buyer has not assumed any duty to attempt to obtain financing.<sup>265</sup> If the financing contingency were totally within the discretion of the buyer, then the promise to purchase might be illusory and inadequate to support the counter-promise to the seller. However, an implied promise to exercise reasonable efforts to obtain financing is generally found and the real estate contract survives.<sup>266</sup>

Likewise, the Letter imposes a duty on the university to exercise best efforts or good faith in the review and approval of the recommended financial aid. The promise to provide scholarship funding is the vital first step in the negotiating process, without which there is generally no predicate for the student-athlete's binding promise to attend an institution. The Letter of Intent instructs the student-athlete to refrain from signing until he has received a pledge of financial aid. The apparent qualifying language of paragraphs two and nine should not strip the contract of its

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264. See *supra* note 152.

265. See, e.g., *Gerruth Realty Co. v. Pire*, 17 Wis. 2d 89, 115 N.W.2d 557 (1962) (clause making purchase "contingent upon the purchaser obtaining the proper amount of financing" renders contract void for indefiniteness); see also *E.I. DuPont de Nemours & Co. v. Claiborne Reno Co.*, 64 F.2d 224 (8th Cir. 1933) (contract giving distributor exclusive right to sell manufacturer's products void for want of consideration). *But see* U.C.C. § 2-306 (1977).

266. See *Horizon Corp. v. Westcor, Inc.*, 142 Ariz. 129, 688 P.2d 1021 (1984); *Mezenotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410, *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

Some courts have attempted to differentiate a clause conditioning purchase upon securing financing from a clause contingent upon the ability to receive financing. See, e.g., Note, *Contingency Financing Clauses in Real Estate Sales Contracts in Georgia*, 8 GA. L. REV. 186, 196 (1973). These attempts at splitting hairs seem fatuous because, in both cases, the parties' intent is abundantly clear: the avoidance of liability if a mortgage cannot be secured. It is not intended to be, and should not be permitted to serve as, an escape hatch for a party who simply gets cold feet or envisions a better deal somewhere else. *Id.*

Professors Calamari and Perillo offer the following observation about the typical real estate transaction containing financing contingencies: "Agreements of this kind serve a vital purpose. They are entered into with the understanding that both parties are firmly committed to the performance of the agreement. . . . His promise . . . is not rendered illusory by the condition attached." J. CALAMARI & J. PERILLO, *supra* note 7, § 4-12, at 233. This rationale is directly applicable to paragraph two. Implications of good faith efforts and a conclusion of nonillusoriness are particularly irresistible, given the overwhelming percentage of scholarships that are actually approved. See *supra* note 9.

validity, because the parties have clearly enunciated their commitments at other points. Construing these provisions as illusory promises which negate the parties' clear and unequivocal manifestations of intent to be bound elevates form over substance. Implication of a university's good faith promise to meet the financial aid commitment is the only feasible construction under these circumstances. The implied promise derives from the language of the scholarship recommendation, as well as the agreement as a whole. Commentators state that "[t]he implication may vary from 'reasonable' efforts to 'good faith' efforts to 'best results.' Whatever the adjective, heroic efforts are not implied."<sup>267</sup> No effort at all would constitute a breach of the implied promise; thus, the apparent illusoriness evaporates, as the university has a commitment to honor and cannot abandon it at will.

### 3. *The Vagueness of the Promised Performance*

The duties of the student-athlete who has executed a Letter of Intent are not delineated anywhere in the NLOI. It is unclear whether the student-athlete can merely attend class and go through the motions of athletic participation. The NLOI does not specify the degree of effort the student-athlete must expend to achieve the stellar performance that is obviously expected and for which the university undertook considerable recruitment efforts. The student-athlete's substantial latitude, or the tremendous subjectivity in ascertaining whether the athlete is performing "his end," speaks to the potentially illusory nature of the student-athlete's promise and the absence of any real obligation.<sup>268</sup>

Once again, however, the illusoriness problem exists only on the surface, and is quickly dissolved. The imprecision of the student-athlete's future performance is part and parcel of many personal services contracts, particularly in the sports industry.<sup>269</sup> A

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267. J. CALAMARI & J. PERILLO, *supra* note 7, § 4-12, at 234 n.27.

268. A collateral illusoriness question arises if the student-athlete has a unilateral right to cancel (e.g., transfer) after the initial commitment, under either a theory of a four year contract with a series of performances or a series of one year contracts. See *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). See generally Leibman & Nathan, *supra* note 259. See also *supra* notes 178-90, *infra* notes 273-82 and accompanying text.

269. The difficulties in ascertaining the parameters of an entertainer's specific duties in a personal services contract are best illustrated by judicial reluctance to order "specific performance" for a breach in these contexts. In addition to recognizing the repugnance of requiring someone to work against his will, courts

contract that bargains for some type of athletic prowess or non-fungible service must contain a modicum of indefiniteness in the performer's duties.<sup>270</sup> The riskiness and unpredictability inherent in artistic performance may be the lifeblood of the agreement.

The quantification of performance levels is irrelevant to the larger question of whether the broad range of performance levels gives the performer free rein to excel or fail at his pleasure—freedom that conceivably would invalidate the agreement on illusoriness grounds. The student-athlete, much like a performer in the professional sports or entertainment industries, must do *something* to satisfy his duty under the agreement. At the very least, the student-athlete must enroll at the university, attend class, and participate at some level in preparation for intercollegiate athletics. The Letter of Intent does limit the student-athlete's future liberty of action.<sup>271</sup> He simply cannot act as though no contract existed—the stuff that illusory promises are made of.<sup>272</sup> The vagueness of the student-athlete's eventual performance responsibilities is a matter for discussion under a "performance" analysis. This vagueness will not, however, negate the agreement on consideration grounds.

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have also eschewed this type of remedy because of the practical problem in ascertaining compliance with the mandate. *See* Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235 (1921). In *Ford v. Jermon*, 6 Phil. Rep. 6 (1865), the court declined to grant a specific performance remedy against an actress who had breached a contract requiring her to act in a play, and commented wryly: "[I]n order to render such a decree effectual, it would be necessary to appoint a master, whose duty should be to frequent the theatre and decide whether the mistakes or incongruities by which the part might be disfigured, were in contempt of the court, or unintentional." *Id.* at 7; *see also* Brennan, *Injunction Against Professional Athletes Breaching Their Contracts*, 34 BROOKLYN L. REV. 61 (1967); Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18, 21-23 (1954).

270. *See* Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902).

271. *See generally* A. CORBIN, *supra* note 114, § 156. Addressing the issue of illusory promises in the context of requirements and outputs contracts and the extent to which contract enforcement is compromised, Professor Corbin offers the following broad prescription:

The promisor's duty is conditional upon the existence of an objective need for the commodity or service, and the promisor may have a high degree of control over the happening of this condition; but this does not render the promise illusory and empty of content. It states a limitation upon the promisor's future liberty of action; he no longer has an unlimited option.

*Id.* at 225-26.

272. *See generally* Corbin, *The Effect of Option on Consideration*, 34 YALE L.J. 571 (1925).

If agreements could be aborted on this basis, then contracting for the personal services of another, particularly in the professional sports and entertainment fields, would be perilous and uncertain. The law will not tolerate an approach that permits the nullification of contractual duties simply because the promises in which they are enveloped are inherently and unavoidably vague.

*D. The Right to Cancel*

Although the Letter of Intent analysis focuses on the initial, pre-enrollment arrangement, a collateral problem arises in a long-term contract that gives one party the right to cancel.<sup>273</sup> As discussed above, the nature and duration of the university/student-athlete arrangement is not clearly defined.<sup>274</sup> However, to the extent that the agreement is a four year contract, with a unilateral right to cancel, an additional consideration issue is raised.

Historically, an unfettered right to cancel a bilateral contract rendered the contract void, because one party had no duty to perform.<sup>275</sup> The rationale is that a promise that can be summarily withdrawn is not a promise, and actually manifests an internal inconsistency in the promisor's representations because "a consideration cannot be constituted out of something that is given and taken in the same breath."<sup>276</sup>

Today, courts are reluctant to abort an agreement solely because a cancellation prerogative exists. Great efforts are made to find some hint of obligation when one party has retained a unilateral right to cancel an agreement. When the cancellation clause contains an express requirement that notice precede termination, courts have had little difficulty finding consideration in the agreement to forego immediate cancellation.<sup>277</sup> Courts have also inferred notice requirements from the general cancellation

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273. See generally Leibman & Nathan, *supra* note 259, at 1510-22.

274. *Id.*; see *supra* notes 178-90 and accompanying text.

275. Professor Corbin states: "If a promisor reserves the power to cancel at any time without notice, his promise seems to be unenforceable." A. CORBIN, *supra* note 114, § 163, at 237.

276. Kadis v. Britt, 224 N.C. 154, 160, 29 S.E.2d 543, 548 (1944); 1 S. WILLISTON, *supra* note 7, § 104.

277. Advanced Copy Prod., Inc. v. Cool, 173 Ind. App. 363, 363 N.E.2d 1070 (1977) (contract clause requiring 30 days notice by either party before termination sufficient consideration to support contract modification); see also Maintenance Specialties, Inc. v. Gottus, 455 Pa. 327, 314 A.2d 279 (1974).

language, and have thereby manufactured the requisite consideration.<sup>278</sup>

If the relationship between the university and the student-athlete is a bilateral contract with a cancellation prerogative, then it is unlikely that the cancellation clause will invalidate the agreement. First, if the agreement begins with the initial Letter of Intent, then both the student-athlete and the university have extended commitments involving significant detriment.<sup>279</sup> Second, the relationship after the first year speaks to an implied, if not actual, notification of intent to terminate.<sup>280</sup> Again, an analogy can be made to the nonguaranteed contract between a professional athlete and his team. In *Philadelphia Ball Club v. Lajoie*,<sup>281</sup> the court interpreted the Philadelphia Baseball Club's cancellation option as follows:

Each party has the possibility of enforcing all the rights stipulated for in the agreement. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which the defendant has agreed to supply his personal services; but mere difference in the rights stipulated for does not destroy mutuality of remedy.<sup>282</sup>

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278. See, e.g., *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642, 644 (2d Cir. 1945). Professor Williston's observation is most apt: "Since the courts . . . do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration . . ." 1 S. WILLISTON, *supra* note 114, § 105, at 418.

279. See *supra* notes 243-50 and accompanying text.

280. See NCAA MANUAL, *supra* note 49, Art. 15.3.5.

281. 202 Pa. 210, 51 A. 973 (1902).

282. *Id.* at 219, 51 A. at 975. The detriment is found in a twofold obligation, the notice to terminate the relationship, and the duty to pay or perform for at least one year. Either of these obligations would probably satisfy consideration prerequisites. The Letter of Intent presents the obverse of the Lajoie situation. There, the player promised to perform for a designated period in exchange for the club's promise to pay and right to cancel. In the four year contract scenario of the Letter of Intent, the student-athlete commits to "play" for a year, with a right to cancel, in exchange for the university's scholarship pledge. The following observations about *Lajoie* could have equal applicability to the Letter of Intent:

It is not merely the obligation of "notice" which gives substance to the employer's undertaking. Rather, the real "consideration" for the player's promise is the other affirmative obligations which the team assumes, most particularly a promise to pay a salary. These bind the team in a very substantial way and will continue to do so until the team takes

Following this rationale, the student-athlete's prerogative to cancel at some point after the first contract year is an insufficient showing of the contract's invalidity. The entire arrangement is replete with obligation; the mere ability to cancel cannot be used as an excuse to frustrate the bargain. Indeed, if the cancellation prerogative alone were to render an otherwise valid contract nugatory, then most personal services contracts in the sports and entertainment industries would be similarly threatened, and the structure of those enterprises would be seriously compromised.

In sum, several potential questions arise under a traditional consideration analysis. However, it is unlikely that the Letter of Intent arrangement would fail for lack of consideration. If the Letter of Intent were found to be invalid on consideration grounds, the now panaceaic doctrine of promissory estoppel waits in the wings to rescue the victim of the putative breach.

#### V. PROMISSORY ESTOPPEL

##### A. *The Development of the Doctrine*

The Second Restatement of Contracts states: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise . . . ." <sup>283</sup> This doctrine, commonly referred to as promissory estoppel, was developed to remedy the harsh effects of a promisee's justifiable reliance upon a promise otherwise unenforceable in contract for want of consideration or other infirmity. Classic applications involved family gifts, <sup>284</sup> gratuitous bailments, <sup>285</sup> bequests of land, <sup>286</sup>

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specific action to negate them. The employer has a real obligation which surely satisfies the minimum requirements of consideration.

J. WEISTART & C. LOWELL, *supra* note 18, § 4-11, at 377.

283. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). For a history of the doctrine, see Metzger & Phillips, *supra* note 238. That article presents an interesting treatment of the accommodation or unification of contract and promissory estoppel, particularly the arguable predominance of the "reliance" theory over the "bargain" theory. *Id.* at 534-36; see also G. GILMORE, *THE DEATH OF CONTRACT* (1974); Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639 (1952).

284. *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898) (plaintiff's reliance on decedent's promise of gift estops executor from alleging lack of consideration).

285. *Sigel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923) (bailor's detrimental reliance on bailee's promise to procure insurance renders bailee liable for failure to procure insurance).

286. *Greiner v. Greiner*, 131 Kan. 760, 293 P. 759 (1930).

and other promises in which the exchange necessary to establish a valid contract was plainly lacking.<sup>287</sup> In most cases, there was not even the pretense of a bargain.

The doctrine has evolved to the point where it can alternately serve as a consideration substitute,<sup>288</sup> a loophole to circumvent the statute of frauds,<sup>289</sup> and even an independent cause of action.<sup>290</sup> Some commentators have characterized promissory estoppel as a "contort" and have intimated that the geometric expansion of the doctrine illustrates that contract law has been absorbed piecemeal by tort law.<sup>291</sup> Promissory estoppel can be catalogued under the tort aegis on the premise that the predicate for remedying the injury is the victim's reliance upon a promise carelessly made.<sup>292</sup> The traditional view that promissory estoppel should only be invoked in the context of detrimental reliance, not the product of

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287. Other examples include charitable subscriptions, promises to reduce rents, and promises to pay employee pensions. *See Metzger & Phillips, supra* note 238, at 482. In most cases, the predicate for the enforcement of the promise was the detrimental reliance of the promisee. *Id.* The Second Restatement, however, eliminates the need to demonstrate detrimental reliance to enforce charitable subscriptions or certain marriage settlements. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1979).

288. *See generally* 1 S. WILLISTON, *supra* note 7, § 139; Metzger & Phillips, *supra* note 238, at 482-87.

289. *Alpark Distrib., Inc. v. Poole*, 95 Nev. 605, 600 P.2d 229 (1979); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1979); Farber & Matheson, *supra* note 148, at 908 n.20.

290. *See Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965); RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979); Lake, *supra* note 23 at 347-50. *See generally* Metzger & Phillips, *supra* note 238, at 508-13.

291. Farber & Matheson, *supra* note 148, at 905 nn. 8-12. *See also* G. GILMORE, THE DEATH OF CONTRACT 87 (1974). An interesting question is whether promissory estoppel is an independent basis of recovery with no relationship to contract law, or whether it is simply a mutant version of traditional contractual obligation, serving as a separate or alternative cause of action. *Compare* Metzger & Phillips, *supra* note 238, at 509-11, 529, 548-50 (promissory estoppel independent from contract law), *with* Farber & Matheson, *supra* note 148, at 905 (promissory estoppel "a new theory of distinctly contractual obligation"). If promissory estoppel were construed literally as an independent theory of recovery, then its application should not depend upon the exhaustion or failure of traditional contract causes of action. Yet, its utility frequently turns on such considerations. *See* Metzger & Phillips, *supra* note 238, at 549 n.513.

292. Farber & Matheson, *supra* note 148, at 905 nn.10-12.

a bargain, fuels that notion.<sup>293</sup> However, the doctrine is regularly employed in situations where some semblance of a bargain has been struck or sought,<sup>294</sup> and even where reliance was not the actual predicate for relief.<sup>295</sup> These expansive applications call into question the traditional descriptive nomenclature, "unbargained-for reliance," and demonstrate the geometric growth of a concept at one time narrowly circumscribed.

Promissory estoppel has been applied to bargain configurations when a binding agreement was contemplated, but either remained inchoate<sup>296</sup> or failed to become a binding contract due to some infirmity, such as indefiniteness.<sup>297</sup> One frequent fact pattern involves subcontractor bidding in the construction industry. In *Dren-*

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293. See Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1274-75 (1980).

294. See *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352 (8th Cir. 1974); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 368-71 (1969). In many bargain-type cases, it is difficult to ascertain whether promissory estoppel has been applied as an independent cause of action or as a transformed contractual basis of recovery. See, e.g., Metzger & Phillips, *supra* note 238, at 522-23, 548-50; see also Farber & Matheson, *supra* note 148, at 905-06.

295. See *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 384 N.E.2d 176 (1978). See generally Farber & Matheson, *supra* note 148. This notion is probably neither as dramatic nor as consequential as one would think. Professors Farber and Matheson have concluded that "reliance is no longer the key to promissory estoppel," based on their research demonstrating that in literally hundreds of cases courts have merely paid lip service to the reliance interest. *Id.* at 904.

296. See, e.g., *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352 (8th Cir. 1974); *Prudential Ins. Co. of America v. Clark*, 456 F.2d 932 (5th Cir. 1972); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

297. *Kearns v. Andree*, 107 Conn. 181, 139 A. 695 (1928); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965). This situation presents the real anomaly of emerging promissory estoppel applications. By definition, the doctrine should, at the very least, require a clear and unambiguous promise. *Triology Variety Stores, Ltd. v. City Prod. Corp.*, 523 F. Supp. 691 (S.D.N.Y. 1981). Yet, some courts are willing to settle for less. See, e.g., *Walter v. KFC Corp.*, 515 F. Supp. 612 (S.D. Ca. 1981), *rev'd in part, aff'd in part*, 728 F.2d 1215 (9th Cir. 1984); see also *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976). Reconciliation of the conflict between these lines of cases may be found in the lack of any consensus regarding whether the precision of the promise in a promissory estoppel context requires the same showing as an offer in a traditional contract. That is, all courts may agree that the promise must be definite—but the term itself takes on a wide range of judicial connotations.

*nan v. Star Paving Co.*,<sup>298</sup> the California Supreme Court, using promissory estoppel as its predicate, construed a bid arrangement between a subcontractor and a general contractor to be an option contract irrevocable by the subcontractor for a reasonable period of time. The court concluded that the subcontractor's bid, which was relied upon by the general contractor in submitting his bid to the "owner," was a promise carrying an attendant implied promise of at least temporary irrevocability.<sup>299</sup> The general contractor's reliance upon the bid in preparation of his own bid acted to freeze the subcontractor's offer much the same as consideration will cement the irrevocability of an offer in the typical option contract.<sup>300</sup> The peculiar aspect of *Drennan* is that the offer plainly invited a promissory acceptance that was not forthcoming before the offer had been revoked. Thus, the court's reasoning reflected a road historically not taken—invoking promissory estoppel when an offer seeking a bilateral contract had been made and the bargaining process was well under way.<sup>301</sup>

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298. 51 Cal. 2d 409, 333 P.2d 757 (1958).

299. *Id.* at 414, 333 P.2d at 761. The reverse of this situation, in which the subcontractor has relied upon a promise by the general contractor, also occurs with some regularity. *See R.S. Bennett & Co. v. Economy Mechanical Indus.*, 606 F.2d 182 (7th Cir. 1979).

300. 51 Cal. 2d 409, 333 P. 2d 757. RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979).

301. The seeds of *Drennan* had actually been sown earlier. *See, e.g., Northwestern Eng'g Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979). Professors Metzger and Phillips acknowledge that the *Drennan* rationale represented expansion of promissory estoppel to certain types of "bargain" cases, but reasoned that the California Supreme Court at least continued to base recovery on contractual predicates (offer and acceptance, the Statute of Frauds, and similar principles were included in the analysis). They suggest that the more dramatic evolution of promissory estoppel occurred later, when courts seemingly ignored traditional requirements and applied the doctrine as a "non-contractual" basis of recovery. Metzger & Phillips, *supra* note 238, at 515; *see N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963); *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976). The dramatic nature of the development is underscored when contrasted with Judge Learned Hand's approach in *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933). There, the court refused to apply promissory estoppel in a traditional bargain context, reasoning that the offeror could not be held to an irrevocable offer when the offeree could unilaterally abandon the agreement. Due to the bilateral character of the agreement sought, there was "not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation." *Id.* at 346; *see also Sharp, Promises, Mistakes and Reciprocity*, 19 U. CHI. L. REV. 286 (1952).

Situations involving subcontractors' bids are somewhat unique, and *Drennan* should not be read as freezing *all* offers to bilateral contracts when the offeree has detrimentally relied. As a practical matter, the offeree need only present a counterpromise to gain assurances of irrevocability, and courts will rarely indulge an offeree's reliance unattended by a return promise.<sup>302</sup> However, *Drennan* does reflect an increasing judicial predisposition to invoke promissory estoppel in other bargain contexts. For example, courts have applied promissory estoppel when a party has relied on a bilateral contract that is later found to be fatally indefinite or otherwise deformed.<sup>303</sup> The doctrine has also been used to permit recovery based upon one party's reliance on a questionable promise made as part of preliminary negotiations undertaken with an eye toward reaching a binding agreement.<sup>304</sup> These lines of authority suggest that contractual foreplay may establish a basis for recovery when the putative promisee has detrimentally relied—even though an intent to be bound and demonstration of commitment are completely lacking.<sup>305</sup>

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302. See J. CALAMARI & J. PERILLO, *supra* note 7, § 6-5, at 285-86; see also Note, *Another Look at Construction Bidding and Contracts at Formation*, 53 VA. L. REV. 1720, 1725 (1967).

303. *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965); *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959).

304. *Associated Tabulating Serv., Inc. v. Olympic Life Ins. Co.*, 414 F.2d 1306 (5th Cir. 1969); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

The *Hoffman* court boldly stated that the promise to be enforced under promissory estoppel need not "be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee." *Id.* at 698, 133 N.W.2d at 275.

305. One commentator has suggested that *Hoffman* reinforces promissory estoppel as a "distinct basis of liability without regard to theories of bargain, contract, or consideration." Henderson, *supra* note 294, at 359. This conclusion reflects the exponential leap of recent scholars who suggest that not only is promissory estoppel a "new theory of distinctly contractual obligation," but also that it may enjoy a vitality independent of its erstwhile lifeblood, detrimental reliance. Professors Farber and Matheson's exhaustive survey reveals that the reliance component of promissory estoppel may no longer be the *sine qua non* of the doctrine's being. Farber & Matheson, *supra* note 148, at 905, 910. Farber and Matheson argue that promissory estoppel is a positive step toward a more realistic rule governing promissory obligations. They would, however, expand the doctrine further by making all commitments entered in "furtherance of economic activity" enforceable. *Id.* at 945. Their proposal posits an independent cause of action requiring "neither satisfaction of traditional notions of consideration nor the specific showing of detriment associated with promissory estoppel." *Id.* at 929. Rather, their theory reinforces the mutual trust inherent in any relationship that involves a commitment made with economic activity at its core. *Id.* at 945.

*B. Promissory Estoppel and the NLOI*

The importance of promissory estoppel to enforcement of promises contained in the NLOI cannot be overstated. The Letter of Intent is by no means immune from attack for lack of consideration or fatal indefiniteness.<sup>306</sup> Various other potential difficulties that plague the agreement may prevent relief under contract theory. Thus, promissory estoppel could be the last refuge of a party who, believing that the agreement is binding, finds that it fails to satisfy the minimum criteria of a "contract." The characterization of promissory estoppel as an independent concept, or merely as a remedy for reliance upon wholly gratuitous, unbargained-for promises, will dictate the extent to which the parties are left without effective redress if the Letter of Intent fails to satisfy contractual thresholds.

Promissory estoppel could become operative in several respects in the Scholarship/Letter of Intent exchange. First, the agreement could be compared to a social obligation, educational grant, or similar arrangement that lacks the crucial intent to be bound or anticipation of legal consequences.<sup>307</sup> It is unlikely that promissory estoppel in its most pristine form would be invoked in these situations given the unmistakable pretense of bargain in the NLOI. However, in view of the catch-all that the doctrine has become, it could serve as the basis for finding liability against a breaching promisor. The long shadow of *Drennan* and similarly expansive authority would easily envelop such a fact pattern.<sup>308</sup>

Second, promissory estoppel may be activated if the promises made by either party are construed to be illusory, or if the requisite validating exchange is found lacking. In this sense, promissory estoppel would again serve as a consideration substitute in a

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306. See *supra* notes 251-82 and accompanying text.

307. Professors Weistart and Lowell have opined that, if the scholarship is an educational grant or similar type of gift, relief for failure to provide the promised monies could rest on estoppel. See J. WEISTART & C. LOWELL, *supra* note 18, § 1.06 at 10 n.31.

308. Again, the incredibly broad language of *Hoffman* could be invoked to establish a basis for recovery when there has been little more than preliminary negotiations and promises of dubious substance. See 26 Wis. 2d at 698, 133 N.W.2d at 275. *But see* *Burst v. Adolph Coors Co.*, 503 F. Supp. 19 (E.D. Mo. 1980), *aff'd*, 650 F.2d 930 (8th Cir. 1981) (promissory estoppel inapplicable where invitation to apply for distributorship did not constitute promise that would induce detrimental reliance).

transaction that plainly contemplated or consummated a bargain.<sup>309</sup> While other "consideration manipulators" may be invoked, some courts will eschew any disturbance of classic consideration criteria, opting instead to apply promissory estoppel as a separate and discrete theory to rescue the floundering promisee.<sup>310</sup>

Notwithstanding surveys reporting judicial disregard for the reliance component,<sup>311</sup> even the more progressive applications of the doctrine seemingly would still require the university or the student-athlete to prove justifiable and detrimental reliance.<sup>312</sup> A university jilted by a student-athlete probably must show that it offered one of its limited scholarships in reliance upon the student-athlete's Letter of Intent and commitment to attend. The reliance may assume several forms. For example, the university's anticipation of a high-school standout's attendance may have been manifested by large-scale publicity campaigns, hiring special coaches or tutors tailored to the student's particular needs, or even expanding existing seating and playing facilities.<sup>313</sup> The university may simply have bypassed or forfeited another student-athlete with similar athletic abilities, or perhaps may have wasted the scholarship commitment because it was too late to secure another quality applicant at the time of the student-athlete's recantation.<sup>314</sup>

Potential reliance-based recovery is by no means limited to the university. The student-athlete may have ample evidence of reliance upon a university's representations of financial aid. A university's eleventh hour decision to withdraw the promised financial aid could leave the student-athlete without any options to attend other schools. The student may have expended significant time and expense in anticipation of attendance at a particular institution, including taking certain courses suited to the pledged university, purchasing an automobile or clothing, or taking similar steps designed to accommodate the peculiar needs of the university.

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309. *See, e.g.,* *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959). Under certain circumstances, promissory estoppel could have similar utility in resurrecting an agreement doomed by illusoriness' kin, fatal indefiniteness. *Hunter v. Hays*, 533 P.2d 952 (Colo. App. 1975); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965). *See also* Metzger & Phillips, *supra* note 238, at 538-39.

310. *See, e.g.,* *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927). Compare Cardozo's majority opinion with Kellogg's dissent.

311. *See* Farber & Matheson, *supra* note 148, at 925-29.

312. *See* Metzger & Phillips, *supra* note 238, at 536-43.

313. *See generally* W. MORRIS, *supra* note 42.

314. *See generally* NCAA MANUAL, *supra* note 49, Arts. 15.5.2, 15.5.3.

A collateral question arises when a student attends a particular school because of an affinity for its head coach. If the student has exacted a promise from the university to maintain the coaching staff, or if such a promise could be inferred, then promissory estoppel may serve as a suitable basis for relief if the university permits that coach to abdicate his responsibilities by accepting a coaching position elsewhere. Of course, as discussed below, if the representation pertaining to the coaching staff is a condition precedent, then it may only be a trigger to the student-athlete's duty to attend.<sup>315</sup> The student-athlete may walk away from the contract because strict compliance with the condition was not achieved, but the student-athlete will not have a cause of action because no promise has been breached.<sup>316</sup>

Thus, under the ever-widening ambit of promissory estoppel, the "breaching" party in the Letter of Intent exchange may be vulnerable, even if the arrangement rests outside traditional theories of contract enforcement.<sup>317</sup> Given the promises attending the exchange, it is unlikely that a noncomplying party would be immune from all sanctions. The law is moving toward the enforcement of all promises based upon theories of bargain, reliance, contract,

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315. See *infra* notes 318-21 and accompanying text.

316. See A. CORBIN, *supra* note 114, § 633, at 594-95 n.34. As a condition precedent, a pledge to maintain a coaching staff may create an implied promise by the university that best efforts will be exercised to maintain current personnel. A corollary issue arises in the context of a university that refuses to enforce a valid agreement with its coach and voluntarily releases a coach from his contractual commitments. Certainly, the university's failure to enforce the contract may make it vulnerable to the student's claims of breach, or at the very least, a reconsideration by the student of his promise to attend. The obvious analogy is the real estate agent whose commission has been forfeited because the homeowner agrees to release a buyer from a contract to purchase.

317. The Farber-Matheson theory of recovery, based upon a commitment involving economic activity, would provide either the university or student-athlete with an independent basis for relief grounded in the promise of the other party. Those commentators have suggested the following:

A revised rule of promissory obligation should accept the fundamental fact that commitments are often made to promote activity and obtain economic benefits without any specific bargained-for exchange. Promisors expect various benefits to flow from their promise making. A rule that gives force to this expectation simply reinforces the traditional free-will basis of promissory liability, albeit in an expanded context of relational and institutional interdependence.

Farber & Matheson, *supra* note 148, at 929. Certainly, this approach could apply to the Letter of Intent—a situation in which both parties are quite serious about their objectives and extremely cognizant of the importance of each set of promises.

tort, conventional morality, and trust. Although the relationship between the university and student-athlete may rest on unsteady contract footing, promises in some form have been advanced. Promissory estoppel looms as an all important equalizer when a putative promise has not been fulfilled and courts perceive an equitable approach as the only means to avoid injustice.

## VI. PERFORMANCE

### A. *The Duty to Perform and The Conditions Upon Which Performance Depends*

In ascertaining the performance obligations of parties to a contract, it is first necessary to identify each party's promises and any conditions that will qualify or trigger the performance of such duties. There is a substantial difference between a condition and a promise,<sup>318</sup> and the failure to fulfill either of these contractual elements has distinct and significant consequences.

Express conditions generally require strict compliance.<sup>319</sup> Any duty dependent upon satisfaction of an express condition will be suspended or discharged if such a condition is not completely and literally followed.<sup>320</sup> However, failure to satisfy an express condition is in itself not a breach because no duty has been created.<sup>321</sup>

A promise, on the other hand, creates a duty that must be fulfilled in order to avoid a breach.<sup>322</sup> In a typical bilateral contract, a promise establishes a constructive condition that must be substantially performed before a corresponding duty arises.<sup>323</sup> There

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318. See *supra* note 30 for the definitions of promise and condition.

319. See, e.g., *Inman v. Clyde Hall Drilling Co.*, 369 P.2d 498 (Alaska 1962). See generally E.A. FARNSWORTH, *supra* note 64, § 8.3, at 544.

320. See E.A. FARNSWORTH, *supra* note 64, § 8.3, at 544; see also *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976).

321. See, e.g., *A. CORBIN*, *supra* note 114, § 633, at 594 n.34.

322. *Id.* See also *supra* note 30.

323. See generally RESTATEMENT (SECOND) OF CONTRACTS § 231 (1979). The concepts of substantial performance and material breach go hand in glove. If a promise giving rise to a constructive condition is materially breached, then the underlying condition has not been substantially performed. Correspondingly, an immaterial breach generally involves substantial performance of the constructive condition spawned by the promise. One party's failure to perform substantially in this regard justifies the other party's termination of the contract (or, at least, suspension of performance) as well as an action for breach. Substantial performance of the condition may still subject the performer to suit based on the immaterial breach, but the other party's duty to perform remains. See generally

are two key points in assessing the finding of a promise versus the finding of a condition. First, the breach of a promise renders the promisor subject to an action for damages or specific performance, whereas the failure of a condition creates no such liability. Second, the constructive condition spawned by the promise need only be substantially performed.<sup>324</sup>

Consider the classic lawn-mowing hypothetical: A promises to pay B \$50 (times have changed) in exchange for B's promise to mow A's lawn. The agreement also contains the following term, "lawn to be mowed with a 'Super Shred' lawn mower." This term could be deemed a promise or a condition. If the former, B's use of a substantially equivalent mower may trigger A's duty to pay,<sup>325</sup>

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Howard v. Federal Crop Ins. Corp., 540 F.2d 695 (4th Cir. 1976); J. CALAMARI & J. PERILLO, *supra* note 7, §§ 11-18, at 458-64. For a summary of the factors considered in determining the materiality of a breach and substantiality of performance, see RESTATEMENT (SECOND) OF CONTRACTS §§ 241-43 (1979). For a discussion of the "victim's" option to continue performing after a material breach, see E.A. FARNSWORTH, *supra* note 64, § 8.15.

The underlying assumption in the above summary is that the promises in a bilateral contract are dependent. This conclusion is eminently plausible; true independent promises are rare and the notion has developed that the performance obligations in a bilateral contract setting are dependent "except in special cases." See *Corn Exch. Nat'l Bank & Trust Co. v. Taubel*, 113 N.J.L. 605, 616, 175 A. 55, 61 (1934); J. MURRAY, *supra* note 26, § 155. Promises in a bilateral arrangement are generally part of a mutual exchange. People simply do not enter a bargain to give something for nothing. If they happen to intend this result, then the promise is probably not supported by consideration. See *supra* notes 229-42 and accompanying text. Indeed, a single consideration can support many promises. *Files v. Schaible*, 445 So. 2d 257 (Ala. 1984). Yet there must still be a degree of interdependence between the promise and its consideration. Thus, to suggest that an *independent* promise is supported by consideration is, in at least one sense, counter-intuitive.

324. See A. CORBIN, *supra* note 114, § 633; see also *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976).

325. The assessment of substantial performance considers the entire performance rather than the performance of each promise. See RESTATEMENT (SECOND) OF CONTRACTS § 232 comment b (1979). This hypothetical also points out the importance of the order of performance, as most promises in a bilateral contract create conditions of exchange. *Corn Exch. Nat'l. Bank & Trust Co. v. Taubel*, 113 N.J.L. 605, 616, 175 A. 55, 61 ("The order in which the things are to be done, it would seem, is now a significant, if not the controlling, factor."). For purposes of this discussion, a few general rules will suffice. First, when the parties manifest an intent to exchange all performances simultaneously, the performances are generally due simultaneously. RESTATEMENT (SECOND) OF CONTRACTS § 234(1) (1979). When true simultaneity is impossible, it is commonly understood that tender of the requisite performance (i.e., a showing of willingness and ability to perform) is sufficient. Second, when one party's performance in

but would also leave B vulnerable to a suit for breach, albeit immaterial. If the term were interpreted as a condition, then the use of the other mower would theoretically discharge A's duty to pay<sup>326</sup> because B had not strictly complied with the condition.<sup>327</sup> If the clause contained additional language tailoring it as both an express condition and a promise, then A could argue that his duty was discharged *and* that he had a cause of action against B for breach of promise.<sup>328</sup>

Courts consider various factors in attempting to draw the often subtle distinctions between promises and conditions. The factors include the peculiarities of the transaction, any pertinent idiosyncracies of the trade or the parties' relationship, and, most important, the nomenclature used and the objectives sought by the provision.<sup>329</sup> The oft-indulged prescription that advises courts to resolve doubts in favor of a "promissory" construction, serves as a backdrop to this exercise in interpretation.<sup>330</sup> Professor Williston has aptly articulated the rationale for this presumption:

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the exchange of promises requires time to complete, his performance is generally due prior to the performance of the other party. *Id.* § 234(2). In a typical contract for services, the work normally must be performed before payment becomes due. *Id.* § 234 comment e.

The applicability of the traditional approach is not immediately clear in the college enrollment situation. On the one hand, the university must act first because the student cannot attend class until he has been assured of financial aid. On the other hand, the student may have "signed" to participate in an intercollegiate sport in which practice sessions begin in the summer preceding the advent of classes. The student's attendance in the summer may be the triggering mechanism for the university's depositing tuition funds in the student's "account" to be paid in the fall. A final possibility is that the exchange involves concurrent conditions in which the respective duties are exchanged simultaneously upon the first day of practice or class, whichever occurs first. The duty to perform would then depend upon the other party's tendering performance or demonstrating an ability and willingness to perform. *See, e.g., Kingston v. Preston*, 2 Doug. 6894 (K.B. 1773).

326. Courts will often permit quasi-contractual relief to "reward" the performer for the work, particularly to prevent the unjust enrichment of the non-breaching party. *See, e.g., Kitchin v. Mori*, 84 Nev. 181, 437 P.2d 865 (1968).

327. To evade the harsh consequences of the strict compliance requirement, courts will often construe an obvious condition as a promise (activating a more flexible substantial performance analysis), *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); excuse the condition to avoid a forfeiture, *Ledford v. Adkins*, 413 S.W.2d 68 (Ky. 1967); or divide the contract to save those portions that were satisfied by compliance, *Yeargin v. Bramblett*, 115 Ga. App. 862, 156 S.E.2d 97 (1967).

328. *See E.A. FARNSWORTH, supra* note 64, § 8.3.

329. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 226-27 (1979).

330. The intent of the parties will be obvious in some instances; in others,

Because the enforcement of conditions frequently leads to forfeitures and penalties, courts have always been indisposed to interpret contracts as containing conditional promises, unless the language is too clear to be mistaken . . . .

The courts have frequently disregarded plainly expressed conditions, because of their unwillingness to deprive a promisee of all rights on account of some trivial breach of condition.<sup>331</sup>

### *B. Performance Obligations Under the Letter of Intent: The Qualifiers*

In order to assess the duties of the parties under the Letter of Intent it is necessary to identify the promises made and any conditions, either express or constructive, upon which they depend. Having already established that the arrangement between the university and the student-athlete is bilateral, the remaining task is to ascertain the promises advanced and any express or constructive conditions upon which the promises depend.

At the threshold, the university has promised to provide the student-athlete with financial aid in exchange for the student-

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complex questions of interpretation must be resolved to classify the clause. Again, courts generally favor a presumption of "promise" due to the flexibility that such an approach provides. However, the court should eschew the presumption of promise when the parties clearly envision a clause that will operate to trigger a corresponding duty, but not create an obligation in itself. *See generally* A. CORBIN, *supra* note 114, § 635; E.A. FARNSWORTH, *supra* note 64, § 8.4. A somewhat disfavored view is presented by RESTATEMENT (SECOND) OF CONTRACTS § 260 (1979). Under this approach, if the clause is ascribed to the party who must perform the act, then the clause will be interpreted as language of promise; if the words are those of the party not to do the act, the clause is presumed to be a condition. Applying this rule to the Letter of Intent situation would identify most of the qualifiers in the Letter as conditions. E.A. FARNSWORTH, *supra* note 64, § 8.4, at 549 n.5. *See infra* notes 334-39 and accompanying text. A better rationale for this conclusion may be that a university suit for a breach is incomprehensible, and the fashioning of an appropriate remedy is extremely infeasible. *See, e.g.,* United States v. O'Brien, 220 U.S. 326 (1911).

331. 6 S. WILLISTON, *supra* note 7, § 827, at 65-67 (footnotes omitted). Interestingly, Professor Williston uses the term "breach of condition", which is theoretically a misnomer. A promise is "breached," a condition is "not satisfied." *See* A. CORBIN, *supra* note 114, § 634. Professor Williston's nomenclature may be a deliberate tongue-in-cheek effort to demonstrate the fungibility of any definitions of "promise" and "condition."

athlete's promise to attend that university and play a college sport. Several provisions in the Letter of Intent expressly condition the respective performances. First, the student-athlete must meet the requirements for admission to the university, its academic requirements for scholarship funding, and the NCAA requirements for freshman financial aid.<sup>332</sup> Second, most scholarship commitments require the student-athlete to observe all academic rules of the institution, maintain satisfactory grades, and comply with rules and regulations established by coaching staffs.<sup>333</sup> Finally, the student-athlete must comply with pertinent conference and NCAA rules and regulations incorporated by reference into the agreement.<sup>334</sup> In addition to these three provisions, which actually seem to be conditions inserted as promise modifiers, there are two other qualifiers that merit brief attention: the twenty-one day filing requirement of paragraph nine, and the approval of the financial

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332. See Letter of Intent, *infra* Appendix A, at para. 1(a). See also NCAA MANUAL, *supra* note 49, Art. 14.3.

333. See, e.g., *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973); see also Note, *Student Athletes*, *supra* note 15, at 104 n.42, 115. It is noteworthy that some commentators and courts have characterized observance of university regulations as a promise rather than a condition precedent to the university's duty to perform. If compliance with pertinent rules were construed simply as a condition, then an action for breach could not be maintained for the student's failure to maintain adequate grades or otherwise fail to follow the university's rules and regulations. The university's duty to provide a scholarship would be discharged unless the condition were excused or waived. See *supra* note 330 and accompanying text.

334. There is nothing in the Letter of Intent suggesting that pertinent NCAA rules, beyond those specifically mentioned in the Letter itself, are incorporated by reference. Accordingly, such regulations are probably not embraced by the Scholarship/Letter of Intent agreement, absent some explicit or implicit manifestations of the parties to assent to such incorporation (e.g., through terms contained in the financial aid package). See *Middendorf v. Schreiber*, 150 Mo. App. 530, 131 S.W. 122 (1910) (rules of race tracks not part of contract between jockey and horse owner because not specifically incorporated). However, it is arguable that compliance with pertinent NCAA guidelines has been tacitly agreed to by the student-athlete's participation in the program through execution of the Letter of Intent. See *supra* note 9. The student-athlete and the university can always enter into an agreement (e.g., the financial aid agreement) whereby the student agrees to comply not only with the institution's rules and regulations but also the pertinent requirements of the NCAA. *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908 (E.D. Tenn. 1973). This agreement would be similar to one entered into by a professional athlete who signs a uniform player contract, with either an express provision or implied understanding that he will abide by all pertinent league rules and regulations. See, e.g., J. WEISTART & C. LOWELL, *supra* note 18, § 303.

aid recommendation of paragraph two. All five provisions are collateral to the exchange at the heart of the contract—scholarship money for athletic participation. The impact of these collateral provisions upon the parties' duties must be assessed before the principal promissory exchange and the activation or discharge of the duties arising under these promises can be addressed in detail.

The student-athlete's satisfaction of university and athletic program standards, and of pertinent conference and NCAA regulations, appear to be conditions that must be strictly satisfied. Failure to comply would as a contract matter, independent of NCAA regulations, justify the university's refusal to honor its scholarship commitments. Each provision could be construed as a promise giving rise to a constructive condition. However, this conclusion is implausible due to the relationship involved and the parties' clear manifestations of intent.<sup>335</sup> A university has no desire to sue a student-athlete for poor grades, disciplinary problems, noncompliance with NCAA regulations, or disregard for team rules. These provisions do not contain language suggesting that the student-athlete has assumed a duty to be fulfilled lest an action for breach eventuate. Rather, they serve as triggering mechanisms for the university's duty to maintain its scholarship pledge.<sup>336</sup> As Professor Corbin has stated, "[b]oth a promise and a condition are means that are used to bring about certain desired action by another person."<sup>337</sup> Applying this concept to a typical insurance premium, Corbin concludes: "[p]ayment by the insured is obtained not by holding a lawsuit over him *in terrorem*, but by hanging before him a purse of money to be reached only by climbing the ladder of premiums."<sup>338</sup> Similarly, the university does not wish to hold the threat of breach over the student-athlete's head whenever

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335. See *supra* note 330.

336. *Id.*

337. A. CORBIN, *supra* note 114, § 633, at 595.

338. *Id.* These three conditions could be conditions subsequent. See, e.g., *Begley*, 367 F. Supp. at 909-10. A condition subsequent has been defined broadly as any event that "operates to discharge a duty of performance" or one to pay damages for breach. J. CALAMARI & J. PERILLO, *supra* note 7, § 11-7, at 441; see RESTATEMENT (SECOND) OF CONTRACTS § 230 comment a (1979). A determination that a condition is precedent or subsequent has the principal consequence of controlling the burden of proof. "The plaintiff ordinarily will be obliged to prove conditions precedent while the defendant will have the burden of proof on conditions subsequent." J. CALAMARI & J. PERILLO, *supra* note 7, § 11-7, at 442. Thus, it could be argued that the defendant-university's duty to provide scholarship funding, activated by the student-athlete's participation in the program, is discharged by the student's subsequent recalcitrance.

he violates a university rule or earns substandard grades. The university merely seeks to protect its scholarship interest and to preserve the right to withhold scholarship monies from recalcitrant student-athletes.<sup>339</sup>

Because no apparent "duty" has arisen, failure to satisfy prescribed academic norms will not create a colorable breach of contract claim. However, the two remaining contingencies, the twenty-one day filing period and the university approval of the recommended financial aid, involve requirements that may be promissory and may compel a slightly different conclusion.

If the twenty-one day filing period is a promise creating a constructive condition, the university's failure to file would constitute a breach remediable by damages or specific performance of the filing requirement. In the unlikely event that the tardy filing or failure to file were deemed to be a material breach when viewed in conjunction with the university's overall performance obligations, then the student-athlete could repudiate his Letter of Intent and terminate the contract, if he so elected.<sup>340</sup>

If the filing requirement were construed to be only an express condition, failure to file would not constitute a breach, but it might suspend or discharge the student-athlete's duty to honor the commitments contained in the Letter.<sup>341</sup> Such a construction is not totally implausible given paragraph nine's naked wording rendering the Letter "invalid" if not filed within twenty-one days of execution. Of course, as discussed earlier, the student-athlete should be able to waive the occurrence of the filing condition and bypass the escape route provided by the university's failure to file. Thus, the student-athlete could resubmit a new Letter or assume the performance obligations of the original Letter as if the filing condition had been literally satisfied. In essence, the student-athlete could ignore the nonoccurrence of the condition, which presumably exists for his benefit and certainly comprises a nonmaterial part of the contract as a whole, much the same as a home buyer could waive a financing contingency and purchase property even though he was unable to secure a satisfactory mortgage.

Moreover, it is extremely improbable that the university would be able to withhold filing the letter and claim that its duty to

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339. *See supra* note 330. Not all courts are predisposed to interpret clauses to avoid hardship and preserve the intended contractual obligations. *See supra* notes 328-30 and accompanying text.

340. *See supra* notes 257, 325-28 and accompanying text.

341. *Id.*

provide scholarship funding has thereby not been triggered. This clause apparently has been inserted for the benefit of the student-athlete, and it cannot be wielded as a sword by the university to vitiate its own performance obligations. In similar contexts, courts have been reluctant to permit failure of a condition to serve as a duty kicker for both sides when it has been included in the contract solely for the benefit of one party.<sup>342</sup>

The requirement that the university must approve the scholarship, contained in paragraph two, seems to be a condition precedent to the university's duty to perform. Although it may be argued that the approval is a condition precedent to the contract's formation, a more intellectually satisfying conclusion is that a contract has been formed and duties will be activated by the ultimate approval of the scholarship.<sup>343</sup> The paragraph should not give the university the prerogative to deny approval with impunity. Rather, the condition begets a corollary promise that good faith efforts will be made to approve the scholarship and fulfill the obligations freely assumed by the university. Such an implied promise of good faith is logically inferred from both the language of paragraph two and the tenor of the entire agreement.<sup>344</sup> The language rendering the "Letter invalid" excuses the student-athlete from a duty to perform if the scholarship commitment is not satisfied. Further, if the university makes no effort to honor its initial scholarship commitment, then the student-athlete may sue on the university's breach of promise to provide the scholarship. Again, the student-athlete's course of action would parallel a seller's suit against a buyer who reneges on a contract for sale of property without exerting good faith efforts to secure an adequate mortgage pursuant to a financing contingency.

*C. The Duty to Pay and the Duty to Play: The Parties' Rights and Responsibilities Under the Scholarship/Letter of Intent Scheme*

To this point, the Article has posited that the Scholarship/Letter of Intent configuration is a bilateral contract containing an

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342. *deFreitas v. Cote*, 342 Mass. 474, 477, 174 N.E.2d 371, 373-74 (1961); see *supra* notes 256-57 and accompanying text; see also *Horizon v. Westcor, Inc.*, 142 Ariz. 129, 688 P.2d 1021 (1984).

343. *Carlton v. Smith*, 285 Ill. App. 380, 2 N.E. 116 (1936); *Western Hills, Oregon, Ltd. v. Pfau*, 265 Or. 137, 508 P.2d 201 (1973). Again, the 21-day provision and the scholarship approval language may be catalogued as conditions subsequent.

344. See *supra* notes 258, 265-67 and accompanying text.

exchange of promises the performance of which is contingent upon the satisfaction of various express and constructive conditions. Collateral conditions that may affect the parties' duties to perform have also been addressed. The remaining issue centers upon the constructive conditions created by the promises to pay and play, and the definition of performance or substantial performance under this scenario. Because the university's duty is fairly well defined as a commitment to provide a financial aid package to the student-athlete, and to provide an opportunity to secure an education and participate in the university's athletic program, this section will primarily address the student-athlete's responsibilities and the difficulties encountered in attempting to establish the parameters of satisfactory performance.

Of course, this does not suggest that the university's performance obligations are so clearly delineated as to preclude controversy. Various performance issues may arise when the university, for example, refuses to give the student-athlete a starting position on the team, provide him with the playing time that he desires, or otherwise neglects to fulfill promises that it may have expressly or impliedly made to the student-athlete, such as maintaining the existing coaching staff. Basic coaching prerogatives such as game strategy and substitutions are probably not subject to challenge by the affected players—absent clear and unequivocal representations from the coaching staff or other agents of the university. Thus, such matters as playing time, guarantees of a starting position, and dispensation from practice sessions are seldom actionable.

However, the student's right to challenge wholesale changes in the coaching hierarchy is much more significant, particularly because many schools "sell" the coach as the key incentive for the student-athlete's commitment. A university that explicitly, or even tacitly, promises to maintain its current coaching staff should make every effort to honor that covenant—or risk legal reprisals.<sup>345</sup> Actions for breach in this context may very well lie if evidence exists to establish that the university has undertaken such a duty. On the facts presented herein, however, the primary basis upon which a student-athlete could terminate the agreement without prejudice or sue for breach is the university's failure to provide the requisite financial aid. Thus, the arrangement again parallels

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345. See generally Note, *Student-Athletes*, *supra* note 15, at 109-11. It bears repetition that the ability of a student-athlete to sue a university for breach of contract or to avoid his commitment to attend may be compromised by the language contained in paragraph three of the 1990 Letter. See *supra* note 55.

the traditional contract between a professional sports team and its players, in which the principal predicate for the athlete's termination of the agreement is the club's failure or refusal to pay monies owed.<sup>346</sup>

Focusing upon the student-athlete's duties, the predominant question that has recurred without resolution throughout personal services litigation in the sports and entertainment arenas centers upon a determination of what constitutes "satisfactory performance." Does the professional basketball player who averages 25 points per game rather than his customary 30 violate his agreement to play? Likewise, if a student-athlete fails to approach his potential as a college performer, is the university, as a matter of contract law, justified in pulling his scholarship? Derivatively, is the student-athlete vulnerable to a breach of contract suit because he has failed to perform as expected?

While the parameters of an entertainer's performance obligations are not readily drawn, it is safe to say that the foregoing questions must be answered in the negative. A contrary response would render professional athletes subject to lawsuits whenever they failed to measure up to the previous years' statistics, and, as applied to the student-athlete, would demean a higher education system already viewed in a dim light. Yet, to suggest that there are no guidelines either to assess an athlete's compliance with his promise to compete or to evaluate his "employer's" ability to terminate the relationship would destroy the very fabric of the bilateral contract model.

### 1. *The "Good Faith" Standard of Professional Sports*

In attempting to define a professional sports team's prerogative to terminate a player's contract, courts and commentators have intimated that the promise to play carries a condition of satisfaction that allows a club to terminate the agreement if it is not satisfied with the player's performance.<sup>347</sup> It is unclear whether this condi-

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346. See J. WEISTART & C. LOWELL, *supra* note 18, § 3.11(c), at 279-82.

347. Most professional sports contracts delineate reasons for which a team may terminate a player's contract. See 1 R. BERRY & G. WONG, *supra* note 15, § 3.22-5, at 159-61, § 4.31, at 287-89. Most agreements also reserve the team's right to terminate a player on the basis of insufficient skill or performance. *Id.* § 3.22-5, at 160 (citing passages from National Football League, National Hockey League, and major league baseball standard players' contracts). When the agreement does not explicitly outline the parameters of competency or performance, the standard is deemed to be "that of ordinary and reasonable skill, care and

tion is implied in fact, thereby "express," invoking a strict compliance requirement, or whether it is a constructive condition derived from a promise to perform satisfactorily.<sup>348</sup> In either event, the club must demonstrate that its dissatisfaction with the performance was registered in good faith.<sup>349</sup> This good faith test allows the club to demonstrate that the decision to terminate was made "honestly and without pretense."<sup>350</sup> The dissatisfaction need not be established by objective criteria.<sup>351</sup>

The rationale for this approach is simply that the nature of professional sports justifies giving considerable deference to the discretionary authority of coaching staffs and management hierarchy.<sup>352</sup> The assessment of skill is not limited to concrete examples of achievement, such as batting averages or shooting percentages; it also embraces considerations of the intangible variables of leadership, teamwork, and motivation. Courts and arbitrators will often indulge the team's determination of whether a player has demonstrated sufficient skill, based on both tangible and intangible factors.<sup>353</sup> Thus, to the extent the club's satisfaction is qualified

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diligence." See Annotation, *Employer's Termination of Professional Athlete's Services as Constituting Breach of Employment Contract*, 57 A.L.R. 3D 257 (1974). However, this language does not suggest an objective, reasonableness requirement in assessing the implied condition of satisfaction. Courts will permit the clubs to apply a subjective standard in assessing whether such ordinary skill has been demonstrated. Needless to say, any standard pertaining to termination of a player must comport with appropriate provisions of any collective bargaining agreements governing the player's wages, hours, and working conditions.

348. It is clear that satisfaction can arise expressly through the parties' agreement, or can be derived constructively through some type of express or implied promise of satisfaction. See A. CORBIN, *supra* note 114, §§ 644-46; see also *Fursmidt v. Hotel Abbey Holding Group*, 10 A.D.2d 447, 200 N.Y.S.2d 256 (N.Y. App. Div. 1960).

349. See J. WEISTART & C. LOWELL, *supra* note 18, §§ 3.07-.08, at 232, 242-48.

350. *Id.* § 3.08, at 242.

351. There is some authority for the proposition that the club's decision should be based on objective criteria under the erstwhile reasonable person standard. See, e.g. *Freudenberger, Eliminating Drug Use in Sports—Utilizing Contractual Remedies*, ENT. & SPORTS LAW., Summer 1987, at 20. However, application of an objective test seems to be circumscribed to terminations based on disciplinary action rather than the player's insufficient skills. See *In re Major League Baseball Players' Ass'n (LaMarr Hoyt) and the San Diego Padres and Peter Ueberroth*, No. 74, (June 16, 1987) (Nicalau, Arb.).

352. See, e.g., *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129 (S.D. Ohio 1974).

353. *Id.* See also J. WEISTART & C. LOWELL, *supra* note 18, § 3.08, at 245.

by any standard, it has frequently been limited to this subjective good faith requirement.

The standard of good faith required in the termination of a professional player's contract is far too lenient to apply to a Letter of Intent that carries a condition of satisfaction giving the university a prerogative to cancel for *inadequate* performance. For several reasons, only an objective standard is acceptable in this context. First, the student-athlete's purpose in attending college is to obtain an education, and athletic activities, at least in theory, remain a secondary pursuit.<sup>354</sup> Therefore, something considerably more than

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354. See Will, *Our Schools for Scandal*, NEWSWEEK, Sept. 15, 1986, at 84. The suggestion that the student-athlete is a student first and an athlete second is perhaps naive. One commentator concludes that, based upon recent NCAA studies, the proper nomenclature would be *athlete-students*. See Denlinger, *In a Textbook Study, Playbooks Win*, Wash. Post, Dec. 3, 1988, at D3, col. 1. If students are indeed employees with student characteristics, perhaps they should be paid a salary and treated in all respects as employees. The payment of a modest stipend would surely do no violence to the school's educational goals and to the concept of amateurism in general. If anything, it may eliminate the need for "under the table" funding and some of the unscrupulous "benefactors" who provide it.

The NCAA has attempted to emphasize academics through recent "legislation" such as Proposition 48. NCAA MANUAL, *supra* note 49, Art. 14.3. In pertinent part, Proposition 48 provides that a student-athlete will not be eligible for regular season competition, practice and financial aid unless the following requirements are met: graduation from high school; achievement of at least a 2.00 (on a 4.00 scale) grade point average (GPA) in a core curriculum of 11 academic courses; and attainment of either a 700 combined score on the SAT verbal and math sections or a composite score of 15 on the ACT. Until the 1988-89 academic year, student-athletes were declared eligible if they exceeded one of the two principal requirements (2.00 GPA or minimum test score) based on a sliding scale. *Id.* Effective August, 1988, "partial qualifiers" were no longer eligible to compete, but remained eligible for financial aid so long as they had attained a 2.00 GPA. *Id.* However, the NCAA, through Proposition 42, recently proposed to close this partial qualifier loophole. Proposition 42 prohibited participating schools from tendering scholarships to students ineligible for college athletics during their freshman year. Nonqualifiers would have been permitted to attend school as freshmen, thereby gaining an opportunity to demonstrate "academic progress" toward qualifying for eligibility the following year. However, Proposition 42 effectively foreclosed this probationary period for low-income student-athletes unable to meet tuition payments for their initial year of enrollment. See Reed, *A New Proposition*, SPORTS ILLUSTRATED, Jan. 23, 1989, at 16; see also *New Perspectives*, U.S. Commission on Civil Rights, Winter, 1988; Greene, *The New NCAA Rule of the Game: Academic Integrity or Racism?* 28 ST. LOUIS U.L.J. 101 (1984); Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83 (1983-84). As a result of vehement protest, particularly relating to the disproportionate and

the university's good faith belief that the student-athlete is not cutting the mustard in the gym is required before the university can revoke the financial aid that enables him to attend college.<sup>355</sup> Second, the scholarship revocation negatively affects the student-athlete in two ways: (1) the revocation forces the student-athlete to surrender his forum to demonstrate his athletic skills for would-be professional suitors; and (2) the student-athlete may be compelled to terminate his relationship with the university, normally after completion of the term in progress, due to insufficient financial aid. Thus, the student-athlete will have compromised both an athletic career and any alternative vocation for which a college education may be preparatory.

Third, professional sports contains an inherent fail-safe mechanism to protect against an arbitrary and capricious decision to terminate—the existence of numerous other employers who will seek to obtain the services of a truly competent athlete.<sup>356</sup> The player who has been unfairly terminated and cannot obtain recourse from the good faith standard will ultimately be vindicated when hired by another team. The college athlete, in comparison, has no such protection because the competing institutions may have exhausted their available scholarships.<sup>357</sup> Pertinent NCAA rules regulating eligibility to participate in intercollegiate athletics after transfer also preclude a college athlete from moving freely from one institution to another.<sup>358</sup>

Finally, most professional athletes are represented by labor organizations that negotiate and administer collective bargaining agreements between the teams and players.<sup>359</sup> These agreements typically embrace the standard player contract and often provide a convenient dispute adjustment mechanism to redress player griev-

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unfair impact upon minorities, Proposition 42 has been modified to permit the awarding of nonathletic financial aid to incoming "Proposition 48" freshmen. See Wieberg, *NCAA Relaxes Prop 42 Aid Restrictions*, USA Today, Jan. 9, 1990, at C-1, col. 1 (on file at *The Wayne Law Review*).

355. This conclusion is reinforced by NCAA regulations. NCAA MANUAL, *supra* note 49, Arts. 15.3.2.2, 15.3.4.2.

356. See, e.g., *Central New York Basketball, Inc. v. Barnett*, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961).

357. See NCAA MANUAL, *supra* note 49, Arts. 15.5.2, 15.5.3.

358. *Id.* Art. 14.6.

359. Collective bargaining agreements exist between the players' associations and the league management in the National Football League, the National Basketball Association, and in major league baseball, among others. 1 R. BERRY & G. WONG, *supra* note 15, § 2.30, at 107-11.

ances arising under the contract.<sup>360</sup> The availability of a collective bargaining agent to administer the agreement and represent the player serves as further disincentive for a team to terminate a relationship arbitrarily. The college athlete has no such assurances and, more important, no comparable forum to resolve contractual difficulties in the event of a termination.<sup>361</sup>

These four reasons provide compelling evidence that any condition qualifying a university's duty to pay scholarship monies should be narrowly circumscribed. Similarly, when a constructive condition of satisfaction is derived from a promise to perform in a satisfactory manner, an action for breach of the agreement to enroll and participate would only exist if the university could show that the student-athlete had either refused to perform, or had performed in such a palpably indifferent manner as to render the performance meaningless and nonexistent.<sup>362</sup> Just as the performances of Luciano Pavarotti singing the refrains from *La Boheme* or Don Mattingly playing first base for the New York Yankees are not consistently superb, the student-athlete's performance will also vary from evening to evening and day to day. But, unlike those skilled artists, the student-athlete is first and foremost a student whose performance is entitled to substantially more indulgence. A student-athlete's performance that falls below a level of expectation contemplated at the time of recruitment cannot constitute an actionable breach or predicate for discharge of the university's duties, unless the performance is so demonstrably deficient as to constitute absolute nonperformance.

## 2. *The Parameters of Substantial Performance*

The line between full performance and substantial performance is quite thin in any personal services contract in the sports or

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360. See, e.g., *id.* §§ 5.30, .31 (describing grievance procedures under National Football League and major league baseball contracts).

361. A student-athlete has an informal mechanism to resolve certain disputes through the Letter of Intent Policies and Interpretations, and the Financial Aid Review Board established by all NCAA institutions providing athletic scholarships. Letter of Intent Policies and Interpretations, *infra* Appendix B, at para. 3. However, these limited procedures hardly approach the type of machinery that a formal collective bargaining agreement provides.

362. Moreover, if the condition exists and strict compliance is found wanting, even under the most strident objective theory, courts, in this context, would probably go to great lengths to avoid a forfeiture. This is especially true when the student-athlete has expended time and effort that cannot be retrieved, and the surrender of scholarship funding will functionally terminate the student-athlete's undergraduate education. See RESTATEMENT (SECOND) OF CONTRACTS § 229 (1979).

entertainment fields. Substantial performance could equal full performance in terms of playing skill, where the ultimate performance of the promise has no upper limit. Thus, if a major league pitcher hurls a "perfect game," he has undeniably "performed;" but if he pitches a two-hit shutout in the following game, he most certainly has not breached the contract, nor has he merely "substantially performed."<sup>363</sup> Applying this reasoning, a university claim of an immaterial breach for a student-athlete's lackluster performance would be an aberration. The student-athlete's promise to perform amounts to a promise to try, or to do his best. The student-athlete would breach this promise only by obvious failure to make an honest effort, a constructive refusal to perform.<sup>364</sup>

Under this analysis, an interesting problem arises with respect to the student-athlete who refuses to perform altogether. Consider a scenario in which eight out of twelve athletes on a college basketball team refuse to play, requiring surrender of the game and possible forfeiture of any revenues that had been collected in advance. The athletes could also refuse to participate during an entire season. In large-scale college athletics, this eventuality could result in the loss of hundreds of thousands of dollars, and a large amount of goodwill and public confidence.<sup>365</sup> It is arguable, then,

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363. There are some examples of true substantial performance in professional sports, such as when a player, in exchange for payment and in addition to his promise to play, has promised to engage in a limited number of club promotions. Adherence to all promises save these "minor" obligations may constitute substantial performance of the contract as a whole, but may leave the athlete vulnerable to an action for immaterial breach. See J. WEISTART & C. LOWELL, *supra* note 18, § 3.07.

364. See *supra* notes 354-62 and accompanying text.

365. See, e.g., Woods & Mills, *supra* note 15, at 152-53. NCAA regulations reinforce the notion that the contractual relationship between the university and the student-athlete can be terminated for an unequivocal refusal to participate in whole or in part, but should not be aborted for deficient skills. These rules provide that the scholarship cannot be "gradated or cancelled" for deficiency in skill, injuries, or other reasons related to athletic performance. NCAA MANUAL, *supra* note 49, Arts. 15.3.2.2, 15.3.4.2. NCAA regulations also govern the immediacy of the scholarship termination decision, generally postponing the effective date of cancellation to the end of the quarter or semester in which the "nonperformance" occurred. *Id.* Thus, although it is unclear whether these regulations are incorporated by reference or implication into the university/student-athlete contract, they are useful tools for interpreting the contract provisions and the performance obligations of the parties.

One potential problem with the contract analysis, independent of NCAA scholarship regulation, pertains to a debilitating injury to the student-athlete. Clearly, the student-athlete's inability to perform would excuse his duty to perform

that the university would have an action in breach, the materiality depending upon the significance of the nonperformance vis-a-vis the total performance due, in addition to possible suspension of scholarship benefits. If the student-athletes have violated their agreement to participate in intercollegiate athletics for the university, they could be held accountable in an action for damages for a refusal to perform. If the breach is deemed material, the university would have the option to continue or withdraw the scholarship, and sue for damages. The university could also treat the breach as immaterial, and proceed with its own performance, reserving its right to pursue a damages action post hoc.<sup>366</sup> Any other conclusion ignores the fact that the parties have entered into a binding, bilateral contract.

The possible hysteria resulting from any conclusion that a student-athlete could be sued for breach of promise might prompt a resurrection of the unilateral contract theory—the university promises scholarship money in exchange for performance, and such performance rests at the behest of the athlete, with the only “sanction” for a refusal to perform being the discharge of the university’s duty to pay scholarship monies. However, this conclusion is merely a placebo. A unilateral contract configuration does not resolve the problem of an athlete who, after enjoying nearly a year of scholarship benefits, such as a baseball player who might not have to perform until the spring, refuses to participate. In that case, the university could probably still sue to recover the monies advanced. Further, the unilateral contract model would require strict compliance with the condition precedent to payment, and any failure on the part of the athlete to perform would justify withholding scholarship funds. Thus, the unilateral contract anal-

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and insulate him from liability for a breach on the basis of impossibility. However, the university’s corresponding duty to provide scholarship funding may likewise be excused. *Shaw v. Mobil Oil Corp.*, 272 Or. 109, 535 P.2d 756 (1975); A. CORBIN, *supra* note 114, notes: “[I]f one of these promises becomes impossible of performance, the party who made it may be excused from legal duty. His failure to perform is not a breach of contract. But the fact that the law excuses him from performance does not justify him in demanding performance by the other party.” *Id.* § 1363, at 1147. However, with appropriate deference to the nature and spirit of intercollegiate athletics, a court may infer from the contract and surrounding circumstances an implied agreement for the university to continue scholarship funding in the face of an unanticipated injury or illness. Of course, such an agreement may be explicitly referenced in the scholarship offer. See generally J. WEISTART and C. LOWELL, *supra* note 18, §§ 3.05, 3.06.

366. See *supra* notes 318-39 and accompanying text.

ysis does not necessarily mitigate the potentially harsh consequences upon the nonperforming athlete. Although the athlete may be immune from breach, he may also be foreclosed from arguing that he has substantially performed the condition precedent to the university's duty to pay. The student-athlete scholarship could be withdrawn for the slightest noncompliance—qualified by pertinent NCAA regulations.

Many of the issues discussed here may never surface. Individuals often choose to settle matters of poor performance and coaching changes through an amicable resolution, or at least through some type of self-help mechanism that likely will not be discovered. However, in the event these matters result in litigation, the legal and practical underpinnings of the Letter of Intent should be understood in order to evaluate possible judicial reaction. A court will often reach a conclusion that will place the parties in the least severe position. Here, there are potentially serious reprisals facing the student-athlete for a failure to play under either a bilateral or unilateral contract analysis. Yet, notwithstanding the possible harshness of the result, it seems clear that each party has assumed obligations as part of a bilateral understanding. Although there is considerable latitude in terms of the parties' duties and obligations, particularly insofar as the student-athlete's performance is concerned, a "breaching" point exists for both sides.

#### VII. CONCLUSION

The arrangement between a university and a student-athlete represents a binding bilateral contract, at least during the first year of matriculation. It would be a grave mistake to describe the relationship in noncontractual terms simply to avoid the complex and difficult conceptual problems attending a conclusion that a contract exists. It is what it is, and no manner of judicial contrivance or scholarly legerdemain will alter the true intent of the parties. The agreement is well suited to "administration" under traditional contract machinery, although the idiosyncracies of the academic setting necessitate some fine tuning.

The university and the student-athlete must recognize that their commitments harbor profound consequences in light of the other party's expectations and reliance, and in terms of their own integrity. The Letter of Intent program has been established partially to provide a mechanism for the university and the student-athlete to extract promises from one another beyond an informal, precatory exchange. The sense of commitment that it conjures just may spill over into other areas of intercollegiate athletics, which

could use a facelift in many respects.<sup>367</sup> The legal system should not bypass this issue, and should not be unavailable as recourse to a victim of a breach simply because it takes place in an academic setting. A simple look at the annual recruiting budget and income from the athletic program of an average university emphatically negates any suggestion that the student-university relationship is mere child's play.<sup>368</sup> These arrangements must be given legal significance in order to provide both the universities and student-athletes proper credit for integrity, intelligence, and maturity. The author hopes that couching this somewhat unique relationship in traditional terms will demonstrate that its peculiarities only warrant special attention in the application of contract law—but under no circumstances do they justify exclusion from traditional contract enforcement machinery.

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367. See generally Note, *Student Athletes*, *supra* note 15, at 104 n.42.

368. The urgency for reconstruction is demonstrated by the fact that, during the past three years, major NCAA athletic programs have been besmirched by point shavings, massive recruiting violations, and drug abuse. See *Blowing the Whistle on Men's Basketball at Tulane U.*, CHRONICLE OF HIGHER EDUC., Apr. 17, 1985, at 27-28, col. 1; Mark, *A Champion Takes a Fall*, SPORTS ILLUSTRATED, Nov. 14, 1988, at 40-42; Telander, *Raising 'Cane*, SPORTS ILLUSTRATED, Jan. 11, 1988, at 18.

APPENDIX A

1989

MEN'S NATIONAL LETTER OF INTENT

1989

(Administered by the Collegiate Commissioners Association)

- MID-YEAR JUNIOR COLLEGE FOOTBALL TRANSFER: Do not sign prior to 8:00 a.m. December 14, 1988 and no later than January 15, 1989
- FOOTBALL: Do not sign prior to 8:00 a.m. February 8, 1989 and no later than April 1, 1989
- BASKETBALL: Do not sign prior to 8:00 a.m. November 9, 1988 and no later than November 16, 1988 OR do not sign prior to 8:00 a.m. April 12, 1989 and no later than May 15, 1989
- ALL OTHER SPORTS: Do not sign prior to 8:00 a.m. April 12, 1989 and no later than August 1, 1989  
*(Place "X" in proper box above)*

Name of student \_\_\_\_\_  
(Type proper name, including middle name or initial)

Address \_\_\_\_\_  
Street Number City, State, Zip Code

This is to certify my decision to enroll at \_\_\_\_\_  
Name of Institution

**IMPORTANT - READ CAREFULLY**

It is important to read carefully this entire document, including the reverse side, before signing this Letter in triplicate. One copy is to be retained by you and two copies are to be returned to the institution, one of which will be sent to the appropriate conference commissioner.

1. By signing this Letter, I understand that if I enroll in another institution participating in the National Letter of Intent Program prior to the completion of one academic year, I may not represent that institution in intercollegiate athletic competition until I have been in residence at that institution for two calendar years and in no case will I be eligible for more than two seasons of intercollegiate competition in any sport, unless the provisions of Paragraph 11 are fulfilled.  
However, these restrictions will not apply to me:
  - (a) If I have not, by the opening day of its classes in the fall of 1989 (or the opening day of its classes of the winter or spring term of 1989 for a mid-year junior college entrant), met the requirements for admission to the institution named above, its academic requirements for financial aid to athletes, the NCAA requirement for freshman financial aid [Bylaws 5-1 (j)] or the NCAA junior college transfer rule; or
  - (b) If I attend the institution named above for at least one academic year; or
  - (c) If I graduate from junior college after having signed a National Letter of Intent while in high school or during my first year in junior college; or
  - (d) If I have not attended any institution (or attended an institution, including a junior college, which does not participate in the National Letter of Intent Program) for the next academic year after signing this Letter, provided my request for athletic financial aid for the following fall term is not approved by the institution with which I signed. In order to receive this waiver, I must file with the appropriate conference commissioner a statement from the Director of Athletics at the institution with which I signed certifying that such financial aid will not be available to me for the requested fall term; or
  - (e) If I serve on active duty with the armed forces of the United States or on an official church mission for at least eighteen (18) months; or
  - (f) If my sport is discontinued by the institution with which I signed this Letter.
2. I MUST RECEIVE IN WRITING AN AWARD OR RECOMMENDATION FOR ATHLETIC FINANCIAL AID FROM THE INSTITUTION AT THE TIME OF MY SIGNING FOR THIS LETTER TO BE VALID. The offer or recommendation shall list the terms and conditions of the award, including the amount and duration of the financial aid. If such recommended financial aid is not approved within the institution's normal time period for awarding financial aid, this letter shall be invalid.

I certify that I have read all terms and conditions on pages 1 and 2, fully understand, accept and agree to be bound by them. *(All three copies must be signed individually for this Letter to be valid. Do not use carbons.)*

SIGNED \_\_\_\_\_  
Student Date & Time Social Security Number

SIGNED \_\_\_\_\_  
Parent or Legal Guardian Date & Time

Submission of this Letter has been authorized by:

SIGNED \_\_\_\_\_  
Director of Athletics Date Issued to Student Sport

## NATIONAL LETTER OF INTENT REGULATIONS AND PROCEDURES

3. **I MAY SIGN ONLY ONE VALID NATIONAL LETTER OF INTENT.** However, if this Letter is rendered null and void under item 1 - (a) on page 1, I remain free to enroll in any institution of my choice where I am admissible and shall be permitted to sign another Letter in a subsequent signing year.
- JUNIOR COLLEGE EXCEPTION:** If I signed a National Letter of Intent while in high school or during my first year in junior college, I may sign another Letter in the signing year in which I am scheduled to graduate from junior college. If I graduate, the second Letter shall be binding on me; otherwise, the original Letter which I signed shall remain valid.
4. I understand that I have signed this Letter with the **institution** and not for a particular sport or individual.
5. I understand that all participating conferences and institutions (listed below) are obligated to respect my signing **and shall cease to recruit me.** I shall notify any recruiter who contacts me of my signing.
6. If my parent or legal guardian and I fail to sign this Letter within 14 days after it has been issued to me it will be invalid. In that event, this Letter may be reissued. (Note: Exception is November 9-16, 1988, signing period for basketball.)
7. My signature on this Letter nullifies any agreements, oral or otherwise, which would release me from the conditions stated on this Letter.
8. This Letter must be signed and dated by the Director of Athletics or his/her authorized representative before submission to me and my parent or legal guardian for our signatures. The Letter may be mailed prior to the initial signing date.
9. This Letter must be filed with the appropriate conference by the institution with which I sign within **21 days** after the date of final signature or it will be invalid. In that event, this Letter may be reissued.
10. If I have knowledge that I or my parent/legal guardian have falsified any part of this Letter, I understand that I shall forfeit the first two years of my eligibility at the participating institution in which I enroll as outlined in item 1.
11. A release procedure shall be provided in the event the student-athlete and the institution mutually agree to release each other from any obligations of the Letter. A student-athlete receiving a formal release shall not be eligible for competition at the second institution during the first academic year of residence and shall lose one season of competition. The form must be signed by the student-athlete, his parent or legal guardian, and the Director of Athletics at the institution with which he signed. A copy of the release must be filed with the conference which processes the Letters of the signing institution.
12. This Letter applies only to students who will be entering a four year institution for the first time as a full time student except after graduation from junior college. (Note item 3.)

The following Conferences and Institutions have subscribed to and are cooperating in the National Letter of Intent Plan administered by the Collegiate Commissioners Association:

### CONFERENCES:

American South	Central Intercollegiate	Mid-Eastern	Southern Intercollegiate
Atlantic Coast	Colonial	Midwestern Collegiate	Southland
Atlantic 10	Gateway	Missouri Intercollegiate	Southwest
Big East	Great Lakes Inter.	Missouri Valley	Southwestern
Big Eight	Great Lakes Valley	North Atlantic	Sun Belt
Big Sky	Gulf South	North Central	Sunshine State
Big South	Lone Star	Ohio Valley	Trans America
Big Ten	Metropolitan	Pacific-10	West Coast
Big West	Mid-American	Southeastern	Western Athletic
California Collegiate	Mid-Continent	Southern	Western Football

### INDEPENDENT INSTITUTIONS:

Akron	Fordham	Minnesota-Duluth	St. Lawrence
Armstrong State	Gannon	Missouri-Kansas City	St. Michael's (VT)
Brooklyn	Hofstra	Monmouth	St. Peter's (NJ)
Buffalo (NY)	Iona	New Haven	St. Thomas (Florida)
Central Connecticut	Kearney (Neb)	New York Tech	Southeastern Louisiana
Central Florida	Kentucky State	Nicholls State	Southern Ill.-Edwardsville
Chicago State	LaSalle	Oral Roberts	Stonehill
Clarkson	Liberty	Pace	Towson State
Concordia (NY)	Lowell	N.C. (Greensboro)	Tulane
DePaul	Loyola (MD)	Northern Illinois	US International
Eastern Montana	Manhattan	Quincy	Wagner
Fairfield	Marist	Robert Morris	Wayne State (Neb)
Fairleigh Dickinson	Maryland (BC)	Rutgers-Newark	Wisconsin-Milwaukee
Florida Atlantic	Metropolitan	St. Francis (PA)	Wright State
Florida International	Miami (Florida)		

**NOTE:** Air Force, Army, and Navy are **not** members of the program.

**APPENDIX B**

**1989**                      **MEN'S AND WOMEN'S**  
**NATIONAL LETTER OF INTENT**                      **1989**  
**POLICIES AND INTERPRETATIONS**  
**(Administered by the Collegiate Commissioners Association)**

1. Each conference and participating institution agrees to abide by the regulations and procedures outlined in the National Letter of Intent Program.
2. An institution must be an NCAA member to participate in the Program, and the Letter applies only to those institutions.
3. The Steering Committee has been authorized to issue interpretations, settle disputes, and consider petitions for release from the provisions of the Letter where there are extenuating circumstances. Its decision may be appealed to the CCA, which is the final adjudication body.
4. No additions or deletions may be made to the Letter or the release form.
5. A coach is not authorized to void, cancel or give a release to the Letter.
6. A release from the Letter shall apply to all participating institutions and cannot be conditional or selective by institution.
7. When two members of the same conference are in disagreement involving the validity of a Letter, the conference commissioner shall be empowered to resolve the issue.
8. The prospect should be notified anytime his/her signed National Letter of Intent has been declared invalid or null and void.
9. In matters involving the validity of the Letter of administrative procedures between two or more institutions not members of the same conference, the appropriate conference commissioners shall take steps to ascertain the facts and apply National Letter of Intent rules. If the case cannot be settled in this manner, it shall be submitted to the Steering Committee. The prospective student-athlete may submit any information he/she desires.
10. The institution shall immediately notify a prospect if he/she fails to meet, for the fall of 1989 (or winter or spring term of 1990 for mid-year junior college transfers), its admission requirements, or its academic requirements for financial aid to athletes, or the NCAA requirement for freshman financial aid (or NCAA junior college transfer rule) if applicable. The institution shall immediately notify the appropriate conference commissioner of the prospective student-athlete's failure to meet any of these requirements, and the date on which the notification of such failure was sent to the prospect. The conference commissioner shall promptly notify all other participating conference commissioners.
11. The parent or legal guardian is required to sign the Letter regardless of the age or marital status of the prospective student-athlete.
12. If the prospect does not have a living parent or a legal guardian, the Letter should be signed by the person who is acting in the capacity of a guardian. An explanation of the circumstances should accompany the Letter.
13. If an institution (or representative of its athletic interests) violates NCAA or conference rules during the recruitment of a prospect who signed a National Letter of Intent with it, as found through the NCAA or Conference enforcement process or acknowledged by the institution, the Letter shall be declared null and void. Such declaration shall not take place until all appeals to the NCAA or conference for restoration of eligibility have been concluded.

14. It is presumed that a student is eligible for admission and financial aid at the institution for which he/she signed a National Letter of Intent until information is submitted to the contrary. This means that it is mandatory for the student to provide a transcript of his/her previous academic record and an application for admission to the institution where he/she signed a National Letter of Intent when requested.
15. The National Letter of Intent rules and regulations shall apply to all sports recognized by the member institution as varsity intercollegiate sports in which the NCAA sponsors championships or publishes the official playing rules.
16. The National Letter is considered to be officially signed on the final date of signature by the prospective student and his/her parent or legal guardian. A National Letter is validated when name is listed on signing list that is circulated to all conferences. If an incomplete Letter is submitted to a conference office by an institution, the Letter may be returned and reissued. If no time of day is listed for signing of Letter it is assumed a 11:59 P.M. signing time.
17. It is a breach of ethics for an institution to sign a prospective student-athlete to an invalid second Letter for the purpose of making the prospect feel obligated to that institution.
18. If a prospect signing a Letter is eligible for admission but the institution defers his/her admission to a subsequent term, the Letter shall be rendered null and void. However, if the prospect defers his/her admission, the Letter remains valid.
19. Any prospect who signs a Letter prior to April 12, 1989 and who becomes a countable player under NCAA Bylaw 6, shall be counted in the maximum awards in the designated sport in his/her first year at the institution with which he/she signed.
20. The conditions of the National Letter of Intent Program shall not apply retroactively to an institution joining the Program.
21. A prospect who signs a professional sports contract remains bound by Letter rules when financial aid cannot be made available to him/her by the institution with which he/she signed.
22. Upon receipt of the completed Letter, the commissioner of each conference shall promptly notify the Big Ten Conference (two copies of signing lists for computer check for double signings) and one copy to the NCAA office.
23. The National Letter of Intent will carry a four year statute of limitations.
24. For a prospective student-athlete signing a National Letter of Intent as a Mid-Year Junior College Transfer, the National Letter applies for the following fall term if the student was eligible for admission, financial aid, and met the NCAA junior college transfer requirements for the winter or spring term.
25. The signing institution and a partial qualifier (NCAA Bylaw 5-1-j) are bound to a signed National Letter since he/she qualifies for freshman financial aid except that an institution with a stated policy that a partial qualifier does not qualify for admission to the university is not bound to the Letter.