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AUDIBLE: CONTRACTUAL RELATIONS BETWEEN SCHOOLS AND THEIR STUDENT-ATHLETES ARE DUE FOR A REROUTE

Every year, thousands of high school students commit to their college of choice to further their education and begin their collegiate athletic career.[1] Prior to making this decision, student-athletes have been recruited by that school, during a process that sometimes begins as early as their sophomore year and culminates on National Signing Day.[2] During the recruiting process, coaches from NCAA member colleges are allowed to contact and engage in conversations with prospective student-athletes to attend their school.[3] These communications are only allowed to occur during a "contact period" and are not allowed to happen during a "dead period."[4] The primary purpose of these communications is to establish a trusting relationship with prospective student-athletes and ultimately obtain a commitment from them to attend the institution represented by that coach.[5] The recruiting conversations consist of a variety of promises, including those that they may not be capable of fulfilling.[6] Recruits often communicate exclusively with the same coach or group of coaches throughout the recruiting process, and rely on their promises and established trust when

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[1] *See* National Collegiate Athletic Association, *NCAA Recruiting Facts,* https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf (noting there are 179,200 Division I athletes and 59 percent receive scholarships). The facts sheet provided by the NCAA notes that throughout the three major divisions, there are 480,000 student-athletes. *See id.* Additionally, 59 percent of Division I student-athletes and 62 percent of Division II student-athletes receive some level of "athletic aid" or scholarship. *Id.*

[2] *See* NCAA RECRUITING FACTS, http://www.ncaa.org/student-athletes/future/recruiting (last visited Mar. 3, 2018) (defining key terms and dates for recruiting cycles). This information sheet provides guidelines to students and coaches on what contacts or recruiting is allowed to avoid any violations. *Id.*; *see also* NATIONAL LETTER OF INTENT, NLI SIGNING DATES FOR PROSPECTIVE STUDENT-ATHLETES SIGNING 2018-19 AND ENROLLING 2019-20, http://www.nationalletter.org/signingDates/index.html (last visited Feb. 15, 2018) (outlining dates where recruits may sign National Letter of Intent and choose their college).

[3] *See* NCAA Recruiting, *supra* note 2 (outlining communication periods for recruiting).

[4] *See* NCAA Recruiting, *supra* note 2 (defining "contact period" as a time when "a college coach may have face-to-face contact with college-bound student-athletes . . . and write or telephone student-athletes or their parents.").

[5] *See* Jamie Y. Nomura, Note, *Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair,* 32 HAWAII L. REV. 275, 275-78 (2009) (describing recruiting process and mindset of recruiters).

[6] *See id.* at 276 (noting that college coaches make false promises because they are not held responsible for them).

choosing which school to attend.[7] It has been stated that "[a] coach is often the most influential reason for a recruit choosing a school."[8] After a recruit has developed a sufficient relationship to commit to a college, they will sign a National Letter of Intent ("NLI") and deliver the NLI to that college.[9] Once a recruit accepts the University's scholarship offer by signing the NLI, a contract has been formed between the student-athlete and the college, and both parties are now bound to the standardized terms of the contract.[10]

Every time a college athlete takes the field to represent their school, they do so without any form of compensation beyond what is included in their scholarship package.[11] Perhaps worse than being without compensation for the inherent risk in athletic participation, they are without any guarantee of what has been verbally promised to them during the recruiting process, as these promises are not recorded in a single document.[12] This leads to the unfortunate and increasingly common scenario in which the coach that recruited the student-athlete and encouraged them to commit to that particular institution may leave at any point to further their own career, all the while the student-athlete who committed to play for them remains contractually bound to stay at that school.[13] For the student-athletes whom find themselves in this situation, they are left with an uncertain future and

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[7] *See id.* (describing typical communication practices during recruiting cycle).

[8] *See* Art Thiel, *If Coach Bolts, Let the Players Go Too,* SEATTLE POST-INTELLIGENCER (Dec. 18, 2007), https://www.settlepi.com/sports/article/If-coach-bolts-let-players-go-to-1259243.php (describing unique relationship between coach and recruit). "The letter of intent is a pledge to the university. But what of a coach's pledge to the university? Apparently, it is worthless. Yet a coach is often the most influential reason for a recruit choosing a school." *Id.*

[9] *See* Nomura, *supra* note 5, at 275 (noting recruiting process ends when recruit signs NLI). The process of accepting the University's scholarship offer and finalizing the contract is completed by the signing of the NLI. *Id.*

[10] *See* Stephen F. Ross & Lindsay Berkstresser, Abstract, *Using Contract Law to Tackle the Coaching Carousel*, 47 U.S.F. L. REV. 709, 725-26 (2013) (describing one-sided nature of NLI). Once signed, the NLI binds the student-athlete to the school that corresponds with the NLI, however, it does not bind the coach to that school or student-athlete. *Id.* at 725, 727.

[11] *See NCAA 2018-2019 Div. I Manual*, NCAA (2018) AT BYLAW 12.1.2, http://www.ncaapublications.com/productdownloads/D117.pdf (noting college athlete loses eligibility if one "uses his or her athletics skill (directly or indirectly) for pay in any form in that sport.").

[12] *See* Katherine Sulentic, Note, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation*, 14 ROGER WILLIAMS U. L. REV. 127, 130-31 (2009) (explaining one-sided nature of NLI). The only document that identifies what the student will receive from the University is the financial aid agreement. *Id.* at 147. "If a plaintiff attempts to sue under a contract based on promises that the coach will not leave the university, the coach will change the playbook, or the student-athlete will receive playing time, it will be impossible to find this documented in either the NLI or the financial aid agreement." *Id.* at 147-48.

[13] *See* Mark Woods, *Athletes on a One-Way Road After Signing*, PALM BEACH POST, June 10, 2000, at 1C (asserting players are bound to stay at school for one-year while coaches are not).

remain fully bound by the terms of the NLI.[14] In the event that this occurs, players may request a release from the NLI and transfer, however, this is subject to the University's athletic officials' approval.[15] In the event that the request for release is denied, the athlete is now facing a situation that is materially different from what they originally committed to and are left without an alternative.[16] Per the NCAA, once a prospective student-athlete has signed the NLI, they have agreed to attend that institution for one academic year.[17] Even when the student-athlete has completed the mandated academic year at the original institution in its entirety, transferring to another institution may not be done without penalty.[18] After transferring to a different institution, the athlete must "complete one full academic year of residence" before being allowed to compete in athletics, further, they are also unable to receive an athletic scholarship from the new school until a release from the original school has been signed.[19] This issue is magnified in college football because of the National Football League's ("NFL") "three-year rule," which requires NFL prospects be enrolled as a college athlete for three years before they are eligible to declare for the draft.[20]

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[14] *See* Michael J. Riella, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2186 (2002) (articulating legal ramifications of NLI).

[15] *See* NLI, *Release Request and Appeal Process*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/releaseAndAppeals/releaseinstructions.pdf (providing NLI release request instructions). Per the NLI website, upon the filing of a request for release, the signing institution has a thirty-day deadline to render a decision on the request. *Id.* (outlining timeline by which request for release process operates).

[16] *See* Fortay v. Univ. of Miami, No. Civ. 93-3443, 1994 LEXIS 1865, *14 (D.N.J. Feb. 17, 1994) (outlining case of rejection of request for release).

[17] *See* NCAA, TRANSFER TERMS, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/student-athletes/current/transfer-terms (last visited Jan. 15, 2018) ("NCAA schools that are part of the program may send a National Letter of Intent to a prospective student-athlete they have recruited. The letter is a legally-binding contract. It explains what athletics financial aid the school agrees to provide the student-athlete for one full academic year, only if the student is admitted to the school and is eligible for financial aid under NCAA rules. If you sign a National Letter of Intent, you agree to attend that school for one academic year and other schools that are part of the National Letter of Intent program can no longer recruit you.").

[18] *See* NCAA Div. I Manual, *supra* note 11, at 168, Art. 14.5.5.1 ("A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution.").

[19] *See* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 72 (2006) (noting effects of penalties imposed on student-athletes when transferring from one school to another).

[20] *See* Sulentic, *supra* note 12, at 131 (describing elevated impact on college football players in comparison to other sports). Several other sports including baseball, basketball, and hockey all have a shorter wait time for draft eligibility. *Id.* at 132 (noting how eligibility varies for other collegiate sports).

Another common issue is that an athlete could sign their NLI only to later find out that the school has accepted more NLI's than available scholarships, and is then left with no option other than to join the team as a "walk-on."[21] When this occurs, the student-athlete who thought they would be receiving financial aid in the form of an athletic scholarship, does not receive any, and is left with the problem of being bound to attend that institution for one academic year following the signing of their NLI.[22]

The National College Players Association ("NCPA") is a nonprofit organization created to provide information and protections to current and future college athletes.[23] The NCPA has created a document entitled the College Athlete Protection Guarantee ("CAP").[24] The CAP allows recruits to rely on a negotiable contract with legal protections as opposed to relying on potentially empty verbal promises received from college coaches.[25]

Several courts have held that under the current NLI model, in order for an athlete to make a contractual claim against a university, the athlete "must point to an identifiable contractual promise that [the university] failed to honor."[26] This holding would implicitly require student- athletes to negotiate for specific contractual terms, which the NLI does not allow.[27]

This Note argues that a widespread adoption and implementation of the CAP guarantee would provide student-athletes with legal protections and a basis for breach of contract claims currently unavailable under the current NLI system.[28] While there are several ways that a student-athlete may be taken advantage of or misled during the recruiting process, this Note focuses on coaching changes and the potential effects on student-athletes after they

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[21] *See* Ross & Berkstresser, *supra* note 10, at 713-14 (describing problems related to school accepting too many NLI's in given year); *see also* NCAA, Transfer Terms, *supra* note 17 (defining walk-on as: "[s]omeone who is not typically recruited by a school to participate in sports and does not receive a scholarship from the school, but who becomes a member of one of the school's athletic teams.").

[22] *See* Andy Staples, *Coming to an Understanding: The Issue With Recruiting Commitments and How We Can Fix It; Punt, Pass & Pork*, SPORTS ILLUSTRATED, Feb. 1, 2016 (noting several major issues with recruiting including accepting too many NLI's).

[23] *See* NCPA, ABOUT US, NATIONAL COLLEGIATE PLAYERS ASSOCIATION, https://ncpanow.org/mission-and-goals (last visited Dec. 14, 2017) (describing purpose behind creation of NCPA).

[24] *See id.* at CAP guarantee (noting creation of CAP guarantee).

[25] *See id.* (describing CAP guarantee and its features).

[26] *See* Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992) (determining standard for breach of contract claim against university from athlete).

[27] *See id.* at 417 (holding created unrealistic narrow window for breach of contract claims to be brought by student-athletes).

[28] *See infra* Part V.

sign the NLI.[29] This Note begins with a background on the history of the NLI as well as the creation of the NCPA and the CAP.[30] It reviews several cases which have analyzed issues centered around contractual disputes between student-athletes and their universities, and the precedent created for future contractual claims of the same nature.[31] Further, this Note provides an analysis of how student-athletes could benefit from the implementation of the CAP, and why the NCAA will oppose a change from the current NLI system.[32] Finally, this Note concludes that the CAP guarantee will effectively provide legal protections to student-athletes that are not currently available and suggest remedies in areas that the NLI is lacking.[33]

PART I: HISTORY AND DEVELOPMENT OF NLI AND CREATION OF CAP

The NLI is a document signed by prospective student-athletes that provides an athletic financial aid award to a recruit for one academic year provided the student-athlete is admitted to the university, and qualifies for aid under the NCAA and institution guidelines.[34] The NLI is drafted and governed by the Collegiate Commissioners Association ("CCA"), however the NCAA manages the daily operations of the NLI program.[35] The NLI was created in 1964 with the same goals in mind as it has today, "to reduce and limit recruiting pressure on student-athletes and to promote and preserve the amateur nature of collegiate athletics."[36] In 1991, the CCA expanded the NLI into its current form, a four-page document that includes all the rules and interpretations of men's and women's collegiate sports.[37]

The University begins the recruiting process by initiating communications with a prospective student-athlete and then ultimately makes an offer to them in the form of an athletic scholarship.[38] The athletic scholarship is required along with the NLI in order to create a binding

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[29] *See* Sulentic, *supra* note 12, at 136-43 (noting and describing several ways that coach may mislead recruit).

[30] *See infra* Part I.

[31] *See infra* Part II-III.

[32] *See infra* Part IV.

[33] *See infra* Part V.

[34] *See* NLI, *supra* note 15 (explaining NLI's primary function).

[35] *See* NLI, *supra* note 15 (outlining governing authority over administration of NLI).

[36] *See* Stacey Meyer, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS LAW. J. 227, 227-28 (2004) (noting core principles behind creation of NLI still emphasized today).

[37] *See id.* at 228 (describing current NLI format).

[38] *See id.* (noting university initiates recruiting process).

contract, as each item separately does not do so.[39] The contract is binding for one year, at which point the scholarship must be renewed on an annual basis.[40] After the completion of the athlete's mandated academic year at the institution the renewal of their financial aid package is reviewed.[41] This is done annually because the NLI document itself only covers the first academic year at the chosen institution.[42] The renewal process is discretionary on the part of the athletic department, as neither the institution nor the athlete carries any obligations under the NLI after the completion of the first academic year.[43] The NLI has a provision entitled "Coaching Changes" in which the student-athlete will sign to acknowledge that they understand the commonality of coaching changes and that they are bound by the NLI in the event that a coaching change does happen.[44]

The NCPA and the Creation of the CAP

The NCPA is a nonprofit organization created by Ramogi Huga, and is comprised of over 17,000 Division I college athletes as well as administrative personnel to protect former, current, and future college athletes.[45] Since its inception, Huga and the NCPA have testified in U.S. congressional hearings and briefings, state legislatures, and in legal matters in support of better protections for college athletes.[46] The NCPA has also

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[39] *See id.* at 229 (emphasizing NLI alone does not create contract). "The NLI is not a scholarship offer, but the athlete is told that 'at the time I sign this NLI, I must receive a written offer of athletics financial aid . . . . The offer shall list the terms and conditions of the award, including the amount and duration of the financial aid.' Thus, without the financial aid award, the contract is not complete." *Id.*

[40] *See* Riella, *supra* note 14, at 2187 (noting NLI itself does not guarantee student-athletes anything that may have been promised).

[41] *See* Riella, *supra* note 14, at 2187 (emphasizing financial aid award and NLI only binding for one-year).

[42] *See* Riella, *supra* note 14, at 2187-88 (noting annual review process).

[43] *See* Riella, *supra* note 14, at 2188-89 (describing discretionary renewal process of financial aid package). "At the end of the academic year covered by the agreement, the coach and athletic director will advise the financial aid department whether to renew the athletic aid." *Id.*

[44] *See* COLLEGIATE COMMISSIONERS ASSOCIATION, COACHING CHANGES, http://www.nationalletter.org/nliProvisions/coachingChange.html (last visited Sept. 6, 2018) (stating coaching changes provision language). "I understand I have signed this NLI with the institution and not for a particular sport or coach. If a coach leaves the institution or the sports program (e.g., not retained, resigns), I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching position." *Id.*

[45] *See* NCPA, MISSION AND GOALS, https://ncpanow.org/mission-and-goals (last visited Dec. 18, 2017) (noting organization's purpose and intent).

[46] *See* COLLEGE ATHLETES PLAYERS ASSOCIATION, WHO WE ARE, http://www.collegeathletespa.org/about (last visited Feb. 17, 2018) (detailing NCPA's accomplishments).

sponsored a Student-Athletes Bill of Rights in California which provides several protections including prohibiting a school from taking scholarships away from athletes that have been permanently injured while playing their sport.[47]

More recently, the NCPA has taken its advocacy a step further and they have developed an editable contract called the CAP.[48] The CAP was created around the idea that colleges have the ability to provide various protections and safeguards for their student-athletes, and the students can receive them "if [they] know what to ask for."[49] The NCPA claims that the CAP can save the student-athletes money and protect them from broken promises by the school.[50] The CAP also states that it can offer the same protection to "walk-ons."[51] There are also athletes that are told that if they attend the school as a walk-on, their play may earn them a scholarship.[52] Per NCAA rules, student-athletes are not obligated to sign NLI agreements to commit to a college and receive an athletic scholarship.[53] Using both an NLI and a CAP may create issues in terms of what protections are actually received.[54] While the CAP does offer "transfer freedoms", NCAA and Conference rules still apply and may require the athlete to sit out a year.[55]

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[47] *See id.* (outlining NCPA's legislative progress).

[48] *See* NCPA, CAP GUARANTEE, www.ncpanow.org/capa (last visited Oct. 28, 2018) (providing CAP guarantee overview).

[49] *See id.* (noting CAP guarantee's purpose).

[50] *See id.* ("A written guarantee can save you tens of thousands of dollars and prevent the agony of being betrayed by an athletic program. Get informed, get protected with the CAP Guarantee."). The CAP also states, "With the [CAP], you can request and secure legally binding protections/benefits worth over $100,000 dollars beyond a minimum scholarship without breaking NCAA rules." *Id.*

[51] *See id.* ("Walk-Ons: Any promises of future financial aid, medical expenses, transfer releases, and the freedom to participate in various employment/activities can be secured using this document.").

[52] *See* NCPA UNVEILS CAP, ATHLETIC MANAGEMENT, http://www.athleticmanagement.com/content/ncpa-unveils-cap (last visited Oct. 26, 2018) ("We often hear from players who were told that if they came in as a walk-on and did well, they would get a scholarship . . . The next thing they know, it's year two or year three and there's still no scholarship, and there's nothing in writing for them to fall back on. With the CAP, those terms and conditions could all be spelled out and agreed to beforehand.").

[53] *See* NCPA, *supra* note 48 (providing CAP replacement option). The CAP also states that if a college insists that the student-athlete does sign an NLI, to use the CAP in conjunction with the NLI to receive protections they would not have otherwise. *Id.*

[54] *See id.* (noting signed and dated CAP must be submitted before NLI, or ". . . no CAP Guarantee protections"). This problem would occur because a submission of the NLI prior to the CAP would override the CAP protections. *Id.*

[55] *See id.* (recognizing conflict between NCAA rules). While the CAP is an agreement between the school and student-athlete, certain NCAA and Conference rules apply. For instance, in a transfer scenario, even if the school and student agree to terms in the CAP, for the student to transfer without penalty they would need the approval of both the NCAA and the relevant conference. *Id.*

Since 2012, the NCAA has allowed schools to provide multiyear scholarships.[56] Yet, the issue is that student-athletes are still not guaranteed and the CAP seeks to fix that by providing the ability to negotiate a four-year guaranteed scholarship for the student-athlete before they step on campus.[57] There are several conferences today that "guarantee" four-year scholarships, the NCAA does not enforce any penalty if the guaranteed scholarship within the NLI is not honored.[58]

One of the most important, if not the primary benefit, that student-athletes receive from the CAP guarantee is a form of legal recourse in the event that the benefits agreed upon are violated, which is not available if solely using the NLI.[59] If a verbal promise is broken, and only an NLI has been executed, there is essentially no form of recourse for the athlete, as the school is not penalized for not honoring verbal promises.[60] However, if any terms of the CAP agreement are violated, the student-athlete will then have several remedies under contract law.[61]

NCAA's Opposition to the CAP

Recently, the NCAA publicly opposed the CAP via memorandum.[62] Primarily, the NCAA believes that several provisions within the CAP are not compliant with current NCAA or conference rules.[63] The NCAA also claims

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[56] *See* Michelle Brutlag Hosick, *Multiyear Scholarship Rule Narrowly Upheld,* NCAA (Feb.17, 2012), http://www.ncaa.org/about/resources/mediacenter/news/multiyear-scholarship-rule-narrowly-upheld (noting decision allows multi-year scholarships). While there was a vote to approve the legislation allowing multi-year scholarships to be administered, there was a significant portion of those who voted who have concerns. *Id.*

[57] *See* NCPA, *supra* note 48 (listing negotiable financial-aid terms).

[58] *See* Dennis Dodd, *Inside the First Legally Binding Contract between a College Athlete and a School*, CBS SPORTS (June 14, 2017), https://www.cbssports.com/college-football/news/inside-the-first-legally-binding-contract-between-a-college-athlete-and-a-school/ (noting schools may offer multi-year scholarships but rarely do).

[59] *See* Jason Scott, *Could the CAP Agreement Shake up College Athletics?*, ATHLETIC BUSINESS (June 2017), https://www.athleticbusiness.com/contract-law/could-the-cap-agreement-shake-up-college-athletics.html (asserting basis for claim present with CAP that is not currently available with NLI).

[60] *See Fortay*, 1994 U.S. Dist. LEXIS 1865, at *45 (holding contract not breached because promises not included in NLI and financial-aid award).

[61] *See* Nomura, *supra* note 5, at 288 (explaining remedies for breach of contract between school and student-athlete). This Note argues that the crux of an argument between a student and the college for a contractual breach if a breach of the duty of good faith, and fair dealing. *Id.*

[62] *See* NCAA, *College Athlete Protection (CAP) Guarantee Agreement – Compliance - Related Concerns*, http://fs.ncaa.org/Docs/AMA/cap-compliance-related-concerns-20170717.pdf (providing reasons why NCAA believes CAP not NCAA compliant).

[63] *See id.* at 1 (asserting conflicting concerns CAP raises). "Although the proposed CAP agreement includes a statement that the student-athlete shall relinquish any benefit provided

that they are not in a position to comment on the CAP guarantee prior to deciding the governing law for a dispute under a CAP violation.[64] Further, the NCAA contends that the CAP will not benefit students as much as the NCPA claims.[65]

PART II: ESTABLISHING A CONTRACTUAL RELATIONSHIP BETWEEN STUDENT-ATHLETE AND INSTITUTION

Courts have repeatedly recognized the contractual nature of the NLI.[66] Courts have also held that the basic legal relationship between a student and the university they attend is contractual in nature; the catalogues, bulletins, circulars, and regulations of the institution made available to the students become a part of the contract.[67] Courts have also specifically held that, when an agreement between the school and the student-athlete is accompanied by a financial aid award, the standard form NLI is a contract.[68] The NLI agreement between student-athletes and their schools contain all of the necessary elements of a contract: offer, acceptance, and consideration.[69] It is an offer by the school, accepted by the student-athlete when he signs the Letter, to provide scholarship money in exchange for his commitment to attend the institution.[70] However, the courts that have recognized the NLI as a contract, still find, student-athletes have no legal remedies for breach of contract and defer to the schools' "reasonable" interpretation of the implied terms to validate a breach.[71]

One of the paramount cases in establishing a contractual relationship between a student-athlete and their school is *Taylor v. Wake Forest Univ.*, a case in which a football player alleged that the university wrongfully

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pursuant to this agreement found to violate applicable NCAA or conference rules, the proposed agreement as constructed raises a number of NCAA compliance-related concerns."

[64] *See id.* (noting that NCAA is unable to comment on accuracy of CAP governing law provision).

[65] *See id.* ("[I]t is clear that the CAP Agreement was developed primarily for elite level Division I football/basketball student-athletes, many of whom will already receive these expenses/benefits as part of their college experience.").

[66] *See* Riella, *supra* note 14, at 2195 (noting courts have held that NLI is contract).

[67] *See id.* at 2189; *see also* Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972) (noting NLIs, scholarship agreements, and student codes of conduct create contractual relationship).

[68] *See* Harold B. Hillborn, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U.L. REV. 741, 750-51 (noting that courts find NLI and financial aid agreement are contracts).

[69] *See id.* at 751(discussing contractual elements of NLI agreements between student-athlete and school).

[70] *See id.* (specifying contractual structure of NLI).

[71] *See id.* at 751-52 (analyzing the courts' decision making in various cases).

terminated his scholarship and attempted to recover the educational expenses that resulted from the loss of scholarship.[72] Taylor's freshman grade point average fell to a 1.0, which was below the University's minimum requirement of a 1.35.[73] After Taylor's grades did not meet the team's academic requirements, Taylor refused to attend practice and participate in football related activities.[74] The scholarship agreement however, stated that the University could terminate the financial aid of a student-athlete if the student-athlete refused to attend practices or in any way disrupted them.[75] The court held that Taylor's refusal to attend practice despite meeting the academic requirements of the scholarship agreement, was a direct breach of contractual obligations.[76]

While courts recognize this contractual relationship between a student-athlete and an institution and therefore the ability to bring a breach of contract claim against the institution, they are hesitant to, and rarely find in favor of the plaintiff student.[77] In arguably one of the most famous cases for establishing this contractual relationship, *Ross v. Creighton*, a men's basketball player brought suit against Creighton University, alleging that the school never tendered academic benefits that were promised to him during

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[72] *See* 191 S.E.2d 379, 380 (N.C. Ct. App. 1972) (describing Taylor's claim against Wake Forest University).

[73] *See id.* at 381 (explaining Taylor's academic history). Wake Forest had a policy requiring a 1.35 GPA freshman year, a 1.65 GPA sophomore year, and a 1.85 GPA junior year. *Id.* In Taylor's second semester, he improved his GPA to a 1.9, which satisfied the policy, however, Taylor still refused to participate. *Id.*

[74] *See id.* (showing Taylor refused to practice through fall of his senior year).

[75] *See id.* at 381-82 (noting Taylor violated terms of scholarship agreement by failing to participate in football program).

[76] *See id.* (acknowledging contractual relationship between student and university).

[77] *See* Riella, *supra* note 14, at 2196:

> The enforceability of the NLI has long been a contentious point for athletes seemingly trapped in programs that are no longer desirable. There are no reported cases, however, where players have challenged paragraph 19 of the NLI in court. This is directly attributable to athletes' compliance with the appeals provisions of the agreement. Scared away from the judicial system by courts' reluctance to hold against university interests, the players languish in an appeals system directed by university administrators. Such a commingling of interests certainly invites further inquiry into the fairness of the current system, especially when athletes are almost invariably denied full releases from NLIs when coaches leave the program. A brief survey of the case law determining the nature of, and duties that arise from, the athlete-university relationship will illustrate why athletes do not regularly challenge the enforceability of the NLI in court.

Id.; See also Ross, 957 F.2d at 417 (explaining that students typically avoid pursuing actions against Universities due to lack of success).

the recruiting process.[78] The court held that in order to state a claim for breach of contract, the athlete "must point to an identifiable contractual promise that the defendant failed to honor."[79]

Other plaintiffs have brought the breach of contract claim further in an attempt to hold institutions responsible for the oral promises made to them during the recruiting process.[80] In *Fortay v. Miami,*[81] the plaintiff was allegedly made promises during his recruitment that he would be named the starting quarterback for Miami's football team.[82] Fortay claimed that the representations made to him during his recruitment were the main reason that he chose to attend the University of Miami.[83] While Fortay's argument was unsuccessful, the court did redefine what constituted a contract by including in this line of cases and included recruiting letters and correspondence as a part of the contract.[84]

PART III: CASE ANALYSIS

The NCAA's mission statement states, "The Association – through its member institutions, conferences and national office staff – shares a belief and commitment to: . . . The highest levels of integrity and

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[78] *See Ross,* 957 F.2d at 416 (noting basis for Ross' claim). Prior to signing the requisite paperwork to attend Creighton, Ross was allegedly told he would be provided with educational assistance because he came from an "academically disadvantaged background." *Id.* at 411.

[79] *See id.* at 415 (holding that Ross did not meet standard for contractual claim). The court found that a contractual relationship did exist between Ross and Creighton University, however, the narrow standard created in the holding is immensely limited. *Id.*; *see also* Sulentic, *supra* note 12 (noting recruiting rules).

[80] *See Fortay,* 1994 U.S. Dist. Lexis 1865, at *1 (describing Fortay's claim to hold school liable for oral promises).

[81] 1994 LEXIS 1865, at *21.

[82] *See id.* at 12 (describing alleged promises made to Fortay during recruitment).

[83] *See id.* (noting Fortay relied on alleged promises made to him by Miami coaches). Fortay was one of the most talented and highly recruited quarterbacks in the nation during his senior year of high school. *Id.* at 9-13. After a busy recruiting process, he ultimately decided to attend the University of Miami. *Id.* After Fortay signed his NLI, the head coach had left Miami to pursue a coaching position in the National Football League. *Id.* at 13-14. Fortay then requested a release from the school however the university officials denied the request. *Id.* at 14. Fortay's career fell short of expectations because he never became starting quarterback or received valuable playing time as was allegedly promised by the coaching staff. *Id.* at 14-15.

[84] *See id.* at 19-21 (expanding contractual items to include recruiting letters). The significance of this expansion is that the court stays true to the standard of requiring the student-athlete be able to point to an identifiable contractual promise that was broken by the university. *Id.* The issue with the failure to recognize verbal promises, is that a majority of the conversations during the recruiting process occur over the phone or in person without any textual records of the dialogue. *Id.* Therefore, student-athletes may be openly lied to without any recourse if those promises are not kept. *Id.*

sportsmanship. . . ."[85]..However, with the current NLI system being so fundamentally unfair and one-sided in the event of a contractual breach by the institution, one can argue that the NCAA does not operate with the self-proclaimed highest level of integrity.[86] The CAP guarantee conversely, the CAP guarantee was designed with the student-athlete in mind and offers numerous protections for them against the institutions that recruit them.[87]

As previously discussed, one major issue for the current NLI system is that once a student-athlete has signed, they are legally bound to that institution for at least one academic year, regardless of any material changes that occur that may affect the circumstances that caused the student-athlete to choose their respective school.[88] For instance, if there is a coaching change, the NLI requires that the student-athlete have signed and acknowledge that they are still bound by the document.[89] Such an event can materially alter an athlete's career trajectory, and yet, the very association that has pledged to protect and service their student-athletes fails to do so by

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[85] *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA CORE VALUES, https://www.ncaa.org/about/ncaa-core-values (last visited Oct. 21, 2018) (outlining core values of NCAA).

[86] *See* Riella, *supra* note 14, at 2182-83 (stating that NLI is heavily criticized for lack of protection of student-athletes). When speaking of situations where coaches leave after a student has signed their NLI, the article states,

> The National Collegiate Athletic Association, the Collegiate Commissioner's Association, and proponents of the NLI see no injustice in such a situation. They stridently assert that the athlete agrees to toil in a program. . .not because of an affinity for a particular coach's personality, style of play, or reputation for molding professional athletes, but for the school itself

Id. at 2182. It is not difficult to see that this view unequivocally disregards the relationships that have been built between recruiters and prospective student-athletes during their recruitment, and therefore emphasizes how the entire process favors the institution from beginning to end. *Id.* at 2182-84.

[87] *See* National College Players Association, *supra* note 23 ("The CAP Guarantee is a free, editable contract that allows D-I recruits and current college athletes to learn about and secure legal protections rather than rely on verbal promises from a coach who may or may not intend on honoring commitments and may or may not be there the next year.").

[88] *See* Riella, *supra* note 14, at 2193-99 (stating that there is no course of action under NLI system regardless of material changes). This issue is widely criticized by even the most well-revered members of the NCAA, including coaches. *Id.* at 2182. Louisiana State University basketball coach Dale Brown compared this situation to that of a bride who has arrived at the chapel and the groom did not show. *Id.* at 2182-83. Several other prominent coaches have stated that they believe student-athletes should have the ability to transfer when the coach who recruited them left for another job. *Id.* at 2183.

[89] *See* Collegiate Commissioner's Association, *supra* note 44, at Coaching Changes (noting coaching change provision). The NCAA has taken note of this issue, and instead of providing a protection for the student-athletes left in this situation, they added a binding provision to the NLI which makes them acknowledge the possibility of this occurrence. *Id.*

refusing to allow student-athletes to transfer without penalty.[90] This is further illustrated in scenarios where that particular institution "over signs" or accepts more NLI's than the school has allotted scholarships for that year.[91] While these issues have been brought to the NCAA's attention in various settings, instead of adjusting the current system to protect their student-athletes, the NCAA has enforced NLI provisions that place the responsibility entirely on the student-athlete.[92]

Now, the NCPA through the CAP guarantee has aimed to benefit student-athletes and protect them in situations where they currently do not have a voice.[93] The NCPA focuses on providing benefits to student-athletes that are already available, but are not regularly provided without any repercussions for the institution.[94] Pertaining to the issue of coaching changes, the NCPA through the CAP guarantee has aimed to created a solution.[95] The agreement has a negotiable transfer clause that would ultimately prevent the institution from blocking a transfer in the event that a coaching change occurs after the CAP guarantee is signed.[96] This not only gives student-athletes an option to leave a situation that has been materially

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[90] *See* NCAA 2018-2019 Div. I Manual, Bylaw 12.1.2 (2018) (explaining amateur status). It should also be noted that the term penalty encompasses the requirement of not being able to participate in their chosen sport for a year, or generally lost time which may affect their career. *See* Sulentic, *supra* note 12, at 146 ("A student-athlete might not recognize that he has made a bad choice until well after that first year is over. To rely on the NLI as the basis for a cause of action under contract provides too narrow a window under which to bring suit."). This significantly effects athletes with aspirations to play professionally significantly because of how valuable their time in college is to their athletic development. *Id.* at 146-48.

[91] *See* Ross & Berkstresser, *supra* note 10, at 726-27 (detailing options for student athletes who are not given scholarships due to over-signing).

[92] *See* Ross & Berkstresser, *supra* note 10, at 725-26 (describing NLI as adhesion contract).

[93] *See* National College Players Association, *supra* note 23 ("A letter of intent provides no protection for a player – it only protects the school. Coaches too often use this to their advantage by breaking verbal promises made to recruits after they have gained their trust during the recruiting process.").

[94] *See* College Athlete Protection Guarantee, *CAP Guarantee vs. Letter of Intent*, https://sports.cbsimg.net/images/collegefootball/College-Athlete-Guarantee-CBS-Sports.pdf (emphasizing pitfalls of NLI compared to CAP guarantee). "The CAP agreement is NOT the same as a Letter of Intent . . . the CAP Guarantee is much better. A Letter of Intent does NOT require a college to provide you a scholarship or any protections/benefits, but it does bind your athletic participation . . . under threat of penalty. This is unfair." *Id.* In contrast, it should be noted that the CAP aims to rectify these pitfalls and provide more protections for the student-athlete. *Id.* at 1 (outlining possible benefits and protections).

[95] *See* National College Players Association, *supra* note 45, at NCPA Goals (creating opportunity to negotiate transfer release in event of coaching change). As noted previously, there is not ability to negotiate within the NLI system, however, the CAP guarantee seeks to provide an opportunity for the student-athlete to have a backup plan in the event of a coaching change. *See* National College Players Association, *supra* note 45, at NCPA goals.

[96] *See* National College Players Association, *supra* note 45, at NCPA Goals (contrasting with NLI where current provision does exact opposite and leaves athletes with uncertain future).

changed by the departure of a coach, but it then requires institutions to be more honest and forthcoming about what coaches' futures may be during the recruiting process.[97]

PART IV: BRINGING A BREACH OF CONTRACT CLAIM AGAINST A UNIVERSITY UNDER THE CAP GUARANTEE OPPOSED TO THE NLI

Perhaps the most important part of the CAP guarantee, is what its implementation potentially means for student-athletes in the courtroom, and that is why the NCAA might strongly oppose its widespread implementation.[98] As it stands, courts routinely recognize that there is a contractual relationship between the student-athlete and their university, yet almost never side with the plaintiff-student in breach of contract claims.[99] Specifically, narrow holdings such as in *Ross,* have said that a student-athlete "must point to an identifiable contractual promise that the defendant failed to honor."[100] The CAP guarantee, as it is laid out, will specifically address this issue and make it much more favorable for the student when pursuing such claims.[101] Now, instead of having to attempt to add hearsay oral promises to the makeup of the student-school contract, those promises are recorded as negotiated terms of the CAP guarantee.[102] When applying the CAP guarantee, athletes in potential future litigation will be able to point to an identifiable breach of contract.[103] Ultimately, the goal of the NCPA and

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[97] *See* National College Players Association, *supra* note 23, at About Us (providing reasons why CAP is more favorable than NLI).

[98] *See* National College Players Association, *supra* note 23, at About Us (noting CAP provides clear legal protections).

[99] *See Taylor*, 191 S.E.2d at 382 (holding player breached contract by not participating in practice); *Ross*, 957 F.2d at 415 (dismissing plaintiff's claim due to compelling policy considerations); *Fortay*,1994 LEXIS 1865, at *19-21(showing that while contractual relationship existed, court still found for school).

[100] *See Ross*, 957 F.2d at 417 (describing narrow holding).

[101] *See* National College Players Association, www.ncpanow.org/capa (last visited Sept. 28, 2018) (noting negotiable and editable nature of CAP); *see also Ross*, 957 F.2d at 417 (demonstrating Ross struggled by not being able to show court where he was promised extra academic services). The CAP guarantee offers a direct solution to this problem by allowing the recruits to record promises made to them, and having them documented to present to courts when asked to point to a specific promise. *See* National College Players Association, www.ncpanow.org/capa (last visited Sept. 28, 2018) (addressing areas in which CAP guarantee seeks to remedy issues).

[102] *See* National College Players Association, www.ncpanow.org/capa (last visited Sept. 28, 2018) (providing negotiable terms for student-athlete to secure protection).

[103] *See id.* (emphasizing negotiable nature of contract).

CAP is to avoid litigation altogether and provide student-athletes with the benefits that have been promised to them.[104]

In *Fortay*, the plaintiff's unsuccessful claim was grounded in the same reasoning as the claim made in *Ross*, which was that the school had made an oral promise to him, and it was not upheld.[105] Once Fortay arrived at Miami, the Miami head coach left his current job for one in the NFL.[106] Fortay had unsuccessfully attempted to transfer, and was now stuck in a situation that was materially different from what he had signed up for.[107] Fortay's main issue, was that he did not have any documentation of the promise allegedly made to him regarding being the next starting quarterback which ultimately led him to sign with Miami.[108] If he had access to the CAP guarantee, and was given the ability to negotiate a written contract rather than rely on a verbal promise, his claim would have likely been successful.[109]

PART V: CONCLUSION

Since the NLI's inception in 1964, it has served as a means for prospective student-athletes to choose which school they will attend. The stated purpose of the NLI is to relieve pressure on student-athletes as they make life-changing decisions on where to attend college and further their athletic career. However, while this purpose may be served, the NLI primarily serves the interests of universities, and has unknowingly bound student-athletes to situations that are materially different from what they originally thought, such as the situations shown in *Taylor, Ross,* and *Fortay.* When a situation changes, student-athletes are left with no way out and are bound by the NLI. This is why the adoption and implementation of the College Athlete Protection Guarantee will better serve student-athletes, as it gives them a cause of action and a chance at receiving the college experience, they were promised by the coaches recruiting them. Since the CAP guarantee gives student-athletes a cause of action and a chance of receiving the college experience promised by the coaches that recruited them, the

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104 *See id.* (explaining documentation of promises to secure clear legal protection).

105 *See Fortay*, 1994 LEXIS 1865, at *19-21 (describing Fortay's claims against University of Miami).

106 *See id.* at 13-14 (noting coaching change that played major role in derailing Fortay's career). After the head coach left, Fortay requested a release from his NLI to transfer to a more favorable situation. *Id.*

107 *See id.* at 16-18 (noting how different reality of situations at, before, and after NLI was signed).

108 *See id.* at 10-12 (discussing Fortay's decision to choose Miami).

109 *See* NCPA AT CAP GUARANTEE, www.ncpanow.org/capa (last visited Sept. 28, 2018) (allowing for negotiation of terms by coaches).

adoption and implementation of the CAP guarantee will even the playing field for student-athletes. A widespread adoption of the CAP guarantee would change the way recruiting works, ultimately for the betterment of the experience for student-athletes as they begin the next step of their academic and athletic careers.

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