LEVELING THE PLAYING FIELD: APPLYING THE
DOCTRINES OF UNCONSCIONABILITY AND CONDITION
PRECEDENT TO EFFECTUATE STUDENT-ATHLETE
INTENT UNDER THE NATIONAL LETTER OF INTENT

"I don't feel like I should play for somebody who has never seen
me play."[1]

"The players have no voice, and that's wrong .... [I]f a coach
leaves before the player sets foot on campus, the player should have
the ability to choose [a school] again."[2]

Under the current rules governing an incoming student-athlete’s
relationship with the chosen university, however, the player does
not have such a choice. The dramatic turnover of intercollegiate
coaches in recent years[3] has resulted in an increasing number of
incoming student-athletes who have signed a National Letter of
Intent (NLI)[4] to play for and attend a particular institution being
"left behind" when the coach for whom they have chosen to play
departs for greener pastures. A coach is free to leave the university
to pursue alternate career paths, often bringing his or her style of
play to another university, yet the athletes recruited to play in that

1. Ezra Williams, top basketball signee of 1998-1999 for the University of Georgia,
commenting on his pending decision whether to leave Georgia because of the men’s
basketball coaching change that occurred after he signed a National Letter of Intent to play
for Georgia, but before he matriculated at the school. Chip Towers, Bulldogs, Harrick May
Lose Signee, ATLANTA J. & CONST., Apr. 13, 1999, at 3E. Williams later decided to remain at
Georgia.

2. Mike Krzyzewski, president of the National Association of Basketball Coaches and
head men’s basketball coach at Duke University, commenting on the restrictive nature of the
National Letter of Intent. Bill Brubaker, Departed Coaches, Deserted Recruits: Courtship Rife

3. For example, forty-one Division I men’s basketball programs began the 1998-1999
season with a new coach.Id. This Note is concerned with the general problem facing student-
athletes in all intercollegiate athletic programs, not solely men’s basketball. The turnover
of college men’s basketball coaches, however, is especially high compared to other collegiate
sports, and the coverage afforded the issue in this Note is correspondingly great.

4. For the text of the National Letter of Intent [hereinafter 2000-2001 NLI], see infra
APP. A, at 2218-2224.
coach's system are precluded from following the one for whom they wished to play.

The National Collegiate Athletic Association (NCAA), the Collegiate Commissioner's Association (CCA), and proponents of the NLI see no injustice in such a situation.5 They stridently assert that the athlete agrees to toil in a program, devoting countless hours to practice, and incurring obligations far greater than a nonathlete student, not because of an affinity for a particular coach's personality, style of play, or reputation for molding professional athletes,6 but for the school itself.7 Such views hold true in numerous situations, but are not shared by those left with uncertain futures because of the coach's departure—the incoming student-athlete.8 Enforcement of the NLI results in a situation in which a coach can tear up his contract and move to an environment in which he can immediately pursue his dreams, aspirations, and occupation. The prospective student-athlete, however, is not so fortunate.9

The current NLI enforcement policy has been severely criticized by intercollegiate coaches. Dale Brown, the former head men's basketball coach at Louisiana State University, once compared the athlete's predicament to that of a bride arriving at the chapel and

5. The NCAA is the governing body of the intercollegiate athletic system. Its central purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA, 1998-99 NCAA DIVISION I MANUAL § 1.3.1, at 1 (1998) [hereinafter NCAA MANUAL]; see also Kevin E. Broyles, NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan, 46 ALA. L. REV. 487 (1995). The NCAA, however, does not directly regulate the NLI Program (NLIP). The NLIP is administered by the CCA, a body within the NCAA composed of the commissioners of member conferences. The daily administration of the NLIP is through the Southeastern Conference offices. NCAA, Frequently-Asked Questions on The National Letter of Intent/Financial Aid, at http://www.ncaa.org/eligibility/faqslfaqslnli_financial_aid.html, (last visited Apr. 2, 2002) [hereinafter NCAA, FAQs].


7. See, e.g., Mark Woods, Athletes on a One-Way Road After Signing, PALMBEACHPOST, June 10, 2000, at 1C (referring to a statement by C.M. Newton, former athletic director at the University of Kentucky, that, "[y]ou don't choose a coach, you choose a school").


9. Woods, supra note 7, at 1C.
discovering that the groom did not show. Rick Pitino, once notorious for moving from one coaching position to the next, stated that his "personal feeling is that the recruits should have the right to go" and follow their coaches. Even Cedric Dempsey, president of the NCAA, agreed that the welfare of the student-athletes should be taken into account "because they're the ones who are caught in the middle."

Despite such sentiment, and the outcries of players who have been jilted at Dale Brown's proverbial alter, players continue to be bound to the universities with which they signed. The rules governing the NLI have not been discussed at any great length [by college sports administrators] in recent years. But as we have become more and more concerned about ... student-athlete welfare this is one of those issues where you ask: Are the rules fair to the student-athletes? This is certainly an issue that deserves some discussion.

Such a discussion, in the context of presenting two avenues for student-athletes to free themselves of the NLI's transfer constraints, is the focus of this Note. The current rules and relationships between college administrators and student-athletes harken to a time when coaches remained at institutions for their entire careers (often becoming institutions in their own right), but are no longer applicable in the current era of intercollegiate athletics. The primary goal of this Note is to apply traditional contract principles to the NLI to posit possible causes of action that support the incoming student-athlete's position, and that would afford such an athlete the option to reselect a school if the athlete's anticipated coach has vacated the position.

The first part of the Note will introduce the reader to the NLI: its history, provisions, and purposes. The second part will discuss the

10. Brown continued: "I believe she can go home, can't she? ... She doesn't have to marry the minister or the best man, does she?" Woods, supra note 7, at 1C. Under current NCAA regulations, "[y]es, she does." Id.
13. Id. (quoting Cedric Dempsey).
14. See infra notes 18-45 and accompanying text.
contractual nature of the student-university relationship to lay the groundwork for a discussion of the student-athlete's possible causes of action. Courts' general unwillingness to rule in the student's favor in actions brought against their respective universities and the failed legal theories asserted in such suits will be explored as well. Finally, the third part will propose and analyze novel causes of action that the student-athlete may be able to assert in a successful action to terminate the NLI when a coach surrenders his or her position. Specifically, the athlete may assert nonperformance of conditions precedent to formation of a contract with the university, and apply the doctrine of unconscionability to the NLI itself.

The scope of this Note is limited to possible causes of action for attacking the restrictive nature of the NLI by incoming student-athletes [hereinafter athletes]. The concerns of those already matriculated and involved in the athletic program, though no less significant, will not be addressed.

To place the Note in the proper context, an analogous situation that nonsports fans are more likely to understand may be appropriate. Not allowing the athlete the option to transfer when a coach leaves is akin to eating at a restaurant and receiving the wrong entree. If you order chicken and get beef, (were the CCA and NCAA operating the establishment) you would be obligated to eat it, even though it was not your choice. One of the advantages of eating out is that we are allowed to order what we want, constrained of course by restaurant type and menu selection, and if we receive the wrong dish, we can send it back in exchange for the desired entree. That same opportunity should be afforded to athletes.

15. See infra notes 46-106 and accompanying text.
16. See infra notes 107-83 and accompanying text.
17. The analogy was adopted from McCallum, supra note 11.
LEVELING THE PLAYING FIELD

THE NATIONAL LETTER OF INTENT

History

The National Letter of Intent Program (NLIP) is administered by the CCA, with the basic purpose of providing certainty in the recruiting process.\(^\text{18}\) Started in 1964 with seven conferences and eight independent institutions, fifty leagues and over 500 institutions currently participate in the program.\(^\text{19}\)

The NLIP was spawned by concerns for both the athlete and the recruiting institutions. During the early years of college athletics, recruiting efforts focused on the geographic region in which the university was located.\(^\text{20}\) Advances in technology and transportation, however, quickly expanded the scope of recruiting efforts, and with the return of World War II soldiers, university officials began to see athletic programs as an untapped revenue source.\(^\text{21}\) Increased focus on revenue derived from “big time” athletic programs resulted in a correspondingly increased emphasis on recruiting. Few, if any, rules existed to regulate university recruiters’ conduct towards a potential athlete.\(^\text{22}\) The athlete heard sales pitches detailing a program’s storied past and bright future, and coaches often engaged mothers in “sincere” conversations regarding the athlete’s education and general well-being.\(^\text{23}\) Athletes and their families were constantly under pressure to attend one university or another, and the athlete’s schedule was continually disrupted.\(^\text{24}\)

The fierce recruiting battles for “blue chip” athletes took its toll on universities as well. Larger institutions often fared better financially than smaller universities, but the impact on athletic

\(^\text{19}\) Id. The institutional commitment, by which a college or university enrolls in the NLIP can be found infra APP. B, at 2225.
\(^\text{21}\) Id. at 1288.
\(^\text{22}\) Id. at 1287-89.
\(^\text{23}\) Id. at 1289.
\(^\text{24}\) Id.
department budgets was noticeable across the board.\textsuperscript{25} The movement for a solution or an alternative to the then-prevalent recruiting practices grew in strength as economic exigencies reached prohibitive proportions.\textsuperscript{26}

By the early 1960s, after fifteen years of conference-by-conference experimentation with various letter-of-intent programs, momentum gathered for a national letter of intent.\textsuperscript{27} Initial NCAA suggestions for a compulsory system were met by vigorous dissent, led by smaller universities who viewed a letter of intent as favoring larger, more financially sound institutions.\textsuperscript{28}

A voluntary program, adopted in 1964, called for a prospective athlete, a parent or guardian, and the chosen institution's athletic director, to sign an "Inter-Conference Letter of Intent" on a specific date.\textsuperscript{29} The letter certified that the student intended to enroll at the chosen institution and indicated, if applicable, any financial aid that was to be provided to the student by the institution.\textsuperscript{30} From the athlete's view, the primary reason for signing the NLI was that once signed, no other participating institution could recruit the athlete further.\textsuperscript{31}

The Current NLI and Requirements

The NLI is "a contract of sorts, a written agreement. . . . The most important service the program does is cease the recruiting process when the kid signs."\textsuperscript{32} The NLI is a binding agreement between a prospective athlete and an institution in which the athlete agrees to attend the institution for one full academic year in exchange for athletic financial aid for that year.\textsuperscript{33} The athlete must be

\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} NLI GUIDELINES, supra note 18.
\item \textsuperscript{28} Note, Educating Misguided Student Athletes: An Application of Contract Theory, 85 COLUM. L. REV. 96, 118 n.125 (1985).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} NLI GUIDELINES, supra note 18.
\item \textsuperscript{31} Cozzillio, supra note 20, at 1293.
\item \textsuperscript{32} O'Neil, supra note 8, at D8 (quoting Karl Hicks, Associate Commissioner of the Southeastern Conference). The Southeastern Conference is responsible for administrative tasks related to the NLIP.
\item \textsuperscript{33} NCAA, FAQs, supra note 5.
\end{itemize}
academically eligible to attend the chosen institution and the NLI must be accompanied by an institutional financial aid agreement.\textsuperscript{34} The NLI does not guarantee the athlete a place on the sports team, nor does it guarantee playing time. Further, the NLI is not satisfied if the athlete completes one season of athletic competition—he or she must attend the institution for one academic year.\textsuperscript{35}

Even though the NLI is a written one-year agreement, the athlete need not sign a new NLI each year while in attendance at the chosen institution. 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.\textsuperscript{36} Renewal is discretionary on the part of the athletic department, as neither the institution nor the athlete carries any obligations under the NLI after completion of the first academic year.\textsuperscript{37}

Penalties will be imposed on the athlete by the CCA should the athlete fail to attend the institution for one year.\textsuperscript{38} The basic penalty for failure to satisfy the terms of the NLI is a two-year suspension from competition at the athlete’s new institution. Specifically, the athlete “may not represent the latter institution in intercollegiate athletics competition until [the athlete has] completed two full academic years of residence at the latter institution. Further, [the athlete] understand[s] that [he or she] shall be charged with the loss of two seasons of intercollegiate athletics competition in all sports.”\textsuperscript{39} This two-year penalty may be reduced to one-year if the institution releases the athlete from the NLI obligations through execution of a Qualified Release Agreement (QRA).\textsuperscript{40} The QRA must be signed by the athlete, a parent or guardian, and the Athletic Director (AD) of the releasing

\textsuperscript{34} 2000-2001 NLI, infra APP. A, ¶ 2 (“The [financial aid] award letter shall list the terms and conditions of the award, including the amount and duration of the financial aid. If such conditions are not met, [the] NLI shall be declared null and void.”).

\textsuperscript{35} Id. ¶ 3.


\textsuperscript{37} Id.

\textsuperscript{38} If the athlete transfers to an institution that does not participate in the NLIP, penalties cannot be assessed because participation is a voluntary decision of the institution. The athlete will be penalized if he or she ever transfers to a participating institution. NCAA, FAQs, supra note 5.

\textsuperscript{39} 2000-2001 NLI, infra APP. A, ¶ 4.

\textsuperscript{40} For the text of the current QRA, see infra APP. C, at 2225-2226.
institution.\textsuperscript{41} Notably, only the AD may grant the athlete's release; the athlete's potential coach is not vested with authority under NLI guidelines to grant the necessary permission.\textsuperscript{42}

An appeals process is available to athletes under "extenuating circumstances."\textsuperscript{43} The one-year suspension may be appealed to the NLI Appeals Committee, "whose decision shall be final and binding."\textsuperscript{44} Such appeals are rarely granted, however, and grants are extremely unlikely when the athlete appeals to obtain a full release from the NLI because of a coaching change.\textsuperscript{45} The end result is that, in virtually all circumstances, the athlete will be penalized for attending an institution different than that indicated in the NLI.

**CONTRACTUAL NATURE OF THE STUDENT-UNIVERSITY RELATIONSHIP**

**Survey of Case Law**

The principal function of contract law has been viewed as providing a framework for the enforcement of promises.\textsuperscript{46} A contract is itself a promise or set of promises that creates legal obligations and duties.\textsuperscript{47} For a contract to exist, there must be a bargained-for exchange, the finding of which depends on the presence of

\begin{itemize}
\item \textsuperscript{41} 2000-2001 NLI, infra APP. A, § 5. Whether an athlete is released from the NLI is a discretionary decision made by the institution's AD. The general trend is for institutions to enforce the NLI and refuse to release the athlete. Fortay v. University of Miami, No. 93-3443, 1994 U.S. Dist. LEXIS 1865, at *14 (D.N.J. Feb. 17, 1994) (not releasing athlete from NLI when head coach left the institution); Eresh Cotton, Williams Eager to Start Over, CHARLESTON DAILY MAIL, Aug. 13, 1996, at 1B (same); Mike Hutton, Please Release Me, Let Me Go: Intent Letter Binds Recruit to Purdue, CHIC. TRIB., April 21, 1996, at C6 (same). The NCAA supports the inflexible nature of these decisions. When asked under what circumstances would the NCAA support an athlete's request for a QRA, Jane Jankowski, NCAA Public Information Coordinator replied, "If a university completely drops a program, that is a possibility." Woods, supra note 7, at 1C.
\item \textsuperscript{42} See 2000-2001 NLI, infra APP. A, § 5.
\item \textsuperscript{43} Id. § 6.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. § 4.
\item \textsuperscript{46} See Timothy Davis, Balancing Freedom of Contract and Competing Values in Sports, 38 S. Tex. L. Rev. 1115, 1118 (1997).
\item \textsuperscript{47} RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).
\end{itemize}
consideration.\textsuperscript{43} A contract may be enforceable without consideration if equitable principals so mandate.\textsuperscript{49}

Courts recognize that the student-university relationship is contractual in nature. The catalogues, bulletins, regulations, and scholarships that the university offers to the student become part of the contract.\textsuperscript{50} In 	extit{Zunbrum v. University of Southern California}, for example, the plaintiff alleged that the university had breached its contractual obligation to teach a sociology course with a certain number of lectures and a final examination.\textsuperscript{51} The plaintiff asserted that the tuition and fees paid for the course served as adequate consideration.\textsuperscript{52} The court held that a slight departure from a projected course of study does not necessarily entitle a student to damages for breach of contract, and that it is the province of the trier of fact to resolve questions about the reasonableness of student expectations and the nature of the departure.\textsuperscript{53} The rule that emerges, therefore, is that just because a university is a defendant the fundamental contractual nature of the parties relationship is not altered and students may make use of factfinders to determine the scope of that relationship.

Specific solicitations, whether written or oral, from an academic institution to a potential student can also serve as the basis for a student's breach of contract action against the institution.\textsuperscript{54} In 	extit{Malone v. Academy of Court Reporting}, Academy officials solicited the plaintiffs to induce them to enroll in the school's paralegal program.\textsuperscript{55} During the course of the solicitation, officials "represented that successful completion of its paralegal curriculum

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\item \textsuperscript{49} \textit{Restatement (Second) of Contracts} §§ 86, 90 (1981).
\item \textsuperscript{50} See, e.g., Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972). See generally Gil Fried & Michael Hiller, \textit{ADR in Youth and Intercollegiate Athletics}, 1997 BYU L. REV. 631, 642-48 (discussing NLIs, scholarship agreements and student codes of conduct as documents that create contractual relationships between schools and students).
\item \textsuperscript{51} Zumbrun, 101 Cal. Rptr. at 504.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Malone v. Academy of Court Reporting, 582 N.E.2d 54, 59 (Ohio Ct. App. 1990).
\item \textsuperscript{55} Id. at 56.
\end{itemize}
would yield an associate’s degree in paralegal studies, that the school had job placement services,” and that starting salaries for Academy graduates were “guaranteed at or around $20,000 to $25,000 per year.” After enrolling, the students discovered that these representations were all false, and instituted a suit against the Academy for breach of contract, misrepresentation, and fraud. The appellate court reversed and remanded the trial court’s dismissal of the case, holding that material promises made through incessant solicitations, regardless of form, are guarantees that must be upheld.

Promises made to athletes also serve as a basis for asserting a breach of contract claim against a university. Where a university makes identifiable contractual promises to an athlete, a breach action may lie if the school does not make a good faith effort to perform its promises. In Ross v. Creighton, a men’s basketball player sued Creighton University, alleging that promises regarding academic benefits that would be provided by the school if Ross were to attend were never tendered. The court held that a contractual

56. Id. Officials also represented that the Academy had certain admission standards, a financial aid program, library facilities, Westlaw and Lexis training, and that hours accumulated at the Academy were transferable to Ohio State University. Id.

57. Id.

58. Id. at 59.

59. See Ross v. Creighton, 957 F.2d 410, 417 (7th Cir. 1992). A thorough analysis of Ross can be found in Hilborn, supra note 48, at 758. Hilborn also argues for judicial recognition of a special relationship that may exist between athletes and universities based on the potentially exploitative nature of such relationships. Id. at 765-72. In the context of failure to educate, Hilborn posits that institutions should be held accountable for educating their athletes under an implied-promise rationale. Id. The relationship is established during the recruiting process and solidified as the athlete is utilized as a money-making tool of the university. The athlete’s role as a “money-maker” distinguishes his or her relationship with the university from that of a “normal” student. Hilborn concludes that the reality of the relationship between athletes and universities “provides more of a compelling moral justification for imposing an implied duty to educate than do express, identifiable contractual promises.” Id. at 770.

The athlete’s role as an instrument of financial gain is further explored in James V. Koch, The Economics of “Big Time” Intercollegiate Athletics, 52 Soc. Sci. Q. 248 (1971). Koch views intercollegiate athletics as an industry. The NCAA is described as a cartel, its member institutions are compared to business firms, and the athletes are labeled “inputs.” Id. at 248-51.

60. Ross, 957 F.2d at 412. Specifically, Creighton assured Ross that he would receive sufficient tutoring to enable him to “receive a meaningful education while at CREIGHTON.” Id. at 411.
relationship exists between a university and its athletes, but to state such a claim, the athlete "must point to an identifiable contractual promise that the defendant failed to honor." Such a narrow holding, though recognizing the contractual relationship, seemingly forces students to bargain for specific contractual terms, and virtually eliminates a student's ability to assert a breach claim based on failure to perform implied promises.

Recognition of a student's contractual relationship with an institution has not always worked in the athlete's favor. An athlete who refused to participate in athletic competition because he felt his academic performance would suffer was held in breach of contractual duties owed to a university in Taylor v. Wake Forest University. Taylor, a football player at Wake Forest, sought recovery of educational expenses after the university terminated his athletic scholarship. Taylor claimed that the Wake Forest football coaches breached an oral promise to limit his involvement in the athletic program if such involvement led to educational conflicts. Taylor refused to participate in the football program after his freshman year, citing poor academic performance as the reason for his absence. The university then terminated his athletic scholarship. The court held that by failing to participate, Taylor breached his duty to perform contractual obligations undertaken when he accepted a Football Grant-in-Aid that was "awarded for academic and athletic achievement." The applicable case law, therefore, points to the conclusion that an athlete may assert a breach of contract action against an institution because the requisite contractual relationship exists between the parties.

61. Id. at 417.
63. Id.
64. Id.
65. Id. (quoting grant language). The scholarship application filed by Taylor provided, "I agree to maintain eligibility for intercollegiate athletics under both Conference and Institution rules. Training rules for intercollegiate athletics are considered rules of the Institution, and I agree to abide by them." Id. One of Wake Forest's Grant-in-Aid policy provisions stated that financial aid could be terminated for "[r]efusal to attend practice sessions or scheduled work-out[s] that are a part of the athletic program or to act in such a manner as to disrupt these sessions." Id. at 380.
NLI as a Contract

The structural keystone of the market for student-athlete inputs is the national letter of intent. Once a prospective student-athlete who otherwise qualifies for financial aid signs a letter of intent with a given university, he is bound to that university for the space of one year and he may not sign with, nor be signed by, any other university. 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 by the NCAA.

A National Letter of Intent, Not a Letter of Intent

The first issue to address when analyzing the NLI as a contract is the title of the agreement itself—Letter of Intent. Ordinarily, and especially in the business world, a Letter of Intent is merely a handshake substitute that temporarily memorializes agreed upon details within a negotiation. The Letter provides a type of ongoing performance ledger, detailing what will be the obligations of each party upon reaching a final agreement, but drafted “without anticipation of legal consequences.” A letter of intent used during negotiations for a corporate merger or acquisition, for example, “indicates the nature of the contemplated transaction and summarizes its basic terms,” but will also include statements that a “formal” agreement is contemplated. A “true” letter of intent, therefore, is tentative and lacks any of the commitment that characterizes a binding agreement. Some posit that in the business community, the words “letter of intent” tend to negate implications of a binding agreement.

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67. Cozzillio, supra note 20, at 1302.
68. Id.
69. Id.
71. See generally id. at 287-94 (describing typical preliminary agreements).
72. Cozzillio, supra note 20, at 1303. Cozzillio quotes the testimony of a commercial-law attorney as an illustration:

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
The NLI is manifestly dissimilar to letters of intent prevalent within the business community. The crucial distinction between the two is that the NLI is *not* a precursor to a more formal commitment, whereas the typical business letter of intent “anticipates a future memorialization.” Further, the NLI contains all material terms and “there is no need for judicial ‘gap filling.’” The NLI itself reflects the athlete’s commitment to an institution in exchange for the institution’s financial aid and educational commitments.

**Contract Underpinnings of the NLI**

At base level, contract formation involves an offer, acceptance of the offer, and an exchange of consideration or a consideration substitute. The written scholarship offer made by an institution as a precursor to an athlete signing the NLI constitutes an offer to enter a bilateral contract. Scholarship letters manifest the institution’s willingness to provide financial aid to the athlete in return for the athlete’s promise of attendance. The proposal is addressed to the potential recipient of the scholarship and includes all of the material terms of the aid package.
The NLI, therefore, is written evidence of a binding, executory pact between the institution and athlete.\textsuperscript{78} It is a promissory acceptance to the scholarship offer—the athlete promises to attend the university in exchange for the promise of financial aid.

An argument can be made that the financial aid letter is an offer to enter into a unilateral contract; however there is little evidence that the university bargains for the athlete's performance without any prior commitment, nor is there evidence that the scholarship pledge can be abbreviated at will.\textsuperscript{79} The most persuasive argument therefore, is that the NLI manifests the athlete's acceptance of the institution's offer to enter into a bilateral contract.\textsuperscript{80}

Courts will not enforce such an agreement without the presence of consideration. The \textit{Restatement of Contracts} defines consideration as "a performance or return promise [that] must be bargained for. ... A performance or returned 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 promise."\textsuperscript{81} Under the \textit{Restatement}'s language, the institution's promise of financial aid and the athlete's promise to attend the institution are the consideration to support the contract. The institution offers aid for the purpose of attracting the athlete, and in exchange for the promise of aid, the athlete tenders his promise to matriculate.\textsuperscript{82}

\textsuperscript{78} \textit{Restatement (Second) of Contracts} § 50(1) (1981) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.").

\textsuperscript{79} Cozzillio, \textit{supra} note 20, at 1318. An examination of the real-world application of NLIs in the recruiting process undercuts the argument that the NLI is merely a form of notice suggesting future performance, rather than the consummation of a bilateral contract. When an athlete signs a NLI, the chosen institution has filled a scholarship, thereby reducing the number of athletic aid packages left to offer to other recruits. Were the institution merely seeking performance (arriving on campus and participating in athletics once the academic year has begun), and not a promise to perform, the institution would not be able to determine the number of scholarships available to offer to subsequent recruits with any certainty. The athlete's promise to perform affords the institution this certainty, and prevents the institution from overextending scholarship offers. \textit{Restatement (Second) of Contracts} §§ 54, 56 (1981).

\textsuperscript{80} Hutton, \textit{supra} note 41, at C6 ("If a recruit doesn't sign a letter-of-intent, coaches will use the scholarship for another player who will sign. The bottom line is that coaches want guaranteed commitments.").

\textsuperscript{81} \textit{Restatement (Second) of Contracts} §§ 71(1), 71(2) (1981).

\textsuperscript{82} Professors Calamari and Perillo offer an alternative definition of consideration, derived in large part from Cardozo's 1927 opinion in \textit{Allegheny College v. National Chautauqua County Bank}, 159 N.E. 173 (N.Y. 1927). The professors propose a three-part test...
Court Treatment of the NLI

Stepping out of the theoretical discussion and back into reality, courts have held that the NLI is a contract. Such recognition allowed an athlete to assert a claim for breach of contract against the University of Virginia for failure to provide adequate medical treatment to the athlete's broken wrist. The court in Barile v. University of Virginia held that Barile's signing of a NLI established a contractual relationship between the school and he. After signing the NLI, the University promised Barile that any injury he received while engaged in athletic competition on behalf of the University would be treated properly. Barile subsequently broke his wrist while playing football for the school, but the University did not treat the injury until two years had passed. The court recognized that contract doctrine was "particularly applicable to college athletes who contract by financial aid or scholarship to determine whether consideration is present:

(a) The promisee must suffer legal detriment; that is, do or promise to do what [the promisee] was not legally obligated to do; or refrain from doing or promise to refrain from doing what [the promisee] is legally privileged to do.
(b) The detriment must induce the promise. In other words, the promisor must have made [the promise] because the promisor wishes to exchange it at least in part for the detriment to be suffered by the promisee.
(c) The promise must induce the detriment. . . . (T)he promisee must know of the offer and intend to accept.

CALAMARI & PERILLO, supra note 48, § 4.2.

This formulation also supports the characterization of the NLI as a contract between an athlete and an institution. The institution (promisee) suffers legal detriment by both offering financial aid to the athlete, which it is not under a legal obligation to do, and by awarding financial aid to an athlete, because such an award reduces the number of scholarship awards available with which to recruit other athletes. The institution's detriment induces the promise by an athlete (promisor) to matriculate in exchange for the institution's promise of financial aid and an education. The third element of the test is satisfied because the institution (promisee) knows of the athlete's promise to attend the school. When the Athletic Director signs the NLI on behalf of the institution, he expressly responds to the promise. Viewing the athlete as the promisee, the same analysis applies, as the relationship embodies a bilateral contract, but brevity dictates such analysis be foregone.

85. Barile, 441 N.E.2d at 612.
86. The University of Virginia medical staff did tape Barile's wrist immediately after he sustained the injury, but failed to provide the necessary surgical treatment until two years after the injury occurred. Id.
agreement to attend college and participate in intercollegiate athletics. 87

Judicial recognition of the contractual nature of the athlete-institution relationship has spawned numerous actions by athletes who allege that their chosen university has in some way breached a contractual promise. 88 Courts, however, have been reluctant to find for the plaintiff athletes. 89 The following discussion will highlight the unsuccessful approaches that athletes have used to attack the institutions' seemingly impenetrable contractual protection.

**Athlete Attempts to Challenge the NLI**

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. 90 This is directly attributable to athletes' compliance with the appeals provisions of the agreement. 91 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. 92 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.

Interpreting the contractual relationship between athletes and institutions strictly, courts have recognized only the express

87. Id. at 615.
88. See infra notes 90-106 and accompanying text.
89. Id.
90. Paragraph 19 states, "If Coach Leaves. I understand that I have signed this NLI with the institution and not for a particular sport or individual. For example, if the coach leaves the institution or the sports program, I remain bound by the provisions of this NLI." 2000-2001 NLI, infra APP. A, ¶ 19.
91. Id. ¶ 6.
92. Such an inquiry, though interesting and worthwhile in considering the overall fairness of the NLI to athletes, is beyond the scope of this Note.
obligations set forth in the contract documents. Athletes have urged courts to imply obligations, but such efforts have met stiff resistance. One athlete asserted that his express contract with the university implied rights to educational opportunity and to athletic participation (as opposed to merely holding a spot on the roster). The *Jackson v. Drake University* court rejected this claim, reasoning that “where the language of the contract is clear and unambiguous, the language controls.” The financial aid and athletic documents did not expressly guarantee the athlete would play basketball, thus the action failed.

Four years earlier, a similar result befell Washburn University football players, who asserted an action for breach of contract, alleging an implied right to play football. In *Hysaw v. Washburn University*, the African-American athletes complained that the coaching staff had subjected them to racial discrimination and that when the school removed the players after they boycotted practices and team meetings, the school had breached its contract with the athletes. The university ultimately refused to allow the players to rejoin the team. In addressing the athletes’ claim, the court stated that

when a written contract exists and its language is clear and unambiguous, the language controls. Plaintiffs argue that they were promised that they would be allowed to play football …. Yet the written scholarship contracts they signed make no indication of such promises. In fact, the only promises in those written contracts were that the players would receive money.

In an unreported yet instructive opinion, a Connecticut court denied a request by the members of the Yale University wrestling

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95. *Id.* at 1493 (citations omitted); see also supra notes 59-61 and accompanying text (discussing *Ross v. Creighton*, 957 F.2d 410 (7th Cir. 1992)).
97. *Id.* at 942.
98. *Id.* at 943.
99. *Id.* at 946-47 (citations omitted).
team to enjoin the university from terminating the varsity wrestling program. The athletes in Soderbloom v. Yale University claimed that terminating the program constituted a breach of contract for educational services that was entered into by the athletes and the university. The athletes alleged that written and oral communications of the wrestling coach and various university publications formed the basis of the breached contract. Two of the wrestlers testified that they would not have attended Yale but for the availability of the wrestling program. The court disregarded such arguments, recognizing that the basic legal relationship in question was contractual in nature. The court held that the athletes would need to show a specific contract provision supporting their claims for them to prevail.

The opinion that has inspired perhaps the most commentary on the contractual relationship between athletes and universities held that the NLI, the scholarship agreement, and various recruiting letters, but not the oral communications, constituted the contract between the athlete and university. The court in Fortay v. University of Miami rejected the plaintiff's claims that oral representations of University of Miami athletic officials and the express contract between himself and the University of Miami induced his matriculation at the institution and thereby gave rise to implied contractual obligations. The court stated that "the written contract is devoid of any express or even implied provision that Fortay would be the starting quarterback."

101. Id. at *1.
102. Id. at *8.
103. Id.
104. Id. at *7.
105. See Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Fortay v. University of Miami, No. 93-3443, 1994 U.S. Dist. LEXIS 1865 (D.N.J. Feb. 17, 1994). For a thorough discussion the accountability of university officials for representations made in the recruiting process see James Kennedy Ornstein, Comment, Broken Promises and Broken Dreams: Should We Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?, 6 SETON HALL J. SPORTS L. 641 (1999). Ornstein concludes that "big-time college recruiters should not be permitted to make open-ended promises for the mere sake of enticing high school athletes to attend their schools. The legal basis exists to reprimand schools who engage in these activities." Id. at 668.
106. Fortay, 1994 U.S. Dist. LEXIS 1865, at *2. Fortay is especially instructive because of the specific allegations and factual circumstances involved in the case. Many considered
Such holdings highlight courts' unwillingness to find for athletes who claim to have been induced to attend a particular institution by the representations of such institution's athletic officials. Thus, for athletes to prevail in such actions against institutions, alternative causes of action must be explored.

**ALTERNATIVE CAUSES OF ACTION IN SUPPORT OF THE ATHLETE'S CLAIM**

Strictly interpreting contracts between universities and athletes, courts have refused to recognize implied obligations that may arise from the contracts or parol representations made to the athlete, and further, "have been disinclined to engage in the type of critical and in-depth evaluation which is warranted in determining the extent to which the range of theories available to student-athletes should be expanded." 107 Such holdings fail to recognize that the documents that form the contract, and especially the NLI, are not bargained-for exchanges, but standard form agreements. The athlete has little room to bargain or transform representations made in the recruiting process into express obligations through inclusion in the contract documents. Athletes must then turn to alternative causes of action to vindicate their rights vis-à-vis the chosen universities. When oral or collateral representations form the basis for the claim the doctrines of condition precedent and unconscionability are aptly suited for this purpose.

Fortay one of the top high school quarterbacks in the nation, and he was a consensus high school All-American during his senior year at East Brunswick High School in New Jersey. He was heavily recruited and decided to attend the University of Miami, known at the time as "Quarterback U" because of the football program's success at developing first round draft picks out of its previous quarterbacks. Fortay signed a NLI, committing to attend Miami based on assurances by head coach Jimmy Johnson that Johnson was planning to remain the Miami football coach for years to come, and other promises of playing time and development into a first round draft choice. Soon after Fortay signed the NLI, Johnson left Miami to accept a head coaching position with the Dallas Cowboys of the National Football League. Fortay requested a release from the NLI, but Dennis Erickson, the coach hired to replace Johnson, and other Miami athletic officials refused to release Fortay.

Fortay never assumed a starting quarterback role at Miami. Gino Torretta was named the starting quarterback for the 1991 season, despite statements allegedly made by Erickson assuring Fortay and his father of Fortay's playing time. Soon thereafter, Fortay transferred from Miami to Rutgers University. See id. at *2-*3; Davis, College Athletics, supra note 93, at 974-80.

107. Davis, College Athletics, supra note 93, at 1017.
Condition Precedent

The Doctrine

Courts' reluctance to enforce implied promises in athletes' contracts with universities significantly restricts the situations in which a claim for breach can be established. By recharacterizing the oral representations made to athletes during the recruiting process as conditions, however, the athlete may be able to achieve his or her ultimate goal—a full release from the NLI. If a coach's statement that he or she will remain part of the athletic program is held as a condition, or condition precedent, only the fulfillment of such a representation will trigger the athlete's duty to attend the institution. Otherwise, the athlete's duty to perform is discharged and he or she may terminate the contract.

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." A condition, therefore, qualifies a duty owed under a contract and imputes some degree of uncertainty as to the occurrence of the event. The event may be made a condition by agreement of the parties or by a term supplied by the court. In

108. The Restatement (First) of Contracts section 250 used the term "condition precedent" to describe the conditions at issue in this Note. Restatement (First) of Contracts § 250 (1932). Section 224 of the Restatement (Second) eliminates this language and refers to conditions precedent as "conditions." Restatement (Second) of Contracts § 224, reporter's note (1981). This Note will utilize the latter Restatement's terminology and refer to such events as "conditions."

109. "Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' all obligations which are still executory on both sides are discharged ...." U.C.C. § 2-106(3) (1998).

110. Restatement (Second) of Contracts § 224 (1981). A condition has been described as the sine qua non of a contract's fulfillment. Sahadi v. Continental Ill. Nat'l Bank & Trust Co., 706 F.2d 193, 198 (7th Cir. 1983). For the purposes of this discussion, the institution is the "obligee" and the athlete the "obligor."

111. Restatement (Second) of Contracts § 226 (1981). This Note is concerned primarily with events made conditions by agreement of the parties. The reluctance of courts to imply promises arising out of the athlete-university contract likely would carry over to a refusal to imply conditions that would discharge the athlete's duty of performance. The oral representations made to the athlete by a coach are express, as opposed to implied-in-law, conditions. Id. § 226 cmt. (c). The distinction between the two is that an express condition requires strict compliance, while implied-in-law conditions require only "substantial
exercising freedom of contract, the parties may make even the most trivial of events conditions to performance under the contract; there is no test of reasonableness or materiality.  

"Performance of a duty subject to a condition [is not] due unless the condition occurs or its non-occurrence is excused." The obligor need not tender performance until the event on which the obligor's duty is conditioned occurs. Unless the condition has been excused, the nonoccurrence of the condition discharges the obligor's duty when the condition can no longer occur, however, such non-occurrence is not a breach.

**Promises and Conditions Distinguished**

A promise, in contrast, creates a duty that must be fulfilled to avoid a breach. 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." The distinction between labeling a representation as a condition or a promise dramatically affects the rights and duties

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performance" to give rise to the obligor's duty to perform. See CALAMARI & PERILLO, supra note 48, § 11-8. In the present context, such a distinction, except for judicial recognition as discussed above, likely would have no effect on the athlete's duty to attend the institution. It is difficult to fathom a situation in which a coach "substantially complies" with the condition that he or she remain at the chosen institution as the sport's team's head coach without actually doing so. Strict compliance with such a condition is the only way in which the representation could be fulfilled.

Similarly, the failure of an institution to fulfill its condition (that the coach remain at the helm of the sport's team), by its nature, dismisses any discussion of the university's right to cure. The nonoccurrence of the condition temporarily suspends the obligor's duty to perform. RESTATEMENT (SECOND) OF CONTRACTS § 225(1) (1981). Performance still may become due if the obligee tenders performance within the agreed-upon period. Only after the time for performance has lapsed and performance cannot be accomplished are the obligor's subsequent duties discharged. *Id.* § 225(2). If the coach vacates his or her position, the only way in which the university could fulfill the condition is by re-hiring the coach. Such action is unlikely, and therefore, in effect, the athlete's duty is discharged once the coach resigns the position.

112. FARNSWORTH, *supra* note 48, § 8.2.
114. FARNSWORTH, supra note 48, § 8.2.
115. RESTATEMENT (SECOND) OF CONTRACTS §§ 225(2), 225(3) (1981); see also Jungmann & Co., Inc. v. Atterbury Bros., 163 N.E. 123 (N.Y. 1928) (holding that a party may not recover on a contract without proof that it has performed all conditions to the contract).
of the parties under the NLI. Failure of a condition will discharge
the athlete's duty to perform under the NLI (i.e., attend the
institution). If the representation is construed as a promise, the
athlete still may be held to performance under the contract, but can
bring suit to recover damages for breach.

Courts, when faced with ambiguous contracts, prefer to interpret
the questioned manifestations as promises, giving rise to a breach
action, rather than conditions, because nonoccurrence of a condition
results in forfeiture. Forfeiture is risked when the nature of the
condition is such that whether the event will occur is resolved only
after the parties have relied on the occurrence of the event in
preparing to perform their respective obligations.

This interpretive preference seemingly works against the
athlete's interests. The representation by a coach that he or she will
remain the coach of the team while the athlete attends the
institution does involve a risk of forfeiture if not complied with,
and under such an interpretive approach, is more likely to be
considered a promise giving rise to a possible action for breach.

It is important to note, however, that the contract and conditions
in question arise between the athlete and the university, not the
athlete and the coach. This distinction alters the preferential
treatment afforded to promises by the courts. The preference for

117. See Cozzillio, supra note 20, at 1359-67.
118. Forfeiture refers to the denial of compensation to the obligee that results from losing
its right to the agreed exchange under the contract after the obligee has relied substantially
on the expectation of that exchange. RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. (b)
(1981). This interpretive preference entails a "full inquiry into the 'intention of the parties
and the good sense of the case' including such factors as whether the protected party can
achieve its principal goal without literal performance ...." Sahadi v. Continental Ill. Nat'l
Bank & Trust Co., 706 F.2d 193, 198 (7th Cir. 1983) (citation omitted).
120. The forfeiture would be both the institution's loss of the player because the coach left,
and the institution's inability to have offered the held scholarship to another recruit.
121. But see supra notes 83-106 and accompanying text (discussing courts reluctance to
imply promises in the context of the athlete-university relationship).
122. See RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. (b) (1981). The impracticality
of compensation in damages also favors the conclusion that the representation is a condition.
See Parnsworth, supra note 48, § 8.4. It would be virtually impossible for a court to
determine a damage award in favor of the athlete. The court would be asked to determine
the monetary value to the athlete of the coach's presence at the university. Courts decline
to undertake such speculation. See Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542
(1932); see also, Calamari & Perillo, supra note 48, § 14.8.
interpreting terms as promises applies only when the event is within the obligee's control. The preferential rule does not apply when performance is within a third party's control. Whether the coach remains at the institution is, to an extent, within the university's control (the coach may be fired), but such control is primarily within the province of the coach. The coach may leave the position unilaterally to retire or accept a position at another university. The university has no control over such decisions. The preferential rule, therefore, should not be applied to a representation that the coach will remain at the university. Instead, the representation may be treated as a condition to the contract, which if unfulfilled discharges the athlete's duty to perform, thereby allowing the athlete to terminate the NLI.

Effect of the Parol Evidence Rule

The Rule and Application

As the condition argued by the athlete would be based upon an oral representation, not recorded in any of the contractual

124. Id.
125. For example, fifty-two Division I men's basketball teams began the 2000-2001 season with a new coach. NCAA Division I coaching changes (Sept. 14, 2000), at http://espn.go.com/ncaa/s/2000/0222373491.html. Of those fifty-two coaches, many departed to accept coaching positions with other college programs or with National Basketball Association (NBA) teams. Representative of this group are Leonard Hamilton, who left five "blue chip" recruits committed to the University of Miami to accept the head coaching position with the NBA's Washington Wizards, and Lon Kruger, who left the University of Illinois for the NBA's Atlanta Hawks. Illinois was Kruger's fourth head coaching position in his eighteen-year career. See Chad Konecky, High and Dry (June 20, 2000), available at http://espn.go.com/highschool/s/000620dry.html. Thirty-nine Division I women's basketball programs also began the season under the direction of a new head coach. See NCAA Division I Coaching Changes (Apr. 17, 2001), at http://espn.go.com/ncaw/s/coaches/new.html.
126. For example, applying the condition argument to the dispute in Fortay, the agreement between Johnson and Fortay regarding Johnson's remaining the head coach at Miami is arguably a condition to the contract. Fortay would not be under a duty to attend Miami if Johnson left the school, as he did. Johnson's departure would discharge Fortay's duty of attendance and allow Fortay to terminate the contract, including the NLI, between himself and Miami. Fortay then could have attended a different university without losing any of his eligibility. Fortay v. University of Miami, No. 93-3443, 1994 U.S. Dist. LEXIS 1865 (D.N.J. Feb. 17, 1994); supra note 106 (discussing Fortay).
documents, a brief discussion of the parol evidence rule and its applicability is necessary.  

The parol evidence rule gives legal effect to the parties’ intention to make their writing a complete expression of the agreement they reached, to the exclusion of all prior negotiations, oral or written. The rule excludes previous and contemporary agreements to a writing when the writing is completely integrated, the parol term contradicts express clauses, the term is within the scope of the writing, or the term would not naturally be excluded from the writing. Traditionally, the rule was rigidly applied; the modern trend, however, has been to limit its application.

Whether the writing is considered completely or partially integrated depends on the intent of the parties. The parties must have intended the writing to be a “complete and exclusive expression of all terms on which agreement was reached, as distinguished from merely a final expression of the terms it contains” for it to be considered completely integrated. "A document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive of the issue in the absence of credible contrary evidence." A writing cannot prove its own completeness, however, and courts allow wide latitude for inquiry into the intentions of the parties.

Regardless of the court’s determination, when an agreement is either partially or completely integrated, it supercedes inconsistent

127. For a thorough discussion of the rule, see FARNSWORTH, supra note 48, §§ 7.1 to 7.17c.
129. RESTATEMENT (SECOND) OF CONTRACTS § 210(1) (1981) (“A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.”).
130. Id. § 213(1) (“A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.”).
131. Id. § 213(2) (“A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.”).
132. Id. § 213(3) (“An integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.”).
133. FARNSWORTH, supra note 48, § 7.3.
134. Id.
136. Id.
terms of previous agreements. Paragraph 19 of the NLI expressly acknowledges that the athlete is entering a contract with the institution, and not with a particular sports team or coach. An oral agreement between a coach and athlete that the coach will remain at the institution in its current capacity is likely to be judged contrary to the terms in Paragraph 19. It seems incomprehensible to reconcile an agreement between a coach and an athlete based on the coach remaining in the position with a clause in the NLI that disregards the identity of the coach. Under this analysis, courts are unlikely to admit evidence of the oral agreement that contradicts the writing.

Exception for Conditions

An exception to the parol evidence rule exists for parties to a written agreement who orally agree that performance of the agreement is subject to the occurrence of a stated condition. Evidence is admissible to show an oral agreement that the written agreement between the parties was not to take effect, in the sense that no duty would arise until the condition occurred. Under such circumstances, the agreement is not integrated with respect to the condition. If the parties orally agreed that performance of the written agreement was subject to a condition, either the writing is not integrated or only partially integrated. Further, even the presence of an integration clause that explicitly negates oral terms, such as Paragraph 18 of the NLI, does not control the admission of such evidence, because effectiveness of the clause itself depends on being part of a valid agreement.

137. Id. § 215.
139. FARNSWORTH, supra note 48, § 7.4.
141. Id. For example, the New York Court of Appeals held that an oral agreement that a merger not become effective unless "equity expansion funds" were first procured was a condition precedent to consummation of the contemplated merger, and without such additional capital, no contract existed. Hicks v. Bush, 180 N.E.2d 425 (N.Y. 1962).
142. Paragraph 18 states: "My signature on this NLI nullifies any agreements, oral or otherwise, which would release me from the conditions stated within this NLI." 2000-2001 NLI, infra App. A, ¶ 18.
143. RESTATEMENT (SECOND) OF CONTRACTS § 217 cmt. (b) (1981); FARNSWORTH, supra note 48, § 7.4.
Courts consistently have regarded the exception for conditions precedent as necessary.\textsuperscript{144} Written loan guarantees, for example, have been held invalid because conditions precedent to the formation of the contract had not been met.\textsuperscript{145} The New York Court of Appeals explicitly stated that in the banking industry, "it ha[s] long been the rule that where the terms of the conditional delivery have not been complied with, the instrument is unenforceable and parol evidence is admissible to show that the delivery ... was a conditional delivery."\textsuperscript{146}

Parol evidence is admissible to show the intent of the parties as to whether the writing was intended to be integrated even where a merger clause bars such evidence. It is presumed that a written contract is "the final repository of the agreement of the parties" and an integration clause strengthens the presumption.\textsuperscript{147} Intent, however, is a "question of fact, and to determine the intent of the parties, it is necessary to look not only to the written instrument, but to the circumstances surrounding its execution."\textsuperscript{148} The rule that emerges from such holdings then, is that oral evidence is admissible and necessary to determine accurately the scope of the entirety of the contract.

An athlete, under the condition precedent exception to the parol evidence rule, should be allowed to introduce an oral agreement that conditions performance under the NLI. Courts are increasingly unwilling to defeat the intentions of the parties to a contract and are especially wary of standard form agreements, such as the NLI.\textsuperscript{149} Despite the harsh application of the rule in past judicial eras, the parol evidence rule should not stand as a challenge to athletes who assert that unfulfilled conditions discharge their contractual duties and allow for the NLI to be terminated.


\textsuperscript{145} See Long Island Trust Co., 344 N.E.2d at 377.

\textsuperscript{146} Id. at 496 (citations omitted).

\textsuperscript{147} See Williams, 229 A.2d at 165.

\textsuperscript{148} Id.

\textsuperscript{149} See RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. (d) (1981).
Unconscionability

The Doctrine

Justice Frankfurter, in his dissenting opinion in United States v. Bethlehem Steel Corp.,\textsuperscript{150} questioned the majority's derogation of traditional principles of fairness and equity.

[Is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principal in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? ... The law is not so primitive that it sanctions every injustice except brute force and downright fraud.\textsuperscript{151}

Later courts have echoed Justice Frankfurter's admonition:

[[In present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party ... is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly ... or because all competitors use the same clauses.\textsuperscript{152}

Justice Frankfurter's appeal for justice and equity has fallen on deaf ears in the athlete-university context. Courts, when deciding actions for breach of contract, routinely fail to acknowledge the manifest disparity in position, power, and knowledge between universities and athletes, harkening instead to institutional pleas for leniency and adherence to the doctrine of academic abstention.\textsuperscript{153}

\textsuperscript{150} 315 U.S. 289 (1942).
\textsuperscript{151} Id. at 326.
\textsuperscript{152} Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960) (internal quotations omitted) (citations omitted).
\textsuperscript{153} Academic abstention refers to a doctrine under which courts defer decisions relating to a university's proper use of discretion to the academic institutions themselves. The doctrine does not automatically preclude courts from deciding issues that arise from the
Such decisions do little to vindicate the rights of the oppressed party in such relationships, instead perpetuating continued injustice and subjugating the athlete to a situation that has been “likened to a mild form of involuntary servitude.”

Such disparity in the positions of the university and student, and the maneuverability within the bounds of the NLI enjoyed by the respective parties, indicates that an action asserting that the NLI, or at minimum Paragraph 19, is unconscionable may meet judicial acceptance. The doctrine is not limited by equity and invites courts to “police” contracts for unfairness. The problem most often faced by courts when trying to apply the doctrine is an absence of a definition in either the Restatement or the U.C.C. Perhaps the most durable definition was set forth by the court in Williams v. Walker-Thomas Furniture Co.: “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” The doctrine then, can be considered to encompass two distinct elements: (1) one party lacks meaningful choice in relation to contract terms (resulting in

student-university relationship. Student claims against universities, usually breach of contract claims alleging the university failed to educate the student, traditionally were either dismissed or narrowly construed because the claims are considered to be within the province of academia. See Cozzillo, supra note 20, at 1295-97; Educating Misguided Student Athletes, supra note 28, at 101-02. For a comprehensive discussion of the doctrine, see Virginia Davis 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 Ross v. Creighton Univ., 957 F.2d 410, 415-17 (7th Cir. 1992) (“[C]ourts are not qualified to pass an opinion as to the attainments of a student... and... courts will not review a decision of the school authorities relating to academic qualifications of the students.”); Malone v. Academy of Court Reporting, 582 N.E.2d 54, 56-57 (Ohio Ct. App. 1990) (“The quality of the education and qualifications of the teachers employed... are concerns not for the courts...”).

155. Farnsworth, supra note 48, § 4.28.
156. Id.
157. 350 F.2d 445, 449 (D.C. Cir. 1965). The “absence of meaningful choice” is commonly referred to as “procedural” unconscionability, while “unreasonably favorable terms” is referred to as substantive unconscionability. See Farnsworth, supra note 48, § 4.28. The traditional definition of unconscionability is offered in more obtuse terms. “[A] bargain was said to be unconscionable in an action at law if it was ‘such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”’ Restatement (Second) of Contracts § 208 cmt. (b) (1981) (quoting Hume v. United States, 132 U.S. 406 (1889)).
“take it or leave it” bargaining strategies), and (2) the terms themselves are unreasonably favorable to the other party.

Bargaining power, however, is not the only consideration.¹⁵⁸ Most cases of unconscionability involve both “unreasonably favorable terms” and “lack of meaningful choice,” and virtually all courts require that some substantive unfairness result from upholding the contract.¹⁵⁹ That a contract is one of adhesion therefore, is not necessarily a fatal flaw, especially when there is no element of surprise in the terms.¹⁶⁰

¹⁵⁸. See U.C.C. § 2-302 cmt. 1 (1997) (“The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”); cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948) (“We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience.”).

¹⁵⁹. See, e.g., Communications Maint. v. Motorola, 761 F.2d 1202, 1209-10 (7th Cir. 1985) (finding that no substantive unconscionability was present and therefore declining to address issues of procedural unconscionability); cf. Amy H. Kastely, Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories, 90 NW. U. L. REV. 132, 139-40 (1995) (discussing necessity that unfairness in bargaining process be present for unconscionability to occur).

A number of factors are considered by various courts in determining whether a contract is unconscionable. These factors include:

(1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in the weaker economic position; (2) a significant cost-price disparity or excessive price; (3) a denial of basic rights and remedies to a buyer of consumer goods; (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect; (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract; (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them; (8) an overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate; and (10) inequality of bargaining or economic power.

Willie v. Southwestern Bell Co., 549 P.2d 903, 906-07 (Kan. 1976) (affirming the trial court’s grant of summary judgment to Southwestern Bell on a claim of breach of contract for omitting a Yellow Pages advertisement; holding that a clause limiting the telephone company’s liability in the advertising contract was not unconscionable because it was not against the public interest) (citations omitted).

¹⁶⁰. See Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) (holding that parties may make contracts exculpating one of negligence, but the terms of such contracts must be knowingly and willingly entered into). The Weaver dissent defines an adhesion contract as “one that has been drafted unilaterally by the dominant party and then presented on a ‘take it or leave it’ basis to the weaker party, who has no real opportunity to bargain about its
A party's "take or leave it" bargaining posture is subject to the same analysis. Absent a lack of meaningful choice, use of such tactics by a party to the contract will not cause a court to find the contract unconscionable.\textsuperscript{161} If the items bargained for in the contract could be procured elsewhere on different terms or are not essential to the party claiming unconscionability, courts will generally uphold the bargain.\textsuperscript{162}

If a contract or contract term is held to be "unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."\textsuperscript{163} Such a rule overlaps with rules that render particular terms in bargains unenforceable on public policy grounds, particularly in the case of standardized agreements, and affords the sitting court discretion to strike only unconscionable terms in an otherwise valid agreement.\textsuperscript{164} This practice allows the court to effectuate the parties' intent upon entering the contract while considering the resulting fairness to the parties.

\textit{Application to the NLI}

An athlete must show both procedural and substantive unconscionability for a court to hold the NLI, or one of its terms, unconscionable. The athlete shoulders the burden of proving that the institution held a gross advantage in bargaining power, the athlete had no meaningful choice of parties with whom to contract, and therefore, entered into a contract the terms of which were


\textsuperscript{162} Id. at 50. Kastely argues for commentators and courts to take notice of the social positioning of parties to contracts and the effect such positions, particularly when great disparity characterizes the relationship, have on the substance of the contract's terms. Once such an understanding is reached, she argues, the use of multiple contract theories can move lawyers and scholars beyond "the reductive dualism of consent and nonconsent" to understand "each disparate piece of the ironic whole of contract." Kastely, supra note 159, at 141-43, 182.


\textsuperscript{164} RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. (a), (e), (g) (1981).
unreasonably favorable to the university at the time of its making.  

_Procedural Unconscionability_

The NLI is a standard form agreement, the provisions of which, by definition, cannot be adjusted to encompass the intent of the particular athlete and university. This places the athlete in a "take it or leave it" situation. The athlete is not afforded the freedom to engage in a meaningful exchange with university officials because of the virtually universal use of the NLI, and NCAA regulations that prohibit altering the document or the terms contained therein. Essentially, the collusive behavior of universities who participate in the NLIP prevents the athlete from negotiating terms in his or her best interests. NCAA rules impose penalties on athletes who do not follow NLI provisions, and should an athlete orally commit to an institution but not sign a NLI, there is no guarantee that the institution will reserve a scholarship for the athlete. The collusive nature of the NLIP forces the athlete into an unconscionable relationship, divesting the athlete of any ability to negotiate more favorable terms.

Proponents of the NLI counter with a twofold argument. They argue that the athlete, not the institution, has superior leverage in

165. See supra notes 150-64 and accompanying text.
167. Id.; NCAA MANUAL, supra note 5, § 13.10.
168. See Craswell, supra note 161.
169. Hutton, supra note 41, at C6 ("The agreement may well be voluntary, but it's necessary in the pressure-packed world of recruiting from a coach's perspective. If a recruit doesn't sign a letter-of-intent, coaches will use the scholarship for another player who will sign. The bottom line is that coaches want guaranteed commitments."). Certainly, there are exceptions to this proposition. Louisiana State University star men's basketball player Stromile Swift did not sign a NLI because he was worried about the future of the LSU program and wanted to retain the ability to attend another institution. Former University of California at Los Angeles star Ed O'Bannon's first choice was the University of Nevada Las Vegas. O'Bannon did not sign a NLI because UNLV was mired in a NCAA investigation. O'Bannon ended up at UCLA because he was uncomfortable with UNLV's predicament at the time. Such exceptions are extremely rare however. Swift and O'Bannon were both rated as two of the top recruits in the nation while in high school, and as such, could risk losing a scholarship offer from a particular institution—an offer from some university would be available. Telephone Interview with Karl Hicks, Associate Commissioner of the Southeastern Conference (Oct. 18, 2000).
the recruiting process because he or she can choose from a number of interested universities.\textsuperscript{170} This argument is flawed because although the athlete may have many suitors, the agreement in which he or she must enter to be guaranteed athletic financial aid is the same, regardless of which suitor the athlete chooses.\textsuperscript{171} The argument fails to effectuate the terms "meaningful choice." Yes, the athlete may be able to choose from a number of suitors, but if the terms of the offered contract are the same, the choice between such suitors is devoid of consequence. Wherever the athlete goes, he or she is subject to the same terms.

The second counter-argument is that the athlete is free to orally agree to attend and play for an institution without signing a NLI. Such an argument ignores the reality of intercollegiate athletics.\textsuperscript{172} One only need look at the athletic teams fielded in "big time" college athletics to recognize that the goal of the recruiting process is to maximize the talent within the sports program by recruiting as many quality players as possible. At any given time during a Duke University men's basketball game, for example, numerous former high school All-Americans and All-State players can be found sitting on the bench, watching their teammates play. It is doubtful that any university, with such a recruiting goal, would hold both a scholarship and the corresponding financial aid available for an athlete who does not sign the NLI.\textsuperscript{173} Recruiting is about certainty, and without an athlete's signature on a NLI, a school cannot be certain that the athlete will attend the institution. Faced with such uncertainty, the university will almost invariably fill that scholarship with an athlete who will sign the NLI, guaranteeing the school a player.\textsuperscript{174}

\textsuperscript{170} Id.; see also, Woods, supra note 7, at 1C.
\textsuperscript{171} See NLI GUIDELINES, supra note 18 (noting that over 500 institutions currently participate in the NLIP).
\textsuperscript{172} Tony Kornheiser, Freedom for Recruits: A Matter of Fairness, WASH. POST, Mar. 7, 1989, at B1 ("Don't tell me that the [NLI] is voluntary, because if you're not ready to sign on the appointed day, schools threaten to give your scholarship to someone else.").
\textsuperscript{173} Id.; Hutton, supra note 41, at C6.
\textsuperscript{174} See NLI GUIDELINES, supra note 18.
Substantive Unconscionability

The athlete must also satisfy the substantive element of unconscionability by showing that the NLI's terms were manifestly unfair at the time of making the contract. By the time that the athlete signs the NLI, the university officials already will have represented to the athlete that the coach will remain with the university in his or her present capacity. It is only after signing that the athlete would discover that the coach is leaving, and subsequently attempt to secure a full release from the contract's obligations.

An argument that at the time the coach leaves that paragraphs 3, 4, 5, 15, 18, and 19 of the NLI are unconscionable is apparent. Under such circumstances, it is clear that the NLI fails to effectuate the intent of both parties to the contract. Certainly, the institution's intent is effectuated—the athlete is committed to attend the university and participate in the athletic program. The athlete's intent, however, is disregarded. Oral representations made by university officials regarding the coach's continued role in the program that the athlete considered a vital aspect of the bargain, and often the sole motivation for attending the institution, are expressly contradicted by the NLI. The NLI's language, therefore, fully effectuates the university's intent, while disregarding the athlete's intent to attend an institution and play for a particular coach.

175. See 2000-2001 NLI, infra App. A. “The terms of this NLI shall be satisfied if I attend the institution named in this document for at least one academic year.” Id. ¶ 3(a).

I understand that if I do not attend the institution named within this document for one full academic year, and I enroll in another institution participating in the NLI program, I may not represent the latter institution in intercollegiate athletics competition until I have completed two full academic years of residence at the latter institution. . . . I shall be charged with the loss of two seasons of intercollegiate athletics competition in all sports.

Id. ¶ 4. Paragraph 5 allows the athlete to enter into a QRA with the chosen institution, but nonetheless provides that, “if I receive this qualified release, I shall not be eligible at a second NLI institution during my first academic year of residence there, and I shall lose one season of competition.” Id. ¶ 5. “No additions or deletions may be made to this NLI or the Qualified Release Agreement.” Id. ¶ 15. “My signature on this NLI nullifies any agreements, oral or otherwise, which would release me from the conditions stated within this NLI.” Id. ¶ 18. “I understand that I have signed this NLI with the institution and not for a particular sport or individual. For example, if the coach leaves the institution or the sports program, I remain bound by the provisions of this NLI.” Id. ¶ 19.
The same argument, though perhaps more difficult to make, is also applicable at the time the NLI was signed. The athlete did not yet know of the coach's intent to vacate the position, but even so, the NLI's terms severely restrict the athlete's rights while granting the university rights and privileges, virtually carte blanche. The athlete is prohibited from signing a professional sports contract, leaving the chosen university without having attended for one full year, signing more than one NLI, falsifying any part of the NLI, adding or deleting terms to the NLI or QRA, and most importantly with respect to this Note, terminating the NLI before matriculating at the chosen institution because a coach leaves the institution or sports program. Conversely, the institution is prohibited from altering the terms of the NLI and having a representative present when the athlete signs the NLI. The terms of the agreement, prima facie, are unreasonably favorable to the stronger party, the chosen university.

The substantive and procedural unconscionability of the NLI gives courts two options. Courts may opt to invalidate the writing as a whole, finding that the unconscionability infuses the entire contract. A second option would be to invalidate only those clauses that restrict the athlete's ability to terminate or alter the NLI when the coach, a primary reason for the athlete's choice, moves to greener pastures despite university oral representations that the coach would remain.

**CONCLUSION**

Many athletes are drawn to schools where they will be able to maximize their athletic talents under the tutelage of a particular coach. The desire to study under a certain individual is no different in athletics than in academia or the performing arts. An aspiring

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176. Id. ¶ 2(a).
177. Id. ¶ 3.
178. Id. ¶ 8.
179. Id. ¶ 12.
180. Id. ¶ 15.
181. Id. ¶ 19.
182. Id. ¶ 15.
183. Id. ¶ 20.
musician may desire to study under a particular instructor to further refine his or her musical talents. If the instructor were to leave the institution before the student matriculated, that student would be free to follow the teacher to another institution, risking only the nominal deposit paid to reserve the student's place in the entering class. Why should the same not be true for athletes? The intent of the individual is the same in both situations, yet the athlete, if he or she follows the instructor, must sacrifice two full years of eligibility for a move that generally costs a nonathlete student a nominal deposit and perhaps some scholarship money. Fine arts majors who do not matriculate at their first chosen institution do not face such unreasonable penalties.

The NLIP was originally developed to protect athletes from the travesties and aggravation of an out-of-control recruiting process. It has accomplished this purpose. The NCAA and CCA should be commended for reducing the pressure placed on high school athletes by college recruiters. The NLI, in some respects, acts as a shield for the athlete. After signing, the athlete is protected from further inquiries and interruptions by NCAA regulations.\textsuperscript{184} For the most part, the intrusions faced by recruited athletes cease.

The same document that isolates the signed athlete from recruiting efforts, however, also unfairly restricts the athlete's ability to pursue his or her dreams and ambitions. By failing to recognize the importance of the coach in an athlete's decision to attend a particular institution, the NLI falls far short of effectuating the athlete's intent, while affording the chosen institution the full benefit of its "bargain."

Courts consistently recognize that the athlete-university relationship is built upon such a bargain, upholding actions brought by athletes for breach of express promises. The NLI is a contract of adhesion that, by its terms, restricts the athlete's ability to negotiate and enter a true bargained-for agreement. Athletes are faced with a take-it-or-leave it situation, and currently, their only avenue for appeal is the CCA, a body directed by the same

\textsuperscript{184} See NCAA MANUAL, supra note 5, § 13.1.
university administrators that perpetuate use of the NLI. Actions for breach under the NLI, therefore, must be based upon oral representations.

Courts, however, have failed to recognize actions that allege a university's breach of implied contractual terms. University officials thereby are given license to abandon athletes in a variety of ways, including making changes in athletic department personnel that directly contradict representations made to the athlete, without fear of judicial reprisal. When such representations are made, athletes must look to alternative causes of action, such as alleging an unfulfilled condition or asserting that the NLI is unconscionable, to vindicate their rights and effectuate their intentions when they signed the NLI and bound themselves to the chosen university.

Alleging that the NLI is unconscionable or that certain express conditions are unfulfilled may provide the “end run” that athletes need to level the judicial playing field, and may supply relief from their duties under the NLI when coaches vacate their positions subsequent to the athlete's NLI signing. The representations communicated to athletes in the course of the recruiting process have yet to be considered implied promises that give rise to breach actions, and recharacterization of the representations as conditions may find greater judicial acceptance.

Attacking the NLI as unconscionable may meet judicial approval because of the inherent disparity in position and bargaining power assumed by universities and athletes. Universities “lock-up” athletes who have little free choice in whether to accept the terms of the NLI, based on representations by coaches and other athletic department officials. Conversely, the same coaches and represented institutions retain their professional mobility, seemingly without obligation to the athletes. Such inequities deserve judicial recognition.

Athletes trapped in undesirable situations through no fault of their own should continue to assert actions for breach of contract based on parol promises made by subsequently departed coaches.

185. See supra notes 32-45 and accompanying text.
Perhaps courts will finally recognize the need for judicial activism in this arena. Until such recognition is granted, however, the doctrines of unconscionability and failure of conditions to a contract may assist in effectuating the intent of such athletes when they entered into bargains with their chosen universities, and may afford athletes the same opportunities granted to nonathletic scholarship recipients.

Michael J. Riella
TEXT OF THE 2001-2002 NLI

1. Initial Enrollment in Four-Year Institution. This NLI is applicable only to prospective student-athletes who will be entering four-year institutions for the first time as full-time students, except for 4-2-4 transfers who are graduating from junior college as outlined in paragraph 8-b. With the exception of midyear transfer students in football, no prospective student-athlete enrolling at midyear shall sign a NLI.

2. Financial Aid Requirement. I must receive in writing an award including athletics financial aid for the entire 2001-2002 academic year from the institution named in this document at the time of my signing. A midyear football junior college transfer must receive athletics financial aid for the remainder of the 2000-2001 academic year. The award letter shall list the terms and conditions of the award, including the amount and duration of the financial aid. If such conditions are not met, this NLI shall be declared null and void, and the institution which submits such a letter for signature to a prospect shall be in violation of the NLI Program and may be subject to appropriate sanctions.
   a. Professional Sports Contract. If I sign a professional sports contract, I will remain bound by the provisions of this NLI in all other sports, even if the institution named in this document is prohibited from making athletically-related financial aid available to me in the sport in which I signed under NCAA rules.

   a. One-year Attendance Requirement Met. The terms of this NLI shall be satisfied if I attend the
institution named in this document for at least one academic year.

b. Junior College Graduation. The terms of this NLI shall be satisfied if I graduate from junior college after signing a NLI while in high school or during my first year of full-time enrollment in junior college, provided it is not the year I am scheduled to graduate from junior college.

4. Basic Penalty. I understand that if I do not attend the institution named within this document for one full academic year, and I enroll in another institution participating in the NLI program, I may not represent the latter institution in intercollegiate athletics competition until I have completed two full academic years of residence at the latter institution. Further, I understand that I shall be charged with the loss of two seasons of intercollegiate athletics competition in all sports, except as otherwise provided in this NLI. This is in addition to any eligibility expended at the institution at which I initially enrolled.

a. Early Signing Period Penalties. A prospective student-athlete who signs a NLI during the early signing period (November 8-15, 1999) will be ineligible for practice and competition in football for a two-year period and also shall be charged with the loss of two seasons of competition in the sport of football.

5. Qualified Release Agreement. A qualified release agreement shall be provided in the event the institution and I mutually agree to release each other from any obligations to the NLI. I understand that if I receive this qualified release, I shall not be eligible for competition at a second NLI institution during my first academic year of residence there, and I shall lose one season of competition. This Qualified Release Agreement form must be signed by me, my parent or legal guardian, and the Director of Athletics of the institution named in this document, and I must file a copy of the Qualified Release Agreement with
the conference which processes this NLI. (A Qualified Release Agreement may be obtained from the institution named in this document.)

a. Authority to Release. A coach is not authorized to void, cancel or give a release to this NLI.

b. Extent of the Qualified Release Agreement. The provisions of the Qualified Release Agreement shall apply to all participating institutions and shall not be conditional or selective by institution.

6. Appeal Process. I understand that the NLI Steering Committee has been authorized to issue interpretations, settle disputes and consider petitions for a full release from the provisions of this NLI where there are extenuating circumstances. I further understand that its decision may be appealed to the NLI Appeals Committee, whose decision shall be final and binding.

7. Letter Becomes Null and Void. This NLI shall be declared null and void if any of the following occurs:

a. Admissions Requirement. This NLI shall be declared null and void, if the institution with which I signed notifies me in writing that I have been denied admission or by the opening day of classes, has failed to provide me with written notice of admission, provided I have submitted a complete admission application.

   1. It is presumed that I am eligible for admission and financial aid until information is submitted to the contrary. Thus, it is mandatory for me, upon request, to provide a transcript of my previous academic record and an application for admission to the institution named in this document.

   2. If I am eligible for admission, but the institution named in this document defers admission to a subsequent term, this NLI shall be
rendered null and void. However, if I defer my admission, the NLI remains binding.

b. **Eligibility Requirements.** This NLI shall be declared null and void if, by the opening day of classes in the fall of 2001, I have not met (a) the institution’s requirements for admissions, (b) its academic requirements for financial aid to athletes, OR (c) the NCAA requirement for freshman financial aid (NCAA Bylaw 14.3) or the junior college transfer rule.

1. If I become a nonqualifier (per NCAA Bylaw 14.3), this NLI shall be rendered null and void.

2. If I am a midyear junior college football transfer signee, the NLI remains binding for the following fall term if I was eligible for admission and financial aid and met the junior college transfer requirements for competition for the winter or spring term, but chose to delay my admission.

c. **One-Year Absence.** This NLI shall be null and void if I have not attended any institution (or attended an institution, including a junior college, that does not participate in the NLI Program) for at least one academic year after signing this NLI, provided my request for athletics financial aid for a subsequent fall term is not approved by the institution with which I signed. To receive this waiver, I must file with the appropriate conference commissioner a statement from the Director of Athletics at the institution named in this document that such financial aid will not be available to me for the requested fall term.

d. **Service in the U.S. Armed Forces.** Church Mission. This NLI shall be null and void if I serve on active duty with the armed forces of the United States or an official church mission for at least eighteen (18) months.
e. **Discontinued Sport.** This NLI shall be null and void if my sport is discontinued by the institution named in the document.

f. **Recruiting Rules Violation.** If the institution (or a representative of its athletics interests) named in this document violated NCAA or conference rules while recruiting me, as found through the NCAA or conference enforcement process or acknowledged by the institution, this NLI 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.

8. **Only One Valid NLI Permitted.** I understand that I may sign only one valid NLI, except as listed below.

   a. **Subsequent Signing Year.** If this NLI is rendered null and void under Item 7, I remain free to enroll in any institution of my choice where I am admissible and shall be permitted to sign another NLI in a subsequent signing year.

   b. **Junior College Exception.** If I signed a NLI while in high school or during my first year of full-time enrollment in junior college, I may sign another NLI in the signing year in which I am scheduled to graduate from junior college. If I graduate, the second NLI shall be binding on me; otherwise, the original NLI I signed shall remain valid.

9. **Recruiting Ban After Signing.** I understand that all participating conferences and institutions are obligated to respect my signing and shall cease to recruit me upon my signing this NLI. I shall notify any recruiter who contacts me that I have signed. Once I enroll in the institution with which I signed, the provisions of NCAA bylaw 13.1.1.3 shall govern.
10. Institutional Signatures Required Prior to Submission. This NLI must be signed and dated by the Director of Athletics or his/her authorized representative before submission to me and my parents (or legal guardian) for our signatures. This NLI may be mailed prior to the initial signing date. When a NLI is issued prior to the initial signing date, the "date of issuance" shall be the initial signing date and not the date that the NLI was signed or mailed by the institution.

11. Parent/Guardian Signature Required. My parent or legal guardian is required to sign this NLI if I am less than 21 years of age at the time of my signing, regardless of my marital status. If I do not have a living parent or a legal guardian, this NLI may be signed by the person who is acting in the capacity of a guardian. An explanation of the circumstances shall accompany this NLI.

12. Falsification of NLI. If I falsify any part of this NLI, or if I have knowledge that my parent or guardian falsified any part of this NLI, I understand that I shall forfeit the first two years of my eligibility at any NLI participating institution as outlined in Item 4.

13. 14-Day Signing Deadline. If my parent or legal guardian and I fail to sign this NLI within 14 days of issuance to me, it will be invalid. In that event, another NLI may be issued within the appropriate signing period. (NOTE: This does not apply to the early signing period).

14. Institutional Filing Deadline. This NLI must be filed with the appropriate conference by the institution named in this document within 21 days after the date of final signature or it will be invalid. In that event, another NLI may be issued.

15. No Additions or Deletions Allowed to NLI. No additions or deletions may be made to this NLI or the Qualified Release Agreement.
16. **Official Time for Validity.** This NLI shall be considered to be officially signed on the final date of signature by myself or my parent (or guardian). If no time of day is listed, then 11:59 p.m. is presumed.

17. **Statute of Limitations.** This NLI shall carry a four-year statute of limitations.

18. **Nullification of Other Agreements.** My signature on this NLI nullifies any agreements, oral or otherwise, which would release me from the conditions stated within this NLI.

19. **If Coach Leaves.** I understand that I have signed this NLI with the institution and not for a particular sport or individual. For example, if the coach leaves the institution or the sports program, I remain bound by the provisions of this NLI.

20. **Coaching Contact Prohibited at Time of Signing.** A coach or an institutional representative may not hand-deliver this NLI off campus or be present off campus at the time I sign it. This NLI may be delivered by express mail, courier service, regular mail or facsimile machine. An NLI transmitted to an institution by facsimile machine shall be considered valid.
LEVELING THE PLAYING FIELD

APPENDIX B

NATIONAL LETTER OF INTENT PROGRAM
INSTITUTIONAL COMMITMENT

As a participating institution in the National Letter of Intent Program, we agree to adhere to all regulations outlined in the National Letter of Intent. Specifically, we understand that the basic purpose of the NLI is to limit recruiting pressure on prospective student-athletes and to reduce recruiting time and expense.

With this understanding, our coaches agree to fully explain the NLI to each prospective student athlete during the recruiting process and to specifically inform all prospects of the penalties associated with not fulfilling the NLI. We agree that providing this information to a prospect prior to his/her signing an NLI will alleviate many future misunderstandings.

In addition, we fully understand that we are obligated to adhere to the recruiting ban provision of the NLI, which includes the prohibition of institutional staff members from telephoning prospects who have signed a valid NLI. We are required to respect a student-athlete’s signing with another institution and shall cease to recruit any student-athlete who has signed with another institution. Finally, we understand that the NLI Steering Committee has the authority to enforce the recruiting ban provision of the NLI.

Institution: __________________________

Signature - Director of Athletics: __________________________

Date: __________________________

PLEASE COMPLETE AND RETURN TO YOUR CONFERENCE OFFICE.
QUALIFIED RELEASE AGREEMENT

_________________________ signed a
_________________________ National Letter of Intent certifying his/her
decision to enroll at __________________ for the
_________________________ academic year.

It has been mutually agreed by the student-athlete, his/her parents or legal guardian, and the Director of Athletics of the above named institution that the student receiving this properly executed Qualified Release Agreement shall not be eligible for competition at the second NLI member institution during the first academic year of residence and shall be charged with the loss of one season of competition.

REDUCTION OF BASIC PENALTY: The student-athlete, his/her parent or legal guardian, and the Director of Athletics release each other from any commitment or liability to each other as the result of the National Letter of Intent. All parties state that they have read this Qualified Release Agreement, fully understand its meaning and effect, know it is an unconditional release in full as to each other, and that they have voluntarily signed it. This Release shall be effective immediately.

SIGNED

_________________________  _________________________
Student-Athlete                   Director of Athletics

_________________________
Student-Athlete’s Social Security Number

_________________________
Parent or Legal Guardian
Student-Athlete’s Permanent Street Address

City, State, Zip Code

Date Signed          Date Signed

This form must be completed in triplicate. One copy should be retained by the student-athlete, one copy by the institution, and one copy sent to the conference which processed the original national letter of intent.

National Letter of Intent
2201 Richard Arrington, Jr. Blvd. N.
Birmingham, Alabama 35203-1103
Phone: (205) 458-3000
Fax: (205) 458-3031