THE NCAA LETTER OF INTENT: A VOIDABLE AGREEMENT FOR MINORS?

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INTRODUCTION

The National Letter of Intent (NLOI) program provides member schools a systematic way of recruiting student athletes.[1] But are these letters of intent binding on prospective players who

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[1] For an overview of the NLOI program, see Stacey Meyer, Comment, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L. REV. 227, 227-31 (2004); Michael J. Riella, Note, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2185-88 (2002).

sign the agreement when they are minors? In 2008, a female basketball player signed a letter of intent to play for a Division I regional university.[2] Subsequently, the head coach for women's basketball at the university announced that she would be leaving to coach at a larger Division I school.[3] With the departure of the coach, the prospective player no longer wished to play for the university with which she had signed, and sought a release from her commitment; however, the university refused to release her. So she filed suit, claiming that her letter was invalid because she was not yet eighteen years old when she signed it, and thus under state law, the agreement was not binding.[4] A basic principle of contract law provides that minors can disaffirm agreements entered into during their minority.[5] Although the university ultimately released her from her letter of intent, the case highlights a potential problem with the NLOI program. While it is designed in part to inject rationality and order into a potentially chaotic recruiting process, the common law's infancy doctrine protects minors from improvident agreements made with potentially predatory adults.[6] This paper analyzes the right of a minor to disaffirm contracts in conjunction with the NLOI program.

I. THE NCAA NATIONAL LETTER OF INTENT PROGRAM

The National Collegiate Athletic Association (NCAA) is a well-funded, non-profit organization with over 1200 members that administers athletic issues in institutions of higher education.[7]

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[2] Tim Stevens, *Letters of Intent Might Not Stand Up*, NEWS & OBSERVER (Sept. 22, 2009 7:40 AM), http://www.newsobserver.com/2009/09/18/58399/letters-of-intent-might-not-stand.html; *see also* Luke DeCock, *Letter of Intent in College Athletics Is Faulty*, NEWS & OBSERVER (Aug. 8, 2010 4:49 AM), http://www.newsobserver.com/2010/08/08/619278/letter-of-intent-faulty.html (discussing the case and the issue of minors and letters of intent).

[3] DeCock, *supra* note 2.

[4] Stevens, *supra* note 2.

[5] JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 8.1-.9 (4th ed. 1998). Minors may also have a reasonable time to disaffirm a contract after reaching majority age. Sisneros v. Garcia, 613 P.2d 422, 423 (N.M. 1980).

[6] For a discussion of minority as a defense to an otherwise binding contractual arrangement, see *infra* notes 32-58 and accompanying text.

[7] GLENN M. WONG, ESSENTIALS OF SPORT LAW 17 (4th ed. 2010). In 2009–2010, the NCAA's total revenue stream exceeded $700,000,000, and its television revenue

Although the organization is voluntary, member schools are bound by the organization's regulations and must administer their athletic programs in accordance with NCAA rules.[8] The NCAA was founded in 1906 as a result of a conference called by President Theodore Roosevelt with representatives from thirteen colleges and universities in order to address the brutality of the sport of football and to reform the rules of college football.[9] The NCAA was primarily a discussion group and rules-making body, until 1921 when the association expanded its operations and conducted its first championship tournament.[10] With the growth and divergence in the number of college athletics programs, the NCAA, in 1973, divided its member institutions into three legislative and competitive divisions—I, II, and III.[11] As the NCAA organization evolved, so did its commercial endeavors, its presence in the media outlets, and commensurately its revenue stream.[12]

The NLOI program was established to bring order to what otherwise could be a free-for-all in the recruitment process.[13] A group of seven conferences in 1964 created the NLOI program to alleviate recruiting excesses that became common with "increased television exposure in the 1940s and 1950s."[14] To stop schools

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alone amounted to $638,980,000. *Id.* at 21. *See also* Orion Riggs, *The Facade of Amateurism: The Inequities of Major-College Athletics*, 5 KAN. J.L. & PUB. POL'Y 137, 138-40 (1996) (discussing the big business of college athletics).

[8] WONG, *supra* note 7, at 165. For a history of the regulatory and enforcement structure of the NCAA, see Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 490-93 (1995).

[9] The Intercollegiate Athletic Association of the United States was formed later in 1906 and "took its present name, the NCAA, in 1910." *History*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history (last visited Nov. 1, 2011).

[10] *Id.* Eventually, more rules committees were formed and more championship series were created. *Id.*

[11] *Id.* "Five years later, Division I members voted to create subdivisions I-A and I-AA (renamed the Football Bowl Subdivision and the Football Championship Subdivision in 2007) in football." *Id.*

[12] Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 546-50 (2010).

[13] For an overview of the NCAA's regulation of recruiting, see 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORT INDUSTRIES § 1.41-.43 (1986).

[14] Michelle Brutlag Hosick, *History of the National Letter of Intent*, NCAA (Feb. 2, 2011 5:00 PM), http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent.

from luring away football players after they had enrolled on other campuses, the group formed a plan to issue *letters of intent* "that would keep other conference coaches from recruiting a student-athlete once he declared his intent to participate at a specific school."[15] For a time, the documents were recognized only within a conference, but subsequently a voluntary inter-conference letter of intent program was developed by the Collegiate Commissioners Association (CCA), which subsequently initiated a *National* Letter of Intent to ensure that a student-athlete would attend an institution for one academic year in return for financial aid.[16] Today, the NCAA Eligibility Center, which handles most issues surrounding prospective student-athletes, administers the NLOI program.[17] Though the program was originally created to address issues with the recruitment of football student-athletes, all student-athletes recruited for any NCAA-sponsored sport now participate.[18]

The National Letter of Intent is a document issued by the CAA and subscribing NCAA-member institutions to prospective student-athletes in order to establish the commitment to attend a particular institution.[19] In actuality, the various conferences play a greater role in administering the program than the NCAA, although it might behoove the NCAA to exercise more oversight.[20] Currently, there are 620 participating Division I and Division II institutions and over 37,000 prospective student-athletes who sign a NLOI each year.[21] Once signed, if student-athletes wish to change schools, then they must participate in at least one practice in their sport or attend at least one class at their initially selected

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[15] *Id.*

[16] *Id.*

[17] The NCAA administers the NLOI program; however, only the CCA has the power to make changes to the program, which is still governed by the CCA through a group of four, five-member committees: NLOI Policy and Review Committee, Division I Appeals Committee, Division II Review Committee and Division II Appeals Committee. *Id.*

[18] *Id.*

[19] Gil Fried & Michael Hiller, *ADR in Youth and Intercollegiate Athletics*, 1997 BYU L. REV. 631, 643-44.

[20] Meyer, *supra* note 1, at 243-44.

[21] *Quick Reference Guide to the NLI*, NCAA 1-2, http://www.ncaa.org/wps/wcm/connect/85bbf0004e0dc6ec94fef41ad6fc8b25/NLI+Guide+201011.pdf?MOD=AJPERES&CACHEID=85bbf0004e0dc6ec94fef41ad6fc8b25 (last visited Nov. 1, 2011).

institution, sit out a year in their sport prior to enrolling at another institution, and complete a full-time academic program for a full year at the new institution before competing in their sport again.[22] Enrolling in another institution within one year of the execution of the agreement "results in intercollegiate ineligibility for two years, unless the initial institution formally releases the student."[23] In other words, "the *basic penalty* for not attending" the institution with which the student signed the NLOI agreement "for one academic year (two semesters or three quarters) is the loss of one season of competition in all sports and a required one academic year in residence at the next NLOI member institution before being able to represent another NLOI institution in intercollegiate athletics competition."[24]

If an institution chooses not to release a prospective student-athlete from the NLOI, the prospective student-athlete may appeal the institution's decision by submitting a NLOI Appeals Form to the NLOI office within thirty days after the institution denied the release request.[25] The institution will then have an opportunity to respond in writing to the student's appeal.[26] Following receipt of the institutional response, the NLOI committee (NLOI Policy and Review Committee for Division I institutions or the Division II Review Committee) will review the materials and render a decision.[27] This decision may be appealed to the NLOI Appeals Committee within thirty days of the date of the appeal decision letter, whose decision is final and binding on member institutions.[28] If the NLOI Appeals Committee upholds

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[22] Fried & Hiller, *supra* note 19, at 644.

[23] Leroy Pernell, *Drug Testing of Student Athletes: Some Contract and Tort Implications*, 67 DENV. U. L. REV. 279, 284 (1990) (discussing the NLOI as a contractual obligation). The Release Request form is available online. *National Letter of Intent Release Request Form*, NCAA 1-2, http://www.ncaa.org/wps/wcm/connect/6d4f0c80486cc85b9444b74c8af46e6f/Release%2BRequest%2BForm%2B911.pdf?MOD=AJPERES&CACHEID=6d4f0c80486cc85b9444b74c8af46e6f (last visited Nov. 1, 2011) [hereinafter *Release Request Form*].

[24] *Release Request Form*, *supra* note 23, at 1 (emphasis added).

[25] *National Letter of Intent Penalty Provisions & Appeals Process*, NCAA 1, http://www.ncaa.org/wps/wcm/connect/2f47b5004e0dc6de94eff41ad6fc8b25/Appeals+Process+Sheet+%2810.01.10%29.pdf?MOD=AJPERES&CACHEID=2f47b5004e0dc6de94eff41ad6fc8b25 (last visited Nov. 1, 2011).

[26] *Id.*

[27] *Id.*

[28] *Id.*

the decision in favor of an institution, the student-athlete may transfer to another institution, but will not be eligible to participate in intercollegiate athletics for one year.[29] Any institution that signs a player who was not properly released has violated the recruiting ban established under the NLOI program and would be subject to sanctions.[30]

The NLOI program also established specific signing periods for prospective student athletes, in both the fall and spring of a high school athlete's senior year.[31] Predictably, many student-athletes will not yet have reached their eighteenth birthday when they sign NLOI agreements on these prescribed dates. So assume the athlete changes his or her mind subsequent to signing the NLOI agreement. Assume also that the institution refuses to release the athlete, and the student-athlete loses his or her appeal of the institution's decision to the NLOI Committee. Could the student athlete, who is a minor, not simply disaffirm the contract?

II. CONTRACTUAL CAPACITY: THE MINOR'S COMMON LAW RIGHT TO DISAFFIRM

A. Overview

Contractual capacity is one of the requirements for a valid, enforceable contract.[32] A lack of contractual capacity makes the agreement voidable at the option of the person lacking capacity.[33]

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[29] *Id.* Last year, fewer than 700 prospective student-athletes, who signed a NLOI, requested releases. Of these, thirty did not obtain a release. Hosick, *supra* note 14.

[30] The NLOI acknowledges that all participating conferences and institutions are obligated to respect the agreement and cease recruiting of the signed athlete. *National Letter of Intent*, NCAA 1-3 (Oct. 1, 2008), http://sportsillustrated.cnn.com/2009_images/letterofintent.pdf.

[31] *Signing Dates*, NCAA, http://www.ncaa.org/wps/ wcm/connect/nli/nli (last visited Nov. 1, 2011).

[32] RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981). For a summary of capacity as a contractual requirement and the common law rules applied to minors see 42 AM. JUR. 2D *Infants* §§ 39-136 (2010).

[33] Along with minors, persons who are mentally incompetent or intoxicated also lack contractual capacity. RESTATEMENT (SECOND) OF CONTRACTS §§ 15-16 (1981); *see* Hedgepeth v. Home Sav. & Loan Ass'n, 361 S.E.2d 888, 889-90 (N.C. Ct. App. 1987) (discussing the requirements for disaffirmance by mentally incompetent parties); *see also* First State Bank of Sinai v. Hyland, 399 N.W.2d 894, 896 (S.D. 1987) (discussing the circumstances under which a party can avoid a contract based on intoxication). Historically, married women also lacked capacity to take, hold, or convey property, a

The common law protects minors from the making of improvident contracts during their infancy by permitting them to rescind, or *disaffirm*, such contracts.[34] What is referred to as the *Infancy Doctrine* can be traced to the thirteenth century, while its basic concepts "have been in place since at least the fifteenth century."[35] This contractual defense permits minors to disaffirm otherwise binding agreements during their minority and for a reasonable time after they reach the age of majority, which is eighteen years old in most states.[36] Disaffirmance must be of the entire contract and not just an objectionable part.[37]

The obligation of the minor upon disaffirmance is to return the consideration the minor received in the transaction in order to receive the consideration the minor exchanged, such that the status quo ante is restored. [38] Typically, there are few complications if the power of avoidance is exercised at the executory stage, because there has been no exchange of consideration, only potentially non-recoupable reliance expenditures incurred by the competent party. However, if the consideration is damaged, destroyed, or consumed in some way, state law may impose a make-whole obligation, requiring payment

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restriction which was removed by state legislatures through the enactment of Married Women's Property Acts. Peddy v. Montgomery, 345 So. 2d 631, 633-34 (Ala. 1977).

[34] Mellott v. Sullivan Ford Sales, 236 A.2d 68, 70 (Me. 1967). Similar protection is afforded to minors by the civil law in Louisiana. Melvin John Dugas, *The Contractual Capacity of Minors: A Survey of the Prior Law and the New Articles*, 62 TUL. L. REV. 745 (1988) (discussing the Civilian Code and Louisiana law). For a discussion of the infancy doctrine and comparison of the law of the United States and England, see Simon Goodfellow, Note, *Who Gets the Better Deal?: A Comparison of the U.S. and English Infancy Doctrines*, 29 HASTINGS INT'L & COMP. L. REV. 135 (2005).

[35] Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 290 (2006).

[36] RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

[37] CALAMARI & PERILLO, *supra* note 5, at § 8.4; *see also* Langstraat v. Midwest Mut. Ins. Co., 217 N.W.2d 570, 571 (Iowa 1974) (refusing to permit selective disaffirmance of provisions in a contract for insurance).

[38] Quality Motors, Inc. v. Hays, 225 S.W.2d 326, 328 (Ark. 1949) (stating the rule that a minor may disaffirm contracts by returning the consideration received as is available); *see also* Robertson v. King, 280 S.W.2d 402, 404 (Ark. 1955) (holding that the minor was entitled to recover the reasonable market value of the car at the time of purchase, since the consideration given by the minor was no longer available).

of depreciation or damages by the minor upon disaffirmance,[39] although many states require no more than that the minor return the consideration, if available, without consequence.[40]

If minors misrepresent their age, the requirements upon disaffirmance will also depend upon state law,[41] although the common law rule provided that falsely representing that one had capacity did not confer capacity.[42] Nevertheless, there is generally a greater obligation under state law to make restitution in cases of misrepresentation, and some states do not allow avoidance.[43]

B. Limitations

There are other common law and statutory restrictions on minors' ability to disaffirm contracts.[44] For example, the law in most states holds minors liable for the reasonable value of the consideration provided if the contract is for something that is *necessary* to maintain their station in life, in order to encourage

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[39] *See* Dodson v. Shrader, No. 89-128-II, 1989 Tenn. App. LEXIS 683, at *21 (Tenn. Ct. App. Oct. 20, 1989) (stating the rule that permits reasonable compensation for the use of the item, or for depreciation, or for willful or negligent damage by the minor).

[40] *See, e.g.*, Swalberg v. Hannegan, 883 P.2d 931, 932-33 (Utah Ct. App. 1994) (holding that state law does not require the minor to restore a plaintiff to his pre-contractual status); Halbman v. Lemke, 298 N.W.2d 562, 567 (Wis. 1980) (holding that a disaffirming minor need not make restitution).

[41] *See, e.g.*, Keser v. Chagnon, 410 P.2d 637, 639-41 (Colo. 1966) (concluding that while misrepresenting one's age does not destroy the right to disaffirm, damages incurred as a result of the false representation may be deducted); Doenges-Long Motors, Inc. v. Gillen, 328 P.2d 1077, 1081-82 (Colo. 1958) (allowing recovery for the damages that flowed from the misrepresentation); Haydocy Pontiac, Inc. v. Lee, 250 N.E.2d 898, 900 (Ohio Ct. App. 1969) (concluding that an infant who induces the contract through false representation may not disaffirm the contract without returning the consideration to the other party).

[42] Sims v. Everhardt, 102 U.S. 300, 313 (1880) ("[A] fraudulent representation of capacity cannot be an equivalent for actual capacity.").

[43] For example, a state statute may prohibit disaffirmance. KAN. STAT. ANN. § 38-103 (2009) (prohibiting disaffirmance when, because of the minor's own misrepresentations as to his majority or involvement in business as an adult, the other party had reason to believe the minor was capable of contracting); *see also* Myers v. Hurley Motor Co., 273 U.S. 18, 22, 26-27 (1926) (allowing a set-off for depreciation when the minor only appeared to be of age but made no affirmative misrepresentation). The Supreme Court stated, "The defense, in effect, is that the plaintiff was guilty of tortious conduct to the injury of the defendant in the transaction out of which his own cause of action arose. In such case it is well settled that the relief is by way of recoupment." *Myers*, 273 U.S. at 27.

[44] CALAMARI & PERILLO, *supra* note 5, at § 8.3.

parties to enter into such agreements without fear of the minor exercising their power of disaffirmance.[45] Therefore, for example, if the item purchased is deemed to be a necessary, the minor would either be liable for its reasonable value, or if allowed to disaffirm, for the reasonable value of its use and depreciation.[46] This caveat is codified in some states.[47]

Some states also specify, by statute, other types of contracts that minors cannot avoid.[48] In order to bring "certainty and finality" with respect to certain dealings, legislatures prohibited minors from avoiding some obligations,[49] such as contracts for insurance[50] and student educational loans.[51] Other state laws provide a process for court approval of minors' contracts, resulting in a valid contract, but with the interest of protecting minors from

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[45] *See, e.g.*, Marshall v. Hous. Auth., 866 F. Supp. 999, 1005 (W.D. Tex. 1994) (determining that "whether or not lodging is a necessary is a question of fact to be determined by the jury"); Young v. Weaver, 883 So. 2d 234, 240-41 (Ala. Civ. App. 2003) (holding that an apartment was not a necessity because the minor was able to return to her parents' home at any time); Schmidt v. Prince George's Hosp., 784 A.2d 1112, 1125 (Md. 2001) (finding the minor liable for necessary medical treatment associated with a car accident when parents diverted insurance proceeds); Cidis v. White, 336 N.Y.S.2d 362, 363 (Nassau Cnty. Dist. Ct. 1972) (determining that contact lenses are necessaries and requiring the minor to pay their fair value); Gastonia Pers. Corp. v. Rogers, 172 S.E.2d 19, 24-25 (N.C. 1970) (concluding that the services of an employment agency could constitute a necessary if reasonably required in order to enable the minor to provide for himself and his dependents).

[46] Rose v. Sheehan Buick, Inc., 204 So. 2d 903, 905 (Fla. Dist. Ct. App. 1967) (holding that a car was a necessary item for the minor to carry out his business).

[47] *See, e.g.*, IDAHO CODE ANN. § 32-104 (2011); MONT. CODE ANN. § 41-1-305 (2010); N.D. CENT. CODE § 14-10-12 (2010).

[48] 42 AM. JUR. 2D *Infants* § 46-56 (2010); *see, e.g.*, MO. REV. STAT. § 431.055 (2010) (allowing sixteen year olds, in certain circumstances, to contract for housing, employment, the purchase of an automobile, student loans, admission to high school or postsecondary school, medical care, establishing bank accounts, or services relating to being a victim of domestic or sexual violence). For a discussion of the relevance of such statutory exceptions to the NCAA NLOI program, see *infra* notes 107-23 and accompanying text.

[49] Cunningham, *supra* note 35, at 290; *see also* KY. REV. STAT. ANN. § 384.090 (West 2010) (enforcing contracts of infants executed to obtain benefits of federal law providing for the making or guaranty of loans to war veterans).

[50] *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-1106 (2011) (allowing minors of at least fifteen years to contract for life or disability insurance); COLO. REV. STAT. § 10-4-104 (2010) (allowing minors sixteen years or older to contract for property or liability insurance); MASS. GEN. LAWS ANN. ch. 175, § 128 (West 2010) (permitting minors fifteen years and over to contract for life insurance).

[51] *See infra* notes 72-73 and accompanying text.

improvident transactions preserved.[52] While court approval of the contracts of minors makes them binding agreements, as does the approval of a contract by a court-appointed guardian, the approval of a minor's contract by a parent or other guardian usually will not alter the voidable nature of the agreement.[53] Minors may also seek court-sanctioned emancipation which would confer capacity to enter into contracts.[54]

Minors who reach the age of majority can ratify an agreement entered into during their minority, at which point the contract is no longer voidable.[55] Ratification consists of words or actions that indicate the minor chooses to be bound by a contract obligation entered into during minority.[56] For example, a person continuing to make payments on a credit sale after reaching the age of majority ratifies the agreement. A minor, of course, is incapable of ratifying an agreement during minority as such a purported ratification would result only in another voidable agreement.

Because minors may only enter into voidable contracts, which is a principle maintained under the Uniform Commercial Code,[57] often their parents will act as surety in order to motivate merchants to sell goods, such as cars, to their minor children. In such cases, if the minor exercises the power of avoidance, the parent would still be bound under the terms of the contract for the

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[52] *E.g.*, NEV. REV. STAT. ANN. § 609.550 (West 2010) (limiting minor's ability to dispute validity of contract approved by court).

[53] 42 AM. JUR. 2D *Infants* § 40 (2010); *see also* Parrent v. Midway Toyota, 626 P.2d 848, 850 (Mont. 1981) (holding that the minor was not bound even though a parent was present and approved without signing the agreement).

[54] *See, e.g.*, KAN. STAT. ANN. § 38-108 (2011) (allowing district courts the authority to confer upon minors the rights of majority concerning contracts, and both real and personal property); OKLA. STAT. tit. 10, § 91 (2010) (allowing district courts to authorize and empower persons under the age of eighteen years to transact business).

[55] CALAMARI & PERILLO, *supra* note 5, at § 8.4.

[56] *See, e.g.*, *In re* The Score Board, Inc., 238 B.R. 585, 593 (Bankr. D.N.J. 1999) (concluding that depositing a check in payment for the minor's performance after reaching majority age was conduct amounting to the ratification of a contract); Fletcher v. Marshall, 632 N.E.2d 1105, 1108 (Ill. App. Ct. 1994) (concluding that occupancy and payment of rent constituted an unequivocal ratification of a lease).

[57] Under the Uniform Commercial Code, a minor's contract with respect to the sale of goods is voidable. If the purchaser of a good from a minor subsequently sells that good to a good faith purchaser for value, that party no longer has a voidable title. Section 2-403(1) provides that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value." U.C.C. § 2-403(1) (1990).

remaining payments. In sum, although there are exceptions to the rule that minors lack the contractual capacity required to consummate valid contracts, it is probably true everywhere that the great bulk of infants' transactions are voidable.[58] Presumably, the same conclusion is applicable with respect to the NLOI.

III. ENFORCEABILITY OF LETTERS OF INTENT

The first inquiry, of course, must be whether or not the NLOI constitutes a contract between the minor and the educational institution.[59] The general consensus is that the letter indeed does constitute an agreement between those two parties, according to both courts[60] and commentators.[61] As such, it is subject to normal

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[58] CALAMARI & PERILLO, *supra* note 5, at § 8.3.

[59] Typically the consideration to support the letter of intent is the athlete's commitment in exchange for a full scholarship; however, as long as financial aid is promised by the institution, the NLOI agreement is binding as per NCAA rules. *NLI Provisions: Financial Aid Requirement*, NCAA, http://www.ncaa.org/wps/wcm/connect/nli/nli/nli+provisions/financial+aid (last visited Nov. 1, 2011).

[60] "The NLI is a contract which imposes obligations upon a prospective student-athlete and the university who executes it." Knapp v. Nw. Univ., No. 95 C 6454, 1996 U.S. Dist. LEXIS 12463, at *2 (N.D. Ill. Aug. 23, 1996), *rev'd on other grounds*, 101 F.3d 473 (7th Cir. 1996); *see also* Pryor v. NCAA, 153 F. Supp. 2d 710, 717 (E.D. Pa. 2001) (referring in dicta to the NLOI as a contract with conditions); Treadwell v. St. Joseph High Sch., No. 98 C 4906, 1999 U.S. Dist. LEXIS 14733, at *17-18 (N.D. Ill. Sept. 13, 1999) (referring in dicta to the NLOI as a contract); Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (holding that the relationship between a student-athlete and the university was contractual in nature); O'Brien v. Ohio St. Univ., No. 06AP-946, 2007 Ohio App. LEXIS 4316, at *19 n.6 (Ohio Ct. App. Sept. 20, 2007) (stating that the NLOI acts as a contract between a school and a prospective student-athlete, giving notice to all other schools of the athlete's commitment to the school designated in the NLOI); Barile v. Univ. of Va., 441 N.E.2d 608, 615 (Ohio Ct. App. 1981) (stating that the conclusion that the relationship between a student and a college is contractual in nature is particularly applicable to college athletes who contract by financial aid or scholarship agreement to attend college and participate in intercollegiate athletics). While the NLOI and its attending circumstances may constitute a contractual obligation, oral assurances of a position on an intercollegiate team may not be sufficient evidence of a contract. Giuliani v. Duke Univ., No. 1:08CV502, 2009 U.S. Dist. LEXIS 44412, at *6-11 (M.D.N.C. May 19, 2009).

[61] Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1283-84 (1989); Kevin Stangel, Comment, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 140-47 (2000); *see also* Derek Quinn Johnson, Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 114-17 (1985) (asserting that "the financial aid statement, the letter of intent, the

contract law principles such as the satisfaction of express conditions, for example.[62] However, while the NLOI agreement is between the member universities and the athlete, the penalty for breaching the agreement, i.e., the rule that the student athlete be precluded from participating at another member institution for a period of time,[63] is enforced by the NCAA's NLOI program, which is not a party to the agreement. Is this fact significant?

In *Oliver v. NCAA*[64] the court acknowledged as obvious the absence of a contractual relationship between the student-athlete and the NCAA, characterizing it as "an unincorporated association consisting of public and private universities and colleges" that "adopts rules governing member institutions' recruiting, admissions, academic eligibility, and financial-aid standards for student athletes."[65] Nevertheless, it did view the student athlete's relationship to the NCAA as that of a third-party beneficiary, stating that it was "unquestionable" that the contractual relationship between the NCAA and its member institutions was created to confer a benefit on student-athletes.[66] As a result, it concluded that any arbitrary and capricious action by the NCAA would violate the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, affording the student-athlete, as a third-party beneficiary of that contractual relationship, standing to sue.[67]

Similarly, the sanctions imposed by the NCAA against schools which would seek to sign minors who disaffirm a NLOI, as well as against minors who exercise that right and are effectively

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university bulletin, the general catalogue, and the various brochures and pamphlets, as well as the negotiations between the parties," manifest the existence of a contract); Fried & Hiller, *supra* note 19, at 643-44; Pernell, *supra* note 23, at 284; Riella, *supra* note 1, at 2193-96.

[62] For example, the NLOI may be predicated on the achievement by the student-athlete of a satisfactory grade point average or college admission test score. *Pryor*, 153 F. Supp. 2d at 718; Hall v. NCAA, 985 F. Supp. 782, 785-87 (N.D. Ill. 1997).

[63] *See supra* notes 22-24 and accompanying text.

[64] 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

[65] *Id.* at 210-11.

[66] *Id.* at 211.

[67] *Id.* at 212. The judgment was later vacated by the settlement in the case. For a discussion of the case and its potential ramifications, see Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until* Oliver v. NCAA, 11 FLA. COASTAL L. REV. 459 (2010).

prevented from competing in intercollegiate athletics for a period of time, also are arbitrary and capricious and a breach of the duty of good faith and fair dealing arguably inherent in the contract between the NCAA's NLOI program and its member schools. As a result, the same argument made in *Oliver* should apply to allow the student-athlete as a third-party beneficiary to hold the NCAA liable for enforcing a rule that strips the minor of his right to disaffirm an agreement.[68] So at first blush, it seems that the NLOI is a voidable contract between the university and the student-athlete. Moreover, it seems that the NLOI program rules and agreement, which purportedly ban member institutions from signing an athlete who rightfully exercises that right to disaffirm, are contrary to public policy, and that such an argument could be raised successfully by the athlete as a third-party beneficiary. Nevertheless, several arguments grounded in the contract law previously discussed,[69] emerge which potentially could be used to find a legal commitment in letters of intent.

A. Education as a Necessary?

As previously mentioned, minors are liable for the reasonable value of their necessaries.[70] Is education deemed to be a necessary, so that a minor-athlete, who receives a college education in exchange for the promise to play exclusively for the institution, would be bound to the agreement? While a certain level of education may be considered necessary under common law precedent, typically a college education is not considered to be a necessary.[71] Nevertheless, educational loans are enforceable by statute in some jurisdictions, such as those which have adopted the *Model Minor Students Capacity to Borrow Act*[72] or a similar

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[68] *See also* Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004) (holding that a student-athlete had third-party beneficiary status to pursue a claim).

[69] *See supra* notes 32-58 and accompanying text.

[70] *See supra* notes 44-47 and accompanying text.

[71] 42 AM. JUR. 2D *Infants* § 69 (2010). "Under present day conditions, as in the past, a college education is not, as matter of law, a necessary, though very likely circumstances could be shown which would warrant that conclusion as matter of fact." Moskow v. Marshall, 171 N.E. 477, 479 (Mass. 1930) (citation omitted).

[72] Under the Model Minor Student Capacity to Borrow Act, any written obligation signed by a minor sixteen years old or older

law.[73] Even if an argument could be made effectively that in today's society a college education is reasonably necessary to maintain one's station in life, there are other means of securing financial support than through an athletic scholarship.[74]

B. Parental Approval?

Is the fact that the parent or guardian signed the NLOI of legal significance? Assuming that the parent or guardian is not court-appointed to transact business on behalf of the minor,[75] the approval of the agreement by the parent should bear no significance on the otherwise voidable agreement.[76] To hold otherwise installs parents as de facto agents:

> in consideration of an educational loan received by the minor from any person is enforceable as if the minor was an adult at the time of execution, but only if prior to the making of the educational loan an educational institution has certified in writing to the person making the educational loan that the minor is enrolled, or has been accepted for enrollment, in the educational institution.

N.D. CENT. CODE § 14-10.2-02 (2011). The act has also been adopted by Arizona. ARIZ. REV. STAT. § 44-140.01 (LexisNexis 2011).

[73] *See, e.g.*, ALASKA STAT. § 14.43.140 (2011) (enforcing a written obligation entered into by sixteen-year-old minor "for the purpose of furthering the minor's education in a career program or an institution of higher learning"); GA. CODE ANN. § 13-3-23 (2011) (providing that contracts, notes, or other evidence of indebtedness "executed by a minor for a loan from any trust fund for educational purposes to any educational institution shall be valid and binding"); MO. REV. STAT. § 431.067 (2010) (permitting minors to "contract to borrow money to defray the necessary expenses of attending any accredited university, college, or conservatory"); N.J. STAT. ANN. § 18A:71C-9 (2011) (making educational loans executed by minors valid); N.C. GEN. STAT. § 116-174.1 (2010) (granting minors of seventeen years the authority to execute loans for obtaining a secondary education); WASH. REV. CODE ANN. § 26.30.020 (West 2011) (making written obligation signed by a minor sixteen years old or older for educational loans enforceable).

[74] For example, Federal Student Aid delivered approximately $100 billion in financial aid to almost eleven million students and families in 2008. *U.S. Department of Education Expands Its Student Loan Servicing Capacity*, U.S. DEPT. EDUC. (June 17, 2009), http://www.ed.gov/news/press-releases/us-department-education-expands-its-student-loan-servicing-capacity.

[75] Additionally, some statutes may permit parental consent to bind the minor with respect to specific agreements. *See* IND. CODE ANN. § 22-3-2-15(c) (West 2011) (providing that a minor dependent, by parent or legal guardian, may compromise worker's compensation disputes and may enter into a compromise settlement upon approval by a member of the worker's compensation board).

[76] At common law, an infant could disaffirm his written consent as well as a consent executed by another on his or her behalf. Shields v. Gross, 448 N.E.2d 108, 110

> The selection of a proper agent requires the exercise of as much discretion as the making of a contract. To bind an infant by the act of an agent, when he would not be bound if the act were done by himself, is to allow him to be overreached indirectly, and so do away with the safeguards provided by law for his protection.[77]

For example, in *NYC Management Group, Inc. v. Brown-Miller*, a minor signed a standard contract which stated the performance required of her as a model.[78] Her mother signed the agreement as well, indicating "her assent to her daughter's entry into the agreement without assuming any obligation of her own."[79] The court noted that "[s]uch indications of parental approval are not enough to override the right of the child to disaffirm her own contracts."[80] Similarly, the parent's assent to the NLOI is not sufficient to override the minor's right to disaffirm.

Parents, however, can become co-signors of obligations as a surety, which does not obligate the minor to perform, but rather acts as insurance against the minor's *non*-performance. Typically, in a surety arrangement, if the minor defaults, the parents must perform the contract. That solution is not available with respect to the NLOI program, as the parent signing for the minor would not be asked to step in and play.[81] In fact, specific performance by the

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(N.Y. 1983) (citing cases); *see also* Schmidgall v. Engelke, 224 N.E.2d 590, 590 (Ill. App. Ct. 1967) ("Minor's right to disaffirm his contract is not affected by parental approval, and a parent by his relationship to minor is without authority to enter into contracts binding on a minor."); Hogue v. Wilkinson, 291 S.W.2d 750, 755 (Tex. Civ. App. 1956) (stating that "[e]ven if the mother and grandfather had signed the written contracts as agents of the minor plaintiff, such contracts would not have bound the minor if he wished to disaffirm"); Bombardier v. Goodrich, 110 A. 11, 11 (Vt. 1920) ("The assent of the father adds nothing to the binding force of an infant's promise."); Hines v. Cheshire, 219 P.2d 100, 104 (Wash. 1950) ("[T]he law seems to be settled that an infant is not precluded from disaffirming by reason of the fact that an adult joined with him in signing the contract.").

[77] Vogelsang v. Null, 3 S.W. 451, 452 (Tex. 1887).

[78] No. 03 Civ. 2617 (RJH), 2004 U.S. Dist. LEXIS 8652 (S.D.N.Y. May 14, 2004).

[79] *Id.* at *16.

[80] *Id.*; *see also* Berg v. Traylor, 56 Cal. Rptr. 3d 140, 147-48 (Cal. Ct. App. 2007) (allowing a minor to disaffirm a contract to secure personal management services for the purpose of advancing the minor's acting career, even though his mother co-signed the agreement).

[81] "Still, the unique problem with the NLOI is that the cosigner is the student-athlete's parent or guardian. The cosigner cannot give the university what it wants—the athletic services of the minor student-athlete. Thus, enforcing the

minor of the agreement would not be enforced against the party to the NLOI if the athlete were not a minor either, as the order to perform a contract involving personal services is usually unavailable as a remedy for breach of contract.[82] Since the parents of a student-athlete can in no way be a secondary obligor should the minor fail to perform, the requirement of a parent's signature is misleading at best, and has a chilling effect on the minor's common law right to disaffirm.[83]

Further, whereas a court-appointed guardian owes a fiduciary duty to the minor or otherwise incompetent party as a representative in legal proceedings,[84] no fiduciary relationship to exercise care in transacting business arises simply by virtue of the parental relationship. As a result, there is no legal guarantee that the best interests of the child will be served with parental approval alone, or that a remedy will exist for any failure to adhere to a fiduciary standard of care in transacting business on behalf of the minor. In fact, the doctrine of familial immunity could preclude any recourse by the minor against the parent who acted negligently and in contrast to the minor's best interests.[85]

Moreover, it is a distinct possibility that the interests of the parents and the minor could diverge in selecting an institute of higher education, and that some over-reaching by the parent could occur in the selection process. For example, the mother of a

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agreement through the cosigner is of negligible utility to the university." Cozzillio, *supra* note 61, at 1327.

[82] *See* Tamarind Lithography Workshop, Inc. v. Sanders, Civ. No. 66492, 1983 Cal. App. LEXIS 1788, at *14-15 (Ct. App. Apr. 28, 1983) (stating the general rule that the specific performance, as a remedy, is only available when damages at law are inadequate); *see also* Felch v. Findlay Coll., 200 N.E.2d 353, 355 (Ohio Ct. App. 1963) (concluding that equity will not grant specific performance of affirmative promises in a personal service contract).

[83] *But see* Cozzillio, *supra* note 61, at 1326. Professor Cozzillio claims that the NLOI intercepted potential problems in the student-athlete's lack of capacity by requiring a co-signature by the parent or guardian. "This requirement allows the Letter of Intent to exist as a viable agreement . . . ." *Id.*

[84] 42 AM. JUR. 2D *Infants* § 160 (2010).

[85] For a discussion of tort immunity among family members, see Brenda K. Harmon, Note, *Parent-Child Tort Immunity: The Supreme Court of Illinois Finally Gives This Doctrine the Attention It's Been Demanding:* Cates v. Cates*, 156 Ill. 2d 76, 619 N.E.2d 715 (1993)*, 19 S. ILL. U. L.J. 633 (1995). Waivers of immunity are usually found only in unique circumstances that overcome the policy behind such immunity, that is, the peace of the home. *See, e.g.*, Henderson v. Woolley, 644 A.2d 1303, 1308-09 (Conn. 1994) (permitting lawsuit for sexual abuse).

prospective athlete recently forged his letter of intent, mistakenly signing with a university for which the athlete had chosen not to play.[86] The alleged activities of Heisman Trophy winner Cam Newton's father also suggest that inappropriate requests for the services of his son were made to intercollegiate athletic programs.[87] Furthermore, under current NCAA restrictions, an agent cannot represent minor-athletes.[88] If the minor could be represented by an agent, then at least a cause of action could be allowed against the agent for a failure to act in the minor's best interests and to exercise care.[89]

Granted, if the NLOI contained a liquidated damages clause in the event of the minor's breach, then the feasibility of a parent serving as a guarantor of that obligation by paying the agreed-upon damages is more realistic. But even that type of arrangement still might be questionable since it could be viewed as being tantamount to imposing a penalty for minor athletes exercising their common law right to disaffirm.[90] If the liquidated damages clause was limited to the reliance expenses incurred in recruiting the student-athlete or to scholarship monies committed and effectively lost if the student disaffirms, then it arguably

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[86] *Recruit Confirms Mom Forged Signature*, ESPN.COM (Feb. 3, 2011 1:39 PM), http://sports.espn.go.com/ncaa/recruiting/football/news/story?id=6084711.

[87] It was reported that the athlete's father told university officials that schools recruiting the quarterback would have to come up with money beyond a scholarship to secure his services. Thayer Evans, *Report: Newton, Father Sought Money*, FOX SPORTS (Nov 11, 2010 2:08 PM), http://msn.foxsports.com/collegefootball/story/report-auburn-qb-and-father-sought-money-from-colleges-110910.

[88] Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 216 (2005); *see also* T. Matthew Lockhart, Comment, Oliver v. NCAA*: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism*," 35 U. DAYTON L. REV. 175 (2010) (discussing a case challenging the NCAA's no-agency rules); Brandon D. Morgan, Oliver v. NCAA*: NCAA's No Agent Rule Called Out, but Remains Safe*, 17 SPORTS L.J. 303, 312-16 (2010) (arguing that having proper representation does not make the student-athlete a professional).

[89] "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

[90] Damages may be liquidated in the agreement at an amount that is "reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981). A contract provision that sets an unreasonably large sum of liquidated damages is "unenforceable on grounds of public policy as a penalty." *Id.*

could be enforced.[91] But reimbursement and recoupment are not what the NCAA member schools desire as part of the bargaining process. The *basic penalty* instead is designed to act as a deterrent to allowing a minor to change their mind—a recognized right the common law permits.

C. Employment Contracts?

What about contracts associated with the minor's employment? Some states will recognize the liability of a minor with respect to contracts associated with a business operated by the minor.[92] Generally, however, contracts for the provision of labor or services are voidable at the election of the minor.[93] Student-athletes are not viewed as employees under most state laws with respect to workers' compensation statutes,[94] so it is

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[91] Typically under contract law liquidated damages that are designed to penalize a breaching party rather than to protect the expectation interests of an innocent party are unenforceable. *See, e.g.*, Cal. & Haw. Sugar Co. v. Sun Ship, Inc., 794 F.2d 1433, 1436 (9th Cir. 1986) (determining that the liquidated damages agreed upon were reasonable in light of the anticipated harm); Mason v. Fakhimi, 865 P.2d 333, 335-36 (Nev. 1993) (upholding a liquidated damage clause as being valid and not a penalty when actual monetary harm was less); City of Rye v. Pub. Serv. Mut. Ins. Co., 315 N.E.2d 458, 459 (N.Y. 1974) (concluding that a liquidated damages provision was a penalty provision since the harm for which it was designed to compensate was minimal and speculative); Watson v. Ingram, 851 P.2d 761, 764 (Wash. Ct. App. 1993) (stating the general rule that liquidated damages clauses must be a reasonable forecast of just compensation for the harm that is caused by the breach).

[92] Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 247-48 (2007) (arguing that the cognitive ability of minors counsels in favor of greater accountability); Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 511-14 (1995) (arguing for greater accountability for minors). A state statute could recognize such liability. *See* GA. CODE ANN. § 13-3-21 (2011) (providing that if "a minor, by permission of his parent or guardian or by permission of law, practices any profession or trade or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade, or business"); *see also* Pankas v. Bell, 198 A.2d 312, 315 (Pa. 1964) (enforcing a minor's restrictive covenant in an employment contract).

[93] 42 AM. JUR. 2D *Infants* §§ 54-56 (2010).

[94] Michael J. Mondello & Joseph Beckham, *Workers' Compensation and Collegiate Athletes: The Debate Over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 295-99 (2002) (discussing case law).

unlikely that their relationship to the university would be viewed as one of employment anyway.[95]

Moreover, the agreement itself acts similarly to restrictive covenants in employment contracts. A similar argument has been made with respect to the NCAA's anti-transfer rules, by which students who transfer are required to satisfy a one-year residency rule.[96] The failure to comply with the letter of intent produces the same result. If the agreement is breached, the student athlete is precluded from playing for another school for a year.[97] Restrictive covenants are often viewed with disdain by courts because they restrict the ability of parties to the contract to earn a living,[98] and they are often examined for legality on reasonableness grounds.[99] Some states provide, by statute, additional criteria for examining the enforceability of covenants not to compete, as well.[100] The fact that the NLOI agreement resembles a restrictive covenant in an employment contract, if anything, strengthens the argument that

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[95] *But see* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (concluding that NCAA athletes in Division I meet both the common law and statutory standards for classification as employees under the National Labor Relations Act); Nathan McCoy & Kerry Knox, Comment, *Flexing Union Muscle—Is It the Right Game Plan for Revenue Generating Student-Athletes in their Contest for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051, 1065 (2002) (concluding that the National Labor Relations Board should recognize student-athletes as university employees with rights enumerated under the National Labor Relations Act).

[96] Ray Yasser & Clay Fees, *Attacking the NCAA's Anti-Transfer Rules as Covenants Not to Compete*, 15 SETON HALL J. SPORTS & ENT. L. 221, 233-50 (2005).

[97] *See supra* notes 22-24 and accompanying text.

[98] *See, e.g.*, Bellsouth Corp. v. Forsee, 595 S.E.2d 99, 105 (Ga. Ct. App. 2004) (affirming that the restrictive covenant must specify with particularity the nature of the business activities to be restrained); VisionAIR, Inc. v. James, 606 S.E.2d 359, 362 (N.C. Ct. App. 2004) (reiterating that covenants not to compete between an employer and an employee are not viewed favorably).

[99] *See, e.g.*, Borden, Inc., v. Smith, 478 S.W.2d 744, 747 (Ark. 1972) (refusing to enforce an overly broad restrictive covenant or to enforce the covenant to the extent that would be reasonable); Stultz v. Safety & Compliance Mgmt., Inc., 648 S.E.2d 129, 131 (Ga. Ct. App. 2007) (applying a three-element test of duration, territorial coverage, and scope of activity for examining reasonableness); Am. Sec. Servs., Inc., v. Vodra, 385 N.W.2d 73, 80 (Neb. 1986) (finding a three-year restraint to protect the goodwill of the employer was not unreasonable); Okuma Am. Corp. v. Bowers, 638 S.E.2d 617, 620 (N.C. Ct. App. 2007) (listing six factors to consider to examine the reasonableness of a restrictive covenant).

[100] *See, e.g.*, A.E.P. Indus., Inc. v. McClure, 302 S.E.2d 754, 760 (N.C. 1983) (requiring an agreement not to compete to be in writing and ancillary to an employment contract).

the agreement should be voidable to protect the minor student-athlete.

Further, the *basic penalty* of the NLOI agreement is indeed somewhat punitive in nature.[101] Punitive damages are disfavored in contract law, absent a public policy justification.[102] The most glaring public policy argument in this situation is that of protecting the minor from such a one-sided agreement. While the NLOI program clearly benefits member schools by ordering the process and making recruitment and retention of athletes more predictable, it is not readily apparent that the student-athlete necessarily benefits from those goals, nor that the program was instituted with the protection of the student-athlete in mind.

Courts are reluctant to intervene in the internal affairs of the NCAA as a voluntary association,[103] and pay deference to their internal governance regulations, subjecting them to an arbitrary and capriciousness standard.[104] However, if the NLOI program sanctioned a member for signing a minor-athlete who had repudiated his or her letter of intent, such an action in effect would be tantamount to enforcing the agreement in contravention of the minor's right to disaffirm—arguably an arbitrary and capricious action without apparent justification that properly considers what is in the best interest of the minor.[105] As a result,

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[101] *See supra* notes 22-24 and accompanying text (discussing the provisions of the basic penalty).

[102] "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages is recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

[103] *See, e.g.*, Tanaka v. Univ. of So. Cal., 252 F.3d 1059, 1063-64 (9th Cir. 2001) (upholding transfer rules against an antitrust challenge); NCAA v. Yeo, 171 S.W.3d 863, 869-70 (Tex. 2005) (upholding transfer rules against a constitutional challenge); *see also* Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of* Bloom v. NCAA, 59 VAND. L. REV. 905, 913 (2006) (discussing the arbitrary and capricious standard of review of NCAA actions). Although it can be argued that there is little choice but to become a member, no court has held that the association is not voluntary. Doug Bakker, *NCAA Initial Eligibility Requirements: The Case Law Behind The Changes*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 160, 162-64 (2006).

[104] *See* Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000); NCAA v. Lasege, 53 S.W.3d 77, 83-87 (Ky. 2001). *But see* Oliver v. NCAA, 920 N.E.2d 203, 214 (Ohio Ct. Com. Pl. 2009) (finding the NCAA's "No Agent Rule" to be arbitrary and capricious).

[105] *See, e.g.*, Sheldon Elliot Steinbach, NCAA v. Lasege *and Judicial Intervention in Educational Decisions: The Kentucky Supreme Court Shoots an Air Ball for Kentucky*

it is unlikely that such an action, though seemingly only involving actions against a member, would be a candidate for deferential treatment by the judiciary.[106]

D. Statutory Exceptions for Minors in the Sport and Entertainment Industry

Given the prevalence of minor professional athletes and entertainers, some states have enacted specific statutes that recognize the validity of such contracts for professional services, provided the statutory requirements are met.[107] Legislatures enacted these statutes based on the common law principle that an infant could disaffirm agreements executed by themselves, as well as those executed by another on their behalf.[108] Many of these statutes establish a detailed procedure for court approval of the contract so that the adult party can be assured of a binding obligation.[109] For example, California's "Coogan" law (named for 1920s child star Jackie Coogan), which covers minors who are to render artistic or creative services, either directly or through a third party, allows for court approval of their contracts, and permits courts to establish trust funds for their earnings.[110] An

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Higher Education, 90 KY. L.J. 329, 344 (2002) (arguing that voluntary associations in higher education should be free to maintain standards when doing so violates no law).

[106] *See* Gordon E. Gouveia, *Making a Mountain Out of a Mogul:* Jeremy Bloom v. NCAA *and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22, 32 (2003) (arguing that inequity of NCAA rules coupled with the NCAA's inflexibility should prompt student-athletes to seek redress in courts and state legislatures).

[107] For a discussion of state regulation of the entertainment industry and participants who are minors, see Ben Davis, *A Matter of Trust for Rising Stars: Protecting Minors' Earnings in California and New York*, 27 J. JUV. L. 69 (2006); Heather Hruby, Comment, *That's Show Business Kid: An Overview of Contract Law in the Entertainment Industry*, 27 J. JUV. L. 47 (2006); and Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429 (2004).

[108] Shields v. Gross, 448 N.E.2d 108, 110-12 (N.Y. 1983).

[109] 42 AM. JUR. 2D *Infants* § 55 (2010). Other state statutes allow for court approval of other types on contracts as well. *See, e.g.*, D.C. CODE § 21-146 (2011) (allowing court approval of joint contract between minor and adult party for the sale of real estate).

[110] CAL. FAM. CODE §§ 6750-53 (2010). For a critical analysis of the law and its subsequent amendments, see Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 MCGEORGE L. REV. 201 (2000); Shayne J. Heller, Legislative Updates, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 161

Illinois statute also allows for court approval of a contract for minors to render artistic or creative services, [111] while a Massachusetts law provides for court approval of entertainment contracts for performances by minors, including modeling. [112] Other statutes allow for court approval of contracts between minors and talent agencies. [113]

Most state contract and labor laws focus on children who pursue careers in the entertainment industry rather than child athletes. [114] However, some state statutes cover both entertainment contracts as well as agreements relating to sports. New York law provides for judicial approval of the contract if the "infant is to perform or render services as an actor, actress, dancer, musician, vocalist or other performing artist, or as a participant or player in *professional* sports . . . ."[115] Florida law also provides for court approval of contracts by minors to perform or render artistic or creative services, or services "as a participant or player in *professional athletics or semiprofessional athletics*."[116] Texas law allows a court, upon petition of the guardian of the estate of the minor, to enter an order approving "an arts and entertainment contract, advertisement contract, or *sports* contract that is entered into by a minor," without specifying that the contract be for professional services. [117] The North Carolina statute, which was at issue in the case discussed in the

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(1999); and Thom Hardin, Note, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 J. JUV. L. 376 (1998). *See also* Davis, *supra* note 107, at 70-76; Krieg, *supra* note 107, at 433-38.

[111] 820 ILL. COMP. STAT. ANN. 20/1 (West 2011).

[112] MASS. GEN. LAWS ANN. ch. 231, § 85P1/2 (West 2010).

[113] *E.g.*, CAL. LAB. CODE § 1700.37 (West 2010); N.C. GEN. STAT. §§ 48A-17, -18 (2010).

[114] *See* Erica Siegel, Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT L.J. 427 (2000) (arguing for a federal law to protect child super-athletes).

[115] N.Y. ARTS & CULT. AFF. LAW § 35.03(1) (McKinney 2011) (emphasis added). For a discussion of the New York law, see Davis, *supra* note 107, at 76-79, and Krieg, *supra* note 107, at 440-42.

[116] FLA. STAT. ANN. § 743.08(1)(a)-(b) (West 2010) (emphasis added). For a discussion of the Florida law, see Stephen M. Carlisle & Richard C. Wolfe, *Florida's New Child Performer and Athlete Protection Act: Or What to Do When Your Client Is a Child, Not Just Acting Like One*, 69 FLA. B.J. 93 (1995). *See also* Krieg, *supra* note 107, at 438-40.

[117] TEX. ESTATES CODE § 903 (2010) (emphasis added) (taking effect in 2014).

introduction,[118] provides for court approval of a "contract pursuant to which a person is employed or agrees to render services as a participant or player in a sport,"[119] as well as for financial safeguards[120] and the establishment of a trust.[121]

It would seem, however, that few, if any, of these statutes contemplate participation in intercollegiate athletics, as most address some sort of payment structure coupled with a financial interest to protect. Therefore, it is likely that these statutes providing for court approval of contracts for the services of child performers are neither relevant nor applicable to collegiate participation.[122] Moreover, an expansive reading of these statutes to include non-professional athletes is ill-advised since statutes that are in derogation of the common law should be construed strictly.[123]

Certainly in practice, court approval of NLOI agreements has not been sought. Seeking court approval of the thousands of NLOI agreements likely would not be feasible anyway, and if sought, such approval would likely be perfunctory at best, since the continuing need to ensure protection of the minor's financial estate is not necessary in amateur athletics. More significantly, minors do not need the defense that the NLOI was not court-approved in those states with a statute that arguably covers student-athletes. Student-athletes, who are minors when they sign, remain free to disaffirm their NLOI agreements anyway, not only before they reach the age of majority, but also for a reasonable time thereafter, provided they do not perform some act inconsistent with the intent to exercise the power of avoidance, such as participating in practices or otherwise indicating unequivocally their intent to be bound after reaching their eighteenth birthday.

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[118] *See supra* notes 2-4 and accompanying text.

[119] N.C. GEN. STAT. § 48A-11(3) (2010).

[120] *Id.* §§ 48A-14, -15.

[121] *Id.* § 48A-16.

[122] *But see* Cozzillio, *supra* note 61, at 1328 (asserting that the NLOI could be covered with "broad legislation that prohibits disaffirmance by infant athletes and entertainers").

[123] Shields v. Gross, 448 N.E.2d 108, 111 (N.Y. 1983).

IV. IMPLICATIONS GOING FORWARD

A. Policy Considerations

Arguably there is a need for higher standards of fairness in relationships between the NCAA and student-athletes, and NCAA rules fail to separate the interests of student-athletes from the interests of their universities.[124] "Comparable bargaining power does not exist at the core of the student-athlete/university relationship."[125] That observation can be extended to the athletic scholarship and how it structures the relationship between the NCAA, the university, and the student-athlete, limiting the term to renewable annual contracts, at the option of the university.[126] "As it exists today, the athletic scholarship contract is an unconscionable contract of adhesion, inconsistent with the important NCAA principles of student-athlete welfare and amateurism."[127]

Further, it is questionable whether or not the educational pursuit is indeed less important than the exploitation of the young person's athletic ability for financial gain.[128] A 1995 study of the decisional structures of the NCAA revealed seven characteristics that cast a degree of doubt upon whether or not the process accurately promotes the notion that one's status as a student

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[124] Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1169-73 (1987).

[125] Timothy Davis, *College Athletics: Testing the Boundaries of Contract and Tort*, 29 U.C. DAVIS L. REV. 971, 1016 (1996).

[126] *See* Daniel Nestel, Note, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L.J. 1401, 1407-08 (1992) (urging for the reform of the current one-year scholarship agreement).

[127] Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS L.J. 41, 76 (2006); *see also* Riella, *supra* note 1, at 2210-15 (applying the doctrines of procedural and substantive unconscionability to the NLOI).

[128] Universities in fact may hinder their student-athletes' ability to receive a meaningful education. Monica L. Emerick, Comment, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 890-98 (1997); *see also* Michael R. Lufrano, *The NCAA's Involvement in Setting Academic Standards: Legality and Desirability*, 4 SETON HALL J. SPORTS L. 97 (1994) (discussing the NCAA's regulation of eligibility standards).

should take precedence over one's status as an athlete.[129] As a result of such concerns, reforms have been proposed to re-focus collegiate athletics on the education—not the exploitation—of the student-athlete. [130] Recent cases and commentaries have questioned another alleged form of exploitation by the NCAA and its members: the student-athlete's common law right of publicity.[131] For example, Hall of Fame basketball player Oscar Robertson is among three former college athletes who filed suit

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[129] John R. Allison, *Rule-Making Accuracy in the NCAA and Its Member Institutions: Do Their Decisional Structures and Processes Promote Educational Primacy for the Student-Athlete?* 44 U. KAN. L. REV. 1, 56 (1995) (identifying seven characteristics which question the purported primacy of the educational goal and exploring potential remediation strategies).

[130] *See, e.g.*, Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 170-71 (2000) (arguing for a four or five year scholarship contract wherein the student-athlete and institution are bound to an extended-term commitment so as to aid the student-athlete's ability to obtain an educational degree); Rodney K. Smith & Robert D. Walker, *From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student-Athletes*, 1 NEV. L.J. 160, 163-69 (2001) (discussing models for dealing with problems of economic inequity and the slippage in educational values plaguing intercollegiate athletics); Harold B. Hilborn, Comment, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 757-58 (1995) (urging courts to acknowledge an actionable *duty to educate* based on the special relationship between the university and student-athletes); *see also* Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010) (discussing exploitation generally).

[131] *See* Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 97-99 (2004) (examining the assignment of the right of publicity by college athletes); Kristal S. Stippich & Kadence A. Otto, *Carrying a Good Joke Too Far? An Analysis of the Enforceability of Student-Athlete Consent to Use of Name & Likeness*, 20 J. LEGAL ASPECTS SPORT 151, 178-80 (2010) (examining the enforceability of the athlete's consent form and the cross purposes of the student's alleged amateur status in conjunction with the NCAA's commercialization of the use of a student-athlete's name and likeness); Bill Cross, Comment & Note, *The NCAA as Publicity Enemy Number One*, 58 U. KAN. L. REV. 1221, 1244 (2010) (concluding that the NCAA has no legal right to profit from the use of the name and or likeness of college athlete in commercial dealings); Sean Hanlon & Ray Yasser, Comment, *"J.J. Morrison" and his Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 243-44 (2008) (arguing that the NCAA's use of the identity of star athletes for commercial advantage is unlawful appropriation that violates the student-athlete's right of publicity); Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1104-05 (2010) (supporting the establishment of a trust fund for former student-athletes with commercially generated revenues).

against the NCAA this year for the alleged illegal use of their images.[132]

Certainly the recruitment of high school athletes is a competitive process that does not necessarily center upon what is in the best interest of the student-athlete.[133] In fact, issues concerning the recruiting of high school athletes have been a focal point of controversy over the life of the NCAA.[134] The recruiting of high school athletes is crucial for the success of the institution's athletic programs, the commensurate financial revenue stream for the institution, as well as for the success of the coaching staff, both financially and professionally.[135] The amount of revenue produced by intercollegiate athletics is substantial[136] and accompanied by the benefits of "money and support for the

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[132] Nancy Kercheval, *Oscar Robertson Among Former College Athletes Suing NCAA, Electronic Arts*, BLOOMBERG, http://www.bloomberg.com/news/2011-01-27/oscar-robertson-among-former-college-athletes-suing-ncaa-electronic-arts.html (last visited Nov. 1, 2011).

[133] The NLOI program was initiated "[t]o deter '*school-jumping*' by prospective student athletes" and was "drafted to protect the school's interests." Johnson, *supra* note 61, at 114.

[134] For example, one notorious case involved Jerry Tarkanian and his dismissal as head coach for UNLV basketball as a result of recruiting violations. *See* Kadence A. Otto & Kristal S. Stippich, *Revisiting* Tarkanian*: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243, 261-63 (2008) (discussing the controversy). Congress held a hearing in the 1970s to examine issues with the NCAA's ability to self-regulate regarding recruiting violations and other serious infractions. Alice I. Youmans, Joan S. Howland & Myra K. Saunders, *Regular Features: Questions and Answers*, 82 LAW LIBR. J. 627, 638-40 (1990). Subsequently, scandals concerning payments to athletes by booster groups and alumni led to an investigation and a subsequent restructuring of processes and oversight after the Knight Commission Report. Jay Jordan, *Reform From a Student-Athlete's Perspective: A Move Towards Inclusion*, 14 U. MIAMI ENT. & SPORTS L. REV. 57, 60-76 (1997) (discussing NCAA structural changes passed and implemented in the late 1990s); *see also* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 6-38, 95-97 (2000) (discussing the restructuring of 1996–1997 and offering additional suggestions for reform).

[135] Jon Perrelle, Note, *An Opportunity for Reform:* Tennessee Secondary School Athletic Association v. Brentwood Academy *and NCAA Recruiting*, 74 BROOK. L. REV. 1213, 1251 (2009) (concluding that "recruiting has become a corrupt process that exposes high school student-athletes to inappropriate situations, exploits the student-athletes, and sacrifices academic success for athletic excellence").

[136] For the 2008–2009 academic year, the top ten revenue generating college athletic programs earned a combined $1,031,170,136 in revenue and netted a combined $117,556,724. Bill King, *Life's Lessons*, SPORTS BUS. J., http://www.sportsbusinessdaily.com/Journal/Issues/2010/06/20100621/SBJ-In-Depth/Lifes-Lessons.aspx (last visited Nov. 1, 2011).

university; enthusiasm and cohesion to the university community; and enjoyment for the region and entire nation."[137]

Unfortunately, ethical lines are often crossed in pursuit of the golden goose. Reports of improper recruiting tactics abound, and include the use of drugs, alcohol, sex, monetary enticements, grades and test alterations, as well as false representations.[138] Arguably, "[t]he inherent conflict of interest in the universities' bargaining position rebuts the presumption that the schools act in good faith, and demonstrates the need for legal protection of the weaker party."[139] Tales of coaches inking lucrative endorsement contracts in exchange for their players wearing certain athletic gear, scandals involving the sale of players by high school coaches, stories of alumni and boosters compromising the integrity of athletic programs to secure top talent,[140] all lend credence to the notion that the recruitment process is a mine field for the unwary, unsophisticated recruit.[141]

Some student-athletes have sued concerning misrepresentations made during the recruiting process about their prospective playing time.[142] Oral misrepresentations made prior

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[137] Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS L.J. 257, 291 (1996).

[138] Perrelle, *supra* note 135, at 1234-35. Further, "recruits have chosen schools based solely on their dreams of playing professional sports, fake books and magazine covers that played on these dreams, their weariness with the recruiting process, and even what number they can wear." *Id.* at 1235.

[139] Johnson, *supra* note 61, at 123.

[140] *See* Marc Jenkins, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39 (2003) (relating incidents of both legitimate and non-legitimate practices). For a discussion of the economics of coaches' contracts in big-time college football and basketball, including the dramatic increase in coaches' compensation and retention strategies used by universities for revenue-generating coaches, see Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4-47 (2009).

[141] *See* Katherine Sulentic, Note & Comment, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation*, 14 ROGER WILLIAMS U. L. REV. 127, 132 (2009) (asserting that fraudulent and negligent misrepresentation have become part of the college football recruiting landscape).

[142] *See* Timothy Liam Epstein, *Splinters from the Bench: Feasibility of Lawsuits by Athletes Against Coaches and Schools for Lack of Playing Time*, 4 VA. SPORTS & ENT. L.J. 174, 186-90 (2005) (discussing *disappointment* lawsuits and the alleged proprietary interest student-athletes have in their athletic reputations); James

to signing day are particularly susceptible to overreaching during the recruitment process when most prospects are inexperienced minors negotiating with seasoned university representatives.[143] "Courts have employed the infancy doctrine to afford greater protection to minors, and the NCAA should be obliged to do so as well."[144]

Criticism that the process is riddled with corrupt practices fuels the concern that minors must be protected from the flurry of predatory adults who do not have their best interests at heart—the same concern that prompted the judicial development of the infancy doctrine under the common law in the first place. Granted, a few months of maturity may not remedy the situation for individual minors who attain the age of majority in relatively short order, but the systemic ignoring of a basic tenet of the legal system certainly adds no credence to the recruitment process. The less well-reasoned, sometimes irrational, decision-making of adolescents counsels against the abrogation of a settled principle of the common law with respect to this genre of agreements.[145]

B. Recommendations

Some commentators recognize that the big business of intercollegiate athletics suggests the decline of amateurism in college sports.[146] If, as a sixty-billion dollar industry, major college sports enterprises indeed are not amateur, and such a characterization is demonstrably false, then arguably

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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, 667-68 (1996) (condemning the practices of some college recruiters and evaluating potential liability).

[143] Jamie Y. Nomura, Note, *Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair*, 32 U. HAW. L. REV. 275, 276-77 (2009) (documenting unfairness in the recruitment process and arguing for reform).

[144] *Id.* at 288.

[145] Perrelle, *supra* note 135, at 1235.

[146] Because amateurism in college athletics has almost disappeared, some suggest taking the next step toward transforming college athletics into a semi-professional organization. Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 274-76 (1993); *see also* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 206 (1990) (asserting that intercollegiate amateur athletics is really a revenue-producing venture).

intercollegiate athletics should be subject to the application of antitrust, tax, and labor laws.[147] Given this realization, several observers are in favor of compensating Division I athletes.[148] Should the historical classification of amateurism of college athletics be modified in favor of paying athletes salaries as semi-professionals, more state statutes governing minors in the sports industry could be applicable to make the NLOI valid, provided the state statutory requirements for court approval were followed and the statutory definitions reasonably could be read to include athletes.[149]

Alternatively, the *No-Agency Rule* could be abandoned in favor of allowing minors to be represented by someone who owes a fiduciary duty to act in the best interest of the student-athlete and to protect the minor from overreaching by university recruiters and coaches.[150] Unfortunately, in reality, this approach likely would be available only to assist those athletes whose future commercial potential is substantial. It is unlikely that agents would scramble to represent the greater number of athletes who do not play in Division I's prestigious programs. Thus, such a proposal could be only a partial solution in practice.

Would a statutory exception to the common law that establishes the validity of NLOI agreements be feasible? The infancy doctrine is an integral part of the *common law* of contracts, which by definition is a matter of state law.[151] To change the state common law in this regard would necessitate requesting each state legislature to carve a statutory exception to

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[147] Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 498-505 (2008).

[148] Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 28 (2000) (claiming that it is unjust for schools to make huge revenues and not share that money with the athletes); Riggs, *supra* note 7, at 141-44 (arguing for the replacement of the NCAA's concept of amateurism so that student-athletes can receive a share of the profits they generate).

[149] For a discussion of current state statutes that allow court approval and supervision of contracts for the services of child performers, see *supra* notes 107-23 and accompanying text.

[150] *See* Nomura, *supra* note 143, at 297-99 (suggesting that the NCAA should mandate that high school recruits have an official representative).

[151] "There is no federal general common law . . . ." Erie R.R. Co. v. Thompkins, 304 U.S. 64, 78 (1938).

the state's jurisprudence on the infancy doctrine for the NLOI agreement—a fairly daunting proposition. While federal regulation under the Commerce Clause of intrastate activity is permitted when that activity is economic in nature, [152] for Congress to pass a law in order to cloak minors across the nation with contractual capacity for NLOI agreements seems a rather heavy-handed response, and seemingly would necessitate an admission that the enterprise is about the economics and not the education. Moreover, even if either a uniform state act or a federal law could be proposed, for what would it provide? The validity of all NLOI agreements? Court approval of NLOI agreements? Court-approved representation in the NLOI negotiation?

Less drastic measures than a legislative response or the abandonment of amateurism and the no-agency rule are available. The NLOI agreement is voidable until the minor reaches the age of majority, which is eighteen years in most states. However, once the student-athlete has reached the age of majority and continues to participate as a member of the sports team, such conduct arguably indicates the intent to be bound by the NLOI; that conduct arguably would constitute a ratification of a previously voidable agreement, the effect of which would be to make the NLOI agreement valid. [153] Rather than rely on conduct manifesting the intent to be bound, a wiser course of action would be for the institution instead to require the student-athlete to ratify the agreement expressly in writing at the age of majority. Of course this option leaves the institution vulnerable for the time period between signing day and the student-athlete's eighteenth birthday.

While some observers have called for the complete elimination of the NLOI agreement,[154] another option is for the NCAA to abandon the arbitrary deadlines imposed by the various national signing days and permit athletes to sign a binding NLOI on their eighteenth birthday. Arguably the elimination of a

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[152] United States v. Lopez, 514 U.S. 549, 559-60 (1995).

[153] Ratification consists of words or conduct manifesting an intent to be bound by a previously voidable contract. CALAMARI & PERILLO, *supra* note 5, at § 8.4.

[154] Seth Davis, *To Sign or Not to Sign: For Recruits, Letters of Intent Are Not the Best Option*, SI.COM (Nov. 14, 2007 11:30 AM), http://sportsillustrated.cnn.com/2007/writers/seth_davis/11/13/national.letter/ (arguing for a greater voice for prospective athletes in the agreement).

national signing day could help to level the playing field more between the university and the athlete, since coaches tend to over-sign athletes, many of whom are dismissed before the season effectively starts.[155] A uniform day was established for the convenience of universities, not the student-athlete, and that rationale is insufficient for completely disregarding the common law's infancy doctrine. While such a change could result in a more chaotic recruiting process for athletic departments, in reality it would protect the institution because recruits who are minors could walk away from the NLOI agreement without ramification, contrary to what it states.

What of prospective players who will not be eighteen years old before the start of practice season? Currently, there is no mandatory requirement for a NLOI agreement, so the athlete could report and play without having signed one.[156] True, the current *basic penalty* of the loss of one season and a required one academic year in residence at the next institution before being able to play is unavailable because the agreement is voidable;[157] however, it would seem that the parent could act as a surety for the financial aid offer extended. In other words, since scholarship offers are limited,[158] it would seem reasonable for the institution to protect its financial position against the minor's disaffirmance by allowing liquidated damages equivalent to the financial aid irrevocably committed and potentially lost if the minor left the institution.[159] Of course, the language used to convey this

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[155] Nomura, *supra* note 143, at 300-01; *see also* Andy Staples, *Eliminate Signing Day Entirely*, SI.COM (June 6, 2008, 12:20 PM), http://sportsillustrated.cnn.com/2008/writers/andy_staples/06/05/early.signingday/index.html (calling for the elimination of signing day in favor of allowing student-athletes to sign whenever they wish).

[156] *About the National Letter of Intent (NLI)*, NCAA, http://www.ncaa.org/wps/wcm/connect/nli/nli+/about+the+nli/index.html (last visited Nov. 1, 2011).

[157] *See supra* notes 22-24 and accompanying text (discussing the basic penalty).

[158] While the number of offers for full-scholarships is limited, there is no rule about how many NLOI agreements a school can send to players. Jeremy Crabtree, *SEC Sets Limits on Player Signings: Will Others Follow?*, RIVALS.COM (June 4, 2009, 3:03 PM), http://www.usatoday.com/sports/recruiting/football/2009-06-04-sec-oversigning_N.htm.

[159] Arguably, this approach could be utilized for any prospective student-athlete who accepted a financial aid offer, not just those recruits who are not yet eighteen when practice season begins. Of course, such a provision must protect a real pecuniary stake advanced by the institution and not be used as a coercive tactic to force parents to force their children to abide by the NLOI agreement. For a discussion of the validity of liquidated damages clause, see *supra* notes 90-91 and accompanying text.

provision should be clear and unambiguous, in bold print, and adequately explained to recruits and their co-signors, with a disclosure that a signed agreement is not required in order to participate in the institution's athletic program. And while agreed upon damages may be recoverable, provided they are reasonable and related to the foreseeable harm flowing from a breach, the institution could not penalize student-athletes from changing schools if they are minors when they sign the NLOI.

Finally, even if the first-year student-athlete becomes of age and signs a binding NLOI agreement, that student typically still may be impressionable, unsophisticated, and naïve. Many student-athletes choose the school for which they will play because of the coach, who assumes a somewhat parental position in their relationship to the young athlete. Predictably, then, a coaching change is one of the major reasons student-athletes seek to be released from their signed NLOI agreement.[160] Arguably, the inability of the student-athletes to make an informed decision about their choice of school in such cases counsels against holding them to the agreement, even if they are of age when it is signed.[161] As a result, the NCAA should also seriously consider permitting a limited exception to all valid NLOI agreements and as a matter of policy to permit student-athletes, at their discretion, to rescind their commitment in the event of a coaching change. This policy shift may not be in the best interest of the member schools, but it would be in the best interest of the young student-athlete, who in good faith accepted the bid in reliance on existing facts concerning the coaching staff.

CONCLUSION

Thousands of prospective student-athletes sign NLOI agreements every year. A great number of these enthusiastic recruits are minors and are not bound by the agreement under the common law's infancy doctrine. The fact that their parents signed in approval has no legal effect other than to mislead the minor

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[160] Meyer, *supra* note 1, at 237-40, 246-47. The NLOI agreement binds the student even if there is a coaching change because the NLOI expressly provides that the prospective student-athlete signs with an institution, not with a coach. *National Letter of Intent*, *supra* note 30.

[161] Meyer, *supra* note 1, at 240.

into believing in the irrevocability of their commitment. Unfortunately, the student-athlete's punishment for breaching the voidable agreement is the loss of one season of competition and a required one academic year in residence before competing for another institution, a penalty enforced by the NLOI's member institutions, which otherwise would be sanctioned for permitting students to play unless they were released from their NLOI agreement. While some state laws recognize the need for child performers to enter into valid contracts for services, and permit court approval of such contracts, amateur intercollegiate athletes are unlikely to be covered by such laws. Given the predatory minefield that characterizes college recruiting today, the NCAA should recognize the protection afforded minors by the common law and abandon its established signing days in favor of allowing student-athletes to enter into valid agreements once they have reached the age of majority. As it stands, the NCAA is perpetuating a charade with its basic penalty provision and misleading thousands of recruits into believing they are bound once they sign the NLOI agreement, when in fact that agreement is voidable during their minority *and* for a reasonable period of time thereafter, provided there has not been an express or implied ratification of the agreement.