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Student-Athlete Contract Rights in the Aftermath of "Bloom v. NCAA"

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I. INTRODUCTION

Jeremy Bloom is the defending World Champion in moguls skiing, representing the United States in this discipline at both the 2002 and 2006 Winter Olympics.[1] Bloom also played football for the University of Colorado from 2002 to 2003 where he established two Colorado football records.[2] Before enrolling at Colorado in 2002, Bloom had endorsed numerous products and desired to continue doing so throughout his time in college so that he could fund his skiing career.[3]

The National Collegiate Athletics Association ("NCAA") allows student-athletes ("athletes" or "student-athletes") to compete professionally and receive salaries in sports other than those for which they compete in college.[4] However, it does not allow athletes to receive endorsements of any kind.[5] When Bloom decided to attend the University of Colorado, the school applied to the NCAA for a waiver of the prohibition on student-athletes receiving endorsements so that Bloom could use these endorsements to enable him to pursue his

1. *Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Congress 40 (2004) [hereinafter *Hearing*] (statement of Jeremy Bloom), *available at http://commdocs.house.gov/committees/judiciary/hju95802. 000/hju95802 _0f.htm*. Bloom finished in ninth and fifth place, respectively, at the 2002 and 2006 Olympics.

2. *Id.* at 40. Bloom is the all-time freshman leader at Colorado in punt return yardage and punt returns for touchdowns; he also led Colorado in punt return yardage in both his freshman and sophomore season and kickoff return yardage in his sophomore season. 2004 COLORADO FOOTBALL MEDIA GUIDE 164-65 (July 2004), *available at* http://www.cubuffs.com/pdf2 /6976.pdf?SPSID=3860&SPID=255&DB_OEM_ID=600.

3. *Hearing*, *supra* note 1, at 41–42 (statement of Jeremy Bloom). Bloom's expenses for coaching (often full-time) and training amounted to an estimated $100,000 a year. Paul Woody, *At NCAA, Good People Made a Bad Call on Players' Eligibility*, THE RICHMOND TIMES-DISPATCH, Sept. 5, 2004, at C-4.

4. 2005–2006 NCAA DIVISION I MANUAL art. 12.1.2 [hereinafter NCAA MANUAL] (2005) (stating that professional athletes in one sport are eligible in other NCAA sports but can not receive athletic aid if under contract and receiving compensation for the professional sport).

5. *Id.* art. 12.5.2.1 (stating that student-athletes will be ineligible if, subsequent to their enrollment in college, they accept compensation for promoting commercial products through their names, faces, or use of the product).

skiing career while playing college football. However, the NCAA refused this request.[6] Bloom sought relief from the Colorado state court system where a trial court ruled against his request for a preliminary injunction in 2002.[7] After relinquishing his endorsements for two years so that he could play college football, Bloom accepted an endorsement deal in March of 2004 because, in his words, "I was certain that with the Olympic Games looming only 2 years away that I could not afford to continue in this manner and have a chance to achieve my objective of winning an Olympic Gold Medal for my country in 2006."[8]

After accepting these endorsements in violation of NCAA policy, Bloom's only hope of continuing his collegiate football career, in the absence of a softened stance by the NCAA, lay in his pending appeal. A Colorado appellate court, however, affirmed the lower court's denial of the preliminary injunction.[9] Nonetheless, the court held that Bloom had standing to sue the NCAA as a third-party beneficiary to the contract between the NCAA and its member schools.[10] Although previous cases had indicated that student-athletes might be third-party beneficiaries, this decision marked the first time that a court acknowledged unequivocally that student-athletes have contract rights under the NCAA Constitution and Bylaws ("NCAA Constitution" or "Constitution").[11] In granting student-athletes standing to sue the NCAA, the Colorado court of appeals implicitly recognized that the interests of universities, the NCAA, and student-athletes are often misaligned as a result of the pervasive commercialism in big-time college sports.

The NCAA enumerates many responsibilities that universities must observe in their dealings with student-athletes. Among the most important of these duties are the dual responsibilities of providing for student-athlete welfare (which includes protecting the health of athletes and providing them with a safe environment)[12] and setting sound academic standards for student-athletes.[13] If considered third-party beneficiaries to the contract between the NCAA and its member

6. *Hearing*, *supra* note 1, at 41 (statement of Jeremy Bloom).

7. *Id.*

8. *Id.* at 42.

9. Bloom v. Nat'l Coll. Athletic Ass'n, 93 P.3d 621, 628 (Colo. Ct. App. 2004).

10. *Id.* at 624.

11. The Constitution, Operating Bylaws, and Administrative Bylaws are parts of the NCAA Division I Manual but will all be referred to as "Constitution" or "NCAA Constitution" for simplicity.

12. NCAA MANUAL, *supra* note 4, art. 2.2.3 (adopted in 1995).

13. *Id.* art. 2.5.

universities, student-athletes would be able to seek injunctive relief to enforce these contractual responsibilities[14] and sue for money damages for foreseeable losses.[15] Before *Bloom*, courts analyzed most suits brought by athletes using a highly deferential standard of review that seemingly gave the NCAA unfettered discretion. However, due to the dearth of cases involving the NCAA and the consequent nationwide importance of each case, the *Bloom* court's ruling may signal a change in the way that courts will view NCAA actions that directly affect student-athletes. After *Bloom*, for example, student-athletes may be able to bring previously unavailable claims against the NCAA as a result of the *Bloom* court's third-party beneficiary determination.

This Note argues that the *Bloom* court's decision recognizes the unequal relationship between big-time NCAA student-athletes,[16] their institutions, and the NCAA by allowing student-athletes to bring their own claims based on the contract rights given to them by the NCAA Constitution. Part II of this Note includes a brief description of the NCAA and details the staggering amount of money generated by Division I basketball and football. Part III analyzes the deferential standard of judicial review traditionally applied to the actions of the NCAA and the difficulties that student-athletes faced when suing the NCAA prior to the *Bloom* decision. This Part also describes the problems associated with giving the NCAA deference when its actions affect student-athletes.

Part IV discusses cases brought against NCAA member schools based on contract law theories before *Bloom*. In these cases, student-athletes succeeded initially by arguing that athletic scholarships constituted employment contracts. Courts, however, eventually rejected this reasoning as the NCAA changed its legal strategy. While modern courts recognize the contractual relationship between student-athletes and their universities, they still require claimants to show a breach of an implied duty, which is difficult to prove.

Part V examines the *Bloom* case in relation to existing association law and contract principles. Focusing on the implications going forward, this Part considers the impact of the Colorado court's decision to confer standing on Bloom as a third-party beneficiary to the NCAA Constitution in light of the rights this contract gives

14. 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:6 at 25 (4th ed. 2000).

15. *Id.* § 37:12 (noting that "creditor beneficiaries" can recover compensation for the value of the promised performance and any other injury that the promisor could have foreseen at the time of the contract).

16. For the purposes of this Note, the term "big-time" NCAA sports means those NCAA Division I basketball and football programs that generate large amounts of revenue.

student-athletes. This Note argues that other courts should follow the approach taken by the court in *Bloom*, and if they do, student-athletes may be able to fashion successful contract claims when institutions breach promises to provide for student-athlete health and academic welfare.

II. THE MODERN NCAA

The NCAA has changed dramatically since 1906 when it was founded for the purpose of establishing safety standards for the game of football.[17] While the NCAA still puts a priority on the safety and amateurism of its athletes, basketball and football at the Division I level have become more and more commercial. The increasing amount of money spent on these sports highlights the tension between the welfare and amateurism provisions in the NCAA Constitution and the commercial reality of big-time NCAA sports.

A. NCAA Structure and Enforcement Procedures

Currently, 1,273 institutions belong to the NCAA in three separate divisions.[18] This Note focuses primarily on the 326 institutions belonging to NCAA Division I whose member schools are required to grant certain minimum financial awards in the form of athletic scholarships.[19] This differs from Division II, where most athletes receive athletic scholarships combined with other types of aid in order to pay for schooling, and Division III, where athletes do not receive athletic scholarships.[20]

The NCAA and its member institutions signify their contract with one another through the NCAA Constitution. The Constitution sets forth the basic purposes and fundamental policies for the association.[21] Various provisions of the Constitution reflect the

17. Steven Rock, *System Puts Players at Risk, NCAA Doesn't Require Medical Supervision*, KANSAS CITY STAR, Oct. 7, 1997, at A1 (detailing the deaths and injuries resulting from the football play called the "flying wedge" that eventually led President Theodore Roosevelt to order colleges to join together to make sports safer).

18. Composition of the NCAA, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Apr. 30, 2006) [hereinafter Composition of the NCAA]. Division I is further split up into I-A and I-AA for football; I-A heing the more elaborate division, with requirements on game attendance and conference participation. NCAA Division I, II and III Membership Criteria, http://www.ncaa.org/about/divcriteria. html (last visited Apr. 30, 2006) [hereinafter NCAA Division I, II and III Membership Criteria].

19. Composition of the NCAA, *supra* note 18; NCAA Division I, II and III Membership Criteria, *supra* note 18.

20. NCAA Division I, II and III Membership Criteria, *supra* note 18.

21. NCAA MANUAL, *supra* note 4, art. 5.2.1.

association's interest in both the welfare of the student-athlete and the principle of amateurism. In its attempt to establish the primacy of its amateur ideals, the NCAA sets forth that its first association-wide purpose is "[t]o initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit."[22] Thus, it intends to make the athletic programs of member institutions a part of the educational program in order to maintain a difference between intercollegiate and professional sports.[23] Theoretically, athletes should participate in NCAA sports because of their educational motivations as well as the "physical, mental and social benefits to be derived" from participation in these sports.[24]

Each NCAA division adopts its own operating bylaws, which provide rules and regulations consistent with the NCAA Constitution and relate to the administration of the division and its championships, the delegation of authority, and the procedures for enforcing the provisions of the Constitution.[25] The amateurism provision in the Division I bylaws prohibits pay for various types of athletic performance in excess of necessary expenses.[26] This same provision, allows a professional athlete in one sport to represent a member institution in a different sport.[27] Student-athletes are not, however, eligible to participate in intercollegiate athletics if they receive endorsements of any kind, even if for a non-NCAA sport.[28]

The NCAA investigates possible infractions when reasonable cause exists to believe that a member institution has violated its obligations under the NCAA Constitution. The NCAA initiates such inquiries on its own but also encourages universities to self-disclose infractions by considering this a "mitigating factor in determining the penalty" to be levied against a school that violates an NCAA provision.[29] Inquiries involving student-athlete eligibility thus take a different form if the university promptly discloses the ineligibility. Instead of appearing before the Committee on Infractions, as it would

22. *Id.* art. 1.2(a).

23. *Id.* art. 1.3.1.

24. *Id.* art. 2.9.

25. *Id.* art. 5.2.2.

26. *Id.* art. 12.1.1.1.

27. *See id.* arts. 12.01.1 (only amateur athletes are eligible to participate in intercollegiate athletics), 12.1.2 (limiting the ability of professional athletes in one sport to represent their colleges in other sports). The bylaw most relevant to Bloom's case is 12.1.2.

28. *Id.* art. 12.5.2.1.

29. *Id.* art. 32.2.1.2.

if it had allowed the ineligible player to continue to participate in his or her respective sport, the university may declare such a student-athlete ineligible and seek a restoration of eligibility through the Committee on Student Athlete Reinstatement.[30] As in all proceedings before an NCAA committee, a representative of the member institution represents the student-athlete in front of this committee.[31]

B. Mass Commercialism in Division I Basketball and Football

While the NCAA posits that the furtherance of amateurism in college sports is its goal, the current state of affairs in the big-money sports reflects a pervasive commercialism. For example, CBS is in the middle of a $6.2 billion, eleven-year contract with the NCAA to televise the NCAA Division I Men's Basketball Tournament. When coupled with other sources of Tournament revenue, this sum amounts to over 90 percent of the NCAA's operating budget.[32] In addition, each football team invited to play in a Bowl Championship Series (BCS) bowl (the most prestigious post-season games in college football) earned more than $14.5 million for its conference in 2005.[33] Even with these staggering figures, however, the NCAA enjoys tax-exempt status because it is a non-profit organization.[34]

Division I basketball and football players have a substantial impact on the financial well-being of the schools they represent both directly, through ticket sales and direct contracts, and indirectly, through increased institutional giving and exposure. Experience has shown that donations and applications to universities increase dramatically in the immediate aftermath of basketball and football

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30. *Id.* art. 14.11.1.

31. *Id.* art. 14.12.2.

32. KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 19 (2001). College football does not contribute to these NCAA revenues because conferences negotiate their own television contracts for football and distribute these funds among member schools. *See id.* at 20 (noting that only conference commissioners and representatives of the television networks negotiate the BCS television contract and that university presidents have little control over the distribution of Division 1-A postseason football revenues).

33. Bowl Championship Series Revenue Distribution, http://www.bcsfootball.org/index.cfm?page=revenue (last visited Apr. 30, 2006). The institutions with teams in bowls do not receive the money directly as it goes to their conferences and is normally divided on a pro rata basis. *See* Cary Dohman, *Rose Bowl or Not, Badgers Still Cash in*, THE DAILY CARDINAL (Dec. 3, 2004), *available at* http://www.dailycardinal.com/article.php?storyid=820646 (last visited Apr. 30, 2006) (describing the University of Wisconsin's bowl share from the Big Ten in 2004-05).

34. Worldwide Basketball and Sports Tours, Inc. v. Nat'l Coll. Athletic Ass'n, 273 F. Supp. 2d 933, 936 (S.D. Ohio 2003), *rev'd on other grounds*, 388 F.3d 955 (6th Cir. 2004).

success.[35] While the debate over the so-called "Flutie Factor"[36] continues, commentators agree that athletic success breeds a higher profile for a university, which, in turn, gives the institution greater exposure.[37] With this monetary impact, the temptation to exploit big-time athletes may affect the actions of university staff and coaches.

III. PROBLEMS WITH THE JUDICIAL DECISION NOT TO INTERFERE WITH THE NCAA

In 1988, The Supreme Court held that the NCAA is not a state actor because the hundreds of institutions that affect NCAA policy do not reside in the same state or act under the color of any one state's laws.[38] Therefore, NCAA action amounts to private conduct and courts will not apply the Fourteenth Amendment's Due Process Clause to actions undertaken by the NCAA.[39] Rather, courts have largely deferred to NCAA action in cases brought by plaintiffs. As a result, student-athletes have met with little success in bringing claims against the NCAA. Applying this deference to decisions involving student-athletes is problematic, however, both because student-athletes have little choice in joining the NCAA and because the amount of money at stake in big-time NCAA sports calls into question whether university officials really act in these student-athletes' best interests.

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35. *See* J. Brad Reich, *All the [Athletes] are Equal, But Some are More Equal Than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for its Future*, 108 PENN ST. L. REV 525, 554 (2003) (noting the precipitous rise in donations and applications at Gonzaga University after the success of its basketball team in the NCAA tournament).

36. *See* Christopher M. Parent, *Personal Fouls, How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 621–22 (2003) (discussing the significant rise in the number of applicants at Boston College in the immediate aftermath of the football team's success, led by quarterback Doug Flutie, which spawned the term describing this phenomenon at other schools).

37. *See* ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETICS FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 89 (1998) (arguing that this public relations function is an important reason athletes are recruited); Reich, *supra* note 35, at 554 (detailing the statements of a Vice President at Xavier University who said that while the success of the basketball team does not win students, it may bring about the exposure that first interests prospective students).

38. NCAA v. Tarkanian, 488 U.S. 179, 193 (1988).

39. *Id.* at 191, 199 (holding that the protections of the Fourteenth Amendment do not apply to private conduct and because the NCAA's conduct cannot be fairly attributable to any one state, it amounts to such private conduct).

A. Arbitrary and Capricious Standard of Review and the NCAA

Because the NCAA is a voluntary athletic association, courts have been reluctant to intervene in its internal affairs.[40] Despite this reluctance, courts *will* interfere when the association's actions threaten members' private rights (including property or pecuniary rights).[41] When no economic interest is at stake, though, courts are divided as to whether they may scrutinize the actions of an association.[42] The majority of courts, however, allow for arbitrary and capricious review of an association's actions even if these actions do not affect a property interest.[43] Finally, courts generally find that the constitution and bylaws of an association constitute a contract between the members and the association.[44]

Despite the fact that the arbitrary and capricious standard is very deferential to associations, some courts apply an even more lenient standard when reviewing the NCAA's actions. For example, in *Phillip v. Fairfield University*, the Second Circuit Court of Appeals found that the NCAA's refusal to grant a waiver of an eligibility requirement for a freshman basketball player was not enough to

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40. *See* Bloom v. NCAA, 93 P.3d 621, 624 (Colo. Ct. App. 2004) (stating that courts are reluctant to intervene except on limited grounds in the affairs of voluntary associations); 6 AM. JUR. 2D *Associations and Clubs* § 8 (recognizing an association's right to administer its own rules without judicial intervention).

41. 6 AM. JUR. 2D *Associations and Clubs* § 29 (2004); NAACP v. Golding, 679 A.2d 554, 562 (Md. 1996).

42. Some courts have held that the actions of certain voluntary associations, because their rulings constitute state action, are subject to review if these actions are arbitrary and capricious but that purely private associations should not be held to this standard. *See* Indiana High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 231 (Ind. 1997) (holding that because the actions of a state high school athletic association are similar to those of a government agency, the same standard should be applied); Plummer v. Am. Inst. of Certified Pub. Accountants, 97 F.3d 220, 227–28 (7th Cir. 1996) (noting that disciplinary actions taken by a voluntary accounting association would not be held to the arbitrary and capricious standard because the association is private).

43. *See* NCAA v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001) (stating that relief from the judicial system is forthcoming when a voluntary athletic association acts arbitrarily or capriciously toward student-athletes); Peoria Sch. of Bus., Inc. v. Accrediting Council for Continuing Educ. and Training, 805 F. Supp. 579, 583 (N.D. Ill. 1992) (stating the "common-law principle" that federal review of the actions of a voluntary association is limited to whether such decisions are "arbitrary and unreasonable"); N.A.A.C.P. v. Golding, 679 A.2d 554, 563 (Md. Ct. App. 1996) (declining to interfere with an association's decision because it was not, among other things, arbitrary); Gulf South Conference v. Boyd, 369 So.2d 553, 557 (Ala. 1979) (sanctioning judicial review of association action that is fraudulent, collusive, arbitrary, or contravening to public policy); 6 AM. JUR. 2D *Associations and Clubs* § 8 (stating that the rules and by-laws of a voluntary association should not be subject to judicial interference unless their enforcement would be, among other things, arbitrary and capricious).

44. *See* Straub v. Am. Bowling Cong., 353 N.W.2d 11, 13 (Neb. 1984) (stating that the rules and by-laws of a voluntary bowling association constituted a contract among the members).

constitute a breach of the NCAA's duty to treat the plaintiff fairly and in good faith even though there was evidence suggesting that the action was arbitrary.[45] The court held that the NCAA must exhibit some bad faith, through a bad motive or dishonest purpose, in order for the court to invalidate the NCAA action.[46] This high burden requires a showing of intent and is not consistent with the majority of association cases[47] which hold that courts may interfere with an organization's rules and by-laws when their enforcement would be arbitrary and capricious.

In cases against other athletic associations, student-athletes have argued that the associations in question interpreted rules differently than these associations had in the past. Under the traditional deferential standard of review, student-athletes have used such arguments to show that the association acted arbitrarily. For instance, in *Manuel v. Oklahoma City University*, the trial court determined that the National Association of Intercollegiate Athletics'[48] interpretation of an eligibility rule was arbitrary because the interpretation was counter to the rule's plain language and counter to its past interpretations in "hundreds" of cases.[49]

B. Student-Athletes Have Little Choice in Deciding to Join the NCAA

The deferential standard of review stated above springs from the notion that associations and their voluntary members have a First Amendment right to associate, which should not be burdened by courts.[50] At least one court, however, has held that this principle should not apply when a college athlete brings suit against an athletic association since student-athletes have little choice but to join the association.[51] This court asserted, "The athlete himself has no voice or bargaining power concerning the rules and regulations . . . because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics."[52] Another court followed this

45. 118 F.3d 131, 135 (2d Cir. 1997).

46. *Id.*

47. *See supra* note 43.

48. The NAIA exists apart from the NCAA and sanctions athletic events among various colleges and universities throughout the country.

49. 833 P.2d 288, 292–93 (Okla. Ct. App. 1992).

50. *See supra* note 40.

51. Gulf South Conference v. Boyd, 369 So.2d 553, 557 (Ala. 1979).

52. *Id.* In addition, Congressman Spencer Bacchus (R-AL) has questioned the validity of calling the NCAA a voluntary association because athletes are most affected by NCAA decisions

reasoning with regard to high school athletes and their relationship to state high school athletic associations.[53]

C. Officials Face Conflicts in Their Treatment of Student-Athletes

Another problem facing big-time student-athletes stems from the fact that university officials who make decisions regarding the welfare of these athletes (coaches, athletic directors, faculty members, or high level officials) face inherent conflicts of interest. Conflicts of interest often exist within a corporate board of directors, and for this reason, commentators have compared the deferential standard of review applicable to associations to the deferential business judgment rule applicable to actions taken by such boards.[54] The business judgment rule is a presumption that in making a business decision, the directors of a corporation "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[55] If the challenger does not establish facts which rebut the presumption, the court will respect the corporation's judgment.[56] Alleging facts that create a reasonable doubt as to whether directors are disinterested and independent suffices to rebut the business judgment rule and causes a court to invoke the tougher, entire fairness standard.[57]

In a famous case involving conflicted board members, *In re The Limited*, the Delaware Chancery Court held that a decision made by the Limited's board that financially benefited the family trust of the controlling shareholder was conflicted.[58] Because the controlling shareholder had the power to remove any director, the court found that there was a reasonable doubt whether those directors with large

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and they have no voice in the rulemaking. *Hearing*, *supra* note 1, at 13 (statement of Spencer Bacchus).

53. *E.g.*, Indiana High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d at 230 (Ind. 1997). Even though the court applied the arbitrary and capricious standard of review to an eligibility decision of a high school athletic association, the court found that high school athletes do not voluntarily subject themselves to the association's rules.

54. *See* NAACP v. Golding, 679 A.2d 554, 561 (Md. Ct. App. 1996) (finding the rule limiting judicial intervention in unincorporated organizations analogous to the business judgment rule).

55. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

56. *Id.*

57. *See id.* at 814 (holding that a plaintiff shows demand futility by creating a reasonable doubt that the directors are disinterested and independent which, in turn, raises a reasonable doubt that the business judgment rule should apply). Winning at the demand futility level allows a plaintiff to have the merits of the case heard, and losing at the demand level effectively ends the suit. *In re* The Limited, Inc. S'holders Litig., 2002 WL 537692, at *3 (Del. Ch. Mar. 27, 2002).

58. *Id.* at *3,*4. The board rescinded a stock buyback option that would have had a negative financial effect on the family trust of the CEO/controlling shareholder.

financial stakes in the corporation had ignored their duty to act in the corporation's best interests in favor of acting in the controlling shareholder's best interest.[59] As a result, the court analyzed the transaction under a more exacting fairness review and determined that the board's decision appeared unfair to the stockholders.[60]

Similar to the facts of *In re The Limited*, the staggering sums of money at stake in Division I basketball and football may shift the priorities of university officials from acting in the best interests of student-athletes to acting in the best financial interests of their respective schools. In choosing to admit incoming student-athletes, universities are likely to dismiss the "student first, athlete second" precept given the involvement of coaches with multi-million dollar contracts and university officials who "balance under-capitalized accounts."[61] Just as actors in a corporation (the board of directors) must act solely in the best interests of the corporation, university actors (i.e. the board of trustees, faculty, and staff) must prioritize the education and welfare of students. Yet, the conflict of interest created by the large financial impact that athletes have on their institutions weakens the school's presumed good-faith in its dealings with athletes.[62]

An anecdote is helpful to illustrate the large financial impact that a single student-athlete can have on an institution's financial well-being. In its final regular football game of the 1996 season against the University of Southern California ("USC"), Notre Dame's placekicker missed an extra point at the end of regulation that sent the game into overtime. In overtime, USC won the game 27-21.[63] That missed extra point "cost" Notre Dame $8 million when its football team did not get the bowl invitation it would have received had the team won.[64] With this level of compensation at stake,[65] the pressure to win is high among the Notre Dame trustees, athletic

59. *See id.* at *7 (finding that the allegations raised disqualifying doubts about the directors' independence). The *Aronson* court similarly held that in the demand futility analysis, which leads to entire fairness review if proven, directors who are under an influence that sterilizes their discretion are not proper persons to bring derivative litigation against the corporation. *Aronson*, 473 A.2d at 814.

60. *See In re* The Limited, Inc. S'holders Litig., 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002) (finding that the plaintiffs stated a breach of loyalty claim that survived a 12(b)(6) motion and would thus go to trial).

61. Derek Quinn Johnson, Note, *Educating Misguided Student-Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 107 (1985).

62. *Id.*

63. ANDREW ZIMBALIST, UNPAID PROFESSIONALS 3 (1999).

64. *Id.*

65. Notre Dame is not forced to give any TV or bowl money from football to a conference as it does not belong to a football conference.

department staff, and football coaches[66] and could prompt these officials to act contrary to a student-athlete's best interests.

While these facts concern only one particular institution, the amount of money available to many Division I basketball and football programs suggests a mismatch between the welfare interests of student-athletes and those of the universities they represent.[67] Consequently, this Note argues that courts should analyze under a stricter standard those claims brought by athletes who allege a failure to value the athletes' welfare over their athletic contributions. This standard of review is similar to that used by courts to review corporate conflicts. Basketball and football players at big-time Division I programs could argue that their performances generate the requisite indirect and direct revenues to create these conflicts of interest. They would, however, need to show that the alleged harmful actions sprang directly from the conflict between the university's financial welfare and the welfare of the athlete. These mismatched interests not only relate to review of the substantive merits of a student-athlete's claim, but also to the student-athlete's ability to bring a case against the NCAA independent of the institution.[68]

IV. CONTRACTUAL CLAIMS AND STUDENT-ATHLETES BEFORE *BLOOM*

In bringing suit against the universities they represent, scholarship athletes have attempted to move courts to a more exacting standard of review by alleging a deprivation of property or financial interests. Over the last forty years, courts have acknowledged that the relationship between athletes and their institutions is contractual in nature and that property interests are at stake. However, these same courts have failed to provide a unified approach with regard to the nature of this relationship and the precise contractual duties that flow from it. This inconsistency, due to a lack of discernable standards by which to measure the NCAA, foreshadows the import of the *Bloom* decision going forward.

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66. Notre Dame's Board of Trustees and athletic department came under tremendous media scrutiny in December 2004 when they fired head football coach Tyrone Willingham after only three seasons. In Willingham's three seasons, Notre Dame was a mediocre 21-15 and did not win a bowl game. *AD Cites Lack of On-Field Progress*, ESPN.com, Dec. 1, 2004, http://sports.espn.go.com/ncf/news/story?id=1935138 (last visited Apr. 30, 2006).

67. *See supra* notes 32–37 and accompanying text.

68. While the *Bloom* court, in granting standing to student-athletes to bring suit, did not identify commercial concerns as a reason for this holding, the fact that the interests of big-time athletes and institutions can be so different affirms the standing decision.

A. Contractual Nature of the Student/Institution Relationship

The relationship between a non-athlete student and that student's college is contractual.[69] Courts have held that this contractual relationship imposes certain duties on both the school and its students and that these duties are judicially enforceable.[70] Institutions must provide students with an atmosphere conducive to learning,[71] must not enter into agreements with students that would be unconscionable,[72] and must award a degree upon completion of the student's course of study[73] among other duties. These duties show that contractual claims are available to even non-athlete students and that courts thus seek to protect students in their relationships with institutions of higher learning.

B. Workmen's Compensation Cases

One of the first cases addressing whether a contractual relationship existed between an athlete and the athlete's institution was *Van Horn v. Industrial Accident Commission.*[74] In this case, Van Horn, a scholarship football player for California State Polytechnic College, died in a plane crash on his way home from a football game in Ohio.[75] Van Horn's family instituted a suit against the state industrial commission, alleging that their son was an employee and that they were entitled to workmen's compensation.[76] The court found for Van Horn's family, holding that Van Horn received compensation (the scholarship) for services rendered (his athletic prowess) and this contract made him an employee of the college.[77] Therefore, the commission was required to pay workmen's compensation to the

69. Cencor, Inc. v. Tolman, 868 P.2d 396, 398, 398–99 (Colo. 1994) (reasoning that an educational institution may augment the agreement between the institution and a student by providing materials, such as catalogs and student bandbooks, to the student).

70. Brody v. Finch Univ. of Health Sciences, 698 N.E.2d 257, 265 (Ill. App. Ct. 1998).

71. Tedeschi v. Wagner Coll., 402 N.Y.S.2d 967, 970 (N.Y. Sup. Ct. 1978).

72. Albert Merrill Sch. v. Godoy, 357 N.Y.S.2d 378 (N.Y. Civ. Ct. 1974).

73. Sharick v. Southeastern Univ. of Health Scis., 780 So.2d 136, 139 (Fla. Dist. Ct. App. 2000).

74. 33 Cal Rptr. 169 (Cal. Ct. App. 1963).

75. *Id.* at 170.

76. *Id.*

77. *See id.* at 174 (holding that the state's workmen's compensation law should be liberally construed to effect its beneficent purposes).

family. This case suggested, for the first time that scholarship athletes were employees of their member institutions.[78]

As a result of this landmark decision, the NCAA took seemingly contradictory steps over the next twenty years to distinguish athletic scholarships from employment contracts.[79] In court, the NCAA asserted that receipt of an athletic scholarship did not hinge on the athlete's continued participation in the activity.[80] However, behind closed doors, the NCAA enacted provisions that would allow a school to cancel an athlete's institutional aid for a lack of participation or for a refusal to follow the directions of athletic staff.[81]

The NCAA's strategy of differentiating scholarships from employment contracts gained traction in *Coleman v. Western Michigan University* when a Michigan court of appeals held that a student-athlete is not an employee due to the fact that sports are not integral to a university's "business."[82] The court further found that the athlete's scholarship did not constitute a wage, and it asserted that the university had only limited ability to "fire" the student-athlete; thus, the university had no more control over athletes than it had over normal students.[83] As indicated by *Coleman* and other cases,[84] courts in the future are not likely to consider scholarship athletes employees of their member institutions.

These courts' assumptions as to the role of college sports in a university's business are questionable when considered within the landscape of big-time Division I sports. Many of these sports bring in considerable amounts of money for the member institutions, and so the insinuation that athletics are not a part of the business of these

78. The court made clear that while it did not consider scholarship athletes employees as a matter of law, where the evidence established a contract of employment the inference could be reasonably drawn. *Id.* at 175.

79. *See* SACK & STAUROWSKY, *supra* note 37, at 81 (noting that in the aftermath of *Van Horn*, the NCAA urged its member institutions to review and reword their grant-in-aid policies so that this language did not suggest an employment relationship).

80. *Id.* at 81–82. The NCAA did this by simply inserting language in the grant-in-aid materials that asserted that the scholarship "did not constitute payment or compensation for participation." *Id.* at 82. If an athlete could get out of his athletic commitment so freely, courts would be less likely to find that the athlete had a performance obligation and that, because of this, the scholarship was not a contract for services.

81. *Id.* at 84. This seems hypocritical in light of the NCAA's previous assertion that student-athletes could escape their athletic commitments and keep receiving scholarship funds.

82. 336 N.W.2d 224, 227 (Mich. Ct. App. 1983).

83. *Id.* at 226–27.

84. *See* Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983) (reversing a lower court holding that an Indiana State football player was an employee of the university).

universities is counterfactual. These early judicial decisions do not affect modern student-athletes who desire to bring claims against the NCAA or their member institutions though. The rights granted by workmen's compensation statutes are not as substantial as contract remedies; normal contract claims are much more valuable to the aggrieved student-athlete.

*C. Other Contract Cases Pre-*Bloom*: The Difficulty of Proving Breach of the Implied Duty of Good Faith*

While courts no longer equate scholarship agreements with employment contracts, the signing of the scholarship agreement and National Letter of Intent ("NLI") does signify the contractual mechanisms of offer and acceptance.[85] Even though courts do not consider these documents to be *employment* contracts, courts have accepted the contractual nature of this relationship.[86] Through the NLI, athletes agree to offer their athletic talents for the sole benefit of the universities that they will attend and universities agree to provide financial assistance as consideration in the scholarship agreement.[87]

Despite judicial recognition of this contractual relationship, athletes have had difficulty proving breaches of these athletic contracts. In a case involving a scholarship basketball player who brought a breach of contract claim against his university for failing to provide the academic support that the university's athletic department had promised, the Court of Appeals for the Seventh Circuit concluded that such an action could only be maintained for a breach of specific promises.[88] In this case, the court noted that it would not allow the student-athlete, Ross, to repackage his educational malpractice claim against Creighton University as a breach of contract claim by making a general attack on the quality of education.[89] Earlier in the decision, the court, citing policy and practical concerns, refused to recognize the tort of educational

85. *See* Mark R. Whitmore, *Denying Scholarship Athletes Workers' Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 787-89 (1991) (identifying the elements of contract formation and enforcement between scholarship athletes and universities).

86. *See, e.g.*, Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (Ct. App. NC 1972) (holding that an eligible scholarship athlete's refusal to play on the university football team constituted a breach of his contractual obligations); Ross v. Creighton Univ. 740 F. Supp. 1319, 1331 (N.D. Ill. 1990) (finding that the contractual relationship surely applied to Ross who was providing athletic services in exchange for tuition and expenses).

87. *See* Whitmore, *supra* note 85, at 787–88 (stating that all the elements of contract formation exist in the scholarship agreement).

88. Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1991).

89. *Id.*

malpractice arising from Creighton's alleged failure to educate Ross.[90] The court explained that a petitioning student-athlete must "point to an identifiable contractual promise that the defendant failed to honor" in order to state a cognizable contractual claim.[91] The Seventh Circuit held that Ross's allegations that the university had not lived up to its promise to provide him specific services so as to allow him to participate academically were sufficient to state such a claim.[92]

Some courts have stated that the only contractual duty owed by institutions and the NCAA to athletes or prospective athletes is the duty of good faith and fair dealing.[93] In *Hall v. NCAA*, a federal district court held that tbe NCAA did not violate the covenant of good faith and fair dealing implicit in its contract with Hall.[94] After a dispute over an NCAA core course requirement, Hall, an incoming scholarship basketball player at Bradley University, sued to enjoin the NCAA from declaring him ineligible, alleging that the NCAA had breached its contract with him.[95] The court found contractual intent through Hall's offer of application and payment to the NCAA Clearinghouse (the organization that determines student-athlete eligibility for the NCAA) and the Clearinghouse's acceptance of his application, but held that the NCAA did not breach this contract because it applied its standards fairly to Hall.[96]

The court then assumed for the purposes of its argument that Hall was a third-party beneficiary to the contract between the NCAA and its member schools.[97] The court's decision to consider athletes the intended beneficiaries arose from the perceived role of "gatekeeper" that the court found the NCAA plays in determining athlete eligibility.[98] Concluding that Hall was unable to show that the NCAA failed to perform a material contractual obligation due to its mere

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90. *Id.* at 415 (citing the lack of a standard of care, concerns with proving proximate cause and damages, and the possibility of a flood of litigation as the main reasons for their decision not to recognize this tort).

91. *Id.* at 417.

92. *Id.* Creighton had promised to provide Ross, "'an opportunity to obtain a meaningful college education and degree'" and Ross alleged that Creighton's failure to provide adequate tutoring had deprived him of this opportunity to obtain a meaningful education. *Id.* at 412.

93. Phillip v. Fairfield Univ., 118 F.3d 131, 135 (2nd Cir. 1997).

94. 985 F. Supp. 782, 795 (E.D. Ill. 1997).

95. *Id.* at 794.

96. *Id.*

97. *Id.* at 797 (granting third-party beneficiary status while expressing skepticism over whether student-athletes are the intended beneficiaries of the NCAA contract).

98. *See id.* (contrasting this case to *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996), where athletes were not held to be the intended beneficiaries to the contract between a conference and its schools).

enforcement of its own rules, the court held that there was no breach of contract.[99]

Even though athletes have convinced courts to recognize scholarships as contracts, courts have only implied vague obligations of good faith and fair dealing because the NLI does not impose any specific obligations on the NCAA or its member institutions. Therefore, in the absence of express material obligations, courts have held that an athlete must prove that the NCAA or its member institution made promises that it did not keep in order to show a breach of the scholarship agreement. With this scheme in place, institutions seem unlikely to make extraneous promises to athletes (as Creighton did in *Ross*), because without such promises, institutions will have fewer obligations to the student-athlete.

V. THIRD-PARTY BENEFICIARY STATUS COMES TO FRUITION IN *BLOOM*

The lessons taught by *Bloom v. NCAA* may allow student athletes to more easily fashion successful claims against the NCAA and its member institutions. Bloom might have been able to prevail even under the strict association law standard of review had the court looked at the NCAA's past eligibility ruling involving an athlete in a similar situation. Moreover, even though Bloom lost his appeal, his case is important because student-athletes may now have standing to sue the NCAA as third-party beneficiaries and can point to material obligations that the university and the NCAA must provide to all student-athletes. These obligations may be tough to prove, but the mere availability of such claims against the NCAA improves a student-athlete's chance of success in court.

A. The Bloom *Holding*

In *Bloom v. NCAA*, the Colorado Court of Appeals recognized that student-athletes have standing to sue the NCAA because they are third-party beneficiaries to the contract between the NCAA and member institutions.[100] Specifically, the court held that the trial court had not abused its discretion by refusing to enjoin the NCAA from barring Bloom's participation in intercollegiate athletics while he received endorsements related to professional freestyle skiing.[101] Bloom argued that these endorsement deals were the "customary" method of compensation in freestyle skiing and that because the

99. *Id.*

100. 93 P.3d 621 (Colo. Ct. App. 2004).

101. *Id.* at 627.

NCAA allows professional athletes to represent member institutions in other sports, he should be entitled to earn this "income."[102] In construing the contract, the court viewed the contract in its entirety, not in isolated portions, to determine the intent and "reasonable expectations" of the parties.[103] The court explained that the NCAA Bylaws evidenced an unambiguous intent to prohibit athletes from obtaining endorsement deals even though athletes are free to receive professional salaries in sports not played at the NCAA level.[104] Further, it found that the trial court did not abuse its discretion by strictly applying the endorsement rules to Bloom because of the rational relationship between these rules and the NCAA's interest in distinguishing amateur from professional sports.[105]

More important to the future of student-athlete claims against the NCAA, the court in *Bloom* found "that the NCAA's Constitution, Bylaws, and Regulations evidence a clear intent to benefit student-athletes."[106] Even though student-athletes are not parties to the NCAA contract, the court determined that Bloom had standing as a third-party beneficiary to the contract because the parties to the agreement[107] intended to benefit athletes directly through the contract.[108] After making this momentous decision, the court turned once again to the contractual analysis from previous cases and found that Bloom could not prove a violation of the duty of good faith and fair dealing implicit in the NCAA contract.[109]

B. Bloom *under Existing Association Law*

The *Bloom* court did not consider an NCAA eligibility ruling involving an athlete in a situation almost identical to Bloom's. If it had taken this decision into consideration, Bloom may have won his appeal even under the deferential association law standard of review. Bloom's attorney attempted to submit supplemental authority to the appeals court detailing the treatment of Tim Dwight,[110] but because the trial court had no opportunity to review it, the appeals court

102. *Id.* at 625.
103. *Id.*
104. *Id.* at 626.
105. *Id.*
106. *Id.* at 623–24.
107. Here, the NCAA and Colorado University.
108. *Bloom*, 93 P.3d at 623–24.
109. *Id.* at 624.
110. Dwight recently finished his first year with the New England Patriots.

refused to consider it.[111] Tim Dwight, a track and football star at the University of Iowa, entered the National Football League ("NFL") after his junior year and played a full season in the NFL while receiving endorsements.[112] Dwight subsequently petitioned the NCAA for reinstatement in 1999 to run track in his last year of college eligibility at Iowa, and the NCAA granted this petition.[113] An NCAA representative told a Colorado compliance officer before Bloom's trial in 2002 that Dwight had not willfully accepted endorsement money while a college athlete and had returned any such money received.[114] However, Dwight sent Bloom's lawyer an affidavit just before the appellate oral argument in 2004 claiming that Dwight's receipt of endorsement money had been willful and produced documentation showing that the NCAA had not asked him to return the money.[115]

Bloom, through Colorado University, sought reinstatement from the NCAA Student-Athlete Reinstatement Committee after he lost in the appeals court.[116] The staff reviewed the request, as it reviews all others by looking at "precedent with similar facts to determine what conditions for reinstatement should be imposed, if any."[117] The NCAA ruled against Bloom's reinstatement request[118] and his subsequent reinstatement appeal due to the "multiple and willful violations of NCAA rules regarding endorsements."[119] Even with the knowledge of the signed affidavit that Dwight had sent Bloom's lawyer, the director of student-athlete reinstatement for the NCAA pointed to Bloom's "willful" violation as the sole substantive difference between the reinstatement requests of Bloom and Dwight.[120]

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111. *Bloom*, 93 P.3d at 628.

112. Affidavit of Tim Dwight, Submitted with Plaintiff's Supplemental Citation of Authority, *Bloom v. NCAA*, Case No.: 02CA2302 ¶¶ 1, 2 (filed with Col. Ct. App., Apr. 3, 2004) (on file with author).

113. *Id.* ¶ 6.

114. *Hearing*, *supra* note 1, at 22 (statement of Jeremy Bloom).

115. Affidavit, *supra* note 112, ¶¶ 6, 8. Dwight was able to keep the endorsement monies he received after successfully petitioning the NCAA for reinstatement to run track. *Id.*

116. All NCAA members, upon finding a violation of legislation regarding ethical conduct, amateurism, recruiting, eligibility, financial aid, extra benefit and drug-testing, must declare the offending athlete ineligible and the athlete must seek reinstatement through that athlete's university. FAQ from the NCAA on Student-Athlete Reinstatement, http://www1.ncaa.org/membership/enforcement/s-a_reinstatement/faqs.html (last visited Apr. 30, 2006).

117. *Id.*

118. *Hearing*, *supra* note 1, at 20 (statement of Jeremy Bloom).

119. Press Release, NCAA, NCAA Statement Regarding Jeremy Bloom Reinstatement Decision (Aug. 17, 2004), *available at* http://www.ncaa.org/releases/miscellaneous/2004/2004081701ms.htm.

120. *Hearing*, *supra* note 1, at 23.

The Colorado appeals court could have determined that the NCAA acted arbitrarily and capriciously in selectively enforcing its provision on endorsements against Bloom but not against Dwight had it received this information in a timely way. At the very least, Bloom should have prevailed in his subsequent request for reinstatement to the NCAA. Not only did the NCAA conceal the facts about Dwight's case from Bloom until it was too late, the NCAA also refused to follow its own precedent-based approach in examining Bloom's reinstatement case. The NCAA's justification for its different conclusions, that Bloom willfully violated the endorsement provision while Dwight did not, seems clearly inconsistent with Dwight's own version of events and makes their treatment of Bloom arbitrary.[121]

C. Failure to Analyze Reasonable Expectations of Both Parties

The *Bloom* court failed to analyze Bloom's reasonable expectations in entering into the contract at issue in the case. While the court stated that it would give effect to the reasonable expectations of both parties by viewing the contract in its entirety, the court focused solely on the NCAA's intent in enacting the bylaw[122] that prohibits athletes from receiving endorsement money and making media appearances.[123] An NCAA official stated that these provisions had been applied consistently and in a non-sport specific manner.[124] Practical implications aside, the court failed to analyze Bloom's intent at the time he signed his NLI, when he subjected himself to NCAA regulations.

Courts must honor the reasonable expectations of all contract parties and intended beneficiaries regarding the terms of a contract.[125]

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121. Since sending Bloom's lawyer the initial affidavit, Dwight sent Bloom's lawyer another affidavit claiming that he had accepted the endorsement money while fully aware of the NCAA rules that bar athletes from receiving endorsement money. Affidavit, *supra* note 112, ¶ 3. This rebuts the NCAA's contention that Bloom's willful acceptance of endorsement money distinguished the two cases.

122. NCAA MANUAL, *supra* note 4, art. 12.5.2.1.

123. *See* Bloom v. NCAA, 93 P.3d 621, 625–26 (Colo. Ct. App. 2004) (finding that the NCAA Bylaws express a clear intent to prohibit student-athletes from receiving endorsements without regard to when the opportunity to receive them originated or whether the opportunity arose as a result of a non-NCAA sport).

124. *Id.* at 626. This statement of consistent purpose seems ironic when considered alongside the NCAA policy of allowing athletes to collect professional salaries, a practice that creates a kind of discrimination against certain professional sports whose athletes are not paid salaries or signing bonuses.

125. *See, e.g.*, Rodman v. State Farm Mutual Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973) (emphasis added) (quoting ROBERT E. KEETON, INSURANCE LAW – BASIC TEXT § 6.3 at 351 (1971) (holding that "[t]he objectively reasonable expectations of applicants and *intended beneficiaries*

Thus, a court could refuse to apply even unambiguously stated contract provisions if those provisions defeat the reasonable expectations of one of the parties or a beneficiary such as Bloom. The doctrine of reasonable expectations is applied generally to all contracts of adhesion.[126]

The NCAA Constitution may be adhesive as applied to student-athletes because athletes have no say in the provisions and protections of their athletic contracts.[127] Additionally, the signing of the NLI brings scholarship athletes under the NCAA's umbrella, a scenario in which athletes seem to be at a bargaining disadvantage when dealing with university officials who routinely engage in this type of transaction.

The NCAA Constitution does not appear to be an adhesive contract on its face. However, because athletes have little choice as to whether to accept the NCAA Constitution's terms, courts should analyze it under the rules that apply to a contract of adhesion. The *Bloom* court purported to do this by analyzing reasonable expectations but again, only analyzed the NCAA's expectations.

Instead of ignoring Bloom's reasonable expectations, the court in *Bloom* should have evaluated what Bloom's actual expectations were when he entered into the contract with Colorado and the NCAA. In Bloom's situation, it is unclear what these expectations were when he signed his letter of intent (although he has intimated that he knew of the endorsement provisions between the time he signed his scholarship and the time he enrolled).[128] Consequently, had the court decided that Bloom did not think that becoming a college athlete would require him to sacrifice his ability to pursue his career as a freestyle skier, the court's holding on the breach of contract claim may have been different.

D. Confusion about the Legal Standard to Apply

During Bloom's appeal, the Colorado court of appeals judge appeared unclear as to what standard of review to apply to the third-

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regarding the terms of insurance contracts will be honored even though painstaking study of the policy provision would have negated those expectations").

126. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 174 (Iowa 1975) (positing that the rules of normal contract law cannot be "'mechanically applied"' to adhesion contracts). Contracts are adhesive when some degree of imbalance of bargaining power exists between the parties and the contract is offered on a take-it-or-leave-it basis. Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Cal. Ct. App. 1961).

127. *See supra* notes 50–53 and accompanying text (demonstrating that student athletes have no voice in adopting the rules and regulations to which they are subject).

128. *Hearing*, *supra* note 1, at 42.

party beneficiary claim. Bloom's lawyer stated that the appellate judge asked three different times at oral argument whether the arbitrary and capricious standard "was part of the contract claim."[129] In response, both Bloom's lawyer and the NCAA counsel told the judge that these issues were separate and independent.[130] This suggests that the Colorado appeals judge may have mistakenly applied the association law standard of review (arbitrary and capricious) to an independent contract claim.

Furthermore, while the *Bloom* court found that student-athletes are third-party beneficiaries, it concluded that Bloom's standing as a third-party beneficiary merited the same vague contractual analysis based on implied duties that courts had applied in cases such as *Ross*.[131] This level of scrutiny seems inappropriate since these earlier courts applied this good faith analysis only when athletes failed to allege a breach of material obligations.[132] Because Bloom alleged such a breach, the court's good faith analysis seems misplaced.

E. Aftermath of Bloom*: Standing and Material Obligations*

Third-party beneficiary status appears to be a boon for wronged student-athletes who bring claims against the NCAA. Under the logic of *Bloom*, student-athletes may now have standing to sue the NCAA and can point to material obligations that the NCAA and its institutions owe student-athletes. Before courts recognized this third-party beneficiary status, student-athletes lacked independent standing and had to rely on their institutions to bring claims against the NCAA.[133] Granting standing to student-athletes as third-party beneficiaries recognizes the mismatch between the interests of the institution and student-athletes due to the amount of money at stake

129. E-mail from Peter Rush, Member, Bell, Boyd and Lloyd LLC, to Author (Jan. 15, 2005, 07:01:22 CST) (on file with author).

130. *Id.*

131. *See id.* (claiming that Bloom's claim of arbitrary and capricious action asserted a violation of the duty of good faith and fair dealing).

132. *See supra* notes 92–94, 97–100 and accompanying text (describing cases in which courts applied the good faith analysis).

133. Because the institution and the NCAA are the parties to the NCAA Constitution, under the traditional common-law privity rule, student-athletes could not sue on this contract because they lacked privity. 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:1 (Jack K. Levin ed., 4th ed. 2000).

and the ongoing nature of the institution's relationship with the NCAA.[134]

The third-party beneficiary rule dispenses with contract law's traditional privity requirement by allowing an individual who is not a party to the contract to nonetheless enforce its terms.[135] Under the third-party beneficiary rule, third parties can enforce the contract to the same degree as a traditional party in privity if they are the intended beneficiaries[136] because the promisor has a duty to any intended beneficiaries to perform the promise.[137] Thus, when an intended beneficiary has an enforceable claim against the promisee, the beneficiary can obtain a judgment from the promisor or promisee or both depending on their duties to him.[138] To be liable, the promisee in the third-party agreement must be responsible for the breach, jointly or individually.[139] However, in most cases, the third-party beneficiary's action lies solely against the promisor.[140]

Before *Bloom*, because the NLI does not identify obligations that the NCAA and member schools owe student-athletes, those who challenged NCAA rules had to argue that the NCAA or its member institution violated an implied duty of fairness. However, the grant of contractual status amounted to a hollow pronouncement because courts made it difficult to prove breaches egregious enough to violate these vague, implied duties in the scholarship contract.[141] Post-*Bloom*, courts faced with student-athlete challenges to NCAA rules and actions should look to the NCAA Constitution and Bylaws to identify the material obligations the NCAA and its member institutions owe to student-athletes.

These material obligations make the athlete's overall burden of proof lighter. While the member institution, as promisor, is more likely to be liable in these situations, a court could hold that the NCAA, even as a promisee, is liable for a misapplication of one of its

134. For instance, the NCAA was investigating the University of Colorado football team for alleged recruiting violations at the time of Bloom's court appeal and final appeal to the NCAA. Rick Morrissey, *Odd As It Sounds, Barnett Will Be Back*, CHI. TRIB., Dec. 11, 2005, at C1. This makes it more likely that Colorado did not press Bloom's case as hard as it normally would have in an attempt to mitigate future penalties incurred for these unrelated recruiting violations.

135. 13 RICHARD A. LORD, 13 WILLISTON ON CONTRACTS § 37:1 (Jack K. Levin ed., 4th ed. 2000).

136. *Id.*

137. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

138. *Id.* § 310.

139. Noel v. Pizza Hut, Inc., 805 P.2d 1244, 1251 (Kan. Ct. App. 1991).

140. District of Columbia v. Campbell, 580 A.2d 1295, 1302 (D.C. 1990).

141. *See supra* notes 91–94 and accompanying text (describing cases in which the NCAA was held not to have breached duties in scholarship contracts).

eligibility rules or a failure to adequately oversee its coaches. Because the NCAA Constitution extensively regulates coaches, student-athletes can argue that coaches and other officials act as the agents of not only member institutions, but the NCAA as well.[142] The NCAA regulations of coaches would make the NCAA a promisee, jointly liable for a breach of contract.

The following sub-sections detail the stories of Devaughn Darling, Neil Reed, and Sammy Maldonado as case studies of the types of athletes who could bring claims against the NCAA and possibly prevail on these claims post-*Bloom*. These examples are meant to be illustrative, not exhaustive, by showing the practical application of the third-party beneficiary rule to student-athletes.

1. NCAA Constitutional Provisions for Health of Student-Athletes

Though the NCAA's amateurism goals are a far cry from the reality of big-time college sports, the provisions relating to student-athlete welfare seem to stray even further from the standard operating procedure of NCAA Division I schools. The NCAA charges its members with the duty of running their athletic departments in a way that protects and increases the "physical and educational welfare of student-athletes."[143] Additionally, institutions must protect the physical health of their student-athletes by providing them with a safe environment.[144]

a. Examples of a Breach of Material Obligations

In February 2001, Devaughn Darling, a linebacker for the Florida State University football team, died as a result of an off-season workout.[145] The Florida State football team's training rules provided that coaches should not allow players to drink water during the workouts which were known as some of the most grueling in college football.[146] An observer of the first day of these off-season workouts wrote that it was "chilling" to hear a Florida State assistant coach tell the athletes, "You will pass out before you die. If you pass

142. *See, e.g.*, NCAA MANUAL, *supra* note 4, art. 11.1.2 (stating that staff members found in violation of NCAA regulations will he subject to discipline set forth in the enforcement procedures); *id.* art. 11.1.2.1 (holding the coach responsible for promoting an atmosphere of compliance and monitoring that compliance within his/her program).

143. *Id.* art. 2.2.

144. *Id.* art. 2.2.3.

145. Gary Smith, *Soul Survivor*, SPORTS ILLUSTRATED, Dec. 2, 2002, at 66.

146. *Id.* at 70. Darling had the sickle cell trait, and sickle-shaped red blood cells, which threaten the flow of oxygen in the blood, were found throughout his body. *Id.*

out, the trainers will take care of you!"[147] Darling's family settled the wrongful death lawsuit it brought against Florida State for $2 million.[148] As a result of the Darling case, Florida State now allows water breaks during its workouts and has an ambulance and defibrillator on site.[149] Florida State University arguably breached its duty to provide athletes a safe environment by putting its athletes through such dangerous workouts. Though Darling's family won a settlement against Florida State for this incident, under the reasoning of *Bloom,* they could have added breach of contract claims against the NCAA and Florida State to the existing tort claim because Darling was a third-party beneficiary to the contract with the NCAA.

Another instance of jeopardizing student-athlete safety occurred when Bob Knight, at the time the head basketball coach at Indiana University, choked Neil Reed, the starting point guard, during a 1997 practice.[150] As a third-party beneficiary, Reed could have argued that pursuant to its duty to provide a safe environment, the NCAA and Indiana were obligated to keep him free from physical attacks outside of those naturally present in the game of basketball. Knight's attack on Reed violated this obligation. Consequently, Reed may have been able to collect from the NCAA and Indiana University for their failure to provide him the requisite safe environment in which to play basketball.

Any time a coach or trainer asks a player to play while hurt or risk further injury, that athlete could allege a breach of the duty to provide a safe environment. Athletes whose injuries are exacerbated while playing hurt could argue that they were compelled to play because of the control the member university and coach have over their future education.[151] As a result of this compulsion by university staff members, athletes may be able to prove that the NCAA failed to provide a safe environment.

2. NCAA Constitutional Provisions for Academic Welfare

The NCAA requires that in order to compete, an athlete must be in "good academic standing" as determined by the institution.[152] It

147. *Id.*

148. Eddie Timanus, *Fla. State, Darling Family Settle Suit for $2M,* USA TODAY, June 29, 2004, at C03.

149. Smith, *supra* note 145, at 75.

150. Jack Thompson, *Tape Shows Knight Grabbing Player's Neck,* CHI. TRIB., Apr. 12, 2000, at 2 (detailing video tape showing Knigbt grabbing Reid's neck and "pushing it back").

151. *See supra* note 81 and accompanying text (noting the institution's ability to take away an athletic scholarship for failure to follow directions or failure to participate).

152. NCAA MANUAL, *supra* note 4, art. 14.01.2.1.

also puts forth a series of complicated degree completion requirements that institutions must enforce.[153] Each member institution bears the responsibility for establishing and maintaining an environment where the student-athlete's athletic activities are an integral part of the educational experience.[154] Specifically, this means "[t]he admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general."[155]

a. Example of Breach of Material Obligations

Sammy Maldonado, a running back at Ohio State University, wanted to transfer to Maryland after his second season but had only earned seventeen transferable credits in his two years at Ohio State.[156] Maldonado had taken the equivalent of forty credit hours at Ohio State and only failed to get a passing grade in six of those credit hours.[157] However, he received four credits for playing football, three credits for Ohio State coach Jim Tressel's "Coaching Football" class, and three credits for a class called "Issues Affecting Student-Athletes."[158] Because of these and other "filler" credits that Maryland refused to accept due to their lack of academic rigor, Maldonado was forced to pass forty-three credit hours in one calendar year to become eligible at Maryland, which he did.[159] These facts call into question the legitimacy of Maldonado's education at Ohio State and the worth of the degree that Maldonado would have received had he stayed at Ohio State. Maldonado explained, "Over there [at Ohio State], they just put you in classes . . . . I let them take care of my schedule."[160] Additionally, while many schools award credit to varsity athletes for playing their sports, as allowed by the NCAA,[161] the number of "filler" classes that Maldonado took seems to overstep Ohio State's prerogatives in this area.

153. *Id.* art. 14.4.

154. *Id.* art. 2.2.1 (adopted 1/10/95).

155. *Id.* art. 2.5.

156. Ryan Hockensmith, *Extra Credit*, http://sports.espn.go.com/ncf/news/story?id=1919255 (last visited Apr. 30, 2006).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Mark Schlabach, *Varsity Athletes Get Class Credit*, WASH. POST, Aug. 26, 2004, at A1.

3. Evidentiary Issues Regarding Proving the Breach

The analysis of whether a university failed to provide either an adequate education or a safe environment under the NCAA contract would be a fact-specific inquiry.[162] To prove that a university did not provide a safe environment, a student-athlete would face a high burden of proof and would need to show facts similar to the Darling and Reed stories. Statements made by coaches expressing an utter disregard for student-athlete welfare and the lack of reasonable safety accommodations, like water breaks, would be essential in showing a lack of concern for the athletes. Further, courts may refuse to allow the introduction of evidence of subsequent remedial measures like the presence of emergency vehicles and defibrillators after Darling died, since the Federal Rules of Evidence block admission of this evidence in order to encourage socially responsible behavior.[163] Student-athletes may also have trouble establishing the standard for a safe environment. As the examples above indicate, student-athletes may only be able to prove what constitutes a safe environment by showing what clearly does not amount to such an environment.

As to the evidentiary proof necessary to show that a school breached its material, academic obligations under the NCAA contract, courts should not overlook the student-athlete's responsibility for his or her own education. Student-athletes must be accountable as they, too, are a part of the educational process. Even though universities filter some student-athletes like Maldonado into classes that may not contribute meaningfully to the educational experience, athletes must take control of their own educations. However, in Maldonado's situation he had little actual control over his schedule, so the athlete's responsibility would seem to diminish in importance as the university's responsibility increases. In arguing that a school breached its academic obligations, additional factors could include: the number of absences occasioned by athletic commitments; a record of complaints by the student or a representative; and evidence of passing grades in courses never attended.[164]

Courts, while hesitant to determine whether an educational experience is legally adequate, have found that material educational obligations prompt a searching review.[165] A situation like Maldonado's, for example, may trigger close judicial scrutiny because

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162. *See* Johnson, *supra* note 61, at 121 (noting that the academic breach claim would be include a fact-specific inquiry).

163. FED. R. EVID. 407.

164. Johnson, *supra* note 61, at 121.

165. *See supra* notes 91–92 and accompanying text (discussing *Ross* case).

Ohio State seemingly breached its material obligation to give him an educational experience on par with the rest of the student body. However, courts have been unwilling to recognize the validity of educational malpractice claims for policy and evidentiary reasons;[166] thus, courts may dismiss many of these third-party claims. Regardless of the likelihood of success, institutions such as Ohio State should not be allowed to wring out every drop of athletic skill from their athletes without providing an educational experience that allows these athletes to transfer or to graduate with a legitimate degree.

4. Remedies

Student-athletes who prove that the NCAA breached a material obligation of its contract with the student-athletes must show monetary damages in order to recover. In the case of a breach of the duty to provide an education "consistent with the policies and standards adopted by the institution for the student body in general,"[167] it may be difficult to prove quantifiable damages. A court will limit damages to those within the contemplation of the breaching party at the time of the contract's formation.[168] In this case, student-athletes could claim that they were denied the opportunity for future earnings reasonably expected if they had received a "meaningful education."[169] The NCAA and its member institutions would have difficulty claiming that it was not within their contemplation that providing a substandard education could bring about these damages. Some courts have been open to punitive damages when a university knowingly breaches such an educational duty.[170] However, other courts have found this approach too speculative and have even refused to permit recovery for lost earnings.[171]

College athletes may also attempt to show restitutionary damages by asserting that if an institution retained the benefit of the student-athlete's services even though the institution did not provide the education owed, this would constitute unjust enrichment.[172] This

166. *See supra* notes 89–90 and accompanying text (discussing rejection of such a claim in *Ross* case).

167. *See supra* note 13 and accompanying text (discussing universities' responsibilities towards their student athletes).

168. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

169. *See supra* note 92 (explaining that Creighton's pledge to Ross to provide him with a "meaningful education" was essential in the court's holding that Creighton was liable for failing to provide this).

170. Johnson, *supra* note 61, at 119.

171. *Id.* at 120.

172. *Id.* at 119.

option would be available only for star athletes in big-time sports who have the ability to "single-handedly [] alter the fortunes of a given athletic program."[173] As a result, most athletes could not easily make this showing.

An athlete able to prove a breach of the NCAA provision to provide for a safe environment for athletes would have a less difficult time showing damages than an athlete trying to prove damages for a breach of academic promises. Both economic damages (such as hospital expenses) and non-economic damages (such as pain and suffering) would be available to the student-athlete injured as a result of the institution's failure to provide a safe environment. Courts are accustomed to awarding such damages as these are the typical awards in tort cases. As a result, courts will more likely grant such awards than grant damages for educational malpractice, a tort unrecognized by most courts.

VI. CONCLUSION

The determination that athletes are third-party beneficiaries to the contract with the NCAA may signal a turning point in the way courts look at the relationship between student-athletes, colleges, and the NCAA. Jeremy Bloom's case received significant exposure in the media because of the perceived inequities present in his situation. While professional baseball players who moonlight as college athletes in other sports may play baseball for compensation in the off-season, Bloom was forced to choose between two sports he loves because he chose the wrong professional sport.

The NCAA's decision not to reinstate Bloom, along with other eligibility decisions made around the same time,[174] caused an uproar in the public and on Capitol Hill.[175] To minimize bad publicity, the NCAA does not want an individual like Jeremy Bloom to tell his story. Congressman Spencer Bachus, presiding over a House subcommittee oversight hearing that included testimony from Bloom, said, "The NCAA made several calls about Mr. Bloom asking that he not testify. I tell you, it just proves my case that we need a little openness and sunshine in these hearings . . . ."[176]

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173. *Id.*

174. *See* Woody, *supra* note 3 (detailing the seeming inequities in Bloom's case and that of Mike Williams, a receiver for the University of Southern California, whose reinstatement request was also denied by the NCAA).

175. *See generally Hearing*, *supra* note 1.

176. *Hearing*, *supra* note 1, at 107.

The many rights guaranteed by the NCAA Constitution (including the right to a safe environment and the right to an education commensurate to that offered to other students) could now be the subject of cognizable claims if student-athletes can clear the necessary evidentiary hurdles. If courts faithfully apply contractual principles to contract claims brought by these student-athletes (something the *Bloom* court failed to do), student-athletes may have a new avenue of redress against both universities and the NCAA. This recognition is long overdue as these big-time "amateur" athletes make large sums of money for their schools and the decisions of athletic department staff and school officials are increasingly conflicted. *Bloom* should signal the advent of greater scrutiny on NCAA and institutional actions that affect student-athlete welfare and will hopefully lead to more oversight of the NCAA and its member institutions.

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