Carrying a Good Joke Too Far? An Analysis of the Enforceability of Student-Athlete Consent to Use of Name & Likeness

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INTRODUCTION

On July 21, 2009, former UCLA (University of California, Los Angeles) basketball star Ed O'Bannon filed a class action lawsuit against the National Collegiate Athletic Association ("NCAA") alleging antitrust violations in relation to ownership rights of former athletes' likenesses and images.[1] The *O'Bannon* case was combined with another class action lawsuit, the *Keller* case.[2] In *Keller*, former college football player Sam Keller sued Electronic Arts, Inc. ("EA Sports"), the NCAA and Collegiate Licensing Company ("CLC") alleging violations of the right of publicity.[3]

In February 2010, the District Court for the Northern District of California denied the NCAA's request to dismiss the *O'Bannon* case.[4] The Court also dismissed, with leave to replead, the *Keller* Indiana state right of publicity

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*. Plaintiffs' counsel in the *O'Bannon* litigation have retained this author to provide consulting services on topics not the subject of this article due to this author's involvement with The Drake Group. Neither plaintiffs' counsel nor plaintiffs, nor anyone affiliated with them, had any input with respect to suggesting, writing, or editing any portion of this article, and did not provide any information related to it. The views expressed herein are solely those of the authors.

1. O'Bannon v. NCAA, C 09-03329 (N.D. Cal., July 21, 2009).

2. Keller v. Electronic Arts, Inc., C 09-01967 (N.D. Cal., May 5, 2009).

3. *See generally id.*

4. O'Bannon v. NCAA: Order on NCAA's and CLC's Motion to Dismiss, No. C 09-3329 CW, Docket Nos. 91, 92 & 142 (N.D. Cal., Feb. 8, 2010).

claim against the NCAA for failure to allege the NCAA "used" student-athletes' likenesses or conspired with others to do so.[5] Subsequently, the *O'Bannon* and *Keller* plaintiffs filed a Consolidated Amended Class Action Complaint captioned *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (hereafter "Amended Complaint").[6] In the Amended Complaint, among other things, the *Keller* plaintiffs repleaded their Indiana state right of publicity claim asserting that EA Sports used plaintiffs' likenesses and that the NCAA conspired with EA Sports to deprive plaintiffs of their publicity rights.[7] According to one commentator, should the plaintiffs be granted class certification, "the NCAA is not expected to fight. . .and would instead pursue a settlement, which would likely be a considerable amount."[8]

In the Amended Complaint, the *O'Bannon* plaintiffs claim that former players should be compensated for the right to sell products (i.e., video games, highlight videos, jerseys, etc.) that use their name, likeness or image.[9] According to the complaint, the NCAA contends that the student-athletes sign forms releasing to the NCAA and third parties their publicity rights including for commercial purposes, in exchange for eligibility to play intercollegiate athletics and that the releases continue after the student-athlete has ceased participation in intercollegiate athletics.[10] The *O'Bannon* plaintiffs have requested that the releases be declared void and unenforceable and that the defendants be enjoined from using these forms.[11]

The *Keller* plaintiffs have similarly requested damages, a declaration that any "contractual provisions or NCAA rules purporting to limit the rights of" plaintiffs to receive compensation are void and unenforceable, and an injunction upon future use of their names and likenesses in video games.[12] Thus, at the heart of both the *O'Bannon* and *Keller* claims is the enforceability of the student-athlete's consent to use of his name, image or likeness.

This article addresses the enforceability of the "consent" purportedly given in one of the forms identified by the plaintiffs: Form 08-3a—Student-Athlete

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5. *Id.* at Dkt. #150.

6. In re NCAA Student-Athlete Name & Likeness Licensing Litigation, Case 4:09-cv-01967 (N.D. Cal. Mar. 10, 2010).

7. *Id.*

8. Jon Weinbach, *NCAA Facing Its Own Erin Brockovich*, FANHOUSE.COM, Mar. 26, 2010, *available at* http://ncaabasketball.fanhouse.com/2010/05/26/ncaa-facing-its-own-erin-brockovich/.

9. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case 4:09-cv-01967 at 6: Antitrust Prayer for Relief.

10. *Id.* at ¶¶ 21-28, 196.

11. *Id.* at Antitrust Prayer for Relief.

12. *Id.* at Right of Publicity Prayer for Relief.

Statement-Division I—Part IV—Promotion of NCAA Championships, Events, Activities or Programs. Part IV stipulates:

> You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.[13]

This language tracks the language of NCAA Bylaw 12.5.1.1.1—Promotions Involving NCAA Championships, Events, Activities or Programs—which provides:

> The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.[14]

Part I of this article highlights the valuable nature of publicity rights. Part II explores four arguments under which a court could find that the student-athlete's consent in Form 08-3a, Part IV, is unenforceable: (1) contract interpretation principles applied to adhesion contracts, by which vague and ambiguous language is construed against the drafter and in favor of the ordinary expectations of the signatory student-athlete; (2) the doctrine of unconscionability as applied to adhesion contracts[15] in that the NCAA unjustifiably imposes a one-sided prohibition upon the student-athlete against profiting from use of his or her likeness while reserving that same right to itself; (3) duress, due to the threat by the NCAA to withhold a necessary good (intercollegiate athletics) in order to obtain an advantage (commercially profit from student-athlete likenesses and images) unrelated to eligibility to play intercollegiate athletics; and, (4) undue influence, due to the special relationship of trust that the NCAA has over the student-athlete.

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13. *Id.* at ¶ 185 and Exhibit A to Complaint. Some schools utilize forms such as the University of Arizona's 2009 student-athlete promotional/fundraising form, which gives the school rights to images of athletes "forever and throughout the universe, and to license others to use them, in any manner and in any and all media now known or hereafter discovered, for commercial purposes." *See* Weinbach, *NCAA Facing Its Own Erin Brockovich*, *supra* note 8, at 3. The language of such forms is not the subject of this article but should be further researched.

14. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2009-2010 DIVISION I MANUAL §12.5.1.1.1.

15. The doctrine of unconscionability and adhesion contracts have also been analyzed with respect to athletic scholarships and the NCAA's one-year scholarship renewability provisions. *See* Sean M. Hanlon, *Athletic Scholarships As Unconscionable Contracts Of Adhesion: Has The NCAA Fouled Out?* 13 SPORTS LAW. J. 41-77 (Spring 2006).

I. RIGHT TO CONTROL THE COMMERCIAL USE OF ONE'S IDENTITY

It is part of the practice of the business of sports and entertainment that a person is to be compensated for the valuable right to profit from their identity.[16] In professional sports, generally an athlete whose identity (e.g., name, number, likeness, etc.) is used for commercial purposes is compensated. For example, the Major League Baseball Players Association has a group-licensing program known as "Players Choice."[17] The program "protects the rights of players from exploitation by unauthorized parties."[18] Under the program, the Association enters into an individual agreement with each player under which the Association

> holds the exclusive, worldwide right to use, license and sublicense the names, numbers, nicknames, likenesses, signatures and other personal indicia (known as 'publicity rights') of active Major League Baseball players who are its members for use in connection with any product, brand, service or product line when more than two players are involved. . . . Also included are promotional uses in which players are utilized to promote the brand, product or service of a third party.[19]

The program facilitates licensing of products such as video games and baseball cards, and revenues from the program (after deductions) are "distributed to the players on a pro rata basis, according to the number of dues-paying days accrued by each player on an active Major League roster or disabled list during that year."[20] The NFL, NBA and NHL, similarly, provide for compensation to their players.[21] Even within the realm of intercollegiate

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16. *E.g.*, Jonathan Faber, *Right of Publicity*, Aug. 18, 2010, http://www.right of publicity.com/brief-history-of-rop, ("few can argue that it would be anything but unfair for a business to siphon [a] celebrity's success into their advertising or products to increase sales, without compensating the celebrity for the heightened profits, profile or recognition of the product or company.").

17. *See* Major League Baseball Players Association, *MLBPA Info: The Players Choice Group Licensing Program*, *available at* http://mlb.mlb.com/pa/info/licensing.jsp (last visited Aug. 3, 2010).

18. *Id.*

19. *Id.*

20. *Id.*

21. In 2000, the National Football League ("NFL") and the National Football League Players Association ("NFLPA") entered into "a historic partnership to provide player group licensing rights to NFL sponsors," NFL Players Association, *Sponsors-Licensees*, http://www.nflplayers.com/About-us/Sponsors--Licensees/ (last visited Aug. 6, 2010); the National Basketball Association Players Association ("NBAPA") finance department "administers the distribution of licensing revenues to players," NBA Players United, *Finance Department*, http://www.nbpa.org/finance-department (last visited Aug. 6, 2010); and, the National Hockey League Players' Association ("NHLPA") "provides

athletics, NCAA coaches have been utilizing their names, likenesses and images for endorsements and video game deals.[22]

The right to control the commercial use of one's identity is so valuable that both common law and many states' statutory law provide causes of action by which a person can sue for damages to protect their image from unauthorized use. The common law cause of action is known as the tort of the violation of the right to control publicity (a subset of the right of privacy), which at its essence seeks to protect a person's proprietary interest in the exclusive use of their name and likeness.[23] The "right to control publicity prevents one person from using another's identity for commercial gain without obtaining consent from the person whose identity is being used."[24]

At least nineteen states have statutory laws to prohibit the appropriation of one's identity.[25] In Wisconsin, for example, there is a statute that provides relief for any person whose "name, portrait or picture" has been used "for advertising purposes or for purposes of trade" where the defendant has not "first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian."[26] Additionally, while there is no express federal right of publicity cause of action, courts have recognized false endorsement claims by celebrity athletes under Section 43(a) of the Lanham Act, 15 U.S.C.

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leadership and management in marketing and licensing of the players, their name and likeness in all areas, including trading cards, video games and apparel," NHLPA, *About-Us*, http://www.nhlpa.com/About-Us/ (last visited Aug. 6, 2010).

22. *See* Darren Rovell, *Exposure For Coaches Finally Ads Up*, ESPN.COM, Jan. 8, 2004, *available at* http://espn.go.com/sportsbusiness/s/2004/0108/1703483.html.

> This year, Electronic Arts' NCAA March Madness 2004 features 13 coaches, including Utah's Rick Majerus, Florida's Billy Donovan, Oklahoma's Kelvin Sampson and Bill Self of Kansas on the sidelines. "The coaches are the stars of the college game," said Bob Williams of Burns Sports, a company that matches athletes and coaches with corporate endorsements. "And something like this could put more dollars in their pockets."

Id.

23. 5 ELISABETH TOWNSEND BRIDGE ET AL., THE WISCONSIN BUSINESS ADVISOR SERIES: INTELLECTUAL PROPERTY LAW § 5.5.3 (2006) (citing 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2005)).

24. *Id. at* § 5.5.4.

25. *E.g., id.* at § 5.5.11 (citing IND. CODE ANN. § 32-36-1-8 (2010) & NEB. REV. ST. §§ 20-201–211, 25-840.01 (2010) and Faber, *supra* note 16 (". . .nineteen states recognize the Right of Publicity via statute (California, Florida, Indiana, Illinois, Kentucky, Massachusetts, New York, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin)").

26. Wis. Stat. § 995.50(2)(b). Indeed, some student-athletes are minors the first time they sign Form 08-3a and individual member institutions' athletic departments do not require a parent or guardian's signature on Part IV. Personal communication with anonymous athletic department employee, July 17, 2010.

§ 1125(a) based on defendant's unauthorized use of the athlete's identity (the "trademark") suggesting that the athlete endorsed the defendant's product.[27]

In light of the valuable nature of publicity rights, parties entering into a licensing agreement for the use of an athlete's likeness or image usually spell out in great detail the terms of the scope of their agreement such as: which identifying features (name, likeness, performance, etc.) are granted for use and which are reserved; the types of media or forums in which the athlete's identity will be used, especially in light of new technologies (internet uses, streaming video); and, the duration of the agreement.[28]

While there is relatively little case law involving a student-athlete's right of publicity,[29] the NCAA appears to recognize the valuable right of publicity held by the student-athlete in his or her name, likeness or image as evidenced by statements made in 2008 by then-NCAA president Myles Brand,[30] as well as the inclusion of Part IV in the Student-Athlete Statement, Form 08-3a.

One of the NCAA's and/or third party's defenses of any claim involving student-athletes' rights to compensation for use of their name, likeness or image will likely be that student-athlete consent was obtained in some manner. Should the NCAA and/or third party contend that it has obtained consent of the student-athlete through Form 08-3a, Part IV, or some version thereof, this article evaluates four arguments as to why such consent could be found to be unenforceable.

II. UNENFORCEABILITY OF STUDENT-ATHLETE CONSENT FORM

There are several arguments by which a court could find the consent to use a student-athlete's likeness or image for commercial exploitation, such as in video games, is unenforceable. Contract law is based on "informed assent" that is freely given; however, if that is lacking, the injured party may undo the transaction by "avoiding" it and restore the parties to their original positions.[31]

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27. PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 81 (2009).

28. *Id.* at 70.

29. Kristine Mueller, *No Control Over Their Rights Of Publicity: College Athletes Left Sitting The Bench*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 70 (Spring 2004).

30. *See, e.g.*, Myles Brand, *Fantasy Leagues May Be Less Than They Seem*, HUFFINGTONPOST.COM, Sept. 8, 2010, *available at* http://www.huffingtonpost.com/myles-brand/fantasy-leagues-may-be-le_b_124758.html (in discussing use of student-athlete's names in college fantasy football leagues and whether NCAA should sue CBS, Brand stated "the stake in the ground is the right to control publicity by athletes of their names, likenesses and identification ... in the case of intercollegiate athletics, the right of publicity is held by the student-athletes, not the NCAA").

31. E. ALLAN FARNSWORTH, CONTRACTS § 4.9 (4th ed. 2004).

In other words, if Part IV of Form 08-3a is found to be unenforceable,[32] neither the third party nor the NCAA may refer to this form as providing it with the right to profit from the student-athlete's likeness.[33] Before analyzing these arguments, a brief background of the Student-Athlete Statement and, in particular, Part IV, is appropriate.

A. The Student-Athlete Statement—Division I (Form 08-3a)

The NCAA provides a Student-Athlete Statement—Division I, which the school administers to the student-athlete.[34] Each year, the school uses this form to certify that the student-athlete is eligible to play intercollegiate athletics.[35] Eligibility is determined based on the student-athlete completing and signing the Student-Athlete Statement (as well as meeting certain other requirements). Specifically,

> [p]rior to participation in intercollegiate competition ***each academic year, a student-athlete shall sign a statement in a form*** prescribed by the Legislative Council in which the student-athlete submits information related to eligibility, recruitment, financial aid, amateur status, previous positive drug tests administered by any other athletics

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32. This article presumes a contract exists between the NCAA, school and student-athlete since the defenses discussed herein would not come into play otherwise. As a general matter, courts have found that the NCAA Constitution and Bylaws constitute a contract between the NCAA and member schools and the student-athlete. *See, e.g.,* Oliver v. Natl. Collegiate Athletic Assn., 155 Ohio Misc.2d 8, 13-14 (Ohio Ct. Common Pleas. 2008):

> [T]he court finds that a contractual relationship does exist [between student-athlete and NCAA]. How? A contractual relationship was formed by the plaintiff's status as an intended third-party beneficiary between the NCAA and OSU. The plaintiff, who is not a party to the contract between NCAA and OSU, stands to benefit from the contract's performance, and thus he acquires rights under the contract as well as the ability to enforce the contract once those rights have vested. ... NCAA members, and OSU in this particular case, pursuant to the NCAA's constitution, bylaws, and regulations, agree that students will not be allowed to play intercollegiate sports unless they meet NCAA requirements. Furthermore, the member institutions agree to let the NCAA set the criteria and to abide by the NCAA's final eligibility decision.

Id.

33. *See* FARNSWORTH, *supra* note 31, § 4.9.

34. NCAA, *supra* note 14, §14.1.3.2 – Administration.

> The institution shall administer this form individually to each student-athlete prior to the individual's participation in intercollegiate competition each year. Details about the content, administration and disposition of the statement are set forth in Bylaw 30.12.

35. NCAA, *supra* note 14, §14.01.1 – Institutional Responsibility.

> An institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements, and the institution has certified the student-athlete's eligibility.

> organization and involvement in organized gambling activities related to intercollegiate or professional athletics competition under the Association's governing legislation. ***Failure to complete and sign the statement shall result in the student-athlete's ineligibility for participation in all intercollegiate competition***. [36]

According to NCAA Bylaw 14.1.3.2, the institution is required to administer the Student-Athlete Statement "***individually*** to each student-athlete prior to the individual's participation in intercollegiate competition each year."[37] NCAA Bylaw 14.1.3.2 also refers to NCAA Bylaw 30.12 for the content, administration and disposition of the statement,[38] and NCAA Bylaw 30.12 – Student-Athlete Statement—provides:

> The following procedures shall be used in administering the student-athlete statement required in Bylaw 14.1.3:
>
> (a) The statement shall be administered individually to each student-athlete by the athletics director or the athletics director's designee prior to the student's participation in intercollegiate competition each academic year;
>
> (b) The statement shall be kept on file by the athletics director and shall be available for examination upon request by an authorized representative of the NCAA; and,
>
> (c) The athletics director shall promptly notify in writing the vice president of NCAA's education services group regarding a student-athlete's disclosure of a previous positive drug test administered by any other athletics organization.

Form 08-3a has seven parts and spans six pages. The headings provide:

> **For:** Student-Athletes.
>
> **Action:** Sign and return to your director of athletics.
>
> **Due date:** Before you first compete each year.
>
> **Required by:** NCAA Constitution 3.2.4.6 and NCAA Bylaws 14.1.3.1. and 30.12.
>
> **Purpose:** To assist in certifying eligibility.
>
> **Effective Date:** This NCAA Division I statement/consent form shall be in effect from the date this document is signed and shall remain in

36. NCAA, *supra* note 14, §14.1.3.1 (emphasis added).

37. NCAA, *supra* note 14, §14.1.3.2 (emphasis added).

38. *Id.*

effect until a subsequent Division I Student-Athlete Statement/Drug-Testing Consent form is executed.[39]

Each of the seven parts must be individually signed: Part I – Statement Concerning Eligibility; Part II – Buckley Amendment Consent; Part III – Affirmation of Status as an Amateur; Part IV – Promotion of NCAA Championships, Events, Activities or Programs; Part V – Results of Drug Tests; Part VI – Incoming Transfers – Previous Involvement in NCAA Rules Violation(s); and, Part VII – Incoming Freshmen – Affirmation of Valid ACT or SAT Score.[40]

On page 4 of Form 08-3a at the top of the page is where the student athlete must sign the promotions statement. It provides:

> **Part IV: Promotion of NCAA Championships, Events, Activities or Programs.**
>
> You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.
>
> _____
>
> Name (Please Print)
>
> _____ _____
>
> Signature of Student-Athlete Date

As noted above, the language of this provision in Part IV mirrors the language in Bylaw 12.5.1.1.1. The last page of the Student-Athlete Statement provides in box form:

> **What to do with this form:** Sign and return it to your director of athletics or his or her designee before you first compete. This form is to be kept in the director of athletics' office for **six years**.
>
> **Any questions regarding this form should be referred to your director of athletics or your institution's NCAA compliance staff, or you may contact the NCAA at 317/917-6222.**[41]

39. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case 4:09-cv-01967, at Exhibit A.

40. *Id.*

41. *Id.*

B. Contract of Adhesion

Form 08-3a, Part IV is arguably a contract of adhesion. A contract of adhesion is a standardized contract in which a form or clause is not negotiated but presented as a "take it or leave it" proposition where the only alternative to complete adherence is outright rejection.[42] As the Supreme Court of California stated, a contract of adhesion

> signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.[43]

Another California court described it as follows:

> The term 'adhesion contract' refers to standardized contract forms offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract. . . . The distinctive feature is that the weaker party has no realistic choice as to its terms.[44]

Form 08-3a contains standardized contract provisions imposed by the NCAA, which is in the superior position, upon the student-athlete. The form does not provide any room to reject it or negotiate, but instead states as the "action" required (on both the first and last pages) to "sign and return to your director of athletics" and specifies this action must be taken "before you first compete."[45] Although Bylaw 14.1.3.2 as well as Bylaw 30.12(a) state that the forms shall be administered individually to each student-athlete, some athletic departments require the student-athletes to sign these forms as a team activity.[46] The consequence for refusal to sign is "the student-athlete's ineligibility for participation in all intercollegiate competition" per Bylaw 14.1.3.1.

Because the NCAA governs intercollegiate athletics at the vast majority of universities and colleges, there is no practical alternative to not signing the

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42. FARNSWORTH, *supra* note 31, § 4.26.

43. Armendariz v. Foundation Health Psychcare Servs., Inc., 99 Cal. Rptr. 2d 745, 767 (Cal. 2000) (quoting Graham v. Scissor-Tail, Inc., 171 Cal. Rptr. 604 (Cal. 1981)).

44. Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783 (Cal. Ct. App. 1976).

45. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case 4:09-cv-01967, at Exhibit A.

46. Personal communication with anonymous athletic department employee (July 17, 2010).

form if the student-athlete wants to participate in intercollegiate athletics.[47] The student-athlete who wants to compete is in a similar "take-it-or-leave-it" position of need as those in which courts have found adhesion contracts: a person seeking employment and having to sign an arbitration provision in exchange for employment;[48] a person seeking medical attention and having to sign an arbitration provision as a condition of hospital admission;[49] a person in the music industry seeking to promote a musician, and having to sign forms drafted by the American Federation of Musicians of which the musician is a member;[50] and, consumers buying a car and having to sign a disclaimer of warranty on a form supplied by the Automobile Manufacturers Association where the few manufacturers accounted for nearly all autos sold in the United States.[51]

However, finding that a contract is one of adhesion does not by itself entitle one to relief—even if the person signed it without reading it or understanding the legal consequence of adhering to it; rather, the "law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms."[52] As the California Supreme Court has stated: "[t]o describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.'"[53]

After concluding the NCAA Form 08-3a is a contract of adhesion, a court could (1) apply contract interpretation and construction principles to determine Part IV does not constitute consent to broadly allow the NCAA or third parties

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47. Other alternatives do exist (such as the National Association of Intercollegiate Athletics ("NAIA"), the National Christian College Athletic Association ("NCCAA"), and the National Junior College Athletic Association ("NJCAA") but none compare in breadth and status to that of the NCAA.

48. *Armendariz*, 99 Cal. Rptr.2d at 768.

> [I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration agreement.

Id.

49. *Wheeler*, 133 Cal. Rptr. at 783 ("The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital.").

50. *Graham*, 171 Cal. Rptr at 611 ("Graham, whatever his asserted prominence in the industry, was required by the realities of his business as a concert promoter to sign A.F. of M. form contracts with any concert artist with whom he wished to do business[.]").

51. Henningsen v. Bloomfield Motors, 161 A.2d 69, 92 (N.J. 1960).

52. FARNSWORTH, *supra* note 31, § 4.26 (quoting Merit Music Serv. v. Sonneborn, 225 A.2d 470, 474 (Md. 1967)).

53. *Graham*, 171 Cal.Rptr. at 611.

to use a student-athlete's likeness for commercial purposes, such as video games; or (2) apply the doctrine of unconscionability to find that the provision is void and therefore unenforceable.[54]

1. Interpretation and Construction of Form 08-3a, Part IV Against NCAA

A basic rule of contract interpretation is that "courts start with the assumption that the parties have used the language in the way that reasonable persons ordinarily do and in such a way as to avoid absurdity."[55] Here, the language of Part IV of Form 08-3a and its companion NCAA Bylaw 12.5.1.1.1 is too limited to include the prospect of the NCAA using publicity rights for commercial purposes, such as licensing to third parties the right to sell video games. Again, Part IV, in full, reads:

> You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.

First, the "third party" acting on behalf of the NCAA should be limited to entities of the same kind as those set out after the "e.g." in the parenthesis. This rule, known as *ejusdem generis* ("of the same kind"), provides that "when parties list specific items, followed by a more general or inclusive term, they intend to include under the latter only things that are like the specific ones."[56] The types of third parties listed are all of educational genre and all appear to be related to promotion of championships: host institution (which is the university hosting a conference championship), conference (which is a group of member institutions and each conference has their own championship); and local organizing committee (the group responsible for organizing the championship). A third party, such as EA Sports, does not have any direct bearing on championship play at any host educational institution. Rather, it is a "leading global interactive entertainment software company which develops,

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54. *Id.* at 612.

> Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. … The second a principle of equity applicable to all contracts generally is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.'

Id. See also FARNSWORTH, *supra* note 31, § 4.26 and § 4.28.

55. FARNSWORTH, *supra* note 31, § 7.11.

56. *Id.*

publishes and distributes interactive software worldwide for video game systems, personal computers, wireless devices, and the Internet."[57]

Second, the language of the provision requires the student-athlete to give the NCAA or third party permission to use the name or picture to "generally promote" NCAA "championships or other NCAA events, activities or programs." The rule *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another")[58] would come into play to limit the things the name or picture can be used to promote to those expressly stated—NCAA championships, events, activities or programs—and exclude things not stated, such as video games and commercial or third-party products.

The word "generally," is synonymous with words such as "ordinarily," "usually" and "commonly,"[59] and the word "promote" means "to help or encourage to exist or flourish."[60] In other words, "generally promote" should be linked to "basic" or "ordinary" promotions of NCAA championships, events, activities or programs—such as media guides, game programs, game announcements in the form of posters, radio, or newspapers, etc.

Third, because a new Form 08-3a (or its equivalent) is signed each year, the duration of the use should be limited to the one-year period of eligibility in which it was signed. As such, without an express provision making it clear otherwise, utilizing student-athletes' likenesses in EA Sports video games for commercial sale indefinitely cannot be considered the type of "general promotion" by third parties contemplated by Part IV of Form 08-3a.

However, assuming the language is, at best, vague and ambiguous, the ambiguity should be construed against the drafter (NCAA or school) and according to the reasonable expectations of the student-athlete.[61] A court should interpret the form contract to mean what the reasonable or ordinary

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57. EA Sports, *Corporate Info. - About Us*, http://www.easports.com/ (last visited Aug. 1, 2010).

58. FARNSWORTH, *supra* note 31, § 7.11.

59. MERRIAM-WEBSTER'S ONLINE DICTIONARY, *Generally*, *available at* http://www.merriam-webster.com/dictionary/ (last visited Aug. 1, 2010).

60. *Id. Promote.*

61. *See* FARNSWORTH, *supra* note 31, § 7.11 (rules of construction differ from rules of interpretation and noting that

> if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred. Such interpretation *contra proferentem* ('against the profferer') is often rationalized on the ground that the party against whom it operates had the possibility of drafting the language so as to avoid the dispute. ... [It] is much favored in the context of standard form contracts, particularly if adhesive, where it often favors a party that is at a distinct disadvantage in bargaining.

(internal citations omitted)).

student-athlete would expect it to mean and protect the weaker party's expectation (student-athlete's) as against the stronger's (NCAA's/school's).[62]

The reasonable expectation is garnered from the primary purposes of the contract; indeed, if the adhesive provision is secondary to, or an exception to the primary purpose of the contract, then its effect must be clearly explained to the weaker party.[63]

For example, in *Gray v. Zurich Insurance Company*, the court refused to interpret a provision in an adhesion insurance contract in favor of the insurer's (drafter's) interpretation—that the insurer had no duty to defend a lawsuit allegedly involving intentional conduct on the part of the insured—where that interpretation was not clearly stated and the insured would expect otherwise in light of the nature of the contract (a comprehensive personal liability contract) and the basic promises of the contract.[64] Contrary to the insurer's interpretation, the court reasoned that the basic promises of the contract would lead the insured to reasonably expect the insurer to defend him against suits seeking damages for bodily injury regardless of the alleged cause of the injury, intentional or otherwise.[65]

Likewise, in *Wheeler v. St. Joseph Hospital*, the court refused to give effect to a provision in a "CONDITIONS OF ADMISSION" hospital form requiring a would-be patient to arbitrate any medical malpractice claims.[66] The court reasoned that the mandatory arbitration provision was unrelated to the primary purpose of admission, which was to provide medical services for payment.[67] The court also noted that the patient required to arbitrate was giving up a valuable right to have claims tried by a jury and possible higher awards.[68] Thus, not only should the provision have been clear and conspicuous but also the patient should have been given an explanation as to its meaning and effect.[69]

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62. *Wheeler*, 133 Cal.Rptr. at 783. *See also* Gray v. Zurich Ins. Co., 54 Cal. Rptr. 104, 107-09 (Cal. 1966) (Utilizing insurance contract principles in interpreting a contract of adhesion, the court stated, "doubts as to meaning must be resolved against the insurer and that any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.").

63. *Gray*, 54 Cal. Rptr. at 107.

64. *Id.* at 109-112.

65. *Id.* at 109-110.

66. 133 Cal. Rptr. at 784-86.

67. *Id.* at 785-86.

68. *Id.* at 786.

69. *Id.*

Applying these principles, a student-athlete signing eligibility forms would not reasonably expect that he or she signs away valuable publicity rights indefinitely to promote commercial endeavors, including third party contracts for video games. Not only does such a broad release not have anything to do with eligibility to compete in intercollegiate sports, *e.g. Wheeler* (requirement to arbitrate malpractice claims had nothing to do with admission to hospital for services), but it is inconsistent and, indeed, contrary to the main purposes of the NCAA contract, which is to uphold the principle of amateurism and protect the student-athlete from commercial exploitation.[70]

Here, as in *Wheeler*, where the requirement to arbitrate medical malpractice claims was housed inside a "CONDITIONS OF ADMISSION" hospital form, Part IV, dealing with use of one's name or picture for promotional purposes, is housed inside a Student-Athlete Statement (Form 08-3a) that touts its purpose as being "to assist in certifying eligibility." The Student-Athlete Statement requirement is derived from NCAA Bylaw 14 – Eligibility.[71] Thus, the particular provisions within the Student-Athlete Statement should be consistent with and forward the purpose of "assisting in certifying eligibility." In order to be deemed "eligible" to compete as a student-athlete it makes sense to require the student-athlete to verify amateur status, agree to be drug tested, report any major violations, etc., but it does not make sense to have to agree to the use of one's name or picture to promote NCAA activities and programs let alone give up publicity rights to the NCAA or third parties for commercial endeavors such as video games. Thus, the student-athlete would expect Part IV of Form 08-3a to be interpreted narrowly to exclude such purposes.

Indeed, this appears to be the only tenable construction. For, if on the one hand the student-athlete is required to certify his amateur status under Part III – Affirmation of Status as an Amateur – it would be logically inconsistent for the student-athlete to on the other hand be required to consent to use by the

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70. *See e.g. Gray*, 54 Cal. Rptr. 104 (failure of insurer to defend suit inconsistent with broad purposes of contract for coverage). NCAA, *supra* note 14, §2.12 – The Principle Governing Eligibility.

> Eligibility requirements shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student-athletes.

See also §2.9 – The Principle of Amateurism.

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

71. "*Eligible*" is defined as: "meeting the stipulated requirements, as to participate, compete, or work; qualified." MERRIAM-WEBSTER'S, *supra* note 59.

NCAA or third party of his name or likeness for commercial exploitation. Specifically, Part III requires the student-athlete to affirm that he has "read and understand[s] the NCAA amateurism rules" and that he has not violated any amateurism rules.[72] The amateurism rules include the declaration that the student-athlete not be commercially exploited (Bylaw 2.9)[73] and that the student-athlete not use his "athletic skill (directly or indirectly) for pay in any form" (Bylaw 12.1.2).[74] If, however, the student-athlete is then required to consent (in Part IV or otherwise) to use of his image by a third party videogame manufacturer who sells that game for a profit, then the student-athlete is in effect consenting to commercial exploitation and use of his athletic skill (at least indirectly by giving consent to use of his image playing athletics) for pay (the NCAA and/or third party recouping the profit)[75] and thereby violates the amateurism rules.

It may be that at the root of such a broad construction that the student-athlete consents to use of their name and likeness for commercial purposes is the presumption that the amateurism prohibitions against commercialization do not apply to the NCAA.[76] However, neither that presumption (which has also been criticized under principles of logical analysis)[77] nor broad consent to

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72. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case 4:09-cv-01967-CW, Exhibit A.

73. *Supra* note 70.

74. NCAA, *supra* note 14, §12.1.2 – Amateur Status.

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

(a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport.

75. NCAA Bylaw §12.1.2 does not appear to require that the pay must be made directly to the athlete. *Id.*

76. For example, in his 2006 presidential message, former NCAA President, Myles Brand stated, "'Amateur 'defines the participants, not the enterprise. We should not be ambivalent about doing the business of college sports" Myles Brand, *President's Message – Call For Moderation Is A Complex Message, Not A Mixed One*, THE NCAA NEWS ONLINE, Sept. 11, 2006, *available at* http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2006/Official+Statements/NCAA+President+Delivers+State+Of+The+Association+Address.

77. The following analysis is reproduced from linguist and logician, Dr. H. R. Otto's contribution, "*Clarifying Amateurism*," currently in press in a textbook chapter by Kadence Otto, *The Commercialization and Commodification of Intercollegiate Athletics*, in POWER, POLITICS, PROBLEMS, AND POLICY IN SPORT (Jason W. Lee & Jason C. Lee, Eds. forthcoming).

Brand's statement can be viewed as an effort to "decouple participants from that in which they participate, so that the status of one does not necessarily apply to the other, and hence, one need not be 'ambivalent about doing the business of college sports.'" But, asks Otto, "What about the student-athletes—are they, or are they not, amateurs? Merriam-Webster's (2009) defines amateur as: 'one who engages in a pursuit, study, science or sport as a pastime rather than a profession.'

use of a student-athlete's image for commercial purposes can be supported by the plain text of the amateurism prohibitions, Form 08-3a or Part IV, or a reasonable construction thereof.

2. *Unconscionable Contract of Adhesion*

Alternatively, a court could apply the doctrine of unconscionability to find that Part IV is void and therefore unenforceable. The doctrine of unconscionability is set forth in the UCC and has been applied by courts generally.[78] It provides:

Since players receive no compensation, it is assumed that they are amateurs, and given Brand's 'decoupling principle' the NCAA and its member schools are able to 'have their cake and eat it too.' However, the second part of [NCAA] Bylaw 2.9 ... brings up a red flag. Consider my analysis ...:

> Let *x* be a participant in a pursuit, study, science or sport as a pastime rather than a profession, receiving no remuneration.

Rejecting Brand's 'decoupling principle,' requires a more rigorous definition of 'amateur' as follows:

> *x* is an amateur if, and only if, no one receives monetary benefit from *x*'s play, performance or talent.

In other words, if *x*'s playing results in an income, even if *x* isn't the recipient of the income, *x*'s playing (like any other product) is part of a commercial transaction, and, as such, cannot be construed as an amateur activity. In such circumstances, *x*'s playing is not an amateur activity, nor, therefore, is *x* an amateur. Much worse, *x* is actually a victim of exploitation by the very party, the NCAA, charged with protecting *x* from exploitation from commercial enterprises even as *x*'s status mutates from amateur to professional—a professional whose income producing ability is being altogether expropriated. Fame, reputation, adulation, and the like, which accrue of necessity to the player are not remuneration, not monetary income, not part of a commercial transaction. Consequently, such psychic reward does not militate against *x*'s status as amateur, but profit to the business certainly does.

[Since tangible monetary income is now being generated,] by definition, *x*'s playing can no longer be called, with any accuracy, 'amateur.' By extension, then, *x* is no longer an amateur, for *x* is the producer of the product—the games, and by extension their derivatives—precisely that which is being sold. The fact that the schools and businesses involved point out that none of the proceeds go to *x*, only makes matters worse. This simply amounts to an admission that one party to the commercial transaction is being deprived of a share of the proceeds. By trying to insist that *x* is an amateur because *x* receives no remuneration, is to admit to a troublesome level of exploitation.

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78. FARNSWORTH, *supra* note 31, § 4.28 (noting that the RESTATEMENT (SECOND) OF CONTRACTS §208 (1979) is a section on unconscionability patterned after the Code). Precursors to the doctrine of unconscionability were usually confined to suits in equity where courts refused to enforce a contract because it was so "inequitable" or "unconscionable" as to shock the conscience—that is, no person in his/her senses would make it or it was so one-sided or unfair. *Id.* at § 4.27.

> When it appears to the court or is claimed by a party that the contract or clause thereof may be unconscionable the parties are to be afforded the opportunity to present evidence as to the commercial setting, purpose and effect to aid the court in making a determination.[79]

The party asserting the defense of unconscionability has the burden to prove it.[80] The test is

> whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.[81]

As a practical matter, courts have relied on various definitions of unconscionability; a common definition is: "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[82] Thus, courts focus on "unreasonably favorable" terms and "absence of meaningful choice," the former deemed "substantive" and latter "procedural" unconscionability.[83] A court weighs both elements and may conclude, on balance, that a provision is unconscionable.[84]

a. Procedural Unconscionability

Procedural unconscionability generally refers to the bargaining process (as opposed to the substance of the bargain), such as use of sharp bargaining practices, fine print, convoluted language, or adhesion contracts; lack of understanding; and inequality of bargaining power/skill.[85] Whether there is procedural unconscionability usually turns on whether the bargaining power is so disparate that the weaker party is left without any real choice.[86] Thus, an adhesion contract may be procedurally unconscionable if the goods or services are essential or could not have been procured elsewhere.[87]

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79. *Id.* at § 4.28 (quoting UCC 2-302(2) (2004)).

80. *Id.* at § 4.28.

81. *Id.* at § 4.28 (citing UCC 2-302, cmt 1).

82. *Id.* at § 4.28 (quoting Williams v. Walker-Thomas Furniture, 350 F.2d 445, 449 (D.C. Cir. 1965)).

83. *Id.* at § 4.28.

84. *Id.*

85. *Id.*

86. *Id.* at § 4.28 n.30 (citing Hydraform Prods. Corp. v. Am. Steel & Aluminum Corp., 498 A.2d 339 (N.H. 1985)).

87. *Id.* at § 4.28.

As discussed above, practically speaking, the student-athlete has virtually nowhere else to turn to play competitive intercollegiate athletics since the NCAA is the gatekeeper of intercollegiate athletics at nearly all schools. There is also not only an inequality of bargaining power between the NCAA/school and student-athlete but no bargaining over the Part IV provision which the NCAA requires member schools to require all student-athletes to sign each year in order to compete.

The student-athlete's lack of bargaining power is exacerbated by a lack of experience in matters of finance, law and business. For example, in *Woollums v. Horsley*, the degree of knowledge of the one signing away rights was critical. Horsley, a sophisticated businessman, sued for specific performance of a contract by which Woollums had agreed to sell Horsley all the mineral rights in his mountain farm of 200 acres for 40 cents per acre though the rights proved to be worth closer to $15 an acre by the time of trial.[88] The court denied specific performance due to Woollums' age (60) and the fact that he was uneducated, disabled from working, and knew little about the business world whereas Horsley was experienced in business of buying mineral rights by the thousands of acres and familiar with all that was going on in that arena.[89] The court emphasized that in the bargaining process, Horsley had a thorough knowledge of the mineral value of the lands and of the developments in progress including the possibility of building a railroad in that locality in the near future.[90]

Here, the NCAA is clearly the expert business purveyor of college sport. Moreover, its officers and business agents are skilled at negotiating licensing agreements in the billions of dollars, understand the value of the rights at issue and are planning for future developments in the vast possibilities of licensing collegiate sports.[91] To the contrary, the student-athlete is usually young (approximately 17-24) and likely inexperienced in business and the valuation

88. *Id.* at § 4.27 (explaining Woollums v. Horsley, 20 S.W. 781 (Ky. 1892)).

89. *Id.*

90. *Id.*

91. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case 4:09-cv-01967-CW, at ¶ 336 (In March of 2007, "the NCAA...launched its 'NCAA On Demand' website, which offers for sale telecasts of games from numerous decades in the DVD and 'on-demand' delivery formats."). *Id.* at ¶ 347.

> On March 3, 2010, *The New York Times* reported on the debut of a new NCAA commercial venture with Thought Equity Motion ("TEM") called 'The Vault.' TEM has digitally diced every tournament game this decade from the Round of 16 forward into all of its notable plays, and assigned a Web address to each of them. It lets fans watch any of the games, or thin slices of them, and link to social networking sites like Facebook or Twitter or to their blogs.

Id.

of publicity rights. This lack of experience and knowledge is compounded by the NCAA rules that insist the student-athlete not cross the line into the business of sport as it pertains to use of their athletic skill for pay.[92]

Thus, in light of the great disparity of power between the sophisticated NCAA/school and the young, inexperienced and usually unadvised, student-athlete to whom the NCAA/school supplies an adhesion contract in Form 08-3a, procedural unconscionability could be found.

b. Substantive Unconscionability

Substantive unconscionability concerns whether the terms are unreasonably favorable/one-sided.[93] In particular, courts are attuned to whether the drafter has imposed a term that the signatory is required to abide by, but which the drafter has exempted itself from.[94] This is called lack of bilaterality or mutuality and is a ground to find substantive unconscionability.[95]

The adhesion contracts involving arbitration clauses are instructive. For example, in *Armendariz v. Foundation Health Psychcare Servs.*, the court refused to enforce an adhesion contract requiring employees to arbitrate wrongful termination claims because it lacked basic fairness and mutuality.[96] Specifically, an imposed arbitration provision was disadvantageous to the employee who relinquished the right to a jury trial with the possibility of higher awards but advantageous to the employer because it reduced the cost of litigation and the size of the award the employee would likely receive.[97] However, at the same time as imposing mandatory arbitration upon the employee, the employer reserved the option of pursuing claims it had against the employee in court and had further written into the agreement special advantages for itself, such as a waiver of jurisdictional objections by the employee if sued by the employer.[98] While the court held that not all lack of mutuality in a contract of adhesion is invalid, if there is no legitimate

92. NCAA restrictions barring student-athletes from profiting from publicity include NCAA, *supra* note 14, §§12.1.2 – 12.1.3.

93. If procedural unconscionability rises to the level of duress or undue influence (doctrines discussed later in this article), the contract may be voidable without regard to substantive unconscionability. FARNSWORTH, *supra* note 31, § 4.28.

94. *Id.*

95. *Id.* (citing, inter alia, *Armendariz,* 99 Cal. Rptr.2d 745).

96. *Id.*

97. *Armendariz,* 99 Cal. Rptr. 2d at 768.

98. *Id.*

commercial need for it and the term is "so extreme as to appear unconscionable according to the mores and business practices of the time and place" then it is unconscionable.[99]

The court found an absence of "justification" for the one-sided arbitration requirement, reasoning that if the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration.[100] The court stated: "[w]ithout reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage."[101]

An influential early case described such unreasonable one-sided terms, "carrying a good joke too far" and chastised a party trying to enforce such one-sided terms.[102] In *Campbell Soup v. Wentz,* the Third Circuit refused to enforce a contract in favor of a buyer of carrots who entered into a contract with the sellers for the entire crop of carrots at $30 ton. When adverse weather conditions made it almost impossible to obtain them and drove prices up to $90 ton, the buyer insisted the seller had to sell at $30 a ton under the contract. The court noted that the terms of the contract were provided in printed form by Campbell and had been drawn by its skillful draftsmen with its interests in mind.[103] Particularly offensive was the clause that excused Campbell from taking any carrots under certain circumstances but not allowing the seller to sell them elsewhere unless Campbell agreed. The court stated that this was "carrying a good joke too far" and held that even though that clause was not directly relevant to the harshness complained of, the "sum total of its provisions drives too hard a bargain for the court of conscience to assist."[104]

Here, as in *Campbell Soup* and *Armendariz*, the NCAA contract is lacking in basic mutuality of obligation. The NCAA rules require the student-athlete to forego compensation for use of their identity in the name of "amateurism" and to "protect" the student-athlete from commercial exploitation. At the same time, the NCAA/school through imposition of Form 08-3a, Part IV (or otherwise), has reserved to itself the right to make a profit and allow others to

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99. *Id.* at 769 (internal quotations omitted).

100. *Id.* at 770.

101. *Id.*

102. Campbell Soup v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948); *See also* FARNSWORTH, *supra* note 31, § 4.27.

103. *Id.* at 83-84 (3d Cir. 1948).

104. *Id.* at 84.

make a profit off the publicity of the athletes. The resulting unilateral obligation upon the student-athlete to forego commercial exploitation of publicity rights is so one-sided as to be substantively unconscionable.

Furthermore, there is no legitimate business justification for such a unilateral obligation. To the contrary, to assert that one of the contracting parties (the NCAA/member school) is not bound by the very bylaws it has established, gives it a market advantage at the "expense of the party [the student-athlete] that is bound."[105] "The unfairness of giving this advantage to one of the parties, at least if the other party has not agreed to it, suggests that neither party should be bound until both are bound."[106]

As in *Armendariz*, where the court did not find any legitimate business reason to hold an employee but not the employer to an arbitration clause, a court here could conclude that if the system of amateurism is indeed essential to intercollegiate athletics, then the schools and the NCAA, not just the student-athletes, should be required to abide by amateurism principles and Part IV of the Form 08-3a cannot be enforced to permit the NCAA or third party to profit from the student-athlete's name, likeness or image. To enforce such an unconscionable provision would be, as the *Campbell* court said, "carrying a good joke too far."[107]

C. Duress

Another doctrine by which Form 08-3a Part IV could be found to be unenforceable is that of duress. There are four elements to such a defense: (1) the injured party must show a threat; (2) the threat must be improper; (3) the threat must induce the victim's manifestation to assent; and, (4) the threat must be sufficiently grave to justify succumbing.[108] As one court described it:

> Duress has been defined as a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and it may be conceded that a contract executed under duress is voidable.[109]

With respect to the first element, a threat is a "manifestation of intent to inflict some loss or harm on another," and can be expressed in words, or

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105. FARNSWORTH, *supra* note 31, § 3.3.

106. *Id. See* also, Otto, *supra* note 77.

107. *Campbell Soup*, 172 F.2d at 83.

108. FARNSWORTH, *supra* note 31, § 4.16.

109. Laemmar v. J. Walter Thompson Co., 435 F.2d 680, 682 (7th Cir. 1970)).

inferred from words or conduct.[110] The second element—improper nature of the threat—can be found even if one has a legal right to do the act, if it is made under circumstances considered wrongful.[111] For example, a threat can be considered improper if the maker of the threat seeks to withhold an item that is scarce or of which the buyer is in desperate need, such as employment.[112] The third element of duress is that the threat must induce the victim's manifestation to assent.[113] This is causation and the question is whether the threat actually induced assent since threats that induce assent on part of one may not on part of another.[114] Finally, the under the fourth element, the threat must be sufficiently grave to justify succumbing.[115] While the standard has varied over the years, the current assessment is whether the threat left the victim "no reasonable alternative."[116] Duress will not be found if the person could procure a suitable substitute on market.[117] "What is a reasonable alternative depends on all the circumstances, including the victim's age and background, the relationship of the parties, and the availability of disinterested advice."[118]

A case in which the court found duress where the defendant used a legal right (firing at will) to obtain an unrelated advantage is instructive here.[119] In *Laemmar v. J. Walter Thompson Co.*, an employer threatened to fire the employees if they did not sell back their stock. The Seventh Circuit reversed a grant of summary judgment for the employer, reasoning that the employees' agreement to sell back their stock to the employer had been made under duress.[120] While the employees were "at will" and thus could be fired for any reason or no reason, the use of the threat of firing in order for the employer to obtain back the stock could be duress if the jury found that the "undoubted effect of threatened act was to undermine the ability of another to refuse to execute an agreement."[121]

Here, the NCAA threatens to withhold eligibility to play intercollegiate athletics. As in *Laemmar*, the threat could be deemed improper because while

110. FARNSWORTH, *supra* note 31, § 4.16.
111. *Id.* at §§ 4.16 & 4.17.
112. *Id.*.
113. *Id.* at § 4.16.
114. *Id.*
115. *Id.*
116. *Id.* at §§ 4.16 & 4.18 (citing, inter alia, RESTATEMENT (SECOND) OF CONTRACTS §175(1)).
117. *Id.* at § 4.18.
118. *Id.*
119. *See id.* at § 4.17 (describing *Laemmar*, 435 F.2d 680).
120. 435 F.2d 680.
121. *Id.* at 682.

the NCAA has a right to withhold eligibility as a general matter, it appears to be using that right to gain an unrelated advantage—profiting from the publicity rights of the student-athlete—by requiring them to sign Part IV of 08-3a or be deemed ineligible. Just as sale of stock rights was unrelated to the employee's ability to do their job, so here the student-athlete's consent to the NCAA to use his/her image for commercial purposes has nothing to do with an athlete's qualifications to play amateur intercollegiate athletics (as set forth in detail above). Moreover, the student-athlete has no practical alternative to earn an education while simultaneously participating in intercollegiate athletics. Thus, the threat of taking away the eligibility of the student-athlete to compete—the immediate goal of the athlete—unless the athlete signs the Part IV provision of which the athlete arguably does not have a clear understanding of its implications, would undoubtedly undermine the ability of a student-athlete to refuse to execute the form and duress could be found.

D. Undue Influence

Another doctrine that could result in making consent voidable by the student-athlete is that of "undue influence." If the essence of duress is fear induced by threat, the essence of the equitable concept of undue influence is to protect those affected "with a weakness short of incapacity, against improper persuasion, short of misrepresentation or duress, by those in a special position to exercise such persuasion."[122]

There are two elements of "undue influence." First, the injured party must establish a special relationship between the parties making one particularly susceptible to persuasion by the other.[123] Classic examples where the weaker party is justified in assuming the stronger party will not act in a manner inconsistent with the weaker's welfare are parent-child and doctor-patient.[124] The undue influence doctrine extends beyond such classical trust relationships to "those in which the weaker party is for some reason under the domination of the stronger."[125]

The NCAA and its member institutions have assumed the role of the guardian or custodian of student-athletes to ensure they receive an adequate education and shield them from commercialization. The NCAA does this by making education and amateurism its bedrock principles which, it claims,

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122. FARNSWORTH, *supra* note 31, § 4.20.

123. *Id.*

124. *Id.*

125. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS, § 177).

serve to delineate intercollegiate athletics from professional sports.[126] In order to further these purposes of amateurism and education, the NCAA strictly prohibits the student-athlete from using his/her participation in intercollegiate athletics for pay or remuneration.[127]

Just as a trustee or custodian in charge of a minor's trust account until he/she reaches the age of majority must administer that trust according to the purposes of the trust to benefit the minor,[128] so too, the student-athlete is in a relationship with the school and the NCAA whereby the purpose of the intercollegiate athletics relationship is to benefit the student-athlete by protecting him or her from commercial exploitation and enable the student-athlete to earn an education. The student-athlete is therefore justified in expecting the NCAA and member schools not to engage in the very acts from which it is supposed to be protecting them (i.e., commercial exploitation). However, to the contrary, the NCAA has exempted itself from the prohibitions against pay placed upon the student-athlete.[129]

Unfortunately, the NCAA's dual objectives of being a business enterprise on the one hand, while trying to forward the educational mission on the other hand, is causing the latter to suffer. Researchers have investigated whether student-athletes are afforded the same opportunity as the general student body to earn a legitimate education. In November of 2008, *USA Today* published an investigative report[130] which examined the academic majors of 2007-08 juniors and seniors (~9,300) in five NCAA Division I sports (football, men's

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126. NCAA, *supra* note 14, §§ 2.9 & 2.12. *See also id.* § 1.3.1 – Basic Purpose:

> The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, ***retain a clear line of demarcation*** between intercollegiate athletics and professional sports (emphasis added).

127. *Supra* notes 74 & 97. *See also* NCAA, *Why Student-Athletes are Not Paid to Play*, http://www.ncaa.org/wps/wcm/connect/public/ncaa/issues/why+student-athletes+are+not+paid+to+play (last visited Aug. 3, 2010) ("Student-athletes are students first and athletes second. They are not university employees who are paid for their labor").

128. *See* BLACK'S LAW DICTIONARY 1513 (7th ed. 1999) ("Trust" is a "fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another.").

129. Currently, the NCAA is engaged in corporate agreements with the following companies; AT&T, Capital One, The Coca-Cola Company, Enterprise, The Hartford, Hershey's Chocolate, LG, Lowe's, Planters (Kraft Foods), State Farm Insurance and UPS. *See* NCAA, *NCAA Corporate Champion/Partner Category Exclusivity*, http://www.ncaa.org/wps/wcm/connect/corp_relations/corprel/corporate+relationships/corporate+alliances/prod_exclusivity.html (last visited Aug. 3, 2010).

130. Jill Lieber Steeg, Jodi Upton, Patrick Bohn, & Steve Berkowitz, *College Athletes Studies Guided Toward 'Major In Eligibility*, USA TODAY, Nov. 19, 2008, *available at* http://www.usatoday.com/sports/college/2008-11-18-majors-cover_N.htm.

and women's basketball, baseball and softball; 654 total teams).[131] Results revealed that 83% (118 of 142) of schools had at least one team in which at least 25% of the juniors and seniors majored in the same academic discipline. More than half of the clustering[132] was considered "extreme" (at least 40% (125 of 235) of athletes on a team were in the same major).[133]

In 2009, Fountain and Finley analyzed the academic majors of upperclassmen football players in the Atlantic Coast Conference ("ACC").[134] Results revealed that Minority players were clustered into specific majors at greater rates than their Caucasian counterparts. Further, six ACC schools had 75% or more of its Minority players enrolled into just two academic majors.[135]

When the findings of the *USA Today* reports were released, former-NCAA president Myles Brand was quoted as saying,

> When you have extreme clustering . . . you really do have to ask some hard questions: Is there an adviser who's pushing students into this? Are there some faculty members who are too friendly with student-athletes? I'm not saying that's the case. But I think you have to ask those questions.[136]

One "hard question" to examine would be—what do the NCAA and its member schools contractually "promise" the student-athlete in exchange for his/her athletic services? According to the Athletic Financial Aid Contract ("AFAC")—"The University of (*x*) hereby awards you [the student-athlete] a grant-in-aid to enable[137] you [the student-athlete] to further your [his/her]

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131. All 120 FBS (Football Bowl Subdivision, formerly Division I-A) were included, as well as 22 other Division I schools with top ranking men's or women's basketball teams ($n = 142$). Jodi Upton & Kristen Novak, *College Athletes Cluster Majors at Most Schools*, USA TODAY, Nov. 19, 2008, *available at* http://www.usatoday.com/sports/college/2008-11-18-majors-graphic_N.htm.

132. Bob Case, H. Scott Greer & James Brown, *Academic Clustering in Athletics: Myth or Reality?* ARENA REVIEW, 11(2), 48-56 ("Clustering is the grouping or clustering of a disproportionate percentage of athletes into selected majors when compared to the overall university percentage in the same major.").

133. *Id.* at 115.

134. Jeffrey J. Fountain & Peter S. Finley, *Academic Majors of Upperclassmen Football Players In The Atlantic Coast Conference: An Analysis of Academic Clustering Comparing White and Minority Players*, JOURNAL OF ISSUES IN INTERCOLLEGIATE ATHLETICS, 2, 1-13 (2009).

135. *Id.* at 137.

136. *Id.* at 133.

137. "*Enable*" is defined as "to make able; give power, means, competence, or ability to; authorize to make possible or easy to make ready; equip; to supply with the means, knowledge, or opportunity; to make feasible or possible; to give legal power, capacity, or sanction." MERRIAM-WEBSTER'S, *supra* note 59.

education."[138] The NCAA further stresses the educational link to the AFAC in its Bylaws.[139] Since it has been revealed that "academic clustering" is present amongst numerous universities' athletic teams, the school as well as the NCAA may be in violation of the AFAC as well as its own bylaws, and thus, it could be argued that they are actually the responsible party for effectively disabling[140] an athlete from furthering his/her education.

Second, for a claim of undue influence, there must be improper persuasion of the weaker party by the stronger party.[141] It must "be shown that the assent of the weaker party was induced by unfair persuasion on the part of the stronger."[142] What is considered unfair depends on circumstances, but ultimately hinges on "whether the result was produced by means that seriously impaired the free and competent exercise of judgment."[143] Factors considered include whether there was an imbalance in the resulting bargain; unavailability

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138. The AFAC is set forth by the NCAA and is uniform across all member schools.

139. NCAA, *supra* note 14, §2.5: The Principle of Sound Academic Standards.

Intercollegiate athletics shall be maintained as a vital component of the education program, and the student-athletes shall be an integral part of the student body. The 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.

§14.01.2.1: Good Academic Standing.

To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be in good academic standing as determined by the academic authorities who determine the meaning of such phrases for all students of the institution, subject to controlling legislation of the conference(s) or similar association of which the institution is a member. (Revised: 5/29/08)

§15.3.1.1: Applicable Requirements.

A student-athlete must meet applicable NCAA (see Bylaw 14), conference and institutional regulations to be eligible for institutional financial aid (see Bylaws 15.01.5 and 15.01.6). A violation of this bylaw that relates only to a violation of a conference rule shall be considered an institutional violation per Constitution 2.8.1; however, such a violation shall not affect the student-athlete's eligibility. (Revised:10/27/06)

§15.3.4.2: Reduction or Cancellation Permitted.

Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient: (Revised: 1/11/94, 1/10/95)(a) Renders himself or herself ineligible for intercollegiate competition;

(b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement (*see* Bylaw §15.3.4.2.3)

140. "*Dis*able" is defined as: "to make unable or unfit; weaken or destroy the capability of; to make legally incapable; disqualify." MERRIAM-WEBSTER'S, *supra* note 59.

141. FARNSWORTH, *supra* note 31, § 4.20

142. *Id.*

143. *Id.*

of independent advice; lack of time for reflection; and susceptibility of the weaker party.[144]

Here, as described above, there is a striking imbalance in the resulting bargain in that the restriction is unfairly one-sided—the student-athlete must forego potential rights to profit from its image but the NCAA does not. There is no independent advice provided to the student-athletes during the review and signing of the NCAA and school eligibility documents, and there is no explanation of the implications of signing the Form 08-3a, Part IV. The student-athlete is the weaker party susceptible to persuasion by the NCAA, school administrators, and coaches by virtue of their age, lack of knowledge and experience, and need/desire to play intercollegiate athletics as well as the mode used at many schools of having the student-athletes sign these forms in a group/team setting. Thus, undue influence could be found.

CONCLUSION

Applying the above described contract law principles to the intercollegiate athletic context sheds light on the deep chasm that has grown between the goals and realities of intercollegiate sports as a result of the cross purposes of amateurism and commercialization and the NCAA's involvement in both. The NCAA's role in licensing rights likely has created the emphasis on forms such as Form 08-3a, particularly Part IV—and that was the focus of this article. However, the NCAA might argue that it does not need Form 08-3a or any other form to give it authority to use a student-athlete's likeness because by participating in intercollegiate athletics, the student-athlete has essentially foregone any rights to proprietary interest in anything related to their play including their image, while in college. By agreeing to be an amateur he or she agrees to not be compensated for the likeness (other than receiving a scholarship if the student-athlete is on scholarship) and as a result there can be no damage/injury for use of the image or likeness (a type of standing argument).

Second, the NCAA may argue (at least with respect to the rights of compensation claims involving NCAA telecasts) that under a copyright theory, the telecasts of the NCAA games in which a student-athlete plays while in college are copyrighted "works made for hire"[145] in which the

144. *Id.*

145.

In general, copyright in a work 'vests initially in the author or authors of the work,' 17 U.S.C. Sec. 201(a); however, '[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author ... and, unless the parties have expressly agreed

student-athlete has no rights because they participated in the games while "employed" by the schools/NCAA.[146]

This was the case in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, where the Seventh Circuit held that Major League Baseball players had no rights to their images in telecasts of games they played because they were preempted by the Copyright law:

> The Players' performances are embodied in a copy, viz, the videotape of the telecast, from which the performances can be perceived, reproduced, and otherwise communicated indefinitely. Hence, their performances are fixed in tangible form, and any property rights in the performances that are equivalent to any of the rights encompassed in a copyright are preempted.[147]

However, both possible arguments[148] have common weaknesses relating to amateurism. The first—lack of injury or damages due to amateur status—would likely fail because the NCAA and member schools are party to the contract and obligated to protect the student-athlete from commercialization and enable the student-athlete to further his/her education. Thus, under a type of "unclean hands"[149] or "estoppel"[150] basis arguably they should not be entitled to defeat the plaintiffs' claims where they have been derelict in their duties and/or have violated their contractual obligations.

> otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.' 17 U.S.C. Sec. 201(b). A work made for hire is defined in pertinent part as 'a work prepared by an employee within the scope of his or her employment.' 17 U.S.C. Sec. 101. Thus, an employer owns a copyright in a work if (1) the work satisfies the generally applicable requirements for copyrightability set forth in 17 U.S.C. Sec. 102(a), (2) the work was prepared by an employee, (3) the work was prepared within the scope of the employee's employment, and (4) the parties have not expressly agreed otherwise in a signed, written instrument.

Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 667 (7th Cir. 1986).

146. There is a broad construction given to the term "employee" in for the purpose of the work made for hire case law such that a person acting under another's direction and supervision is considered an employee. Black's Law Dictionary, *supra* note 132, at 669 (citing Evans Newton Inc. v. Chicago Systems Software, 793 F.2d 889, 894 (7th Cir.1986))

147. *Id.* at 675.

148. The defendants may also pose First Amendment arguments which could be the subject of another article and certainly would pose different issues depending upon the medium analyzed (video games, other merchandise, telecasts, etc.).

149. Under this doctrine, "plaintiff's fault, like defendant's, may be relevant to the question of what, if any, remedy plaintiff is entitled to" and a court of equity could deny relief to the party whose conduct has been inequitable or unfair. BLACK'S LAW DICTIONARY, *supra* note 132, at 1524.

150. Estoppel means "that party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly." *Id.* at 551.

Second, as for the copyright argument, even if the student-athlete fit within the broad definition of "employee" under the Act,[151] and the telecast of NCAA games was copyrightable material, a key factor in the Seventh Circuit's analysis was the assumption that the players could have, but did not, negotiate for a written exception to the statute.[152] Here, unlike professional sports' collective bargaining agreements, there is no collective bargaining of student-athletes with the NCAA. The student-athletes could not "expressly agree" to rebut the statutory presumption. Even if they succeeded in uniting, they would be violating the rules of amateurism if they negotiated for proprietary rights and could be deemed ineligible. Indeed, such lack of mutuality of obligation as to the prohibition on commercialization is what likewise drives the above arguments for unenforceability of any student-athlete consent to use of name and likeness.

Another point that could distinguish the student-athlete from the professionals in *Baltimore Orioles* is the scope of the student-athlete's "employment" and whether it encompasses the performance of games before "live and remote audiences." The Court in *Baltimore Orioles* found that it did with respect to the professional baseball players.[153] However, while playing before live television audiences and being recorded may be par for the course even in intercollegiate athletics, the scope-of-employment question for the student-athlete also has to ask: are those telecasts merely a public or educational service or are they a profit-making endeavor? If the latter, then it is out of the scope of their employment because student-athletes must be amateurs as a condition of their eligibility. As has been pointed out, once their play (even in the sale of the telecasts) is used for profit they are no longer amateurs.[154] In sum, in resolving any of these defenses and indeed the enforceability of any consent of the student-athlete to use of their name, likeness, or image discussed in this article, the definition of "amateur" will ultimately need to be resolved.[155]

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151. *See, supra* note 146.

152. *Id.* at 673 ("the parties did not expressly agree to rebut the statutory presumption that the employer owns the copyright in a work made for hire.").

153. *Id* at 670.

154. Otto, *supra* note 77.

155. *See id.*

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