Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 20 *Volume XX*
Number 1 *Volume XX Book 1*

Article 1

2009

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INTRODUCTION

At the end of each college football and basketball season, coaches in the early years of multi-year term contracts (under which they agreed to perform exclusively for the school for the entire contract term) consider more lucrative offers from other schools that freely solicit them to fill their coaching vacancies, causing the coaches to break their existing contracts with their schools, and leaving vacancies for the jilted schools to fill in the same manner.[1] This is known as the "college coaching carousel" in big-time intercollegiate athletics,[2] and it has been causing coaches' salaries to spiral out of control into the $2, $3 and $4 million dollar ranges and climbing, which some critics have

1 *See, e.g.*, Steve Wieberg & Jodi Upton, *The Money Game*, USA TODAY, Dec. 5, 2007, at 1A, *available at* http://www.usatoday.com/sports/college/football/2007-12-04-coaches-pay_N.htm [hereinafter Wieberg & Upton, *The Money Game*].

2 *See, e.g.*, CBSSports.com, 2007–08 College Football Coaching Carousel, http://www.cbssports.com/collegefootball/story/10491600 (last visited Sept. 21, 2009).

characterized as "eye-popping, mind-boggling" and which "[s]ort of takes your breath away in this economic environment."[3] While the "have nots" continue to complain about cost containment and too much commercialization in intercollegiate athletics and the NCAA asserts it is powerless to do anything, the "haves" are the ones pushing the carousel because they generate the revenue to offset the huge financial liability created by buyouts and lucrative coaches' salaries.[4]

College coaches are not at-will employees; they promise to perform exclusively for the school for a period of years in exchange for an exorbitant guaranteed salary for the duration of that period.[5] The problem is that these contracts are a one-way street from an enforcement standpoint. The schools continue to reward coaches with contract extensions and salary raises after one winning season, and schools remain liable for the coach's guaranteed salary for the remainder of the term when they terminate him without cause; the schools also, however, let coaches walk away at will and go work for, and be solicited by, their competitors with impunity.[6] To be certain, this is not representative of free market competition, but rather unfair competition. The purpose of this paper is not to criticize how much money coaches make, but to encourage our public academic institutions, which owe a moral and ethical duty to their student bodies, their student-athletes and society at large, to exercise fiscal responsibility and restraint by simply deterring their coaches from breaching their contractual obligations and their competitors from interfering with contractual relations. This paper analyzes the economics of college coaches' contracts and uses it as justification and support for universities to look closer at their legal options, rights and remedies.

3 Steve Wieberg, *Brand: 'Hard Questions' Need to Be Asked About Rising Salaries*, USA TODAY, Apr. 3, 2009, http://www.usatoday.com/sports/college/mensbasketball/2009-04-02-brand-salaries_N.htm [hereinafter Wieberg, *Hard Questions*] (internal quotation marks omitted) (quoting University of Hartford President, Walt Harrison).

4 *See id.*; *see also* Wieberg & Upton, *The Money Game*, *supra* note 1.

5 *See, e.g.*, Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127, 134–35 (2001).

6 *Id.* at 135–36, 226.

Part I of this paper will address the economics of coaches' contracts in big-time college football and men's basketball. It will discuss the contributing factors for the dramatic increase in coaches' compensation in recent years, including the desire to win and the prospects of generating more revenue, the granting of contract extensions to keep winning coaches from being poached (with five specific examples of recent extensions), the payment of huge buyouts when coaches do not win, and the tremendous leverage that coaches have over schools in the hiring and contract negotiation process. Part II will address the options and remedies schools have to deter coaches from jumping ship before the expiration of their contracts. Specifically, this Part will examine the use and validity of liquidated damages clauses given the unquantifiable nature of the damages incurred by the school as a result of the loss of a head coach, and the difficulties of suing for damages in the absence of a liquidated damages clause. It will also discuss the viability of the negative injunction to prevent a coach from working for another institution, including how college coaches meet the unique skills test for the requisite showing of irreparable harm and how a balancing of the harms to the parties, the public interest and the interest of student-athletes weighs heavily in favor of granting injunctive relief. This paper concludes by addressing some practical considerations for schools in seeking injunctive relief, such as whether the existence or non-existence of a liquidated damages clause impacts the availability of injunctive relief, the likelihood of a quick settlement, and whether the school should be concerned about having to keep an "unhappy coach."

I. THE ECONOMICS OF COLLEGE COACHES' CONTRACTS

In 2007, for the first time, the average earnings of the major-college football coaches reached $1 million, which does not even include benefits, perks and performance bonuses.[7] This included

[7] *See* Wieberg & Upton, *The Money Game*, *supra* note 1. For summaries of the material terms contained in numerous college football and men's basketball head coaches' contracts, see Coastal Law Sports Law Coaching Contracts, http://www.fcsl.edu/node/174 (last visited Sept. 1, 2009). "A coach's base salary is . . . a small piece of his overall guaranteed compensation package" which typically includes

at least fifty coaches who made seven figures, which was seven more than in 2006, and at least twelve coaches who earned $2 million or more, up from nine in 2006.[8] By 2008, in college football there were twenty-three coaches who were making at least $2 million,[9] which included one coach reportedly making in excess of $4 million[10] and at least seven other coaches who had broken the $3 million mark.[11] At the start of the 2009 football season, Notre Dame's Charlie Weiss and Florida's Urban Meyer became the second and third coaches to break the $4 million mark and at least sixty-nine coaches were making $1 million or more.[12] Setting the market in college basketball by 2009 were Kentucky's John

"income guaranteed by their institutions from media and apparel deals, speaking fees and football camps." Peter J. Schwartz, *The Best (and Worst) College Football Coaches for the Buck*, FORBES.COM, Aug. 13, 2008, http://www.forbes.com/2008/08/13/football-carroll-tressel-biz-sports-cz_pjs_0813coaches.html [hereinafter Schwartz, *The Best (and Worst)*]; *see also* Greenberg, *supra* note 5, at 134 ("The package might include shoe, apparel and equipment endorsements, television, radio and Internet shows, speaking engagements, personal or public appearances, and summer instructional camps. In addition, the job may also mean such related perquisites as housing, insurance premiums, annuities, membership in health and country clubs, financial gifts from alumni and boosters, business opportunities, and the use of automobiles."). Throughout this paper, all references to dollar figures in compensation or salary shall mean a coach's guaranteed compensation in the contract irrespective of how the compensation is characterized in the contract, i.e. base salary, endorsement compensation, guaranteed bonuses, etc., and do not include benefits, perks and performance bonuses.

8 Wieberg & Upton, *The Money Game*, *supra* note 1.

9 Tom Dienhart, *Calipari Deal Good News for Football Coaches*, RIVALS.COM, Apr. 13, 2009, http://collegefootball.rivals.com/content.asp?CID=934841.

10 Southern California's Pete Carroll earns a reported $4.4 million a year. *See* Tom Van Riper, *The Highest-Paid Coaches*, YAHOO! SPORTS, May 14, 2009, http://sports.yahoo.com/top/news?slug=ysforbescoachespay051409&prov=yhoo&type=lgns.

11 These coaches include Florida's Urban Meyer, Notre Dame's Charlie Weiss, Alabama's Nick Saban, LSU's Les Miles, Ohio State's Jim Tressel, Oklahoma's Bob Stoops, and Iowa's Kirk Ferentz. *Id.* Tressel's average annual salary was increased from $2.6 million to $3.5 million in late August, 2008. *See* Ken Gordon, *New Salary for Tressel Ranks No. 1 in Big Ten*, COLUMBUS DISPATCH, Aug. 30, 2008, at 1A, *available at* http://www.dispatch.com/live/content/sports/stories/2008/08/30/tressel_contract.ART_ART_08-30-08_A1_4QB6A4A.html?sid=101.

12 *See Ranking Salaries of Head Football Coaches in Football Bowl Subdivision*, ORLANDO SENTINEL, July 29, 2009, at C1, *available at* http://www.orlandosentinel.com/sports/college/orlsportseconchart30b073009jul30,0,6128405.story; *see also* Robbie Andreu, *UF Gives Meyer New 6-Year Contract*, GAINESVILLESUN.COM, Aug. 3, 2009, http://www.gainesville.com/article/20090803/ARTICLES/908039934/1109/SPORTS?Title=UF-gives-Meyer-new-6-year-contract.

Calipari earning $3.7 million,[13] Florida's Billy Donovan at $3.5 million and Kansas's Bill Self at $3 million.[14] Other basketball coaches at the $2 million mark include Louisville's Rick Pitino, North Carolina's Roy Williams and Duke's Mike Krzyzewski.[15] The "athletics arms race" in big-time collegiate athletics is certainly apparent when one compares these numbers to 1999, when only five coaches at major college football programs were making $1 million.[16]

A. *The Revenue Factor*

What is contributing to the dramatic increase in compensation of college football and basketball coaches? One legal scholar opines that some of the factors that have contributed to the rise in salaries of college football coaches are (1) the proliferation of revenue generated from football bowl games and television contracts, (2) the substantial rise since the mid-1990s in agents representing coaches, and (3) increased competition for coaches fueled by the desire of National Football League ("NFL") teams to hire college coaches and colleges to hire NFL coaches.[17] Similarly, Peter Schwartz of *Forbes Magazine* noted that, in football, "Escalating revenues from television, fat donations from boosters and bidding wars with rival schools (and in some cases the NFL) led to 56 coaches taking home $1 million or more in 2007."[18]

The top revenue producers in collegiate athletics—Alabama, Florida, Kansas, Louisiana State and Notre Dame, among others—are continuously willing to push the envelope on football and basketball coaches' compensation for the prospect of having successful programs, which has led to the rapid escalation in salaries in recent years.[19] Indeed, the revenues generated in big-

[13] *See* Wieberg, *Hard Questions*, *supra* note 3.
[14] Dienhart, *supra* note 9.
[15] *Id.*
[16] *See* Wieberg & Upton, *The Money Game*, *supra* note 1.
[17] MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & ROBERT C. BERRY, SPORTS LAW AND REGULATION: CASES, MATERIALS AND PROBLEMS 370–71 (2d ed. 2009).
[18] Schwartz, *The Best (and Worst)*, *supra* note 7.
[19] *See supra* notes 9, 13–15 and accompanying text.

time collegiate athletics in recent years can support the rising salaries. In the 2007–08 school year, the top twenty revenue producers in college athletics each generated total revenue in excess of $75 million:[20]

School	2007–08 Total Revenue
1. Texas	$120,288,370
2. Ohio State	$117,953,712
3. Florida	$106,030,895
4. Michigan	$99,027,105
5. Wisconsin	$93,452,334
6. Penn State	$91,570,233
7. Auburn	$89,305,326
8. Alabama	$88,869,810
9. Tennessee	$88,719,798
10. Oklahoma State	$88,554,438
11. Kansas	$86,009,257
12. Louisiana State	$84,183,362
13. Georgia	$84,020,180
14. Notre Dame	$83,352,439
15. Iowa	$81,148,310
16. Michigan State	$77,738,746
17. Oklahoma	$77,098,009
18. Stanford	$76,661,466
19. Southern California	$76,409,919
20. Nebraska	$75,492,884

[20] *Top Revenue Producers in College Athletics*, STREET & SMITH'S SPORTSBUS. J., June 15, 2009, at 26, *available at* http://www.sportsbusinessjournal.com/article/62825 [hereinafter *Top Revenue Producers*] (based on Equity in Athletics Disclosure Act documents filed by each school with the Department of Education).

On an individual sport level, football by far generates the most revenue at the top revenue producing schools.[21] The top ten revenue producers in football in the 2007–08 school year each generated between $52 and $73 million in revenue, reflecting a percentage of the school's total revenue in the range of 55 and 80%:[22]

School	2007–08 Football Revenue	Percentage of Total Revenue (rounded to the nearest tenth of one percent)
1. Texas	$72,952,397	60.6%
2. Georgia	$67,053,051	79.8%
3. Florida	$66,124,945	62.4%
4. Ohio State	$65,162,179	55.2%
5. Notre Dame	$59,774,851	71.7%
6. Auburn	$59,671,354	66.8%
7. Michigan	$57,463,603	58.0%
8. Alabama	$57,370,617	64.5%
9. Penn State	$53,766,038	58.7%
10. Louisiana State	$52,687,713	62.6%

The revenue generated in basketball, however, paints a completely different picture and pales in comparison to the revenue generated in football.[23] The top ten revenue producers in

[21] *See id.*

[22] Percentage of a school's total revenue equals the revenue from a sport divided by the total revenue. *See id.*

[23] According to Oklahoma Athletic Director Joe Castiglione, "Sheer numbers alone [ticket sales, donations related to benefits, premium seats and suites] would account for most of the difference [between football and basketball revenue]." Dienhart, *supra* note 9 (alteration in original) (internal quotations omitted).

basketball in the 2007–08 school year each generated between $14 and $24 million in revenue:[24]

School	2007–08 Basketball Revenue
1. Louisville	$23,519,846
2. North Carolina	$17,831,583
3. Indiana	$17,037,443
4. Arizona	$16,417,302
5. Arkansas	$16,099,373
6. Syracuse	$15,997,638
7. Duke	$15,903,075
8. Michigan State	$15,839,369
9. Wisconsin	$14,962,970
10. Kentucky	$14,867,027

As evidenced by the above data, all of the top ten revenue producers in football were among the top twenty in total revenue.[25] In contrast, of the top ten revenue producers in basketball, only two schools, Michigan State and Wisconsin, were among the top twenty in total revenue.[26] However, the percentage of total revenue generated by the basketball programs at Michigan State and Wisconsin was only 20.4% and 16%, respectively.[27]

If the salaries of football and basketball coaches are a reflection of the revenue generated by their respective sports, then the large disparity in revenue between the two sports leads one to question: whether perhaps football coaches are underpaid or, conversely, basketball coaches are overpaid. To illustrate the point, the 2007

[24] *See Top Revenue Producers*, *supra* note 20 and accompanying text.

[25] *See id.*

[26] *See id.*

[27] Percentage of total revenue that is Michigan State's basketball revenue is $15,839,369/$77,738,746=20.4% and percentage for Wisconsin's basketball revenue is $14,962,970/$93,452,334=16%. *See id.*

salary of Florida football coach Urban Meyer was $3.25 million[28] and represented 4.9% of Florida's football revenue generated in the 2007–08 school year.[29] Alabama's Nick Saban and Notre Dame's Charlie Weiss, who each earned roughly $4.0 million in 2007,[30] were paid salaries representing 7.0% and 6.7%, respectively, of their school's football revenue generated in the 2007–08 school year.[31] In basketball, the $2 million salaries of Louisville's Rick Pitino, North Carolina's Roy Williams and Duke's Mike Krzyzewski[32] represented approximately 8.5%, 11.2% and 12.6%, respectively, of their school's basketball revenue generated in the 2007–08 school year.[33]

Thus, while the highest-paid football coaches are earning roughly 5% to 6% of their school's football-related revenue, the highest-paid basketball coaches are earning more than twice that percentage of their school's basketball-related revenue. Indeed, comparing John Calipari's $3.7 million salary, which he started earning when he signed with Kentucky in April of 2009,[34] with Kentucky's basketball revenue generated in the 2007–08 school year represents a whopping 25%.[35] It remains to be seen what impact, if any, Calipari's contract will have on football coaches' contracts. According to Rivals.com College Football Senior

[28] *See Donovan and Meyer: Highest-Paid Tandem?*, ESPN.COM, June 8, 2007, http://sports.espn.go.com/ncaa/news/story?id=2897946.

[29] Percentage of Florida's football revenue that is Urban Meyer's salary is $3,250,000/$66,124,945=4.9%. *See Top Revenue Producers*, *supra* note 20 and accompanying text.

[30] *See* Monte Burke, *The Most Powerful Coach in Sports*, FORBES.COM, Sept. 1, 2008, http://www.forbes.com/forbes/2008/0901/092.html; Jodi Upton, *Saban's Contract Could Bring Congressional Inquiry*, USA TODAY, Jan. 3, 2007, http://www.usatoday.com/sports/college/football/sec/2007-01-03-saban-contract_x.htm.

[31] Percentage of Alabama's football revenue that is Nick Saban's salary is $4,000,000/$57,370,617=7.0%; percentage of Notre Dame's football revenue that is Charlie Weiss's salary is $4,000,000/$59,774,851=6.7%. *See Top Revenue Producers*, *supra* note 20 and accompanying text.

[32] *See* Dienhart, *supra* note 9.

[33] Percentage of Louisville's basketball revenue that is Rick Pittino's salary is $2,000,000/$23,519,846=8.5%; percentage of North Carolina's basketball revenue that is Roy Williams's salary is $2,000,000/$17,831,583=11.2%; percentage of Duke's basketball revenue that is Mike Krzyzewski's salary is $2,000,000/$15,903,075=12.6%. *See Top Revenue Producers*, *supra* note 20 and accompanying text.

[34] *See* Wieberg, *Hard Questions*, *supra* note 3.

[35] *See Top Revenue Producers*, *supra* note 20 and accompanying text.

Writer Tom Dienhart, Calipari's deal will likely push the salaries of college football coaches even higher:

> Football is a much bigger revenue-producer on college campuses than basketball, so it stands to reason the football coach almost always will be higher paid.
>
> . . . .
>
> . . . And if a basketball coach now is being paid almost as much as the highest-paid football coach, it stands to reason football coaches will see their salaries rise. In fact, college football may have a $5 million–$6 million per year coach in the next few seasons.[36]

B. The High Cost of a Highly Successful Coach

"It's a difficult line presidents, chancellors and athletic administrators have to walk. You depend on the revenue of certain sports, and if you don't have quality coaches who continue to bring in that revenue, especially if you have a highly successful coach who is in demand, you're caught.

If you lose that coach, will a school suffer a revenue drop? And if I don't pay this coach and lose him, does it signify that a school isn't committed to a program? You could lose donations, ticket sales and television appearances, and that affects the other programs.

36 Dienhart, *supra* note 9. It also remains to be seen what impact Calipari's contract will have on the women's basketball coaches market. According to Bob Lattinville, an attorney who represents college coaches, "In the last 10 years, the increases in salaries have been exponential . . . . They have, in some respects, tracked the men's game." Stu Durando, *Fortunes Soar for Women's Coaches*, ST. LOUIS POST-DISPATCH, Mar. 26, 2009, at A1 (internal quotation marks omitted). In 2001, a study conducted by the Women's Basketball Coaches Association showed that the average salary was $86,199, and by 2009, the average salary in the Big 12 conference was $548,000 and $345,000 in the Big Ten conference. *Id.* The highest-paid women's basketball coaches in 2009 were Connecticut's Geno Auriemma, with a 5-year, $8 million contract, Tennessee's Pat Summitt, with a $1.275 million salary, and Baylor's Kim Mulkey and Texas' Gail Goestenkors, with $1 million salaries. *Id.*

I think it's a heck of a conundrum."[37]

– Big 12 Commissioner Dan Beebe

The cost of hiring and keeping a successful coach can be substantial and may consist of (1) the coach's guaranteed compensation package plus benefits and perks, as well as raises in guaranteed compensation following successful seasons pursuant to any contract extensions, (2) performance-based incentives for successful seasons throughout the term of the contract, (3) the payment of a buyout that is owed to a coach who is fired, and (4) a payment on behalf of a newly-hired coach for liquidated damages that is owed by the coach to his previous employer for breach of contract by failing to perform for the remainder of the term.[38] As observed by two sports reporters:

> The marketplace shudders at the end of every season. Coaches retire, resign and are fired, and schools eager to preserve or upgrade their programs chase the most attractive replacements. Others try to keep their coaches from being poached.[39]

1. Guaranteed Salary Raises: The Cost of Contract Extensions

The proliferation of schools trying "to keep their coaches from being poached"[40] in recent years has resulted in a flux of contract extensions that involve a consistent theme. The team has a successful season and the coach, who has multiple years remaining under the term of his existing contract, is rewarded with a substantial raise in guaranteed compensation for another multi-year term (typically at least five years).[41] Sometimes negotiations are contentious.[42] However, a successful season provides the coach

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[37] Blair Kerkhoff, *College Coaches Get Richer as Programs Try to Trim Other Costs*, KAN. CITY STAR, June 1, 2009, http://www.kansascity.com/sports/story/1228663.html (quoting Big 12 Commissioner, Dan Beebe).

[38] For an in-depth and comprehensive discussion, as well as specific examples, of the various guaranteed and non-guaranteed sources of income in college coaches' contracts, see Greenberg, *supra* note 5, at 170–208.

[39] Wieberg & Upton, *The Money Game*, *supra* note 1.

[40] *Id.*

[41] *See id.*

[42] *See* Tim Griffin, *As Meeting Nears, 'Stalemate Not Good,'* ESPN.COM, Feb. 19, 2009, http://sports.espn.go.com/espn/print?id=3918813&type=story.

with tremendous leverage and oftentimes there is minimal negotiation between the university and coach over compensation and term, which in and of itself creates a very unusual market dynamic involving a buyer and seller of services in an arm's length transaction.[43] Thus, a coach who has a successful season typically receives not only the incentive bonuses provided under his existing contract that were initially agreed upon in contemplation of future successful performance during the term of the contract, but the school also extends his contract providing the coach with additional guaranteed compensation for future years irrespective of performance in those years. These dynamics are illustrated by recent contract extensions of coaches at Florida, Louisiana State, Kansas, Texas Tech and Cincinnati.

a) Florida's Billy Donovan and Urban Meyer

In 2007, the University of Florida won both the football and basketball national championships simultaneously, a first in major-college sports history.[44] Billy Donovan coached the Florida basketball team to consecutive national championships, as his team also won the national championship in 2006, and Urban Meyer was only in his second season as head football coach at Florida when his team won the 2007 BCS National Championship.[45] In June of 2007, Florida rewarded Donovan and Meyer each with a new six-year contract, making them the nation's highest-paid basketball-football coaching tandem and together costing the university more than $40 million through 2013.[46] At the time, it was reported that these two contract extensions made Donovan the highest-paid basketball coach and Meyer the second highest-paid football coach at a public school.[47] When the extensions were announced, Florida Athletic Director Jeremy Foley said, "I

[43] *See infra* text accompanying notes 59–60.
[44] *See Donovan and Meyer*, *supra* note 28.
[45] *Id.*
[46] Under the contracts, Donovan is paid $3.5 million annually and Meyer is paid $3.25 million annually. *Id.*
[47] *Id.*

understand those numbers are significant . . . but it's the market for having highly successful coaches."[48]

Foley's comment prompts two pertinent questions. First, what is the definition of a "highly successful coach" and, second, how is the market determined? Florida assessed Donovan's market value at $3.5 million per year when it signed him to a $21 million, six-year contract and Meyer's market value at $3.25 million when it signed him to a $19.5 million, six-year contract.[49] At the time the contract extension was signed, Donovan achieved an overall win-loss record of 261–103 in eleven seasons at Florida, which included nine NCAA tournament appearances, but his performance prior to winning the national championships in 2006 and 2007 certainly would not justify making him the highest-paid college basketball coach in the country.[50] Meyer, on the other hand, was only in his second year at Florida when his team won the national championship in 2007.[51] The year before that, Meyer's team had fourteen starting players return from the previous year (seven on offense and seven on defense) and the team finished with a 9–3 record (5–3 in the conference), including a win at the Outback Bowl following the regular season.[52] Florida made the determination that Donovan's and Meyer's performances justified giving them contract extensions that would make them the highest-paid and second highest-paid public school coaches, respectively, and the highest-paid basketball-football coaching tandem in the nation.[53]

In the first year of Donovan's new six-year contract, which was the 2007–08 basketball season, the basketball team had an overall

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48 *Id.* (internal quotation marks omitted). "Foley's announcement followed Donovan's news conference Thursday during which he apologized to the Orlando Magic, his family and the [Florida] Gators for changing his mind . . . to opt out of the 5-year, $27.5 million contract signed [with the Magic] last week." *Id.* The day before the news conference, Donovan reached a deal with the Magic and opted out of that agreement. *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *See* GatorZone.com, UF Football Schedule and Results, 2005 Season, http://www.gatorzone.com/sched.php?sport=footb&curyearb=2005&submita=1 (last visited Oct. 16, 2009).

53 *See supra* notes 44–51 and accompanying text.

win-loss record of 24–12 (8–8 in the conference) and did not even qualify for the NCAA tournament.[54] Donovan's team did not fare much better in the second year of his contract, as the team had an overall record of 25–11 (9–7 in the conference) and for the second straight year did not qualify for the NCAA tournament.[55] Notably, for the second straight year Donovan's six-year contract was not extended.[56]

In the first year of Meyer's new six-year contract, which was the 2007–08 football season, the football team finished with a 9–4 record (5–3 in the conference), including a loss against the University of Michigan in a non-BCS bowl game, the Capital One Bowl.[57] Meyer's contract was not extended following that season. However, the next year Meyer's team won the 2009 BCS National Championship Game, finishing with a 13–1 record (7–1 in the conference).[58] A few months later on May 30, 2009, University of Florida President Bernie Machen announced that Meyer would receive a significant raise to his $3.25 million annual compensation.[59] Although Meyer still had four years remaining on his six-year contract and Machen acknowledged that he does not know whether Meyer should be the *nation's* highest-paid coach because he does not "know the market," Machen proclaimed, "He

54 *See* GatorZone.com, UF Basketball Schedule and Results, 2007 Season, http://www.gatorzone.com/basketball/men/history/2007/review.pdf (last visited Oct. 16, 2009).

55 *See* GatorZone.com, UF Basketball Schedule and Results, 2008 Season, http://www.gatorzone.com/basketball/men/history/2008/review.pdf (last visited Oct. 16, 2009).

56 Author's Note: Please note that news sources normally do not report non-extensions on long-term coaching contracts with multiple years remaining.

57 *See* Gator Zone.com, UF Football Schedule and Results, 2007 Season, http://www.gatorzone.com/sched.php?sport=footb&curyearb=2007&submita=1 (last visited Oct. 16, 2009).

58 *See* GatorZone.com, UF Football Schedule and Results, 2008 Season, http://www.gatorzone.com/sched.php?sport=footb&curyearb=2008&submita=1 (last visited Oct. 16, 2009).

59 Jeremy Fowler, *UF President: Meyer Should Be SEC's Top-Paid Coach*, ORLANDO SENTINEL, May 30, 2009, at C1, *available at* http://blogs.orlandosentinel.com/sports_college_uf/2009/05/uf-prez-hopes-urban-meyer-becomes-secs-highestpaid-coach.html ("Despite the negative public perception of spending money on athletics while academics suffer, Machen said Gator athletics will move forward without the fear of spending.").

should be (the SEC's highest) . . . . He's the best."[60] On August 3, 2009, Florida announced that Meyer signed a new six-year contract that raises his salary by $750,000 and guarantees him $4 million annually.[61] At the time of the announcement, Florida Athletic Director Jeremy Foley said, "Coach Meyer has certainly proven to be one of the top college football coaches in the country and should be compensated as such."[62]

Perhaps Florida's definition of a highly successful coach is one that deserves a significant raise in guaranteed annual compensation for a period of years immediately following a successful season (or a national championship).[63] And the market is determined by Florida. One way to view a contract extension when the coach has a successful season during the term of an existing contract is that the coach is receiving a very large performance bonus in the form of higher multi-year guaranteed compensation that was not provided for in the existing contract, *in addition to* any incentive bonuses that the coach is entitled to receive under the existing contract based upon successful performance in any season during the term.[64] In other words, it is almost as if the school is saying to the coach, "we originally agreed that you deserve to be paid an additional amount of $X if you win a national championship, but now that you won it, we think you deserve to be paid a lot more."

b) Louisiana State's Les Miles

Despite Bernie Machen's desire to make Urban Meyer the highest-paid coach in the conference, it may not be possible because Louisiana State football coach Les Miles has an escalator clause in his contract that must keep him the conference's top earner.[65] The escalator clause in Miles' contract is an interesting twist not only in terms of how the market is determined, but also from the standpoint that the coach continues to receive raises in

60 *Id.* (internal quotation marks omitted).
61 *See* Andreu, *supra* note 12.
62 *Id.* (internal quotations omitted).
63 *See supra* notes 59–61 and accompanying text.
64 "Meyer made $375,000 in bonuses last season for winning the BCS national and SEC titles and finishing in the top 10." Andreu, *supra* note 12.
65 Fowler, *supra* note 59.

guaranteed compensation throughout the contract term regardless of performance, *i.e.* whether or not he is a "highly successful coach."[66] Conceivably, there can only be one highest-paid coach in the conference and as long as Miles' contract with LSU contains the escalator clause, he must be the one. However, it raises an interesting question, beyond the scope of this article, as to which school's escalator clause would govern if another school in the conference included a similar clause in the contract with its coach.

How the escalator clause in Miles's contract came to fruition is especially noteworthy. Less than one week after LSU landed a berth in the national championship game in January of 2008, and five days after Miles decided not to accept the vacant coaching position at Michigan, Miles and LSU entered a $12 million, four-year contract extension.[67] Miles had three salary escalators in his original contract that were also carried over to his new agreement—one required LSU to make him at least the Southeastern Conference's ("SEC") fifth-highest paid coach if the team wins ten games, another guaranteed he would be the SEC's third-highest if the team wins a conference championship, and the third one guaranteed he would be "the nation's third-highest paid coach if LSU wins the national title."[68] Within months, changes needed to be made to the new contract because LSU ended up winning the national championship game and the University could not verify the salaries of coaches at private universities, which are not required by law to disclose their salaries, such as Notre Dame's Charlie Weiss and Southern California's Pete Carroll, who are believed to be the highest paid in the nation.[69] Therefore, Miles and LSU revamped that agreement and signed a five-year contract which guarantees that "he will be paid no less than the highest-paid coach at a public university in the conference, plus $1,000."[70]

[66] *Id.* "If Meyer gets bumped to, say, $4 million per year from Florida, LSU might have to escalate Miles' salary to $4.001 million—for five losses last season." *Id.*

[67] *See* Wieberg & Upton, *The Money Game*, *supra* note 1.

[68] *Id.*

[69] *See* Brett Martel, *LSU's Miles Signs New Contract*, USA TODAY, Mar. 14, 2008, http://www.usatoday.com/sports/college/football/2008-03-14-1205869527_x.htm; *see also Ranking Salaries of Head Football Coaches*, *supra* note 12.

[70] Martel, *supra* note 69. This agreement also guaranteed Miles $18.75 million if he is fired without cause, which increased the previously agreed upon $15 million without

What would compel LSU to agree to guarantee that Miles would be the highest-paid coach in the conference for the ensuing five years? LSU Board of Supervisors Chairman-elect Jim Roy said, "It is what it is . . . . It's a performance-based contract. The man won a national championship."[71] But to the contrary, Miles's contract is not performance-based; the escalator clause applies each year and effectively guarantees Miles a raise in compensation during each of the remaining years of the term irrespective of the team's performance in those years. Another board member commented, "When you look at the silliness that's going on in college athletics . . . it's inevitable we're looking at numbers that seem out of perspective. But I think it's the right number."[72] Presumably, this board member is referring to the right number as the $3.751 million salary Miles earned the first year of the new five-year deal when the team won the national title,[73] because the following year the team had a mediocre overall record of 8–5 (3–5 in the SEC) and was unranked in all of the polls at the completion of the season.[74] Former LSU Chancellor Sean O'Keefe said in regards to the adjusted cost to keep Miles, "If that's what everybody considers reasonable, I congratulate him."[75] Notably, because of the escalator clause in Miles's contract, what constitutes "reasonable" broke the $4 million mark beginning in 2009 with the announcement of Urban Meyer's new contract that pays him $4 million annually as well as Nick Saban's contract at Alabama providing for annual salaries of $4.1 million in 2010, $4.15 million in 2011 and $4.2 million from 2012 to 2015.[76]

cause termination clause. Jordan Blum, *Miles Could Get $3.75 Million*, 2THEADVOCATE.COM, Mar. 15, 2008, http://www.2theadvocate.com/sports/lsu/16699056.html?showAll=y.

71 Blum, *supra* note 70 (internal quotation marks omitted).

72 *Id.* (internal quotation marks omitted).

73 *See* Martel, *supra* note 69 ("Miles will earn at least $3.75 million plus $1,000 a year in a deal that nudges him ahead of Alabama coach Nick Saban and makes Miles one of the nation's top-paid college football coaches.").

74 *See* Joey Johnston, *Tigers Talented, but Have a Tough Road Ahead in Imposing SEC West*, NBCSPORTS.COM, http://nbcsports.msnbc.com/id/19945677/ns/sports-college_football/.

75 Blum, *supra* note 70 (internal quotations omitted).

76 *See* Adam Jones & Cecil Hurt, *Saban's Contract a Done Deal*, TUSCALOOSA NEWS, June 15, 2007, http://www.tuscaloosanews.com/article/20070615/NEWS/706150345/1007/APS.

c) Kansas's Bill Self

Within twenty-four hours after Kansas won the national basketball championship in 2008, head coach Bill Self was already discussing his contract situation—a contract that still had four years remaining.[77] Following the game, Self told reporters that he would not rule out listening to an offer from Oklahoma State, a competitor of Kansas in the Big 12 conference: "That's my alma mater . . . . I know people down there. But they haven't contacted me."[78] Although Self signed a five-year contract extension the year before that increased his annual compensation to more than $1.3 million with a chance to make another $350,000 each year if he meets incentives,[79] Self told ESPN that he still needed to talk to Kansas Athletic Director Lew Perkins about his contract:

> I want to visit with my athletic director . . . . To be real honest with you, I love Kansas. I love my job here, and hopefully it will be a situation where I can spend a long time here. I'm certainly not looking to leave, but Lew and I got to visit. I'm sure that'll happen in the next couple days.[80]

Four months later, it was announced that Kansas and Self entered a $30 million, ten-year contract extension.[81] According to Perkins, the extension entailed minimal negotiation: "I wouldn't even use the word 'negotiate.' The entire process was positive from day one. We didn't squabble over anything."[82] Self confirmed that:

> When we first sat down to talk, Lew asked me, "How many years do you want?" I said 10 and he

[77] *See* Posting of Thayer Evans to The Quad, The New York Times Sports Blog, *Self Says He Wants to Stay*, http://thequad.blogs.nytimes.com/2008/04/08/self-says-he-wants-to-stay/ (Aug. 8, 2008, 18:17 EST).

[78] *Self Wants to Stay at Kansas but Won't Rule Out Talking to Alma Mater*, ESPN.COM, Apr. 8, 2008, http://sports.espn.go.com/ncb/ncaatourney08/news/story?id=3335488 [hereinafter *Self Wants to Stay at Kansas*].

[79] *Id.*

[80] *Id.*

[81] *See* Associated Press, *Self Signs New 10-Year, $30 Million Contract with Kansas*, USA TODAY, Aug. 7, 2008, http://www.usatoday.com/sports/college/mensbasketball/big12/2008-08-06-self-kansas_N.htm.

[82] *Id.* (internal quotation marks omitted).

> said, "Perfect, that's what I had in mind. We're going to take care of you" . . . . There was no negotiating on my part, either. I can't think of any place I'd rather work or live. . . .
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> . . . .
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> . . . But getting the security is definitely a nice thing. Our coaches and I are very happy about the commitment the university has made to us. We want to make a similar commitment back.[83]

However, Self's commitment seems questionable when he also told reporters, "But I'm looking at it as 10 one-year contracts."[84] Perhaps Self remains committed to Kansas so long as he remains content with the level of guaranteed compensation each year.

d) Texas Tech's Mike Leach

In the 2008 football season, Texas Tech, under the leadership of head coach Mike Leach, matched the school single-season record for victories with an 11–2 record (7–1 in the conference), including a loss in the 2009 Cotton Bowl Classic.[85] The team has been to nine bowl games during Leach's nine-season tenure at Texas Tech.[86] Leach had two years left on his existing contract and reports surfaced that Leach was apparently "willing to fulfill the terms of the remaining two seasons under his current contract," but that Tech would not "go along with his desire because of the potential for recruiting damage with a lame-duck coach during that period."[87] Unlike the previous situations discussed, negotiations over an extension between Texas Tech and Leach got contentious regarding issues involving compensation and term: "what would happen if Leach were fired" or quit or "interviewed for a new job without the university's permission," and how money would be

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83 *Id.* (internal quotation marks omitted).

84 *Id.* (internal quotation marks omitted).

85 *See* Brandon George, *Leach Deal Gets Done Five-Year Agreement Reached After Long, Intense Negotiations*, DALLAS MORNING NEWS, Feb. 20, 2009, at C6, *available at* http://www.wfaa.com/sharedcontent/dws/spt/wfaa/stories/022009dnspotechlede.2fa7bb13.html.

86 *Id.*

87 Griffin, *supra* note 42.

shared from "personal appearances and promotional activities."[88] Leach and Texas Tech ultimately signed a new $12.7 million, five-year contract.[89] *The Dallas Morning News* compared the new contract with the previous one:

- Leach's new contract doesn't have a buyout, making him the fifth Big 12 coach without one. Tech had wanted a $1.5 million buyout. His previous contract had a $500,000 buyout.
- Leach's new contract has a termination guarantee of $400,000 for each season left or about 16.5 percent of the entire deal. Tech had proposed $300,000 for each season left. Leach's previous contract guaranteed him 40 percent left of his remaining deal if he were to be terminated without cause.
- Both sides agreed that Leach has to give Tech "notification" if he were to interview for another job, but he won't be required to get Tech Athletic Director Gerald Myers' "permission" to do so, as Tech had proposed. Leach also can't be penalized for interviewing elsewhere.
- Leach gets to maintain his personal property rights, as he has in his previous contract, though Tech and Leach agreed to share marketing responsibilities for him . . .
- Tech also guaranteed Leach $400,000 more annually to go toward his staff's salary pool.[90]

e) Cincinnati's Brian Kelly

In late 2006, the University of Cincinnati hired Brian Kelly away from Central Michigan to fill its football head coaching vacancy and guaranteed him about 62% more than it had paid its

[88] *Id.*; *see also* George, *supra* note 85 ("After 10 months of fruitless talks that were sometimes heated, Leach and Tech finally agreed Thursday to a contract extension that will keep him in Lubbock through 2013.").
[89] *See* George, *supra* note 85.
[90] *Id.*

previous coach, Mark Dantonio, who was hired away by Michigan State to fill its vacancy.[91] The contract called for Kelly to make $800,000 in 2007, almost 4.5 times the $185,000 Kelly made with Central Michigan the previous year, and contained "built-in annual increases of $50,000."[92] In Kelly's first season with Cincinnati in 2007, the team finished with a 10–3 record (4–3 in the conference), including a win in the PapaJohns.com Bowl.[93] After the 2007 season, Kelly and Cincinnati agreed to a new five-year contract, which voided the remaining four years on Kelly's initial contract and raised his guaranteed salary between $1.2 million and $1.35 million and included performance-based incentives.[94] In Kelly's second season in 2008, the team finished with an 11–3 record (6–1 in the conference) and won the Big East Conference title "sending them to the first BCS bowl in school history."[95] Once again, following the 2008 season, the two sides immediately began to discuss another extension that would add an additional year to the agreement and give Kelly another raise in guaranteed compensation.[96] Cincinnati ultimately rewarded Kelly with a contract extension that gave him an additional year and raised his salary to $1.475 million, and included performance-based incentives and increases in the salaries of his assistant coaches as

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91 Wieberg & Upton, *The Money Game*, *supra* note 1.

92 *Id.*

93 *See* Joel Welser, *2008 Cincinnati Bearcats Football Preview*, COLLEGESPORTS-FANS.COM, http://www.collegesports-fans.com/football-previews/2008-ncaa-fbs/cincinnati-bearcats-preview.html.

94 *See* Associated Press, *Kelly Agrees to Terms on New Contract with No. 20 Cincinnati*, USA TODAY, Dec. 17, 2007, http://www.usatoday.com/sports/college/football/2007-12-17-757914779_x.htm.

95 Associated Press, *Kelly Says He is Planning on Staying at Cincinnati*, USA TODAY, Dec. 2, 2008, http://www.usatoday.com/sports/college/football/bigeast/2008-12-02-cincinnati-kelly_n.htm. In response to a question about his plans on staying at Cincinnati, Kelly responded:

> All I can say is that with all the speculation and all the jobs that have been out there, sooner or later "no" means "no." . . . Again, no one can ever speak in terms of forever and ever, but what I can tell you is there's been a lot of interest in my services, and I want to be here at the University of Cincinnati because of the right reasons.

Id. (internal quotation marks omitted).

96 *See* Brian Bennett, *Cincinnati, Kelly Close in on New Deal*, ESPN.COM, June 2, 2009, http://myespn.go.com/blogs/bigeast/0-5-4/Cincinnati--Kelly-close-in-on-new-deal.html.

well.[97] Regarding this most recent extension, one reporter raised an excellent question: "It's a fitting reward for Kelly. The question is, however, if a big-name program comes calling on Kelly after this season, will the contract actually mean anything?"[98]

2. Buyouts: The Cost of Replacing an Unsuccessful Coach

When a new coach is hired to fill a vacancy, unless the former coach retired, the vacancy usually arises because the former coach either (a) voluntarily left for greener pastures to coach at a different school, or (b) was terminated. Because college coaches are not at-will employees, a termination by the school "without cause" (for reason other than a breach or violation committed by the coach)[99] entitles the coach to compensation, or damages, in accordance with the terms of the contract.[100] Unfortunately for the school, when a coach is terminated for not winning, it constitutes a termination without cause.[101] What is typically referred to in most industries as severance pay, the compensation paid to the former coach under these circumstances is commonly known in the

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97 *See* Associated Press, *Cincinnati Coach Kelly Gets Extension Through 2013*, USA TODAY, June 22, 2009, http://www.usatoday.com/sports/college/football/bigeast/2009-06-22-cincinati-kelly_N.htm.

98 Bennett, *supra* note 96.

99 Some of the typical termination "with cause" provisions in coaches' contracts include the commission of a material breach by the coach, the commission of a felony or crime of moral turpitude, and serious or material violation of NCAA bylaws. For a discussion of typical "with cause" termination provisions in college coaches' contracts, see Greenberg, *supra* note 5, at 209–13.

100 "[W]hen the coach is terminated without cause, the issue centers on the determination of the amount of damages that the coach will receive, the nature of the damages, and the method of payment." *Id.* at 226; *see also* Libby Sander & Paul Fain, *Coaches' Contracts Are Fertile Ground for Conflict*, CHRON. HIGHER EDUC. (Wash., D.C.), June 12, 2009, at A1, *available at* http://chronicle.com/article/coaches-contracts-are-fertile/44424/ ("In most cases, if a university fires a coach with cause—that is, for a specific reason spelled out in the terms of a contract—it does not have to pay a dime. But terminating a coach for no reason often triggers payments, and those details are usually worked out in a contract.").

101 *See* Greenberg, *supra* note 5, at 226 ("[T]ermination without cause is usually based upon the coach's win-loss record, failure to beat a conference opponent, failure to obtain post-season invitations or appearances, attendance, lack of attendance, loss of favor with boosters, program elimination or financial exigency.").

college coaching industry as a "buyout."[102] The amount of the buyout is typically tied to the number of years remaining on the term of the contract at the time the coach is terminated.[103] Thus, the earlier in the term that a coach is terminated, the costlier it is for the school. Buyouts are, in essence, an additional cost to schools for keeping coaches on contract that are no longer working for them.[104]

Four recent terminations (or forced resignations) in college football during mid-season in 2008, and one at the end of the 2008 season, demonstrate just how costly buyouts can be. Washington terminated Tyrone Willingham in mid-season two days after the team fell to a record of 0–7.[105] With one year remaining on his

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[102] Steve Wieberg, *Huge Buyouts for College Coaches Causing Concern*, USA TODAY, Nov. 6, 2008, http://www.usatoday.com/sports/college/football/2008-11-06-coaches-buyouts_N.htm [hereinafter Wieberg, *Huge Buyouts*].

[103] A number of options are available, including:

> 1. A negotiated stated amount.
> 2. The coach's base salary or other compensation items for the remainder of the contract term.
> 3. The percentage of the base salary and other compensation packages for the remainder of the agreement.
> 4. De-escalating amount depending upon the year of the agreement and the termination therefor.
> 5. A lump sum settlement.

Greenberg, *supra* note 5, at 226 (citing Kevin Stangel, Comment, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 154 (2000)).

[104] As noted by Dutch Baughman, who heads the Texas-based Division I-A Athletic Directors' Association:

> Not only do you have these buyouts, these immediate expenses—what it's going to cost you to keep coaches on contract who are no longer actually working for you? . . . You've got all the new (coaches') contracts, all the moving expenses, all the other start-up costs of a whole new staff coming in.

Wieberg, *Huge Buyouts*, *supra* note 102 (internal quotation marks omitted); *see also* Iliana Limón, *Part 4: Come on Down: College Football Coaches Still Lining Up for Rising Pay*, ORLANDO SENTINEL, July 29, 2009, at C1 ("The big salaries don't stop when a coach is fired. Numerous schools are still paying coaches buyouts to coaches they're now paying not to coach.").

[105] *Willingham to Step Down as Huskies Coach at Season's End*, ESPN.COM, Oct. 28, 2008, http://sports.espn.go.com/ncf/news/story?id=3667258. Washington Athletic Director Scott Woodward said, "It became quite obvious with the performance on the football field it wasn't up to what we talked about at the beginning of the season and previous to the season." *Id.* (internal quotation marks omitted).

contract at the time he left, Washington owed him a buyout of $1,000,000.[106] Three football coaches—Clemson's Tommy Bowden, Kansas State's Ron Prince, and Tennessee's Phillip Fulmer —were terminated mid-season during the first year of new contracts.[107] Bowden stepped down after starting the first season of a new six year contract extension with a 3–3 record, and he was paid his salary through the end of the season in addition to a $3.5 million buyout that was owed under the terms of his contract.[108] Kansas State's decision to fire Prince was made mid-season after the team fell to a 4–5 record and a 52–21 loss to Kansas one week earlier.[109] Prince was terminated in the first year of a five-year contract extension that was agreed to just prior to the commencement of the season.[110] Prince coached the team for the remainder of the season and was owed "a $1.2 million buyout plus a prorated, $150,000 longevity bonus."[111] Fulmer was terminated during the first season of a seven-year contract extension in which he is owed a $6 million buyout payable over 48 months.[112]

106 *Id.*; *see also* Wieberg, *Huge Buyouts*, *supra* note 102.

107 *See* Wieberg, *Huge Buyouts*, *supra* note 102.

108 Associated Press, *Clemson's Bowden Steps Down*, SI.COM, Oct. 13, 2008, http://sportsillustrated.cnn.com/2008/football/ncaa/10/13/clemson.bowden.resigns/index.html.

109 *See* Tim Griffin, *Prince Won't Return as Kansas State's Football Coach in 2009*, ESPN.COM, Nov. 6, 2008, http://sports.espn.go.com/ncf/news/story?id=3684640. Kansas State Athletic Director Bob Krause indicated that the loss to Kansas contributed to the disappointment in Prince's job performance: "I think, in all honesty, that coming into the game, the buildup was there that there was a significant expectation that we would expect to win . . . . That certainly is a factor." *Id.* (internal quotation marks omitted).

110 *See* Kansas State University, *Prince Agrees to New Five-Year Contract*, K-STATESPORTS.COM, Aug. 7, 2008, http://www.kstatesports.com/ViewArticle.dbml?SPSID=3065&SPID=212&DB_OEM_ID=400&ATCLID=1551188.

111 Wieberg, *Huge Buyouts*, *supra* note 102. In the months following Prince's termination, Kansas State officials discovered a "secret" deferred-compensation agreement, signed by the former athletic director months before Prince was fired, that would pay Prince $3.2 million and would be funneled to a limited-liability corporation formed by Prince. *See* Sander & Fain, *supra* note 100. Kansas State filed a lawsuit challenging the validity of that agreement. *Id.*

112 Chris Low, *Fulmer Agrees to Step Aside as Vols Coach at End of Season*, ESPN.COM, Nov. 4, 2008, http://sports.espn.go.com/ncf/news/story?id=3679810; *see also* Wieberg, *Huge Buyouts*, *supra* note 102 (according to *USA Today's* Steve Wieberg, in addition to the buyout owed Fulmer, Tennessee would pay "Fulmer's assistants if they're also let go: two years' pay for coordinators and one year's pay for the others[,]" totaling $1.935 million in salaries).

Finally, Auburn's Tommy Tuberville resigned at the end of the 2008 season in which the team finished with a 5–7 record, and Auburn agreed to pay him the $5.08 million buyout that was owed pursuant to the terms of his contract (that went through 2013) if he was fired.[113] These five terminations in one football season left the five schools owing a combined $16.9 million to their former coaches in buyout obligations alone.[114]

In April of 2009, the University of Kentucky hired John Calipari away from Memphis and signed him to an eight-year, $31.65 million contract, making him the highest-paid college basketball coach in the nation.[115] Calipari filled a vacancy that was left following the dismissal of Billy Gillispie, who went 40–27 in two seasons at Kentucky and did not get Kentucky a seat in the NCAA tournament for the first time since 1991.[116] Gillispie was working under a memorandum of understanding, which was signed when he was hired in 2007 and contemplated a seven-year term, because he had not signed a formal contract during the two years he coached at Kentucky.[117] Gillispie and Kentucky both filed lawsuits over whether a buyout clause in the two-page memorandum, which would pay Gillispie $6 million, is binding.[118] If Gillispie prevails in his lawsuit, with Calipari's salary, Kentucky

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113 *See* Associated Press, *Despite Tuberville Quitting, Auburn Will Pay Buyout*, ESPN.COM, Dec. 11, 2008, http://sports.espn.go.com/ncf/news/story?id=3763601; *see also Update: Auburn's Tommy Tuberville Resigns*, NBC13.COM, Dec. 3, 2008, http://www2.nbc13.com/vtm/sports/college/auburn/article/tommy_tuberville_resigns_as_auburn_coach/49416/.

114 *See supra* notes 105–13 and accompanying text.

115 *See* Michael Smith, *TV Money Arriving Just in Time for Kentucky, Calipari*, STREET & SMITH'S SPORTSBUS. J., Apr. 6, 2009, http://www.sportsbusinessjournal.com/article/62131; *see also* Wieberg, *Hard Questions*, *supra* note 3.

116 *See* Associated Press, *Gillispie Regrets Not Winning More*, ESPN.COM, Mar. 31, 2009, http://sports.espn.go.com/ncb/news/story?id=4023318.

117 *See* Associated Press, *Kentucky, Gillispie Exchange Lawsuits Over Termination*, USA TODAY, May 29, 2009, http://www.usatoday.com/sports/college/mensbasketball/sec/2009-05-28-kentucky-gillispie_N.htm?csp=34.

118 *See id.* Kentucky's lawsuit states,

> UK's lawyers are asking the court to rule that the two-page memorandum of understanding Gillispie signed after his hiring in 2007 was not the equivalent of a full contract. Gillispie says it is and that he is entitled to $1.5 million a year for four of the five years left on the deal.

Id. (internal quotation marks omitted).

will have paid in excess of $37 million over eight years for their new coach—a steep price to pay for a basketball program that generates approximately $15 million annually in revenue.[119]

C. The University's Return on Investment: Reward vs. Risk

1. The Reward

Schools justify the large financial commitments to their football and basketball head coaches on the basis that a coach's compensation is an investment that yields a monetary return. For example, when University of Florida President Bernie Machen told the *Orlando Sentinel* that Urban Meyer should be the highest-paid coach in the Southeastern Conference, he referred to Meyer's compensation as an investment:

> Especially in a dynamic business like athletics, you invest a lot of resources and time in something . . . . It may not pay off for 3 or 4 or 5 years, but if you stop, then it's just going to slow you down . . . . I really believe No. 1, we've got the best athletics program in the country.[120]

The expected return on that investment can take the form of increased ticket sales, marketing and sponsorship revenue, donations, and even admissions applications.[121] Additionally, if there is a surplus in revenue, some athletic departments will help fund their school's academic programs.[122]

The expected high return on investment is evident in the recent hiring of two coaches towards the high-end of the pay scale in football and basketball, Alabama's Nick Saban and Kentucky's John Calipari. In early 2007, Alabama hired Nick Saban away

119 *See Top Revenue Producers*, *supra* note 20.

120 Fowler, *supra* note 59 (internal quotation marks omitted).

121 *See* Wieberg & Upton, *The Money Game*, *supra* note 1 ("It's an investment, school officials say, in the health of a sport that's the revenue-generating backbone of most major-college athletics programs. Successful teams pump up ticket sales and prices, television rights fees, marketing revenue, donations and even applications for admission to the universities.").

122 *See infra* text accompanying notes 152–55.

from the Miami Dolphins.[123] Saban and his agent "negotiated an eight-year, $32 million contract that was, at the time, the highest salary ever paid to a college coach. It remains among the highest" and is even larger than most NFL coaching salaries.[124] Alabama President Robert Witt told the Board of Trustees, "We believe this contract serves the university well . . . . It represents a sound business decision."[125] The Chairman of the Board of Trustees said, "As a board, we feel we have made a wise and good investment."[126] Monte Burke of *Forbes Magazine* highlighted some of the areas of "return on investment" to Alabama as a result of the hire, from both an athletic and academic standpoint:

- 92,000 fans attended Saban's first spring practice game.[127]
- The waiting list for season tickets tripled following Saban's arrival.[128]
- The football program had an estimated $32 million profit the year following Saban's arrival, which was being used to pay off the athletic department's $130 million debt incurred for capital improvements. Alabama's football program finances 77% of Alabama's entire athletic department as well as some academic programs.[129]
- With regard to the school's recent $500 million capital campaign, Alabama's president Robert Witt said, "We have had a 100,000 donors in that campaign, and a major reason they support us is football."[130]

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[123] Burke, *supra* note 30.

[124] *Id.* Nick Saban's contract with Alabama includes, "among other perks, 25 hours of private use of a university airplane, two cars and country club membership." *Id.*

[125] Jones & Hurt, *supra* note 76 (internal quotation marks omitted).

[126] *Id.*

[127] Burke, *supra* note 30.

[128] *Id.*

[129] *Id.*

[130] *Id.*

- Regarding student enrollment, Witt said, "Having a coach of his caliber makes it easier to recruit better students and raise more money." For example, enrollment of students in the top quarter of their high school class increased from 54% in 2007 to 57% in 2008.[131]
- Saban's 2008 recruiting class was the consensus number one in the country. Saban also had top-rated recruiting classes in three of his five years as head coach at Louisiana State where he won two conference championships and a national title before taking the job with the Dolphins in 2005.[132]

Kentucky recently established a new high mark in basketball coaches' compensation when it signed Calipari to an eight-year, $31.65 million contract.[133] In the first year of the contract, he will make approximately $1 million more than the previous coach at Kentucky, Billy Gillispie, would have made that year had he not been fired.[134] "Calipari is guaranteed $3.7 million [in the first year], then $3.8 million annually through the 2013–14 season and $3.25 million a year for the remainder of the agreement through 2016–17."[135] It remains to be seen over the ensuing three or four years what kind of return Kentucky will ultimately receive on its investment in Calipari, but Kentucky has high expectations that the hiring of Calipari will generate more revenues. In defending the contract, Kentucky Athletic Director Mitch Barnhart said, "If done correctly, the investment in a coach will pay for itself and yield returns for the overall program in general."[136] According to Tom

131 *Id.*

132 *Id.*; *see also* Wieberg & Upton, *The Money Game*, *supra* note 1 ("At LSU, a football team that finished 11–2 and ranked No. 3 in 2006 accounted for 63% of the school's athletics revenue for the year. It also accounted for a lion's share of the spending—more than $16 million—but turned an almost $32 million profit that helped underwrite the school's non-moneymaking sports.").

133 Smith, *supra* note 115; *see also* Wieberg, *Hard Questions*, *supra* note 3.

134 Smith, *supra* note 115.

135 Wieberg, *Hard Questions*, *supra* note 3.

136 *Id.*

Stultz, IMG College's Senior Vice President and General Manager:

> A marketable head coach affects how people feel about the program. . . . If the perception among the fans is that coach Calipari will return the program to national prominence, the value of that fan affinity in the eyes of sponsors goes up. The fan base is more inclined to embrace the products and the sponsors that support the school.
>
> . . . .
>
> . . . You think about sponsors, donor contributions, the pressure on ticket sales, premium seating, merchandise sales. It all goes up or down based on how the team is doing. Paying a good coach will fund itself in extra revenues.[137]

How are the large investments in Saban and Calipari funded? According to Alabama President Robert Witt, none of Saban's compensation is funded by students or taxpayers but is paid entirely from athletic department revenue, which includes broadcasting fees, sponsorships, booster donations, ticket sales, and shoe and apparel endorsements.[138] Calipari's compensation is also supported by the athletic department budget.[139] For example, Kentucky will pay Calipari with additional television revenue flowing from new contracts the conference entered into with CBS and ESPN that commence with the 2010 season and will pay the conference an average of $205 million annually, representing a projected revenue boost of approximately $5 million to each school in the conference.[140] Kentucky will also receive additional revenues from an escalating marketing and media rights agreement it has with IMG College that guarantees Kentucky $7.8 million in 2009 and $8 million in 2010.[141] According to one source,

[137] Smith, *supra* note 115 (internal quotation marks omitted).
[138] Burke, *supra* note 30.
[139] *See infra* notes 140–41 and accompanying text.
[140] Smith, *supra* note 115.
[141] *Id.* Kentucky is not the only school funding coaches' salaries with additional revenue from new broadcast and marketing deals. For example, Georgia will use part of the revenue generated from the new SEC television deal and its new

Kentucky's basketball program "generates more than $20 million of [Kentucky's] $70 million budget."[142]

Although most athletic departments operate under their university's administrative umbrella, "Florida's athletic department . . . operates as a separate nonprofit organization that funds itself."[143] Florida's Athletic Director Jeremy Foley elaborated:

> It was set up as a private corporation, the underlying philosophy being money that could be used for academics would not be used for athletics. . . . That's the way it always has been. We receive no money from the university. We generate our own dollars.[144]

The athletic association is well-positioned financially, producing revenue in excess of $106 million before expenses of $98 million during the 2007–08 fiscal year.[145] Like most major athletic programs, Florida's primary revenue sources consist of booster contributions, ticket sales, licensing and marketing agreements, and broadcast deals.[146] At Florida, winning has generated more revenue. For example, Florida's 2007 BCS National Championship Game "created windfalls from merchandise sales and booster donations."[147] Donations from

marketing/multimedia deal with ISP Sports to help fund coaches' salaries that increased from the previous year. *See* Tim Tucker, *Georgia's Athletics Budget in Good Shape*, ATLANTA J. CONST., June 28, 2009, at 1C, *available at* http://www.ajc.com/uga/content/sports/uga/stories/2009/06/28/georgia_athletics_budget.html.

142 Smith, *supra* note 115.

143 Joey Johnston & Mick Elliot, *Gators: Bank on Winning Ways*, TAMPA TRIB., June 7, 2009, at 1. Florida's rival, the University of Georgia, operates its athletics department in a similar manner with a self-supporting, separate fiscal entity apart from the university. *See* Tucker, *supra* note 141.

144 Johnston & Elliot, *supra* note 143 (internal quotation marks omitted).

145 *Id.*

146 *Id.* Florida athletics "receive[] a membership share of television-contract money paid to the Southeastern Conference, and [in 2008,] signed a 10-year, $100 million deal with Sun Sports and its partner, sports marketing company IMG," which generates revenue for broadcast rights and advertising at athletic venues. *Id.* Florida athletics will receive $25 million annually for fifteen years under the Sun Sports agreement and the SEC's broadcast agreements with ESPN and CBS. *Id.*

147 *Id.*

boosters and other sources produced $3.6 million in the 2005–06 fiscal year and jumped to $8.6 million the next year (an increase of 138.9 %).[148] In addition, Florida athletics experienced a $4.1 million increase in merchandise sales and licensing income after winning the 2007 football title, which decreased by $2.4 million the following year.[149] Florida's $106 million in revenue for the 2007–08 fiscal year was the third highest among all college athletic programs behind Texas and Ohio State.[150]

New marketing and broadcast deals are generating more revenue for athletic departments, and as a result, more schools are seeing a surplus in revenue.[151] Operating surpluses in athletics can help fund academics. For example, according to *The Tampa Tribune*, since 1990, Florida's athletic association has made annual contributions to the university totaling in excess of $48 million, including a contribution in excess of $9.5 million in 2007.[152] Oklahoma's athletic department makes annual contributions of at least $1 million to the university's academic programs, and in 2009, it increased financial assistance by $3 million to help the university avoid tuition increases for students and layoffs of faculty and staff.[153] The athletic departments at Arkansas and South Carolina recently made million-dollar contributions to their schools' academic programs in 2009 as well.[154] Additionally, as a

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148 *Id.*

149 *Id.*

150 *See Top Revenue Producers*, *supra* note 20.

151 *See supra* notes 141 and 146; *see also* Seth Emerson, *USC Funds Up Even as Football Ticket Sales Dip*, STATE, June 12, 2009, *available at* http://www.thestate.com/gogamecocks/story/823288.html (noting that South Carolina's athletics department is projecting a $1 million increase in its surplus for the 2009–10 fiscal year, despite an anticipated drop in football season-ticket sales and club memberships, in large part due to the SEC's new 15-year television deal with ESPN); Tucker, *supra* note 141 ("Georgia expects an increase of about $8.5 million in athletics revenue, almost $7 million of it from the SEC's new TV deal and UGA's new marketing and multimedia deal."); Michigan Athletic Department FY 2010 (June 18, 2009), http://annarborchronicle.com/wp-content/uploads/2009/06/fy-2010-athletic-budget-presentaiton.pdf (projecting that Michigan's athletic department, in its ninth straight year of operating surpluses, will have a $9 million surplus for fiscal year 2010).

152 *See* Johnston & Elliot, *supra* note 143.

153 Tim Griffin, *Sooner Athletics Gives an Additional $3 Million*, ESPN.COM, June 24, 2009, http://sports.espn.go.com/ncaa/news/story?id=4284416.

154 *Id.*

result of a reduction in state funding at the University of Georgia, its athletic department will contribute $2 million each of the next three years to support academic programs.[155]

2. The Risk

Focusing on the potential reward from making such a large investment in a coach may convince one to conclude that a highly-compensated coach is more likely to result in a successful program, which will lead to a surplus in revenue.[156] But as is the case with any investment, risk follows potential reward. In big-time intercollegiate athletics, the risk to a school making a significant investment in a coach is that the investment does not result in a successful program. A few recent studies have shown that there is a tenuous connection between coaches' salaries and winning.

A report released in 2009, based upon a study commissioned by the NCAA that evaluated overall athletic department spending and win-loss records over the three-year period from 2004–07, revealed that there is a significant relationship between winning

155 Tucker, *supra* note 141.

156 *See supra* text accompanying note 137; *see also* Mary Morgan, *UM FY10 = Tuition Hike + Financial Aid*, ANN ARBOR CHRON., http://annarborchronicle.com/2009/06/21/um-fy10-tuition-hike-financial-aid/ ("UM is one of only a handful of universities with a self-sustaining athletic department."). *But see* Wieberg & Upton, *The Money Game*, *supra* note 1 ("Not all athletics departments are self-supporting, however. The NCAA's latest data shows that more than four of every five major-college sports programs need institutional subsidies, student fees and other supplements to balance their budgets."); Mark Alesia, *Colleges Play, Public Pays*, INDIANAPOLIS STAR, Mar. 30, 2006, at A1, *available at* http://www.indystar.com/apps/pbcs.dll/article?AID=/99999999/SPORTS06/399990029/1216/LOCAL08 ("Athletic departments at taxpayer-funded universities nationwide receive more than $1 billion in student fees and general school funds and services, according to an *Indianapolis Star* analysis of the 2004–05 athletic budgets of 164 of the nation's 215 largest public schools. Without such outside funding, fewer than 10 percent of athletic departments would have been able to support themselves with ticket sales, television contracts and other revenue-generating sports sources."); Steve Wieberg & Steve Berkowitz, *NCAA Report: College Sports Spending Keeps Skyrocketing*, USA TODAY, Apr. 30, 2009, *available at* http://www.usatoday.com/sports/college/2009-04-29-college-athletic-spending-report_N.htm [hereinafter Wieberg & Berkowitz, *NCAA Report*] ("All but about two dozen of the 120 athletics programs in the Bowl Subdivision are subsidized to some degree by their respective schools.").

and *total* program expenditures.[157] For example, the study estimates that "[a]n extra $1 million spent on football increases winning percentage by 1.8 percentage points and the chances of a top 25 finish in the Associated Press media poll by 5 percentage points," which results in extra revenue of approximately $3 million (not including revenue generated from bowl game appearances).[158] However, the authors of the report noted that team expenditures, such as recruiting, equipment and other "game-day expenses" are the only category of spending with a statistically significant effect on performance.[159] According to "[c]o-author Jonathan Orszag, an economist who once served on President Clinton's National Economic Council and as assistant to the Secretary of Commerce," although there are exceptions, in the aggregate, "big salaries for coaches [do not] prove to be sound investments."[160]

Forbes Magazine completed a study in 2008 comparing the highest-paid football coaches with their win-loss records using a metric that compared a coach's 2007 salary with his team's performance over the previous three-year period covering the 2005, 2006 and 2007 seasons, with bonus points given for winning any of the five prestigious BCS bowl games.[161] The study was limited to coaches from schools in the six major conferences,[162] which "accounted for 87% of total college football revenue, as

157 *See* Wieberg & Berkowitz, *NCAA Report*, *supra* note 156.

158 *Id.* In basketball, the study similarly concluded that there was a distinct correlation between non-salary expenditures and both winning percentage and the probability of reaching the NCAA tournament. *Id.*

159 *Id.*

160 *Id.* ("There's a lot of pressure on university presidents to hire an expensive coach, . . . but the evidence suggests that spending more on coaches does not bring the benefit to the university that they expect." (internal quotation marks omitted) (quoting Jonathan Orszag)).

161 *See* Schwartz, *The Best (and Worst)*, *supra* note 7. In addition to base pay, salary figures used in the study included: (1) income guaranteed from media and apparel deals, speaking fees and football camps; (2) performance bonuses received during the 2007 season for bowl game appearances and high national rankings; and (3) expense accounts and estimated value of perks such as use of cars and private airplanes, golf club memberships, etc. *Id.*

162 Atlantic Coast Conference, Big East Conference, Big Ten Conference, Big 12 Conference, Pac 10 Conference and Southeastern Conference. CBSSports.com, Comparing Major Conferences' OOC Schedules, http://www.cbssports.com/mcc/messages/chrono/15354081 (last visited Oct. 17, 2009).

well as independent . . . Notre Dame."[163] According to *Forbes Magazine*, the five most *underpaid* coaches with successful football programs were as follows:

- Ohio State's Jim Tressel, whose $2.6 million salary was less than eight other coaches despite a 33–5 record (1–2 in BCS bowl games),[164] including appearances in the 2007 and 2008 BCS National Championship Games;[165]
- Oregon State's Mike Riley, who had a 24–14 record (2–0 in bowl games) and earned $1.1 million;[166]
- Wake Forest's Jim Grobe, who also had a 24–14 record (2–0 in bowl games; 0–1 in BCS bowl games) and signed an extension for a relatively low $1.2 million after he took the team to its first BCS Orange Bowl Game;[167]
- Southern California's Pete Carroll, whose 34–5 record (2–1 in BCS bowl games) made him the highest paid at $4.4 million;[168] and
- Virginia Tech's Frank Beamer, who had a 32–8 record (1–2 in bowl games; 0–1 in BCS bowl games) and earned $2.1 million.[169]

Interestingly, just two weeks after *Forbes Magazine* published this list, Ohio State announced that Tressel's annual salary would be immediately raised from an average of $2.6 million to an average of $3.5 million, which automatically made him the highest

[163] Schwartz, *The Best (and Worst)*, *supra* note 7.
[164] Peter J. Schwartz, *In Pictures: The Best (and Worst) College Football Coaches for the Buck*, FORBES.COM, Aug. 13, 2008, http://www.forbes.com/2008/08/13/football-carroll-tressel-biz-sports-cz_pjs_0813coaches_slide.html [hereinafter Schwartz, *In Pictures*].
[165] *See* ESPN.com, Flynn Leads LSU With 4 TDs As Tigers Extend Buckeyes' SEC Troubles, http://sports.espn.go.com/ncf/recap?gameId=280070194 (last visited Oct. 17, 2009).
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

paid football coach in the Big Ten conference.[170] According to Ohio State Athletic Director Gene Smith, Tressel "was not the No. 1 (paid) coach in the conference. The big thing for me was, 'How can we sit here and not be fair to him?' We have the No. 1 coach in the conference, period. Why wouldn't we recognize that?"[171]

Even more indicative of the tenuous relationship that exists between winning and high coaching salaries is *Forbes Magazine's* list of the five most *overpaid* coaches with unsuccessful football programs:

- Iowa's Kirk Ferentz, who had a $3.4 million salary with a 19–18 record (1–2 in bowl games);[172]
- Syracuse's Greg Robinson, who had a 7–28 record with a $1.1 million salary;[173]
- Notre Dame's Charlie Weis, who had a 22–15 record (0–2 in BCS bowl games), and his 3-win season in 2007 was the second year of a 10-year contract extension reportedly worth between $30 and $40 million;[174]
- Maryland's Ralph Friedgen, who earned $1.8 million with a 20–17 record (1–1 in bowl games) and a win percentage that dropped by

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170 Gordon, *supra* note 11.

171 *Id.* (internal quotation marks omitted). Ohio State University President E. Gordon Gee emphasized:

> I honestly think Jim Tressel is so committed to our program that we could not raise his salary, not extend his contract, and he'd stay and be loyal. . . . But that's all the more reason to recognize someone. You don't take advantage of someone; you take advantage of what you have because of him.

Id. (internal quotation marks omitted).

172 Schwartz, *In Pictures*, *supra* note 164. In July of 2009, Ferentz signed a seven-year contract extension with the Hawkeyes through the 2015 football season. Associated Press, *Kirk Ferentz Signs New Seven-Year Deal at Iowa*, USA TODAY, July 20, 2009, http://www.usatoday.com/sports/college/football/bigten/2009-07-20-iowa-ferentz-contract_N.htm.

173 Schwartz, *In Pictures*, *supra* note 164.

174 *Id.*

35% since signing a new contract in 2004;[175] and

- Virginia's Al Groh, who had a 21–16 record (1–1 in bowl games) with a $2 million salary.[176]

The top three most overpaid coaches on *Forbes Magazine's* list—Ferentz, Robinson and Weis—are also coaches at schools that are listed among the top ten schools that paid the most coach's salary per win during the 2007 football season:[177]

175 *Id.*

176 *Id.*

177 *Id.*; Rank That Coach!, Dollars Per Win, http://rankthatcoach.com/blog/dollars-per-win/ (last visited Sept. 22, 2009).

Coach	School	Salary	Wins	$ Per Win
1.Charlie Weiss	Notre Dame	$3,500,000	3	$1,166,666.67
2.Tim Brewster	Minnesota	$1,000,000	1	$1,000,000.00
3.Nick Saban	Alabama	$3,500,000	6	$583,333.33
4.Greg Robinson	Syracuse	$1,000,000	2	$500,000.00
5.Phil Bennett	SMU	$495,602	1	$495,602.00
6.Kirk Ferentz	Iowa	$2,840,000	6	$473,333.33
7.Butch Davis	North Carolina	$1,800,000	4	$450,000.00
8.Guy Morriss	Baylor	$1,144,236	3	$381,412.00
9.Ted Roof	Duke	$370,200	1	$370,200.00
10.Gene Chizik	Iowa State	$1,100,000	3	$366,666.67

Perhaps the real impetus for the rise in coaching salaries in big-time intercollegiate athletics may be attributed to the desire to win and a perception among college administrators that only a small handful of coaches in the marketplace are capable of doing that. Whether that perception is accurate is irrelevant because, as the old adage goes, "perception is reality." In basic economic terminology it equates to limited supply and high demand, which causes an increase in price. However, the above data indicates that winning is not a reflection of a coach's salary. Nevertheless, in an effort to do whatever it takes to succeed, schools that generate the revenue to support large coaching salaries will continue to chase the carrot by luring coaches from their competitors with even greater compensation, thus creating a unique leverage dynamic between college football and basketball coaches' contracts. In regards to this leverage dynamic, one commentator noted that "[b]y definition, each coach's compensation level is 'the market.' Therefore, if any contract pushes the envelope, it immediately establishes a new grid for negotiation."[178]

D. The Leverage of Highly Successful Coaches

Successful college coaches have tremendous leverage in the hiring and contract negotiation process. While revenue generation and the desire to win discussed in the previous sections may, in part, provide an explanation for why that leverage exists, they certainly do not tell the complete story. This Section will address the various factors (in no particular order of priority) contributing to the leverage of successful college coaches, including why they have greater leverage than even coaches in the professional ranks.

1. Timing Pressures, Agents and the Media

"What I think happens is the fact that, gee, we lost our coach . . . and so we've got to get someone the next day, and so we panic."[179]

—Ohio State President, E. Gordon Gee

A small window of opportunity exists during the peak hiring seasons in football and men's basketball in which athletic directors with coaching vacancies scramble to hire their first choice for the job. The peak hiring season in football is from the end of the season in late December to early January, and for men's basketball, it is the end of the season in late March to early April.[180] Timing is everything, and "[a]n athletic director who can't make an offer right away can lose his top prospect in an instant."[181] Some commentators say this pace makes many athletic department

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[178] Dienhart, *supra* note 9 ("[C]ollege football may have a $5 million–$6 million per year coach in the next few seasons.").
[179] Sander & Fain, *supra* note 100 (internal quotation marks omitted) (quoting Ohio State President, E. Gordon Gee).
[180] *Id.*
[181] *Id.*

administrators nervous and, in the words of Ohio State University President Gordon Gee, leads to "panic."[182] According to Raymond D. Cotton, a Washington-based lawyer who specializes in presidents' compensation, "The panic leads to overpaying and lack of adequate negotiations," and "leaves the university exposed."[183] Moreover, he says it is a "ludicrous" process and one that is not appropriate for higher education.[184]

The pressure to quickly get a coach signed for fear of losing him to a competitor school if a deal does not get done gives the coach an advantage over the school in the negotiation process. As is the case in any negotiation, unless the school is willing to walk away from the deal, the school is likely to accede to the coach's demands. Moreover, in an effort to lock up the coach before the media gets hold of it and announces the hiring, the school quickly hammers out a short memorandum of understanding that outlines the material terms, such as length of term, compensation and buyout amounts, in contemplation that a detailed employment agreement will soon be negotiated and signed in the ensuing months.[185] As a result of this pressure, the school is "caught between a rock and a hard place" in at least two respects. First, today's 24-hour news cycle makes it very difficult for schools to keep their search process confidential, and once it is reported that the school and coach are having discussions, the school would be hard-pressed to explain that it passed on its first choice because an agreement could not be reached with the coach on the material terms of employment. Arizona Athletic Director Jim Livengood, who swiftly hired a new basketball coach recently, is "well aware that athletic directors and university lawyers need to have the tough conversations early on, even at the risk of throwing a wet blanket on the hopeful tone of a new coaching regime."[186] Second, once the coach has signed a memorandum of understanding and begins working, the coach tends to have more leverage in negotiating the employment agreement because, although the

182 *Id.* (internal quotation marks omitted).
183 *Id.* (internal quotation marks omitted).
184 *Id.* (internal quotation marks omitted).
185 *See id.*
186 *Id.*

memorandum locks in both the school and the coach, from a practical standpoint, the school is not going to allow the outcome to be dictated by a dispute over terms to be included in an employment agreement.[187]

The expansion of the coaching marketplace expands the role of agents working on behalf of coaches, who can chart the coach's career and seek out potential opportunities and offers.[188] The proliferation of coaches' agents in recent years has clearly had an impact on the demands of coaches during the hiring process, which has contributed to the rise in salaries.[189] Agents are well-prepared and are well aware of the salaries of other coaches.[190] By virtue of the fact that a relatively small number of agents represent the high profile coaches, an agent can easily justify to an athletic director what the market should pay.[191] Most agents operate on a commission basis,[192] giving agents an incentive to drive up salaries even more. Thus, an agent who negotiates a $3,000,000 annual salary for a coach receives $90,000 to $120,000 in commission, annually, for the life of that contract. Libby Sander and Paul Fain of *The Chronicle of Higher Education* noted that, "As coaches

[187] *But see, e.g.*, *UK Athletics Files Suit in Response to Gillispie*, SPORTS NETWORK, May 20, 2009, http://www.sportsnetwork.com/merge/tsnform.aspx?c=sportsnetwork &page=cbask/news/newstest.aspx?id=4234270 ("Until the firing, neither side could agree to an actual contract due to disputes over deferred compensation and how to define 'termination without cause.'").

[188] Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review*, 17 MARQ. SPORTS L. REV. 109, 121 (2006).

[189] *See* Brian Curtis, *The Kingmakers: Part II: Agents Playing an Ever Greater Role in the Hiring of College Coaches*, CSTV.COM, Jan. 30, 2008, http://www.cstv.com/sports/m-footbl/stories/013008aag.html [hereinafter Curtis, *The Kingmakers: Part II*]. As noted by one prominent agent, Jimmy Sexton, "Agents are relatively new, especially in sports, [and] coaching agents are an even more recent change, just in the last five to 10 years." *Id.* (internal quotations omitted).

[190] *Id.* ("One clear success in recent years for coaching representatives has been the driving up of salaries. . . . And they will tell you that one of the reasons for their successes in negotiations is that they come prepared. They know what the market should pay and they know what other coaches are making.").

[191] *Id.* Agents also keep abreast of the market via the Freedom of Information Act, which requires public universities to make copies of their coaches' contracts available to the public upon request. *Id.*

[192] *See, e.g.*, *id.*

demand bigger compensation deals, one question looms: Are university lawyers outmatched?"[193] Sander and Fain elaborated:

> It is extremely rare for universities to use outside lawyers to handle their contract negotiations. Most large public universities that stand to face serious scrutiny during the hiring process have large legal staffs accustomed to the various moving parts of a university and familiar with its culture and mind-set.
>
> But these lawyers also shoulder a heavy workload in many other areas. Their top priority is not to draw up coaches' contracts and haggle over how many courtesy cars a coach gets.
>
> Given the workloads of many university lawyers and the hardball nature of contract negotiations, some in college sports think universities may have to turn to outside help.[194]

Rather than hire outside legal help, the trend at an overwhelming majority of schools is to hire an outside consultant or headhunter that specializes in collegiate athletics to help with the search for coaching candidates.[195]

A tactic used by agents to increase demand for their clients is to create a new perception, often using the media to push their clients' names as candidates for vacant coaching positions or

193 Sander & Fain, *supra* note 100.

194 *Id.* Former NCAA President Myles Brand tended to agree: "I think universities need to get good advice on contracts. . . . Some universities do, some don't. There could be someone on campus, or they should hire an attorney who specializes in contract law for sports." Curtis, *The Kingmakers: Part II*, *supra* note 189 (internal quotation marks omitted).

195 *See* Brian Curtis, *The Kingmakers: Part IV: Search Consultants Are Seamlessly Weaving Their Way Into the Coaching Search Web*, CSTV.COM, Jan. 31, 2008, http://www.cstv.com/sports/m-footbl/stories/013108aag.html. Consulting services typically include "gauging candidate interest, presenting candidates to decision-makers, performing background checks and setting up interviews . . . ." *Id.* "Because of the tremendous amount of media coverage for most searches, some headhunters . . . keep no paper trail of their contacts—no e-mails, no letters, etc., to protect the process from Freedom of Information Act requests from the media." *Id.*

"soon-to-be" vacancies.[196] Athletic department officials panic over speculation that a coach is considering an offer from another school or an NFL team, and regardless of whether the threat is real or simply created by the "rumor mill," coaches often receive salary raises because of it. For example, when Arkansas reached out to Auburn's football coach, Tommy Tuberville, about its opening and the media reported that Tuberville might go, Auburn panicked out of fear of losing its coach and gave him a $200,000 raise despite the $6 million buyout in his contract that would be owed to Auburn if he left.[197] In another example, after only seven games into his first season at Notre Dame, agent Bob LaMonte persuaded Notre Dame to extend Charlie Weis's original contract in large part because LaMonte was successful in convincing Notre Dame about the prospective NFL interest in Weis after his fast start.[198] "So for LaMonte and another leading coaches agent, Gary O'Hagan, who is believed to represent many current NFL and collegiate clients, the threat of more potential employers (both in the NCAA and the NFL) making viable offers to their clients makes their jobs easier."[199] Nebraska Chancellor Harvey Perlman said, "Agents make me worry sometimes about coaches 'playing the game,' with ulterior agendas . . . perhaps to try and get a raise at their job."[200] Coaches add fuel to the fire when they could put an end to the speculation by simply announcing, "I'm not leaving," but instead they "tip-toe around the media inquiries, usually responding that 'I'm happy here' or 'I plan to be the coach here.'"[201]

2. Boosters

It is widely speculated that donors often play a significant role in the decisions to hire and fire coaches. The level of donor influence appears to vary depending upon the particular school, which can take the form of no involvement whatsoever, merely giving input or advice, or making pressured threats to withhold

196 Curtis, *The Kingmakers: Part II*, *supra* note 189.
197 *Id.*
198 Lattinville & Boland, *supra* note 188, at 122.
199 *Id.* (citations omitted).
200 Curtis, *The Kingmakers: Part II*, *supra* note 189 (internal quotation marks omitted).
201 *Id.*; *see also Self Wants to Stay at Kansas*, *supra* note 78.

contributions, or actually making the decision regarding who to fire and hire.[202] Donors that contribute significant amounts of money "carry significant weight at some schools, especially if they are the ones asked to pony up significant amounts of cash to lure a coach."[203] One prominent agent who has been involved in dozens of coaching searches insists that, in 90% of the searches he has been involved with, "there is a middleman [donor] involved [and] [t]he average fan doesn't understand that at some places, major donors make a lot of the decisions."[204] Needless to say, if a donor is pushing to hire a certain individual, that coach has tremendous leverage during the hiring and contract negotiation process.

3. Recruiting Cheap Talent

Professional and collegiate sports are a unique product in that the athletes playing in the sports not only produce the product, they *are* the product. The consumers of this product spend billions of dollars to watch, in person and on television, the few individuals on the field and court who are producing the game. The high value of the players' labor to produce this product is evident by looking at professional sports, where individual club player payrolls can range from $50 to $200 million annually.[205] While big-time college sports constitute a huge commercial enterprise generating billions in annual revenues, the NCAA and its member institutions do not share any of the revenues with the players who generate it.[206] Thus, schools do not have the huge player payroll burden that

[202] For a discussion and examples of booster influence on coaching decisions at various schools, see Brian Curtis, *The Kingmakers: Part III: Roles of Donors in Coaching Searches Debated by Administrators*, CSTV.COM, Jan. 30, 2008, http://www.cstv.com/sports/m-footbl/stories/013008aau.html [hereinafter Curtis, *The Kingmakers: Part III*].

[203] *Id.* ("Universities are often limited by what they can pay a coach or his assistants, which is supplemented by private donors . . . .").

[204] *Id.* (first alteration in original) (internal quotations marks omitted) (quoting agent Jimmy Sexton).

[205] *See* ESPN.com, New York Yankees Salaries, http://sports.espn.go.com/mlb/teams/salaries?team=nyy (last visited Sept. 24, 2009) (calculating the 2009 New York Yankees payroll to be $208,097,414); HoopsHype, NBA Salaries, http://hoopshype.com/salaries.htm (last visited Sept. 24, 2009).

[206] "The N.C.A.A.'s notion of amateurism continues to boggle the mind. It is ill defined at best, hypocritical at worst. The N.C.A.A. embraces a version of amateurism

offsets the revenue generated like the professional sports teams, which means a larger percentage of revenue generated by a school's football and basketball program is available to fund the coach's salary.[207] This gives college coaches greater leverage in the hiring process.

Financial documents obtained by *The Indianapolis Star* through public records requests revealed that "43 of the 50 public school teams in [the 2005 NCAA March Madness basketball] tournament generated a combined $267 million for their athletic departments" and "gave out a total of $12 million in men's basketball scholarships."[208] A professional club generating that kind of revenue would spend five to ten times that amount on players' salaries.[209] Moreover, the coach-to-player spending ratio in big-time collegiate sports is lopsided compared to professional sports. *The Indianapolis Star's* study, "based on data obtained through public-records requests to the 215 public universities that compete in Division I," found that the coaching staffs from the teams in the 2006 Final Four made $5.3 million the previous year, and those four schools spent a total of $1 million on men's basketball scholarships.[210] The average head coach's salary in the NBA is $4 million, and $3 million in the NFL,[211] which is comparable to the salaries of the top collegiate basketball and football coaches.[212] Indeed, the highest-paid major league baseball

that allows the men's tournament to rake in millions on the backs of talented athletes—without sharing revenue with those responsible for generating it." William C. Rhoden, *In Tournaments, N.C.A.A. Shines at Its Athletes' Expense*, N.Y. TIMES, Apr. 6, 2009, at D4, *available at* http://www.nytimes.com/2009/04/06/sports/ncaabasketball/06rhoden.html?_r=3.

207 *See* Van Riper, *supra* note 10 ("[T]he big businesses of college football and basketball create genuine wage competition for head coaches. That's something minor league baseball doesn't do for the wallets of big league managers. There aren't many fans filling out brackets for the Triple-A playoffs.").

208 Mark Alesia, *Tourney Money Fuels Pay-To-Play Debate*, INDIANAPOLIS STAR, Apr. 1, 2006, at A1 [hereinafter Alesia, *Tourney Money*].

209 *See, e.g.*, *supra* note 205 and accompanying text.

210 Alesia, *Tourney Money*, *supra* note 208.

211 Van Riper, *supra* note 10.

212 *See* Lattinville & Boland, *supra* note 188, at 116 ("[I]n the last decade, top college programs have begun paying on a scale equal to the NFL . . . .").

coach makes less than the highest-paid collegiate football coach.[213] Ellen Staurowsky, professor of sport management at Ithaca College and a member of the Drake Group, noted that "[t]he hidden part of the budget (in big-time college sports) is the artificial suppressing of the value of the people making this run."[214] The suppressed value of college players at the top revenue-generating schools means more money is available for coaches whose values most certainly are not suppressed.

According to Mark Alesia of *The Indianapolis Star*, "[b]ecause athletes' 'compensation' is capped—at the value of a scholarship—one way of looking at players' worth is through the money spent to get them."[215] *The Indianapolis Star's* records request showed that the 164 schools responding to the request spent a total of $35 million on recruiting in football and men's basketball in 2005, which is an average of slightly more than $200,000 per school.[216] The four schools in the 2005 Final Four spent an average of $505,000 on recruiting for athletes who eventually signed scholarships with the schools.[217] The $200,000–$500,000 spent annually by a school to recruit the very athletes who generate the revenue in big-time collegiate athletics—$75 to $120 million at the top twenty schools[218]—is a very cheap payroll expense. However, the scholarship and recruiting expenses certainly do not represent the players' market value because they are unable to freely market their services to the highest-bidding schools.

The key to maintaining a successful program is winning, and the key to winning is to recruit and sign the top talent. Because there is relatively little variance among schools in the amounts they spend annually in recruiting and "capped" scholarships expense, the schools obtain a competitive advantage in recruiting by hiring and keeping the coaches who are the best recruiters. The

213 Van Riper, *supra* note 10 ("The Dodgers' Joe Torre, baseball's highest-paid manager at $4.3 million a year, is the third highest-paid head man in Los Angeles, behind the NBA Lakers' Phil Jackson and (barely) USC football coach Pete Carroll.").

214 Alesia, *Tourney Money*, *supra* note 208 (internal quotation marks omitted).

215 *Id.*

216 *Id.*

217 *Id.*

218 *See Top Revenue Producers*, *supra* note 20 and accompanying text.

suppressed market value of the players is shifted to the salaries of coaches, who, unlike the players, are able to freely market their services to the highest bidders. A coach who gives the school a competitive advantage in recruiting not only drives up the coach's market value, but also gives the coach a lot of leverage in negotiating compensation.

II. THE UNIVERSITY'S REMEDIES UPON BREACH

As discussed above, a coach who is terminated by the school without cause before the expiration of the contract term is entitled to compensation.[219] When the tables are turned and a coach leaves the school for a more lucrative deal at another institution prior to the expiration of the contract term, the coach has committed a breach of contract.[220] The available remedies for a breach in this situation, in theory, consist of suing for damages, seeking a negative injunction to prevent the coach from working for the other institution, or simply canceling the contract and allowing the coach to leave.[221] But as one scholar noted, the relationship between the school and the coach is "somewhat unbalanced" because "[w]hile the coach has clear contractual remedies against the university for breach of contract, the same may not be true if the coach decides to terminate performance."[222] To combat the imbalance in the relationship between school and coach, in recent years more schools have begun to insist upon a liquidated damages provision in the contract.

A. Liquidated Damages Clauses

When a coach breaches by leaving prior to the expiration of the term, schools are increasingly seeking to be compensated in some

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219 *See* Sander & Fain, *supra* note 100.

220 *See* MITTEN ET AL., *supra* note 17, at 372.

221 *Id.*

222 Greenberg, *supra* note 5, at 245–46. "The advantage may lie with the coach 'who can breach the contract and leave the relationship with virtual impunity.'" *Id.* at 246 (quoting Judson Graves, Commentary, *Coaches in the Courtroom: Recovery in Actions for Breach of Employment Contracts*, 12 J.C. & U.L. 545, 548 (1985)).

form by the breaching coach,[223] just as the coach is compensated when the university fires him. The compensation is typically paid to the school pursuant to a liquidated damages provision in the contract, which is negotiated between the two sides and often paid by the breaching coach's new institution.[224] Similar to the typical buyout clause when the coach is fired by the institution, the amount owed under the liquidated damages clause is greatest when the coach leaves early in the contract term and the amount decreases incrementally as the termination date gets closer to the end of the term. Oftentimes the amount owed is based upon the coach's base salary multiplied by the number of years remaining on the term of the contract at the time of the termination.[225] For example, in *Vanderbilt University v. DiNardo*,[226] the liquidated damages provision at issue provided that if the coach resigns or otherwise terminates his employment, and is employed or performing services for a person or institution other than Vanderbilt, he would "pay to the University as liquidated damages an amount equal to his Base Salary, less amounts that would otherwise be deducted or withheld from his Base Salary for income and social security tax purposes, multiplied by the number of years (or portion(s) thereof) remaining on the Contract."[227]

The pertinent question regarding liquidated damages provisions is whether they are designed to compensate the school for damages incurred for the loss of the coach's services or rather to penalize the coach for leaving. *DiNardo* is the seminal case on the validity of liquidated damages provisions in coaches' contracts. Gerry DiNardo resigned as Vanderbilt's head football coach to accept the head football coaching position at Louisiana State University, and Vanderbilt brought suit to enforce the liquidated damages

223 *See* MITTEN ET AL., *supra* note 17, at 372.
224 *Id.* For specific examples of liquidated damages provisions, see Greenberg, *supra* note 5, at 248–52.
225 *See, e.g.*, Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999) ("[U]sing the number of years left on the contract multiplied by the salary per year was a reasonable way to calculate damages considering the difficulty of ascertaining damages with certainty.").
226 174 F.3d 751 (6th Cir. 1999).
227 *Id.* at 753–54. The coach's base salary was initially set at $100,000, and he received salary increases in following years. *Id.* at 754.

provision.[228] The coach argued that the liquidated damages provision in his contract was a "thinly disguised, overly broad non-compete provision" and constituted an unenforceable penalty under Tennessee law.[229] Under Tennessee law, similar to most jurisdictions, "a provision will be considered one for liquidated damages, rather than a penalty, if it is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages."[230] The district court held that, "given the nature of the unquantifiable damages in the case," the use of a formula based on a coach's salary to calculate the liquidated damages was reasonable, and further explained:

> "The potential damage to [Vanderbilt] extends far beyond the cost of merely hiring a new head football coach. It is this uncertain potentiality that the parties sought to address by providing for a sum certain to apply towards anticipated expenses and losses. It is impossible to estimate how the loss of a head football coach will affect alumni relations, public support, football ticket sales, contributions, etc. . . . As such, to require a precise formula for calculating damages resulting from the breach of contract by a college head football coach would be tantamount to barring the parties from stipulating to liquidated damages evidence in advance."[231]

In rejecting the coach's contention that his salary has no relationship to the damages incurred by the university, which, according to the coach would not go beyond the cost of hiring a replacement coach, the Sixth Circuit Court of Appeals affirmed the district court's ruling and upheld the liquidated damages provision because both parties understood and agreed that the coach's resignation would result in damage to the university beyond the

[228] *Id.* at 753.
[229] *Id.* at 755 (internal quotation marks omitted).
[230] *Id.*
[231] *Id.* at 755–56 (alteration in original) (quoting Vanderbilt Univ. v. DiNardo, 974 F. Supp. 638, 642 (M.D. Tenn. 1997)). The district court entered judgment against the coach for $281,886.43, and the coach appealed. *Id.* at 755.

cost of hiring a replacement.[232] Applying the standard for enforceability of liquidated damages clauses, the court of appeals held that "using the number of years left on the contract multiplied by the salary per year was a reasonable way to calculate damages considering the difficulty of ascertaining damages with certainty."[233] The court of appeals noted that the coach was hired for "a unique and specialized position, and the parties understood that the amount of damages could not be easily ascertained should a breach occur."[234] Finally, the court of appeals even hinted that there was nothing particularly unfair about the liquidated damages provision in that it "was reciprocal and the result of negotiations between two parties, each of whom was represented by counsel."[235]

The dissenting judge in *DiNardo*, Judge David Nelson, believed that the liquidated damages provision functioned as a penalty and was not intended to make the university whole as a result of "being left in the lurch."[236] First, noting that the provision only makes the coach liable for liquidated damages if he is employed or performing services for another university during the unexpired term of the contract, "how the coach spends his post-resignation time could not reasonably be expected to affect the university's damages."[237] Second, Judge Nelson questioned how a formula based on the coach's "'take-home pay'" and tied to the

232 *Id.* at 756 ("Vanderbilt offered the two-year contract extension to DiNardo well over a year before his original contract expired. Both parties understood that the extension was to provide stability to the program, which helped in recruiting players and retaining assistant coaches.").

233 *Id.* at 757. The court of appeals determined that "Vanderbilt did not need to undertake an analysis to determine actual damages" and "[t]he fact that liquidated damages declined each year DiNardo remained under contract, is directly tied to the parties' express understanding of the importance of a long-term commitment from DiNardo." *Id.*

234 *Id.*

235 *Id.* "The contract also contained reciprocal liquidated damage provisions. Vanderbilt agreed to pay DiNardo his remaining salary should Vanderbilt replace him as football coach, and DiNardo agreed to reimburse Vanderbilt should he leave before his contract expired." *Id.* at 753.

236 *Id.* at 760 (Nelson, J., concurring in part and dissenting in part).

237 *Id.* ("[S]hould the coach choose to quit in order to lie on a beach somewhere, the university would presumably suffer the same damages that it would suffer if he quit to coach for another school.").

number of years remaining on the contract could possibly constitute a reasonable estimate of the university's damages.[238] According to the judge, the university's actual damages are the proper measure of recovery and the case should have been remanded to the district court for a determination of the extent of any actual damages suffered by the university as a result of the coach's breach.[239] But this last point merely begs the question posited by the majority as well as the district court, which essentially formed the basis of the majority's ruling, and that is, how can the actual damages suffered by the university be quantified?

A lawsuit that garnered much attention and publicity recently, and that put to the test the "reasonable measure of the university's damages" standard, was *West Virginia University v. Rodriguez*.[240] In 2007, West Virginia's then head football coach, Rich Rodriguez, resigned and accepted the head coaching position at the University of Michigan.[241] At issue in the lawsuit was the validity of a $4 million liquidated damages provision in Rodriguez's contract with West Virginia.[242] In July of 2008, a settlement was reached in which Rodriguez and Michigan agreed to pay $1.5

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238 *Id.* at 760–61. "[I] am aware of no reason to believe that damages arising from the need to replace a prematurely departing coach could reasonably be expected to vary in direct proportion to the number of years left on the coach's contract." *Id.* at 760. The dissenting judge further wrote:

> [T]he use of a "take-home pay" measuring stick suggests that the function of the stick was to rap the coach's knuckles and not to measure the university's loss. Such factors as the number of tax exemptions claimed by the coach, or the percentage of his pay that he might elect to shelter in a 401(k) plan, would obviously bear no relation at all to the university's anticipated damages.

Id. at 761.

239 *Id.* at 761.

240 No. 1:08 (N.D. W. Va. filed Sept. 27, 2007); *see, e.g.*, Posting of Howard M. Wasserman to West Virginia University College of Law Sports & Entertainment Law Society, West Virginia University v. Richard Rodriguez: The Legal Perspective, http://richrodriguezlaw.blogspot.com/ (July 13, 2008, 12:05 EST) (discussing and analyzing the events as the Rodriguez lawsuit unfolded and posting links to documents filed in the case).

241 *See, e.g.*, MITTEN ET AL., *supra* note 17, at 377–78 (citing Vicki Smith, *Rodriguez, Michigan to Pay WVU $4 Million*, PITTSBURG TRIB.-REV., July 10, 2008).

242 *See id.*

million and $2.5 million, respectively, to West Virginia.[243] Interestingly, the employment agreement between Rodriguez and Michigan includes a $4 million liquidated damages provision.[244] Even though the lawsuit lacks the value of legal precedent in that it settled prior to a judicial determination on the enforceability of the liquidated damages provision, which involved a much steeper liquidated damages amount than was at issue in the *DiNardo* case, the *Rodriguez* settlement will most certainly be relied upon by schools seeking to enforce liquidated damages provisions against coaches jumping ship.

West Virginia's refusal to settle the case for less than the full amount of the liquidated damages clause tends to suggest that the University believed it had a relatively strong case, and perhaps rightfully so. As the district court in *DiNardo* found, and the majority on appeal agreed, it is extremely difficult to quantify the actual damages to the university attributable to the loss of a head football coach, which includes, among other things, the affect on alumni relations, public support, football ticket sales and contributions.[245] Even Judge Nelson did not express disagreement with the majority on that point. While Judge Nelson criticized the liquidated damages formula in the contract as bearing little or no relation to a reasonable estimate of the university's anticipated damages and he would have remanded the case to the district court for a determination of the university's actual damages,[246] the judge did not offer any alternative formula that would bear such a relation nor did he offer any explanation as to how the lower court could determine the actual damages incurred by the university. And therein lies the problem, and in fact lends support for enforceability because "liquidated damages clauses are inserted

243 *See id.* As part of the settlement, Michigan agreed to pay Rodriguez's attorney's fees incurred in the litigation. *Id.* at 377. "The amounts due to institutions under such provisions are often paid by the breaching coaches' new institutions." *Id.* at 372.

244 *See id.* at 377–78.

245 Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755–56 (6th Cir. 1999) (citing Vanderbilt Univ. v. DiNardo, 974 F. Supp. 638, 642–43 (M.D. Tenn. 1997)).

246 *Id.* at 760–61 (Nelson, J., concurring in part and dissenting in part).

where damages from breach are uncertain, not when they can be precisely ascertained."[247]

Judge Nelson's argument that the university's damages could not be "expected to vary in direct proportion to the number of years left on the coach's contract"[248] is misplaced. Judge Nelson overlooked the primary basis for the majority's decision, which was that the university wanted a five-year contract because, as the contract language expressly provided, "a long-term commitment by DiNardo was important to the University's desire for a stable intercollegiate football program and that this commitment was of essence to the contract."[249] Moreover, when the university offered a two-year extension well over a year before the original contract expired, it signaled that "[b]oth parties understood that the extension was to provide stability to the program, which helped in recruiting players and retaining assistant coaches."[250] Thus, "stability" is what the university gets in return for the coach's guaranteed salary commitment, and when the coach leaves before the expiration of the term, the university loses the stability. It is the loss of stability that constitutes the university's damages and which are difficult to quantify. However, when the parties attempt to prospectively measure the university's anticipated damages at the time they enter the contract, it is not unreasonable for the parties to agree that the uncertain amount of damages (whatever that amount may be) attributable to the loss of stability would vary depending upon the number of years of stability the university lost at the time the coach commits the breach. In the words of the majority, "[t]he fact that liquidated damages declined each year DiNardo remained under contract, is directly tied to the parties' express understanding of the importance of a long-term commitment from DiNardo."[251] It would also not be unreasonable for the parties to measure anticipated damages based upon a lump

[247] Beasley v. Horrell, 864 S.W.2d 45, 49 (Tenn. Ct. App. 1993) (holding that the cancellation provision in interest-bearing, non-negotiable promissory note, providing note would be cancelled and void if noteholder failed to make any payment under leases executed in conjunction with note, was an unenforceable penalty).

[248] *See DiNardo*, 174 F. 3d at 760 (Nelson, J., concurring in part and dissenting in part).

[249] *Id.* at 756 (internal quotation marks omitted).

[250] *Id.*

[251] *Id.* at 757.

sum payment irrespective of the number of years remaining on the contract at the time the coach resigns.[252]

In the absence of a liquidated damages provision in the contract, what recourse does the university have when a coach leaves before the expiration of the contract term? Simply canceling the contract and allowing the coach to leave is one option. This option effectively makes the coach's long-term contractual commitment meaningless and the contract tantamount to a one-way street in which the university is bound for the entire length of the contract but the coach is not. Despite the fact that the coach is clearly in breach for leaving, institutions often avoid litigation partly because they believe litigation is costly and tends to prolong negative public relations which can cast a shadow over the athletic program for years to come.[253] "As a result, most employees, and certainly most coaches, have historically been able to leave their employment virtually at will despite their prior contractual commitments."[254] The available legal remedies to the university are to sue the coach for damages or injunctive relief.

B. Suing for Damages

A bedrock principle of contract law is that "[d]amages for breach of contract should be sufficient 'to place the plaintiff in the position he would be in if the contract had been fulfilled.'"[255] Consequential damages such as lost profits may also be recovered for breach of an employment contract if the employer can show

[252] However, some courts have held that a lump sum payment that makes "no attempt to graduate the amount according to the length of the unexpired part of the term" constitutes a penalty, not liquidated damages. *Beasley*, 864 S.W.2d at 49 (quoting Jennings v. First Nat'l Bank, 30 S.W.2d 1049, 1053 (Mo. App. 1930)). These cases are distinguishable because the breach in these cases consisted of a failure to make required payments during the term of the contract, and, thus, a lump sum payment that does not differentiate based on the timing of the breach is not a valid attempt at making a reasonable estimate of the damages that could result from missed or late payments. *See id.* at 49–50; *Jennings*, 30 S.W.2d at 1053.

[253] *See* Greenberg, *supra* note 5, at 246.

[254] Graves, *supra* note 222, at 549.

[255] Eckles v. Sharman, 548 F.2d 905, 910 (10th Cir. 1977) (quoting C. MCCORMICK, HANDBOOK OF THE LAW ON DAMAGES § 137, at 560 (1935)) (holding that in order to recover for lost profits, plaintiff basketball team was required to show coach was unique or irreplaceable).

that those damages were reasonably foreseeable when the contract was made.[256] In cases where an employee is in breach of an employment agreement,

> the recoverable damages are normally measured by the cost to the employer of obtaining equivalent services elsewhere, plus consequential damages. Some cases indicate that in assessing such damages, the "market value" of the lost services must be measured against that of the substitute services procured by the employer to remedy the breach.[257]

Thus, in theory, damages under the normal measure would consist of the difference in salary of the existing coach and the substitute coach and any incidental costs incurred by the school in locating and signing the substitute coach, plus consequential damages related to the coach's breach. Because coaches are not fungible, a court could conclude that any salary differential that resulted from the hiring of a more talented substitute coach thereby caused no net loss to the team.[258] Conversely, a court could determine that the school, when suddenly faced with a vacancy as a result of its coach's decision to leave, had to pay more than market value for the substitute coach, in which case the school would be entitled to the difference between the "true" market value of the substitute coach and the "inflated" market value that the school paid to get him.

The market value of a coach's services is extremely difficult, if not impossible, to determine thereby making it impractical to apply

256 *See id.* at 910 ("[T]he elements of the plaintiff's (employer's) damages are two: the reasonably necessary expense to which plaintiff was put in procuring a new agent, and the loss of profits (if any profits were lost) caused by defendants' breach." (internal quotation marks omitted) (quoting Steelduct Co. v. Henger-Seltzer Co., 160 P.2d 804, 812 (Cal. 1945))).

257 Graves, *supra* note 222, at 548–49 (citations omitted).

258 *Cf.* LAW OF PROFESSIONAL & AMATEUR SPORTS § 10:21 (Gary A. Uberstine ed., West Group 1989) (2008) (recognizing a similar problem in the context of a professional athlete's breach). Uberstine also suggests an alternative measure of damages that would focus on the salary differential between the athlete's original contract and his new contract with the other team. *Id.* Uberstine notes that this methodology could be undesirable from the team's standpoint because its losses would typically exceed the salary differential, but it would deter athletes from jumping ship solely for the financial benefit. *Id.*

the normal measure of employment contract damages to college coaches' contracts.[259] The value of a coach to one school's athletic program may not be the same to another school's athletic program. The same holds true in trying to determine the market value of a player's services, as articulated by Professor Geoffrey Rapp:

> The services of a player are "extremely difficult to value and impossible to prove." Sports contracts do have a relative advantage over, say, opera contracts, in that sports contracts can be compared to one another in relative worth using player statistics. It is possible to determine if players are "under" or "over" paid given their performance and prevalent market trends. However, a significant problem remains. The value of a player to a team may not be the same as the overall "market value" of the player. It is "exceedingly burdensome to establish what the loss of one player, even a superstar player, will have on the club's performance and its financial condition." As a result of these limitations, there are no recorded cases in which a club successfully pursued a claim for damages against an athlete.[260]

Rather than focusing on a coach's market value, damage to the university as a result of a coach's failure or refusal to perform should focus on the school's total economic loss, i.e. the loss of stability in the program, which includes, among other things, the monetary loss flowing from its adverse impact on alumni relations, public support, ticket sales, contributions, recruiting, retaining assistant coaches and admissions.[261] However, it is extremely difficult to assign a dollar value to these losses incurred, not to mention the causation problems in determining whether such losses were due to the coach's breach. Because of the difficulty in determining the university's damages, the school may instead opt

[259] *See* Greenberg, *supra* note 5, at 246.

[260] Geoffrey Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the* Lumley *Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 269–70 (2006) (citations omitted).

[261] *See supra* note 245 and accompanying text.

for injunctive relief to prevent the coach from accepting employment at another institution.

C. Injunctive Relief

In contracts for personal services, including employment agreements, courts of equity refuse to grant injunctive relief in the nature of specific performance, i.e. ordering an individual to perform a contract, due to (1) the inherent difficulty or impossibility of enforcing and supervising the performance and quality of uniquely personal efforts, (2) the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone, and (3) the view that judicial compulsion of services violates the Thirteenth Amendment's prohibition of involuntary servitude.[262] However, "where an employee refuses to render services to an employer in violation of an existing contract, and the services are unique or extraordinary, an injunction may issue to prevent the employee from furnishing those services to another person for the duration of the contract."[263] Under such circumstances, a "negative injunction" is warranted because (a) the employee either expressly or by clear implication agreed not to work elsewhere during the

[262] *See* Am. Broad. Co. v. Wolf, 420 N.E.2d 363, 366 (N.Y. 1981); 42 AM. JUR. 2D *Injunctions* § 127 (2009). *But see* Rapp, *supra* note 260, at 263–64 (advocating for specific performance enforceable by affirmative injunction as a remedy for breach of contract when players hold out).

[263] *Wolf*, 420 N.E.2d at 367 (citing Shubert Theatrical Co. v. Gallagher, 201 N.Y.S. 577, 579–81 (1923)); *see also* Boston Celtics Ltd. P'ship v. Shaw, 908 F.2d 1041, 1048–49 (1st Cir. 1990) (noting general policy of disfavoring enforcement of personal service contracts in the sports context "typically prevents a court from ordering an individual to perform a personal service; it does not prevent a court from ordering an individual to rescind a contract for services and to refrain from performing a service for others." (citations omitted)); Minn. Muskies, Inc. v. Hudson, 294 F. Supp. 979, 987 (M.D.N.C. 1969) ("It is generally held that where a person agrees to render personal services to another, which require special and unique knowledge, skill and ability, so that in default the same services cannot easily be obtained from others, a court of equity is empowered to negatively enforce performance of the agreement by enjoining its breach."); Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 42 (Tex. Civ. App. 1961) ("It is well established in this State and other jurisdictions that injunctive relief will be granted to restrain violation by an employee of negative covenants in a personal service contract if the employee is a person of exceptional and unique knowledge, skill and ability in performing the service called for in the contract.").

term of the contract and (b) when the requisite unique services element is met, the employer would be irreparably harmed if the employee is permitted to work for a competitor.[264] Moreover, the Thirteenth Amendment's prohibition of involuntary servitude[265] does not pose the same concern that is present with affirmative injunctions in personal services contracts because with a negative injunction the coach is free to quit and the court is not ordering the coach to work.[266] To obtain a negative injunction, the school must demonstrate that it is irreparably harmed by the coach's breach and must show absence of substantial harm to the coach, other interested parties and the public interest if the injunction is granted.[267]

1. Irreparable Harm: The Unique Skills Test

There is a paucity of cases in which a professional team or school has sought a negative injunction to prevent a coach from jumping prior to the expiration of the contract term. The seminal case is *New England Patriots Football Club, Inc. v. University of Colorado*,[268] in which the First Circuit Court of Appeals affirmed a preliminary injunction enjoining the University of Colorado from hiring Chuck Fairbanks as its head football coach, who was at the

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264 *See Wolf*, 420 N.E.2d at 367 (noting that when the plaintiff seeks to enjoin the employee from performing for someone else, the "negative injunction" is a standard remedy in the sports and entertainment industries). This notion of a negative injunction emanates from the classic case of *Lumley v. Wagner* in which the Queen's Theatre sought injunctive relief to require opera star Johanna Wagner to perform her contract and to prevent her from performing elsewhere, and the court held that the theatre could not get specific performance to compel Wagner to perform for the Queen's Theatre but could obtain a negative injunction to prevent her from performing elsewhere. Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.).

265 U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

266 *But cf.* Rapp, *supra* note 260, at 278 (arguing that even when an affirmative injunction is sought in athletic contract disputes, the Thirteenth Amendment should not be a defense because "the Amendment's target was slavery and its attendant circumstances, not a relationship between a multi-millionaire athlete and a sports franchise owned by multi-millionaires.").

267 *See generally Wolf*, 420 N.E.2d at 403 ("[S]ince the services must be unique before negative enforcement will be granted, irreparable harm will befall the employer should the employee be permitted to labor for a competitor." (citation omitted)).

268 592 F.2d 1196 (1st Cir. 1979).

time employed as head football coach of the New England Patriots under a contract that had five years remaining on it.[269] Fairbanks's contract with the Patriots contained a provision that, during the term, Fairbanks was not to provide services connected with football to any entity other than the plaintiff, or to perform services of any kind for anyone, without the plaintiff's permission.[270] In this regard, Judge Aldrich wrote:

> At the hearing Fairbanks testified that although the contract read "services directly connected with football . . . (or for) another entity not connected with football," this meant, simply, activities competitively connected with the Patriots. . . . Parenthetically, having in mind, as sometimes helpless dial-spinners, that professional and prominent college football teams compete for TV viewers, and hence, presumably, for the advertising dollar, we may wonder whether we have to accept at face value the protestation of no competitive activity here. In any event, there is ample authority contradicting both aspects of defendants' legal position. Indeed, some courts have gone even further, and have enjoined the defaulting athlete himself from noncompetitive sport. We would not distinguish between an athlete and a coach.[271]

The foregoing excerpt demonstrates that, in the view of the First Circuit Court of Appeals, there is sufficient "economic" competition between professional and collegiate sports teams such

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269 *Id.* at 1198.

270 *Id.* at 1198 n.1 ("10(b) Fairbanks shall not render services directly connected with football during the period of his employment other than for the Patriots except with the express written permission of the Patriots, which permission shall not be unreasonably withheld. (d) Fairbanks shall not render services to another entity not connected with football during the period of employment except with the express written permission of the Patriots, which permission shall not be unreasonably withheld."); *see also* Greenberg, *supra* note 5, at 248 (noting that in many coaches' contracts, "the coach will be required to promise not to accept employment under any circumstances as a coach at any other institution, or with any professional league, or with any other competing entity, without first obtaining permission from the university" (internal quotations marks omitted)).

271 *New Eng. Patriots*, 592 F.2d at 1200 (citations omitted).

that a professional club is irreparably harmed when a coach leaves before the expiration of his contract to accept employment at the collegiate level (and presumably vice-versa as well).[272] Another significant aspect of the court of appeals' ruling is that, by relying on the negative injunction cases involving professional players, a coach is similar to an athlete as it relates to the unique services element.[273] This is consistent with the *DiNardo* court's determination that the coach was hired for a "unique and specialized position."[274] The court of appeals in *New England Patriots* affirmed the district court's findings that damages would be difficult to ascertain and that Fairbanks' services were unique, and that, accordingly, the Patriots would be irreparably harmed by the loss of his services.[275] Although the *New England Patriots* case was decided over thirty years ago, given the exponential increases in both revenue and coaches' salaries since that time, the irreparable harm element is perhaps even more compelling today than it was back then.

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272 *See id.* As one scholar noted in discussing the case, "The competition may exist between teams in a league, teams in different leagues, or teams in different sports." RAY YASSER, JAMES R. MCCURDY, C. PETER GOPLERUD & MAUREEN A. WESTON, SPORTS LAW: CASES AND MATERIALS 469 (6th ed. 2006).

273 *See New Eng. Patriots*, 592 F.2d at 1200.

> In many instances, a coach's contract will contain a unique service clause to protect the university from a breaching coach. By agreeing to this clause, the coach acknowledges that he has a special, unique and exceptional skill, and that the university's need for continuity in its coaching—as well as any further acquisition of coaching experience—will reflect that uniqueness.

Greenberg, *supra* note 5, at 247–48.

274 Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999).

275 *New Eng. Patriots*, 592 F.2d at 1199. The court of appeals also held that even though the Patriots allegedly lured Fairbanks from the University of Oklahoma, inducing him to break his contract there, the Patriots were not barred from relief by the doctrine of unclean hands. *Id.* "Both [Fairbanks and the Patriots] may have done the University of Oklahoma dirt, but that does not mean unclean hands with respect to 'the controversy in issue.'" *Id.*; *see also* Houston Oilers, Inc. v. Neely, 361 F.2d 36, 42–43 (10th Cir. 1966) (issuing injunction, rejecting defense of unclean hands based on club signing college player prior to completion of eligibility in violation of NCAA rules). *But see* N.Y. Football Giants, Inc. v. L.A. Football Club, Inc., 291 F.2d 471, 474 (5th Cir. 1961) (denying injunction on basis of defense of unclean hands resulting from club signing college player prior to completion of eligibility in violation of NCAA rules).

In *Northeastern University v. Brown,*[276] Northeastern sought a negative injunction to prevent its head football coach, who was in the first year of a six-year contract, from accepting an offer to coach at the University of Massachusetts ("U. Mass.").[277] The court's opinion commences with a quote from *Detroit Football Co. v. Robinson*[278] that

> described these types of "contract jumping cases" with players and coaches as follows:
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> "This case is but another round in the sordid fight for football players [or coaches] . . . It is a fight characterized by deception, double dealing, campus jumping, secret alumni subsidization, semi-professionalism and professionalism. It is a fight which has produced as part of its harvest this current rash of contract jumping suits. It is a fight which so conditions the minds and hearts of these athletes [and coaches] that one day they can agree to play [or coach] football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along."[279]

Regarding irreparable harm, the court in *Northeastern University* focused on the competitive disadvantage to Northeastern and found that (1) at U. Mass. the coach would be able to use his knowledge of Northeastern's program, plays and procedures against Northeastern, (2) Northeastern and U. Mass. compete with each other for recruits as well as for regional television coverage of their games, and (3) Northeastern and U. Mass. are members of the same football conference and play against each other every year.[280] The judge therefore granted an interim injunction.[281] One month later, the judge lifted the

[276] No. 20040827F, 2004 WL 616225 (Mass. Super. Ct. Mar. 11, 2004).
[277] *Id.* at *1–*2.
[278] 186 F. Supp. 933 (E.D. La. 1960) (alteration in original).
[279] *Ne. Univ.*, 2004 WL 616225, at *1 (quoting *Detroit Football Co.*, 186 F. Supp. at 934).
[280] *Id.* at *4.
[281] *Id.*

injunction and instructed the parties to settle, which they ultimately did.[282]

Due to the limited case law on the enforcement of coaches' contracts through negative injunctions, it is also helpful to look at courts' rationale for holding that professional athletes meet the unique services element for the issuance of negative injunctions. In *Dallas Cowboys Football Club, Inc. v. Harris*,[283] the Dallas Cowboys, a member of the NFL, sought an injunction to restrain Harris, who was under contract with the Cowboys, from playing football for the Dallas Texans, a member of the American Football League.[284] The court of appeals affirmed the lower court's order granting a temporary injunction in favor of the Cowboys.[285] In doing so, the court of appeals explained what constitutes "unique" services and relied on the following statement from *Philadelphia Ball Club v. Lajoie*:[286]

> "We think, however, that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him he has taken extreme ground. It seems to us that a more just and equitable rule is laid down in Pom.Spec.Perf. p. 31, where the principle is thus declared: 'Where one person agrees to render personal services to another, which requires and presupposes a special knowledge skill, and ability in the employee, so that in case of a default the same service could not easily be obtained from others . . . its performance will be negatively enforced by enjoining its breach. . . .' We have not found any case going to the [same] length of requiring, as a

[282] *See* Mark Blaudschun, *Settlement Is Reached on Brown; Umass, NU End Coach Saga*, BOSTON GLOBE, May 13, 2004, at E1. The University of Massachusetts paid Northeastern $150,000 and agreed to suspend Brown from coaching the first three games of the 2004–05 season. *Id.*

[283] 348 S.W.2d 37 (Tex. Civ. App. 1961).

[284] *Id.* at 39–40.

[285] *Id.* at 47 ("We cannot support harris' [sic] contention that the contract is so unreasonable and harsh as to be unenforceable in equity.").

[286] 51 A. 973 (Pa. 1902).

> condition of relief, proof of the impossibility of obtaining equivalent service."[287]

The *Dallas Cowboys* court emphasized the test for uniqueness is that the service is not easily replaceable as opposed to being irreplaceable which is "too narrow and limited."[288]

The unique skills test satisfies the irreparable harm element for injunctive relief.[289] Numerous courts have found that professional athletes meet the test;[290] however, a small handful of courts have determined that money damages are an adequate remedy for the loss of an athlete's services.[291] The *Lajoie* case is beneficial to

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[287] *Harris*, 348 S.W.2d at 44 (quoting *Lajoie*, 51 A. at 973).

[288] *Id.* at 44; *see* MITTEN ET AL., *supra* note 17, at 412 ("For the past century, [*Philadelphia Ball Club, Ltd. v.*] *Lajoie* has represented the prevailing judicial view regarding the availability of equitable relief to remedy a professional athlete's breach of contract.").

[289] *See* YASSER ET AL., *supra* note 272, at 467 ("The 'irreparable harm' requirement for the issuance of the negative injunction usually is determined by the 'unique skills test.'"). For a case departing from the unique skills test and denying an injunction based upon the team's economic position, see Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 269 (D. Mass. 1971) ("The irreparable harm, the probability of which must be shown by the corporate plaintiff, is harm to its financial and business health."), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972). *But see* LAW OF PROFESSIONAL & AMATEUR SPORTS, *supra* note 258, § 10:19 ("*Cheevers* appears to be of dubious precedential value because the appellate court strongly questioned the validity of the lower court's irreparable harm analysis. . . . [A]s subsequent cases have expressly 'balked' on the *Cheevers* analysis and have continued to endorse the traditional irreparable harm/unique skills test.").

[290] *See* YASSER ET AL., *supra* note 272, at 467 ("Few cases are found involving professional sports athletes in which courts denied negative injunctions on the basis of inadequate or ordinary skills."); *see also* Winnipeg Rugby Football Club v. Freeman & Locklear, 140 F. Supp. 365 (N.D. Ohio 1955) (enjoining two rookies without any professional experience from jumping from a Canadian professional football club to the Cleveland Browns); Cent. N.Y. Basketball Club, Inc. v. Barnett, 181 N.E.2d 506 (Ohio C.P. 1961) (holding that professional players satisfy the unique test *per se*); Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725 (Tex. Civ. App. 1974) (holding that the question of unique skills depends on facts of each case). Injunctive relief to prevent players from jumping was sought as far back as the late 1800s in *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198 (C.C.S.D.N.Y. 1890) and *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (N.Y. Sup. Ct. 1890). For an annotation of negative injunction cases by sport, see *Cincinnati Bengals v. Bergey*, 453 F. Supp. 129, 139 n.1 (S.D. Ohio 1974).

[291] *See* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); Conn. Prof'l Sports Corp. v. Heyman, 276 F. Supp. 618 (S.D.N.Y. 1967); Brooklyn Baseball Club v. McGuire, 116 F. 782 (C.C.E.D. Pa. 1902); Columbus Base Ball Club v. Reiley, 11 Ohio Dec. Reprint 272, 272 (Ohio Ct. Comm. Pl. 1891).

understanding why teams are entitled to injunctive relief to prevent professional players from jumping because the court connects the dots between the unique skills test and the irreparable harm requirement for injunctive relief.[292] As sports law experts have noted: "The court enunciated the question as not whether the player was 'irreplaceable,' but whether replacement of the player on the playing field could be translated into money damages. Thus, the question was whether harm was irreparable, or the damage remedy at law inadequate."[293]

Moreover, the *Lajoie* court's discussion of how the irreparable harm element is met in the professional player context helps explain why the court in the *New England Patriots* case "would not distinguish between an athlete and a coach."[294] The glaring similarities between players and coaches for purposes of irreparable harm and the impact to the team are evident in the *Lajoie* court's opinion:

> The court below finds from the testimony that "the defendant is an expert baseball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game." . . .

[292] *See* Phila. Ball Club v. Lajoie, 51 A. 973, 976 (Pa. 1902).

[293] YASSER ET AL., *supra* note 272, at 468. According to the court in *Lajoie*:

> We have not found any case going to the length of requiring, as a condition of relief, proof of the impossibility of obtaining equivalent service. It is true that the injury must be irreparable; but, as observed by Mr. Justice Lowrie in Com. v. Pittsburgh & C. R. Co., 24 Pa. 160, 62 Am. Dec. 372: "The argument that there is no 'irreparable damage' would not be so often used by wrongdoers if they would take the trouble to discover that the word 'irreparable' is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimated only by conjecture, and not by any accurated standard."

Lajoie, 51 A. at 973.

[294] New Eng. Patriots Football Club v. Univ. of Colo., 592 F.2d 1196, 1200 (1st Cir. 1979); *see Lajoie*, 51 A. at 976.

> He has been for several years in the service of the plaintiff club, and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of the other players in the club, and his own work is peculiarly meritorious as an integral part of the team work which is so essential. In addition to these features which render his services of peculiar and special value to the plaintiff, and not easily replaced, Lajoie is well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive drawing card for the public.
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> . . . We have the further fact that the contract has been partially executed by services rendered, and payment made therefor, so that the situation is not now the same as when the contract was wholly executory. The relation between the parties has been so far changed as to give to the plaintiff an equity, arising out of the part performance, to insist upon the completion of the agreement according to its terms by the defendant. . . . The plaintiff has so far performed its part of the contract in entire good faith, in every detail, and it would therefore be inequitable to permit the defendant to withdraw from the agreement at this late day.
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> . . . The defendant sold to the plaintiff, for a valuable consideration, the exclusive right to his professional services for a stipulated period, unless sooner surrendered by the plaintiff, which could only be after due and reasonable notice and payment of salary and expenses until the expiration. Why should not a court of equity protect such an agreement until it is terminated? The court cannot compel the defendant to play for the plaintiff, but it

> can restrain him from playing for another club in violation of his agreement.[295]

It is difficult to argue that college coaches at the major schools do not have unique skill because of the undisputable fact that there is a very limited supply of coaches whose services are in such high demand and who have the ability to command a salary that puts them among the most highly-compensated coaches in all of sports, both collegiate and professional. Simply, if they did not have unique skill, they would not be paid accordingly.[296] That is precisely why some coaches become icons at big-time collegiate athletic programs, such as Knute Rockne, Bobby Knight, Bo Schembechler, Woody Hayes, Paul "Bear" Bryant and "Coach K," to name just a few.[297] These individuals became household names because of their unique coaching skills and achievements. The irreparable harm to the university when it loses its highly successful coach is the loss of stability to the athletic program which the *Dinardo* court referred to as "unquantifiable."[298] Indeed, coaches' contracts often include a clause providing that the coach acknowledges and agrees that the loss of his services prior to the expiration of the term would result in irreparable harm to the university.[299] The irreparable harm element for injunctive relief should be fairly easy to satisfy when a school is requesting a

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[295] *Lajoie*, 51 A. at 974–75.

[296] *See* Cent. N.Y. Basketball Club, Inc. v. Barnett, 181 N.E.2d 506, 517 (Ohio C.P. 1961) ("Professional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed. Such players . . . are not easily replaced.").

[297] *See* Bentley Historical Library, University of Michigan Athletics History, http://bentley.umich.edu/athdept/football/coaches/gschemb.htm (last visited Sept. 24, 2009); Indystar.com, Library Factfiles, http://www2.indystar.com/library/factfiles/people/k/knight_bob/knight.html (last visited Sept. 24, 2009); Ohio State History, Woody Hayes, https://bucknuts.com/osuhistory/coachhayes.htm (last visited Sept. 24, 2009); The Official Website of Coach Mike Krzyzewski, http://coachk.com (last visited Sept. 24, 2009).

[298] Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755–56 (6th Cir. 1999) (quoting Vanderbilt Univ. v. DiNardo, 974 F. Supp. 638, 642 (M.D. Tenn. 1997)).

[299] Greenberg, *supra* note 5, at 248 ("The contract will also require the coach to agree that the loss of his services, prior to the expiration of the contractual term and without the university approval, will cause an inestimable loss to the university, which cannot be adequately compensated for by money damages.").

negative injunction to prevent the coach from accepting employment at another institution.

2. Balancing the Hardships in Granting or Denying Injunctive Relief

In addition to the requirement of irreparable harm to obtain injunctive relief, the plaintiff has the burden to show absence of substantial harm to the defendant, other interested parties and the public interest, if the injunction requested is granted.[300] As one court noted, "[c]ourts of equity frequently, in resolving a question concerning injunctive relief, try to evaluate the balance of hardships on both parties that would result from the granting or the withholding of the injunction requested."[301] According to sports law experts, this is the greatest hurdle to obtaining a negative injunction:

> If a court finds the requested injunction will create an unreasonable hardship to the party sought to be restrained, the injunction will be denied or its scope may be limited. What constitutes unreasonableness, or undue harshness, varies with the particular circumstances. Factors considered by a court may include the length of the requested injunction, its geographical reach, the types of employment or activities prohibited under the injunction, and its potential effects in preventing employment or other opportunities for the restrained party. However, these factors are balanced against the resulting damage to the plaintiff if an injunction is not granted.[302]

[300] *See* Cincinnati Bengals v. Bergey, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (citing World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972)); *see also* Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 269 (D. Mass. 1971) ("It is usual practice for a court of equity, called upon to pass on a claim for injunctive relief, to weigh the consequences that the granting of the injunctive relief sought would have on all parties to the litigation.").

[301] *Cheevers*, 348 F. Supp. at 269.

[302] MITTEN ET AL., *supra* note 17, at 415; *see also* LAW OF PROFESSIONAL & AMATEUR SPORTS, *supra* note 258, § 10:23 ("Even when a former team can establish the necessary prerequisites for equitable relief, courts nevertheless have wide discretion in deciding

In balancing the hardships to both parties and other interested parties when a coach leaves for a competitor before the expiration of his current contract, the substantial harm to the school, the public interest, and the student-athlete if an injunction is not granted far outweighs any harm to the coach and competitor school if the injunction is granted.

a) Harm to the Parties: Preventing Unfair Competition for Coaches' Services

A major concern of the courts in balancing the harms in injunction proceedings is the impact on free and open competition in the marketplace if the injunction is granted.[303] As this section will address, in the player context, courts have routinely denied injunctive relief to the club when a player signs with another club for services to commence *after* the expiration of the player's existing contract.[304] The reason being that there is no harm to the interest of the plaintiff nor the public when (1) the player (defendant) is not breaching his existing contract and is fully performing the obligations he agreed to perform for the entire contract term, and (2) the other club that desires to sign the player for services to commence after the expiration of the player's existing contract has not tortiously interfered with the plaintiff's contractual relationship with the player.[305] Indeed, to grant an injunction under such circumstances has a chilling effect on competition and the ability of the player to freely market his services to the highest bidder. [306]

Such was the case in *Cincinnati Bengals, Inc. v. Bergey*,[307] in which the NFL Bengals sought an injunction to enjoin a player (Bergey) and clubs in a competing league (WFL) from signing

whether to grant such relief. In determining whether an injunction should issue, courts balance the competing needs of teams, players, and society at large.").

303 *See Bergey*, 453 F. Supp. at 147 ("As we view it, the 'public interest' within the meaning of that phrase as it is used here is the policy such as that behind the antitrust laws to encourage to the fullest extent practicable free and open competition in the marketplace. Restraints on competition are not favored.").

304 *See, e.g.*, *id.* at 149.

305 *See, e.g.*, *id.* at 138.

306 *See, e.g.*, *id.*

307 453 F. Supp. 129 (S.D. Ohio 1974).

players to contracts for *future* services to commence following the expiration of their contracts with the Bengals. In denying an injunction, the court reasoned:

> [N]either the WFL nor Bergey committed a tortious or otherwise unlawful act in entering into negotiations for and reaching agreement upon a contract for Bergey's personal services to commence after the expiration of his contract with the Bengals. . . . [T]here are no more obligations to be protected by either party to the Bengals contract after [expiration] . . . .
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> This Court recognizes such public interest would probably not stand in the way of plaintiff's obtaining injunctive relief if it is able to establish that the contractual rights it has with its players have been tortiously, I. e. [sic], maliciously interfered with (plus irreparable harm and no adequate remedy at law). On the facts of this case the Court cannot conclude that such interference as there may be was due to unfair competition. On the contrary, it seems to the Court that the threatened harm is due to competition, and an injunction would therefore not be in the public interest.
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> It is not the players' present services for which the clubs will have to pay more, for those are protected by contracts which can presumably be enforced in the usual manner. It is only when the NFL chooses (and such decision is likely) to join the competition for the later services of its players that it will incur these higher costs. In our best judgment, such higher costs will be attributable to competition and not unfair competition.[308]

[308] *Id.* at 144, 147–48 (citations omitted). For holdings consistent with the holding in *Bergey*, see *Munchak Corp. v. Cunningham*, 457 F.2d 721 (4th Cir. 1972); *Wash. Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969); *Minn. Muskies v.*

In *World Football League v. Dallas Cowboys Football Club, Inc.*,[309] referenced in *Bergey*, the court considered the harmful effect on competition if players were unable to freely bargain with other clubs for their services to commence after the expiration of their current contracts:

> We must consider the freedom of contract of the individual players as well as the rights of the Club under its present contracts. Bargaining for future services is a matter of economics. The Club can assure itself of the continued services and loyalty of its players by offering them long-term contracts and other financial inducements. If it chooses not to do so for economic reasons, it has no legal ground to complain if the players look elsewhere for their future careers and enter into contracts for services to be performed when their present contracts with the Club expire.[310]

While the same effect on competition would certainly be applicable to a coach seeking to leave for another school *after* the expiration of his contract, there is no interest of the coach or the other school worthy of protection whatsoever when the coach instead wants to breach his existing contract by accepting a new position *before* the expiration of his existing contract.[311] The most that could be said is that the coach is not able to freely work for the

Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); *World Football League v. Dallas Cowboys Football Club, Inc.*, 513 S.W.2d 102 (Tex. Civ. App. 1974).

309 513 S.W.2d 102 (Tex. Civ. App. 1974).

310 *Id.* at 105.

311 Ne. Univ. v. Brown, No. 20040827F, 2004 WL 616225, at *4 (Mass. Super. Ct. Mar. 11, 2004) (finding that the harm to Brown because he would not be able to be the football coach at U. Mass. and the harm to U. Mass because it would not be able to employ Brown as its football coach was outweighed by the irreparable harm suffered by Northeastern).

> The breach of contract by Brown was and is obvious, brazen, and defiant. U. Mass., as the Commonwealth's premier higher educational institution was and is so callous in its duty to provide ethical and moral values for its students. The persons from U. Mass. involved in this episode have clearly violated the law but above all else have brought great shame on themselves and the university.

Id.

employer of his choice if the injunction is granted. However, there is nothing inherently unreasonable or unduly harsh about a coach not being able to work for his school of choice, which is not the equivalent of being denied the opportunity to freely market his services. To the contrary, the coach was provided the opportunity to freely market his services to the fullest extent when he agreed, with the assistance of counsel, to a long-term employment contract in return for a very high level of guaranteed compensation. In that contract, the coach expressly agreed (and if not expressly, then implicitly) to provide his services exclusively to the contracting school. This negative covenant should be deemed reasonable because the restriction only exists for the contracted period.[312]

The frequency at which schools terminate unsuccessful coaches (oftentimes mid-season) creates a notion that schools should in turn expect coaches to leave for more prestigious institutions when they are successful.[313] This thought process is flawed because when the school terminates the coach without cause for not winning, the coach fully expects, and does receive, the guaranteed compensation owing through the remainder of the contract term. To permit a coach to walk away from his employment is tantamount to transforming a long-term employment agreement into a one-sided at-will employment arrangement such that, although the school may not terminate the coach at will, the coach may leave at will and be relieved of the coach's long-term commitment that both sides understood was to provide stability to the program and was the "essence" of the agreement.[314] Thus, balancing the harms between the school and coach weighs in favor of the school because if the injunction is denied, the coach receives a windfall and the school is harmed by the loss of stability to the program as well as the substantial

[312] *See* LAW OF PROFESSIONAL & AMATEUR SPORTS, *supra* note 258, § 10:19 ("[R]easonableness issues relating to negative covenants are not frequently litigated in the context of major team sports (primarily because the restriction usually exists only for the contracted period).").

[313] *See supra* text accompanying notes 105–13 (discussing dismissal of four "unsuccessful" coaches).

[314] Indeed, the lost stability when the coach breaches the employment contract provides the basis for enforcing liquidated damages clauses. *See* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 756 (6th Cir. 1999).

economic investment it made in the coach. Moreover, the competitor school is unjustly enriched and obtains an unfair competitive advantage if it is permitted to interfere with a school's contractual rights with its coach and take from that school the intangible value and goodwill associated with program stability and success that was created by the school's substantial economic investment in that coach. Indeed, the courts in *New England Patriots* and *Northeastern University* expressed concern over the unfair competitive advantage obtained by the interfering school.[315]

The head coach's influence in maintaining stability to the team is perhaps more of an issue at the collegiate level (than the professional level), where the head coach plays a critical role in the recruitment of student-athletes and the recruits seek assurance that the coach is going to be around for at least the next few years.[316] Therefore, one could argue that the unfair competition advantage obtained by the interfering school is greater at the collegiate level than the professional level. But ironically, the NFL, unlike the NCAA, prohibits interfering with its extensive "no-tampering" rule that restricts clubs from speaking about their vacancies with any coach who is already under contract with another club.[317] The absence of a "no-tampering" rule only highlights the absurdity of the situation at the collegiate level whereby NCAA member institutions are handing out salary raises to their coaches in order to keep them from being poached.[318] In June of 2009, Oklahoma extended the contract of its football coach Bob Stoops, who was at the time already among the top paid football coaches, and the contract extension added a "stay" bonus of $800,000 if Stoops is still employed by Oklahoma on January 1, 2011, which is in

315 *See* New Eng. Patriots Football Club v. Univ. of Colo., 592 F.2d 1196 (1st Cir. 1979); Ne. Univ. v. Brown, No. 20040827F, 2004 WL 616225 (Mass. Super. Ct. Mar. 11, 2004).

316 *See* Katherine Sulentic, *Running Backs, Recruiting and Remedies: College Football Coaches, Recruits and the Torts of Negligent and Fraudulent Misrepresentations*, 14 ROGER WILLIAMS U. L. REV. 127, 140 (2009) ("A coach is often the most influential reason for a recruit choosing a school.").

317 Lattinville & Boland, *supra* note 188, at 132.

318 *See* Limón, *supra* note 104 ("Alabama is one of many schools locked in an expensive arms race, raising coaching salaries at a blistering pace and putting a strain on other schools trying to woo and retain top talent.").

addition to his yearly $700,000 bonus.[319] When the extension was announced, Oklahoma University President David Boren said that, while he thinks salaries are too high nationwide, "we can't control the national marketplace."[320] But in reality, what Boren is saying is that they cannot keep competitors from tampering with their coach, which was the real motivator for Oklahoma to increase the stay bonus, which would also be paid in July in future years rather than in October.[321] Oklahoma Athletic Director Joe Castiglione even indicated that the payment date for the stay bonus was intentionally set after the hiring season when coaches are poached: "We're just annualizing what coach Stoops received in the stay bonus by waiting multiple years. . . . We annualized that amount so it triggers at a certain time of year following what we would call the hiring periods—not just collegiate hiring, but the NFL hiring periods."[322]

The NFL's no-tampering policy provides that, during the playing season a head coach may not seek or accept other employment unless he is terminated, and during the off-season a head coach under contract is still prohibited from seeking or accepting employment unless "(1) he is dismissed; (2) his club has granted him permission to explore other employment opportunities; or (3) his club has granted another club the opportunity to contact him."[323] The NFL's no-tampering policy is, in essence, an anti-poaching rule that not only prohibits another club from negotiating for services to commence before the expiration of the coach's current contract, which would otherwise constitute tortious interference with contractual relations and may

319 Associated Press, *New Deals for Stoops, Capel at Oklahoma Laden with Bonuses*, USA TODAY, June 24, 2009, http://www.usatoday.com/sports/college/2009-06-24-oklahoma-contracts-stoops-capel_N.htm?obref=obnetwork.

320 *Id.* (internal quotation marks omitted).

321 *Id.* (internal quotations marks omitted).

322 *Id.* (internal quotations marks omitted). Castiglione further stated, "When those rumors start floating and people start questioning and speculating what might happen or whether or not a person is interested . . . they always ask what are we going to do? I usually say, 'Well, have you ever looked at what we have already done?'" *Id.* (internal quotation marks omitted).

323 Lattinville & Boland, *supra* note 188, at 132 (internal quotation marks omitted) (citing and quoting NAT'L FOOTBALL LEAGUE, NFL ANTI-TAMPERING POLICY 1 (1999)).

provide a basis for injunctive relief,[324] but also deters another club from negotiating for *future* services which is clearly not tortious. The NFL's no-tampering policy appears to be effective in accomplishing its intended purpose. A few examples demonstrate its effectiveness in preventing and deterring coaches from jumping ship.

After the St. Louis Rams won the Super Bowl following the 1999 season, Dick Vermeil announced his retirement as head coach.[325] At that time, Vermeil's contract with the Rams extended through the 2001 season.[326] The Rams replaced Vermeil's coaching contract with "a consulting agreement that paid him $2 million over the following four years and . . . expressly provided that Coach Vermeil was 'terminated' as the Rams' head coach."[327] Approximately one year later, the Rams discovered that Vermeil was having discussions with the Kansas City Chiefs to fill their head coaching vacancy and filed a tampering claim against the Chiefs.[328] Despite the fact that the consulting agreement did not prohibit Vermeil from seeking a head coaching position with another club in 2000 and 2001, former NFL Commissioner Paul Tagliabue ruled that "the clear purpose and effect of the [Rams'

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324 *See* New Eng. Patriots Football Club, Inc. v. Univ. of Colo., 592 F.2d 1196 (1st Cir. 1979) (granting injunction based on tortious interference with contractual relations where defendant negotiated and entered contract for services to commence during the term of coach's existing contract with plaintiff); *see also* Wash. Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 477 (9th Cir. 1969) ('"[N]o actionable wrong is committed by a competitor who solicits his competitor's employees or who hires away one or more of his competitor's employees *who are not under contract*, so long as the inducement to leave is not accompanied by unlawful action.'" (emphasis added) (quoting Diodes, Inc. v. Franzen, 67 Cal. Rptr. 19, 25–26 (1968))); Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 128, 147 (S.D. Ohio 1974) ("This Court recognizes such public interest would probably not stand in the way of plaintiff's obtaining injunctive relief if it is able to establish that the contractual rights it has with its players have been tortiously, I. e. [sic], maliciously interfered with . . . ."); World Football League v. Dallas Cowboys Football Club, Inc., 513 S.W.2d 102 (Tex. Civ. App. 1974) (denying injunction sought by Cowboys against competitor to prevent signings for services following completion of contractual obligations to Cowboys because "[s]igning such contract is neither a breach of the contract by the players nor a tortious interference by the future employers, and the threat to enter into such contracts affords no ground for equitable relief").

325 Lattinville & Boland, *supra* note 188, at 132.

326 *Id.*

327 *Id.*

328 *Id.* at 132–33.

consulting] agreement . . . was that Vermeil would remain retired from coaching through the 2001 season" and awarded the Chiefs' second and third round draft picks to the Rams and ordered Vermeil to pay back the fees he received from the first year of his consulting contract.[329]

There have been numerous controversies involving head coaches Bill Parcells and Bill Belichick. In January of 1997, Parcells was preparing the New England Patriots for the Super Bowl, but his agent was telling the Patriots that Parcells would be terminating his contract at the end of that season to accept a head coaching position with the New York Jets.[330] The Patriots were successful in an arbitration whereby Tagliabue interpreted Parcells's contract as "giving him the right to terminate the contract only for new positions other than coaching or its equivalent."[331] Thereafter, Parcells signed a contract with the Jets to be their head coach beginning in 1998 (after the expiration of his contract with the Patriots), and for 1997, he would be a paid "consultant."[332] The Patriots asserted that the consulting arrangement was merely a subterfuge and that the Jets engaged in tampering.[333] Tagliabue persuaded them to settle the dispute "with Parcells leading the Jets immediately, and the Patriots getting four draft picks over the next three years."[334]

At the end of the 1999 season, Parcells stepped down as coach of the Jets and decided to serve as general manager for the remainder of his contract, at which point the Jets immediately named its lead assistant coach Bill Belichick as head coach.[335] At

329 *Id.* at 133 (internal quotation marks omitted) ("The Chiefs' conduct did not technically violate the Policy, since Vermeil should have been characterized as a mid-level club employee ('other club employee'); he was a consultant, not a coach, and was given less responsibility than a club president or general manager, both of whom are considered high-level club employees under the Policy. . . . Notably, Commissioner Tagliabue considered the Rams' intentions in his determination that a violation took place." (internal quotation marks omitted) (quoting former NFL Commissioner Paul Tagliabue)).

330 PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 131 (3d ed. 2004).

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.* at 131–32.

the time, Belichick was performing under a six-year contract that permitted him to leave at any time to become a head coach for another team but which also provided that if Belichick was still with the Jets when Parcells left his position as head coach, Belichick would automatically become the head coach for the duration of the six-year term.[336] Belichick rejected the position the very next day because he was interested in head coaching the Patriots.[337] Belichick claimed that his Jets contract was no longer binding on the basis that the owner of the Jets in 1997, when the contract was signed, had since passed away.[338] However, Tagliabue quickly ruled that Belichick's contract with the Jets was still binding and, thus, Belichick had become the Jets head coach automatically and all other teams were prohibited from negotiating with Belichick without the Jets' permission.[339] Shortly thereafter, all three parties—Belichick, the Jets, and the Patriots— entered a settlement that permitted him to coach the Patriots and required the Patriots to give the Jets their first round pick in the spring 2000 draft.[340]

In January of 2002, the Tampa Bay Buccaneers signed Parcells to a multi-year coaching contract, but "[s]hortly thereafter, . . . Parcells decided not to coach the team."[341] Approximately one year later, Parcells had discussions with the owner of the Dallas Cowboys, Jerry Jones, regarding their head coaching vacancy.[342] The general manager of the Buccaneers took the position that clubs needed permission from the Buccaneers before meeting with Parcells, in compliance with the no-tampering policy.[343] Although Commissioner Tagliabue acknowledged that the Buccaneers had established a "substantial claim" of tampering, he ruled that their

[336] *Id.* at 131.
[337] *Id.* at 132 ("Apparently Belichick did not want to serve as head coach under Parcells as general manager, and he was actually interested in returning to Boston as coach of the New England Patriots.").
[338] *Id.* ("Thus, he argued that he did not automatically become the Jets' head coach when Parcells resigned, leaving him free to seek other offers to be a head coach, which he would have been precluded from doing as the Jets' head coach.").
[339] *Id.*
[340] *Id.*
[341] Lattinville & Boland, *supra* note 188, at 133.
[342] *Id.*
[343] *Id.*

only recourse was to seek damages against Parcells individually because the NFL could not recognize the Buccaneers' contract with Parcells as it had never been filed with the NFL office.[344] The Buccaneers elected not to pursue a claim.[345]

Lastly, in 1998, Cleveland Browns CEO Carmen Policy was asked at a luncheon whether the Browns would be interested in hiring head coach Mike Holmgren, who at the time was under contract with the Green Bay Packers.[346] In his response, Policy first said:

> [A]ny comment "would be tampering," but then quipped: "Let's just say if a head coach who's out there, who has won a Super Bowl, who has been to another Super Bowl, who is coaching a team in contention for the playoffs this year, who is an offensive-minded coach, looking to perhaps move when the season's over, were to be interested" the Browns would also be interested.[347]

As one scholar summed up the NFL's ruling on the Packers' tampering claim, "despite the luncheon crowd's laughter in response to Policy's rather innocuous humor, the NFL got the last laugh, issuing a $10,000 fine against the Cleveland Browns."[348]

If the NCAA were to adopt a no-tampering policy similar to the NFL, one could state that this policy presents a potential antitrust problem on the same basis that regulating coaches' salaries raises an antitrust problem. For example, when Kentucky recently lured basketball coach John Calipari away from Memphis and signed him to an eight-year, $31.65 million contract, former NCAA President Myles Brand's response was that "[t]he NCAA is legally powerless to control the extravagant salaries being thrown at coaches" and "[i]t's antitrust if [the NCAA] were to try to regulate any salaries."[349] Brand was undoubtedly referring to the

344 *Id.* at 133–34.
345 *Id.* at 134.
346 *Id.*
347 *Id.*
348 *Id.* "The [no-tampering policy] specifically states that 'any public or private statement of interest in another club's employee is a violation.'" *Id.*
349 Wieberg, *Huge Buyouts*, *supra* note 102.

NCAA's inability to cap or restrict coaches' salaries under *Law v. NCAA*,[350] the so-called "Restricted-Earnings" case.[351] In *Law*, the Tenth Circuit Court of Appeals held that an NCAA rule limiting the annual compensation of certain Division I entry-level coaches to $16,000 was an illegal restraint on trade under Section 1 of the Sherman Antitrust Act.[352] The court of appeals found that:

> Nowhere does the NCAA prove that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities. . . . [O]n its face, the REC Rule is not directed towards competitive balance nor is the nexus between the rule and a compelling need to maintain competitive balance sufficiently clear on this record to withstand a motion for summary judgment.[353]

The antitrust implications of the NCAA's adoption of a rule that would deter multi-million dollar salaried coaches from breaching their term employment agreements, but which would also fall short of regulating salaries, are beyond the scope of this article.[354] But needless to say, there are some material differences between a no-tampering rule similar to the NFL's policy that does not regulate compensation and the rule that was struck down in *Law* that imposed salary restrictions. These differences are apparent not only on the face of the rule but are also present in terms of the nexus between the rule and a compelling need to maintain competitive balance.[355]

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[350] 134 F.3d 1010 (10th Cir. 1998).

[351] *See* Limón, *supra* note 104 ("I don't see a cap coming on it because we lost that battle once before with restricted earning coaches. I think it's restraint of trade and we'd probably lose again. I think the market has to somehow take care of it." (internal quotation marks omitted) (quoting Stanford Athletic Director Bob Bowlsby)).

[352] *Law*, 134 F.3d at 1012.

[353] *Id.* at 1024.

[354] *But see* WEILER & ROBERTS, *supra* note 330, at 132 (noting that when Tagliabue barred Belichick from leaving the Jets for the Patriots, "Belichick and his attorney Jeffrey Kessler then unsuccessfully sought an injunction barring enforcement of this Commissioner ruling as a 'restraint of trade' under the Sherman Antitrust Act").

[355] *Cf*. Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (upholding an NCAA rule limiting the number of assistant coaches member institutions could employ at any one time). In distinguishing *Hennessey*, the court of appeals in *Law* noted:

b) Harm to the Public Interest

In weighing the harm to the public interest in the context of professional players leaving their team, the *Bergey* court acknowledged the existence of a public interest in preserving key team members' loyalty, given that members of the public are devoted followers to such team members and that any such loss will affect a team's chances of winning.[356] But on balance the court found that any public interest in loyalty was outweighed by "the policy of the law to encourage free competition in the marketplace."[357] However, *Bergey* can be distinguished in numerous respects, most of which relate to the distinction between professional and collegiate athletics.[358] Moreover, in *Bergey*, the professional players were not breaching their employment agreements and were leaving *after* the expiration of their current contracts.[359] The public has an interest in parties' adherence to contractual obligations. As duly noted by the court in *Northeastern University*:

> There should be no doubt that college sports and the revenue that they draw are a major business for a university. At times, at some universities, football and basketball programs appear to be more important than the universities' duty to educate and their duty to instill in college students basic

> *Hennessey* addresses a restriction on the number of assistant coaches that a Division I school could employ whereas the REC Rule limits salary of a certain category of coaches. Therefore, the analysis of the reasonableness of the restraint in *Hennessey*, which did not involve a naked restriction on price, will not control the analysis of the reasonableness of the REC Rule.

Law, 134 F.3d at 1021.

356 Cincinnati Bengals v. Bergey, 453 F. Supp. 129, 147 (S.D. Ohio 1985) ("The Court would be blind if it did not recognize that there is a public interest of another sort. This is the concern among fans over the actual and prospective loss of key members of a team of which they are devoted followers and the effect this may have on that team's 'chances.'").

357 *Id.*

358 *See infra* notes 368 and 373 and accompanying text.

359 *See Bergey*, 453 F. Supp. at 144.

> concepts of ethical conduct and adherence to legal and moral obligations.[360]

There are numerous aspects of collegiate sports that separate it from professional sports for public interest purposes. The fan loyalty mentioned in *Bergey* tends to be stronger in collegiate sports than in professional sports, much of which can most likely be attributed to the relationship fans develop with the coaches.[361] Psychology experts believe that "college coaches have a special place in the realm of social identity in sports."[362] Rick Grieve, associate professor of psychology at Western Kentucky, says "[i]t is very common for people to adopt a team for part of their identity."[363] According to Christian End, assistant professor of psychology at Xavier University, sports fans do not identify with individual players very well due to constant player turnover, but "a head coach in a major, successful program is in a different category" because "the fan-coach connection is well-established" when the coach has held that position for a number of years.[364] End further postulates that "when that coach leaves, there are strong feelings of being rejected, jilted by someone with whom you have a strong emotional commitment."[365] Loyalty is very important among sports fans: "A fan is expected to stay loyal even in difficult years. But fans expect reciprocity from the team."[366] Therefore, when a coach leaves before the expiration of his contract, not only is the coach breaching his contractual commitment, but it also constitutes a breach of loyalty. When Rich Rodriguez left West Virginia for Michigan and challenged the validity of a $4 million liquidated damages clause in his employment agreement with West Virginia, U.S. Senator Jay

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[360] Ne. Univ. v. Brown, No. 20040827F, 2004 WL 616225, at *2 (Mass. Super. Ct. Mar. 11, 2004).

[361] Sal Ruibal, *State of W.Va. Still Feeling Spurned; Calm Yet to Prevail After Departure of Native Son*, USA TODAY, Jan. 23, 2008, at 5C, *available at* http://www.usatoday.com/sports/college/football/bigeast/2008-01-23-wvu-disgruntled-fans_N.htm (discussing the reaction from disgruntled fans following the departure of West Virginia University football coach Rich Rodriguez).

[362] *Id.* (citing Christian End, Assistant Professor of Psychology at Xavier).

[363] *Id.* (internal quotation marks omitted).

[364] *Id.* (internal quotation marks omitted).

[365] *Id.* (internal quotation marks omitted).

[366] *Id.*

Rockefeller denounced, "I think it's amoral—not immoral—but amoral behavior when you dump your team and take off. I'm furious at Rich."[367]

There is also a public interest in cost containment at public educational institutions during an economic recession, especially because of recent state funding cuts for many publicly-funded universities.[368] In regards to the multi-million dollar buyouts paid to fired football coaches at the end of the 2008 season, Cornell economics professor Robert Frank noted that "[t]he pattern is very troubling. We're spending a lot of money on things that, in the end, aren't going to make any difference in how well we do as a society."[369] Maryland Chancellor Brit Kirwan, who chairs the Knight Commission, said, "When times are flush, I guess maybe people look the other way when they see these kinds of numbers. But I think it's going to be increasingly difficult for boards to explain . . . in these tough economic times."[370] Robert Zemsky, the founding director of the University of Pennsylvania's Institute for Research on Higher Education, recently told the Knight Commission in blatant terms: "Since you've been in business, things have gotten a lot worse. . . . A set of values is not present to hold athletics accountable, so the competitive pressures of the market give you what you have."[371] Kirwan analogizes spending on coaches' salaries to the excessive salaries of CEOs: "There was such an outrage about what corporate CEOs were making and now people are looking at what coaches are making compared to other

[367] *Id.* (internal quotation marks omitted).

[368] *See* Mark Schlabach, *Programs Struggle to Balance Budget*, ESPN.COM, July 13, 2009, http://sports.espn.go.com/ncaa/columns/story?columnist=schlabach_mark&id=4314195 ("Many athletic departments are struggling to balance their financial books after receiving less funding from state legislatures and fewer donations from alumni and boosters."); *see also* Wieberg, *Huge Buyouts*, *supra* note 102 ("Four major football-playing schools will pay a combined $11.85 million in severance to newly deposed coaches, a longstanding practice drawing fresh scrutiny as universities and their athletics departments struggle through the nation's economic decline.").

[369] Wieberg, *Huge Buyouts*, *supra* note 102 (internal quotation marks omitted).

[370] *Id.* (internal quotation marks omitted).

[371] Jack Carey, *Knight Commission Told Restraint in College Spending Must Start at Top*, USA TODAY, May 12, 2009, http://www.usatoday.com/sports/college/2009-05-12-knight-commission_N.htm (internal quotation marks omitted).

university personnel, and I think there's the same concern."[372] The increasing costs to universities of huge buyouts and salaries as a result of the coaching carousel at the end of each season is another factor that weighs in favor of issuing an injunction.

Finally, the tax-exempt status of intercollegiate athletics distinguishes it from professional sports, and the public has an interest because it is subsidizing the buyouts and salaries that are funded by universities with tax-exempt revenue.[373] In a letter sent to former NCAA President Myles Brand from House Ways and Means Committee Chairman Bill Thomas on October 2, 2006 requesting information regarding the tax-exempt purpose of intercollegiate athletics, Congressman Thomas asked the following questions specifically related to coaches' salaries:

> From the standpoint of a Federal taxpayer, why should the Federal government subsidize the athletic activities of educational institutions when that subsidy is being used to help pay for escalating coaches' salaries, costly chartered travel, and state-of-the-art athletic facilities?
>
> . . . .
>
> Coaches' salaries account for one of the biggest expenses of Division I-A athletic departments. According to reports, more than 35 college coaches receive salaries of at least one million dollars per year. Sources of revenue to pay these rising salaries include student fees, corporate sponsorships, and television deals. Paying coaches excessive compensation also makes less revenue available for other sports, causes many athletic departments to operate at a net loss, and may call into question the priorities of educational institutions.

372 Schlabach, *supra* note 368 (internal quotation marks omitted).

373 For an in-depth discussion and analysis of federal tax-exemption laws as they apply to the NCAA and to the universities operating Division I football and basketball programs, see John D. Colombo, *The NCAA, Tax Exemption and College Athletics* (Univ. of Ill., Pub. Law & Legal Theory, Research Paper Series, Paper No. 08-08, 2009), *available at* http://ssrn.com/abstract=1336727.

> a. Several Division I-A schools pay their men's basketball coaches four to five times more than their women's basketball coaches. What additional educational benefit do men's basketball coaches provide beyond that which is provided by women's basketball coaches?
>
> b. What actions has the NCAA taken to encourage its member institutions to curb excessive compensation for college coaches?
>
> c. In 2000, the NCAA repealed a rule requiring all athletics-related coaches' income to be reviewed and approved by the university. Why did the NCAA repeal this rule?[374]

This is a situation in which the questions themselves provide more information than the answers. So long as intercollegiate athletics has the benefit of a tax exemption and until the schools themselves make the effort to control their purse strings, the public will continue to subsidize coaches' compensation—one more factor for a court to consider in an injunction proceeding weighing in favor of granting injunctive relief.

c) Harm to the Interest of Student-Athletes

"A head coach can sign a 10-year deal, say he's found his final job, promise recruits they'll be part of a glorious future at XYZ U and then leave before the first year's [sic] *over."*[375]

As discussed, the NCAA has not implemented a "no-tampering" policy regarding coaches.[376] Thus, coaches are relatively free to leave with impunity, unless of course the former institution enforces a liquidated damages clause in the contract or in the absence of such a clause sues for damages or injunctive

[374] For the full text of the letter, see Letter from Bill Thomas, Chairman, House Ways and Means Committee to Dr. Myles Brand, President, National Collegiate Athletic Conference (Oct. 2, 2006), *available at* http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm.

[375] Jim Thomas, *Coaching Searches Get Thumbs Down*, DAILY NEWS, Dec. 20, 2007, at C3.

[376] *See supra* text accompanying note 318.

relief. However, the same does not hold true for student-athletes. The NCAA has a no-tampering policy with regards to student-athletes that prohibits schools from making any contact whatsoever with student-athletes under scholarship with another institution without first receiving permission from that institution.[377] Moreover, student-athletes are deterred from transferring to another institution because NCAA rules require them to sit out for a full academic year if they transfer, unless the former institution gives permission.[378] This inconsistent treatment of coaches and student-athletes under NCAA rules, which is fundamentally unfair to student-athletes simply on its face, combined with the impact to student-athletes when the head coach leaves the athletic program in the lurch, makes the case for injunctive relief all the more compelling.[379]

In a law review article analyzing head football coach responsibility for athlete academic performance and good citizenship, one commentator posed the question, "what is the role of head coaches in relation to the core business of universities, the education of the next generation in preparation for their assumption of societal responsibilities[?]"[380] The NCAA is comprised of academic institutions whose mission and purpose are recognized in its constitution and bylaws. Principles of education

[377] NCAA, 2008–09 NCAA Division I Manual, Bylaw 13.1.1.3 (effective Aug. 1, 2008), *available at* http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf [hereinafter NCAA Division I Manual] ("An athletics staff member or other representative of the institution's athletics interests shall not make contact with the student-athlete of another NCAA or NAIA four-year collegiate institution, directly or indirectly, without first obtaining the written permission of the first institution's athletic director (or an athletics administrator designated by the athletics director) to do so, regardless of who makes the initial contact.").

[378] *Id.* ("If permission is not granted, the second institution shall not encourage the transfer and the institution shall not provide athletically related financial assistance to the student-athlete until the student-athlete has attended the second institution for one academic year.").

[379] "Coaches jump from program to program without having to sit out a second; the student-athlete who transfers must sit out one season. Coaches have lucrative side contracts and side deals; the N.C.A.A. manual has pages upon pages of rules to ensure that athletes do not receive extra benefits." Rhoden, *supra* note 206.

[380] Linda S. Greene, *Football Coach Contracts: What Does the Student-Athlete Have To Do With It?*, 76 UMKC L. REV. 665, 672 (2008).

and amateurism are at the constitution and bylaws' core, including "the provision of 'intercollegiate athletics programs for student-athletes . . .[,]' the adoption of 'eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism . . .[,]' and the maintenance of a distinction between its athletic programs and those of official professional sports leagues."[381] Indeed, the NCAA's Constitution expressly provides, "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."[382] But as one scholar articulated, in reality, there are actually two separate and distinct competing education models in intercollegiate athletics:

> Under the prevailing amateur/education model, college sports are an avocation, engaged in by student-athletes to reap the educational, physical, mental, and social benefits presumably derived from athletic competition.
>
> . . . [T]he commercial/education model, recognizes the dynamic influence which commercialism exerts over intercollegiate athletics. The commercial/education model, more closely reflective of the modern day economic realities of college sports, can thus be contrasted with the competing amateur/education model, premised on illusory assumptions which fail to acknowledge commercialism as the driving force in college athletics.[383]

As more collegiate athletic programs desperately search for a "quick fix" to turn around their athletic programs, big-time intercollegiate athletics begins to resemble the professional sports model, and thus blurring the line of demarcation between amateur

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381 *Id.* at 667 (citing NCAA Division I Manual, *supra* note 377, Bylaws 1.2(a), 1.2(c) and 1.3.1).

382 NCAA Division I Manual, *supra* note 377, Bylaw 1.3.1.

383 Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 270–71 (1994).

and professional athletics. As more college coaches are being fired during mid-season, it creates more vacancies to be filled at season's end with coaches under contract at other programs. According to renowned basketball commentator Dick Vitale,

> There is no doubt that the administration has a right to make a change, but . . . unless a coach has violated his contract due to behavior that is not representative of the school and has not violated his contract morally, he should not be fired based on wins and losses during the season.[384]

As Vitale puts it, "[i]t seems that the college game is now adopting the NBA mentality,"[385] in which six NBA head coaches were fired during a 24-day period in 2008 from late November to mid-December.[386]

Even in the professional context, some in the industry question the message that is being sent when teams abruptly fire coaches mid-season. Prominent coaches' agent Lonnie Cooper, who represented all six of the fired NBA head coaches, questioned how any of these teams could claim to have improved their prospects: "If you're firing six guys at the beginning of the season, but you're replacing them with an interim coach, what's the message you're sending right there? . . . Did you make a change because the interim coach is a better coach? I haven't figured that one out, that

[384] Dick Vitale, *Vitale: NBA Mentality Regarding Coaches Creeping Onto Campus*, USA TODAY, Feb. 17, 2009, http://www.usatoday.com/sports/college/columnist/vitale/2009-02-16-vitale-column_N.htm (internal quotation marks omitted).

[385] *Id.* (internal quotation marks omitted).

[386] *See* Howard Beck, *Easy Come, Easy Go*, N.Y. TIMES, Dec. 27, 2008, at SP1, *available at* http://www.nytimes.com/2008/12/28/sports/basketball/28agent.html?_r=3&pagewanted=1&ref=sports.

> The firings began Nov. 22, when P. J. Carlesimo was dismissed by the Oklahoma City Thunder. Two days later, Eddie Jordan was fired by the Washington Wizards. Sam Mitchell (Toronto) was the next to go, then Randy Wittman (Minnesota) and Maurice Cheeks (Philadelphia). The purge continued Dec. 15, with the Sacramento Kings firing Reggie Theus.

Id.

logic."[387] In the collegiate context, some college coaches have noted the impact that mid-season firings have on student-athletes. Some coaches claim that the firings send a hypocritical message to the players, as Tennessee coach Bruce Pearl asked, "What kind of pressures are you putting them under and what kind of message are you sending?"[388] Pearl and LSU coach Trent Johnson said that mid-season firings are "disturbing."[389] When Georgia fired its head basketball coach mid-season in 2009, even interim coach Pete Herrmann publicly commented how detrimental it was to the program as well as the student-athletes: "It's not a good day for the Georgia program . . . . We don't feel that it's in the best interests of the team and the players in preparing for games when a decision is made like this, but that's the prerogative of the administration in charge at the time."[390]

The "win at all cost" mentality when it comes to a school's decision to hire or fire a coach may not serve the best interest of current players in the athletic program as well as prospective players who have signed scholarships in reliance on a particular head coach leading the program for the term of his contract.[391] Just one week after John Calipari left Memphis and signed his multi-million dollar deal with Kentucky, which made him the highest paid basketball coach, he indicated that some players needed to be concerned about keeping their scholarships.[392] In describing the type of player needed for his "high-pressure, up-tempo style" of play, Calipari said: "It's not for everybody. If they're good enough to play here and help us win national titles, I want you here . . . . If they're not, I'm going to tell them the truth.

387 *Id.* (internal quotation marks omitted); *see also* Vitale, *supra* note 384 ("When you evaluate their NBA rosters, you don't have to go to Harvard to figure out that changing coaches is not the answer." (internal quotation marks omitted)).

388 Marlen Garcia, *College Basketball Coaches' Departures "Disturbing,"* USA TODAY, Jan. 30, 2009, http://www.usatoday.com/sports/college/mensbasketball/2009-01-29-coach-departures_N.htm (internal quotation marks omitted).

389 *Id.* (internal quotation marks omitted).

390 *Id.* (internal quotation marks omitted).

391 *See, e.g.*, Rhoden, *supra* note 206, at D4 (referring to student-athletes under scholarship, which is only a one-year commitment, "If your skills fade or the coaching situation changes, you might be out.").

392 *Id.*

I'm just going to be honest."[393] There is nothing in that statement whatsoever remotely hinting to academics or the best interest of the student-athlete. Former NCAA President Myles Brand, speaking in Detroit a few days before the 2009 Final Four, said, "You have to ask some very hard questions, whether this is really in tune with the academic values, whether we've reached a point already that these high salaries and packages for coaches has really extended beyond what's expected within the academic community."[394]

3. Practical Considerations in Seeking Injunctive Relief

Schools might be deterred from seeking injunctive relief because of the cost and burdens associated with prolonged litigation as well as the fact that a relationship has deteriorated and the school does not want an unhappy employee.[395] These are some of the oft-cited reasons by courts of equity in refusing to grant affirmative injunctive relief in the nature of specific performance to order an individual to perform an employment contract.[396] This section of the paper will discuss whether these concerns are exaggerated. It will also address whether the existence of a liquidated damages provision, as well as the absence of one, impacts a school's ability to obtain a negative injunction.

a) Liquidated Damages Clauses and the Availability of Injunctive Relief

Liquidated damages clauses in college coaches' contracts are heavily negotiated and represent an amount, measured by the parties prospectively at the time the contract is entered into, that represents just compensation for the school's damages should the coach resign or terminate before the end of the term. The fact that the parties negotiated and agreed upon a stipulated amount as a reasonable estimate of the school's damages does not suggest or imply that irreparable harm is lacking. In other words, the fact that

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393 *Id.* (internal quotation marks omitted).

394 Wieberg, *Hard Questions*, *supra* note 3 (internal quotation marks omitted).

395 *See* Greenberg, *supra* note 5, at 248.

396 *See supra* note 262 and accompanying text; *see also* Rapp, *supra* note 260, at 271.

money damages are deemed under the law to be an inadequate remedy when the coach refuses to perform is not altered by the fact that the parties agreed that the remedy for non-performance would be a stipulated dollar amount. Thus, in *Northeastern University* the court concluded that, when injunctive relief is sought, a liquidated damages provision is not the exclusive remedy unless the contract expressly prohibits injunctive relief.[397] However, even if the contract does not expressly prohibit such relief, a liquidated damages clause implies that the parties contemplated substituting the stipulated amount for the injunctive relief remedy. Contrary to the conclusion reached in *Northeastern University*, the sensible and fair result is that a liquidated damages clause should constitute the school's exclusive remedy.

On the other hand, failure to include a liquidated damages clause in the contract does not imply that the parties contemplated money damages would be adequate to compensate the school for the coach's non-performance. Unless the parties expressly agree that injunctive relief would be unavailable to the school, the absence of a liquidated damages clause should have no bearing whatsoever on a school's ability to obtain a negative injunction. Indeed, to the contrary, the coach and school typically expressly agree that the school would be irreparably harmed if the coach refuses to perform and that injunctive relief is an available remedy in the event of such breach.[398]

b) Protracted Litigation

The issuance of a negative injunction typically will not result in prolonged litigation for the simple fact that continuing the lawsuit is virtually a no-win situation for the coach. The coach is clearly in breach of his contract, and by virtue of the granting of the

[397] Ne. Univ. v. Brown, No. 20040827F, 2004 WL 616225, at *3 (Mass. Super. Ct. Mar. 11, 2004) ("It appears to the Court that Article IX does not in any way prohibit injunctive relief, and merely deals with financial payments for money losses incurred by Brown for leaving the University and breaching the contract."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 361 (1981) ("Specific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty.").

[398] *See supra* note 314 and accompanying text..

injunction, the court has determined that the school is likely to succeed on the merits and that money damages are inadequate to compensate the school. Therefore, once the court orders that the coach is prohibited from working for somebody else, the only feasible options are that either the coach goes back to work or settles, unless of course the coach chooses the highly unlikely option of sitting on his hands and not working.

Settlement is a viable solution after the issuance of an injunction and operates as a forced buyout. Because it is likely that the contract omitted a liquidated damages clause (otherwise there would be no need for an injunction),[399] settlement is akin to the parties negotiating a post-breach liquidated damages clause that they neglected to do when they entered the contract. With post-breach negotiation, not only are the parties in a better position at that time to make a more reasonable assessment of the coach's market value than at the time the contract was entered, but it also enables all three parties—the coach, the party to which he owes a contractual obligation and the third party he wishes to join—to fashion an appropriate remedy.[400]

For example, in a case factually similar to *New England Patriots*, Michigan State University attempted to hire George Perles as its head football coach when he was under contract with the Philadelphia Stars of the former United States Football League.[401] The Stars filed suit against Michigan State and sought damages of $1 million, and the parties settled with Michigan State paying the Stars $175,000 to hire Perles and protect itself from potential legal liability.[402] Also, in *Northeastern University*, all three parties reached a settlement in which the University of Massachusetts agreed to pay Northeastern University $150,000 in

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[399] *See supra* notes 397–98 and accompanying text.

[400] *See* Rapp, *supra* note 260, at 280 ("After the issuance of a decree, the parties would simply bargain for an appropriate 'side payment' to settle the matter in the most efficient way possible. . . . [T]he parties will arrive at an equilibrium transaction price that reflects how much the player values being free of the injunction and how much the team values preventing that player from escaping his contractual obligations."). "A negative injunction might be sufficient to induce a player, and the team he wishes to join, to bargain with the team to which he owes a contractual obligation." *Id.* at 271.

[401] *See* Greenberg, *supra* note 5, at 247.

[402] *Id*.

order to hire its coach, but the parties also agreed that he would be precluded from coaching the first three games of the season with U. Mass.[403] Finally, there are the numerous examples raised in this paper of settlements reached in the NFL in the face of the league commissioner's rulings to prevent coaches from jumping ship.[404]

c) The "Unhappy Coach" Misnomer

Some believe that seeking injunctive relief to prevent a coach from carrying out his desire to coach someplace else will lead to a strained employment relationship with an unhappy coach. Presumably, the belief is that a coach faced with an injunction will be difficult to deal with and may take his frustration out on the team and not use his best efforts to win or engage in fundraising activity. Not only are these concerns based on pure speculation (because it is extremely rare for schools to even seek a negative injunction), but they also seem to be based on faulty logic. Indeed, the substantial likelihood that a negative injunction decree (or threat of seeking one) will lead to settlement, as history suggests, should vitiate any unhappy coach concern.

Commentators have made similar arguments in the context of *affirmative* injunctions that order professional players to perform under their existing contracts.[405] However, Professor Rapp rejects the notion that players faced with an affirmative injunction would have an incentive to "dog it," noting that they would be lowering their performance statistics which would prevent them from

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[403] *See* Blaudschuh, *supra* note 282.

[404] *See supra* Part II.C.2.a.

[405] *See, e.g.*, Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61, 84 (1989) ("[Serving players with an injunction can cause] opportunistic behavior by engaging in conduct that is euphemistically known as 'dogging it.' In other words, he can give less than his best efforts on the playing field, and thereby punish the club for its failure to acquiesce to his demands, while collecting his full salary as provided by the contract."); Stephen C. Wichmann, Note, *Players, Owners, and Contracts in the NFL: Why the Self-Help Specific Performance Remedy Cannot Escape the Clean Hands Doctrine*, 22 SEATTLE U. L. REV. 835, 843 (1999) (noting that the terms of the contract must be sufficiently definite to permit a court to craft an appropriate order to enforce contract obligations through an affirmative injunction and emphasizing that this poses a problem in the athletic employment context, since most standard player contracts require a player's "best efforts," which is not a sufficiently definite requirement).

earning higher salaries in subsequent seasons and "performing poorly in a season might permanently affect an athlete's earning trajectory for his relatively short career."[406] Rapp further notes that there are behavioral norms and incentives in professional sports that may not exist in the typical personal services relationship in that "most athletes are highly competitive individuals who have, in effect, internalized norms of competitiveness . . . [that] might motivate them to try to win even if they were upset about their contractual arrangements."[407] Moreover, courts have rejected the "dogging it" theory asserted by teams seeking negative injunctions to prevent a player under contract from signing a contract with another team for future services to commence after the player's current contract expires.[408]

Coaches are much more analogous to players than the typical employee working in corporate America. Not only do coaches satisfy the "unique skills" test as players do,[409] but coaches are similar to players in that, if confronted with a negative injunction, they would have no incentive whatsoever to "dog it" while continuing to perform under their existing contracts. One or two mediocre seasons could preclude the coach from obtaining performance bonuses and salary raises, and could be detrimental to his prospects for future employment. A coach's failure to actively recruit could severely impact his chances for successful seasons in the future. Finally, a half-hearted effort in carrying out various off-field (or off-court) responsibilities, such as fundraising, would be harmful to a coach's reputation and could impede future employment opportunities as well.

406 Rapp, *supra* note 260, at 272–73.

407 *Id.* at 273.

408 *See* Cincinnati Bengals v. Bergey, 453 F. Supp. 129, 136 (S.D. Ohio 1974) (rejecting the Bengals' argument that "future services agreement" would reduce player's effectiveness with the Bengals during his existing contract); World Football League v. Dallas Cowboys Football Club, Inc., 513 S.W.2d 102, 105 (Tex. Civ. App. 1974) (arguing for the players under existing contract who signed contracts for future services with WFL teams "will not use their best efforts for the team under their current contracts, the morale of the entire team will suffer, the enthusiasm of the fans will wane, and the new employers will reap the benefits of any favorable publicity for outstanding performance of the players so signing").

409 *See supra* notes 289–96 and accompanying text.

CONCLUSION

At the hearing on the motions for injunctive relief in the *Northeastern University* case, counsel for the coach attempted to justify his client's jumping ship with an explanation that "everyone in collegiate football does this" and "what is the big deal?"[410] That sentiment is all too prevalent in the college coaching industry. To condone a breach of contract that is "obvious, brazen and defiant" (as described by one court)[411] violates public policy and does not comport with capitalist ideals of fair competition. The non-quantifiable harm to the public academic institutions employing these coaches, including to the public that funds their compensation and the student-athletes that rely on them, far outweighs the breaching coach's desire to maximize compensation and justifies court intervention to deter coaches from skirting their contractual commitments with virtual impunity. Academic institutions have a responsibility—morally, socially and ethically—to make sound economic business decisions, which may include enforcement of their coaches contracts through atypical legal means.

[410] Ne. Univ. v. Brown, No. 20040827F, 2004 WL 616225, at *2 (Mass. Super. Ct. Mar. 11, 2004) (internal quotation marks omitted).
[411] *Id.* at *4.