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The Offer Sheet: An Attempt to Circumvent NCAA Prohibition of Representational Contracts

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THE OFFER SHEET: AN ATTEMPT TO CIRCUMVENT
NCAA PROHIBITION OF REPRESENTATIONAL
CONTRACTS

I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) is a voluntary organization of over 860 colleges and universities.\(^1\) One of the primary goals of the NCAA is to "promote college sports, individually and collectively."\(^2\) Through its constitution and bylaws the NCAA establishes standards of eligibility with which its members must comply. One such standard attempts to preserve the sanctity of amateurism\(^3\) in intercollegiate sports. The student-athlete is prohibited from either receiving compensation for his athletic accomplishments or signing a contract to play a professional sport in the future, regardless of its legal enforceability;\(^4\) similarly, the student-athlete is precluded from contracting or agreeing with an agent to be represented in the marketing of his athletic ability.\(^5\) A violation of any one of these provisions will result in the immediate ineligibility of the student-athlete to compete in

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1. NCAA, GENERAL INFORMATION PAMPHLET 3 (1978).
2. NCAA, PUBLIC RELATIONS MANUAL 93 (1976).
3. "A basic purpose of the 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 college athletics and professional sports." NCAA CONST. art. 2, \$ 2.
4. The NCAA Constitution provides:
   Any individual who signs or has ever signed a contract or commitment of any kind to play professional athletics in a sport regardless of its legal enforceability or the consideration (if any) received; plays or has ever played on any professional athletic team in a sport, or receives or has ever received, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional organization in a sport based on his athletic skill or participation, except as permitted by the governing legislation of this association, no longer shall be eligible for intercollegiate athletics in that sport.
   NCAA CONST. art. 3, \$ 1(b).
5. NCAA CONST. art. 3, \$ 1(c) provides in part: "Any individual who contracts or who has ever contracted orally or in writing to be represented by an agent in the marketing of his athletic ability or reputation in a sport no longer shall be eligible for intercollegiate athletics in that sport."

NCAA, 1979-80 MANUAL OF THE NCAA (March 1979) [hereinafter cited as NCAA MANUAL] contains a casebook of various fact situations which attempt to clarify the interpretation of the NCAA Constitution and bylaws. Case No. 28 addresses the problem of
that sport.6

In the past, professional sports agents have used various ploys to evade the NCAA's rule that prohibits representational contracts between agents and student-athletes.7 One example of a recent effort to circumvent this NCAA restriction is the "offer sheet."8 The offer sheet is essentially a revocable offer signed by the student-athlete and conveyed to the agent. According to the terms of the offer, it may not be accepted by the agent until a date after the student-athlete's senior season of eligibility has been completed. On this date, barring a prior revocation by the student-athlete, the agent may accept the offer, thus giving rise to a prima facie representational contract.

Legally, there is no contract until the agent accepts the student-athlete's offer, after the student-athlete's eligibility has expired. Prior to that time, the student-athlete has made no binding commitment. He is free to revoke his offer.9 The NCAA contends that the signing of the offer sheet by the student-athlete is, in itself, violative of its constitution and will result in the premature loss of the student-athlete's eligibility.10

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6. NCAA Const. art. 3, § 1(b). See note 4, supra.
7. David Berst, the NCAA's Director of Enforcement, stated: Agents use all kinds of gimmicks to try to get around our rules. An agent sometimes will write out a check to an athlete with a notation on the back, stating that when the athlete endorses the check he is agreeing to be represented by the drawer of the check.
8. The offer sheet was devised by sports agent Mike Trope. Id.
10. The NCAA's Director of Enforcement, David Berst stated: By signing a so-called offer sheet an athlete would in effect be agreeing to be represented at some time in the future by the agent. That would clearly be a violation of
Representational contracts between professional sports agents and student-athletes that are formed in violation of NCAA rules pose numerous legal problems. This comment addresses those problems by examining the most recent method utilized by agents in their attempt to circumvent NCAA regulations—the offer sheet.

Is the offer sheet violative of NCAA rules? Can its usage be constitutionally prohibited by the NCAA? If so, is a contract that is formed by means of an offer sheet or any other contract formed in violation of NCAA rules enforceable against a breaching party? This comment examines the roles played by the student-athlete, the professional sports agent and the NCAA in the formation of representational contracts. It assesses the utility of the offer sheet as a means of evading NCAA regulations and analyzes the legal enforceability of contracts formed in violation of NCAA rules. It further addresses the possibility that contracts made in violation of NCAA rules may be illegal, and investigates the potential liability to which an agent may be exposed by contracting with a student-athlete in violation of the NCAA’s regulations.

II. THE CHARACTERS

A. The Agent

The agent is a prominent figure in the life of an athlete. He plays an integral role in determining the economic value of the athlete’s talents, and he has the ultimate responsibility of ensuring that the athlete is properly compensated.11 While agents may limit their services to negotiations with professional sports teams, some serve as the athlete’s personal manager, seeking opportunities for lucrative product endorsements and public appearances. Many also act as advisors in the ath-

lete's business and tax planning activities. In short, agents frequently have an immense impact on the lifelong financial security of the athlete.  

The recent explosion in the salaries of professional athletes has prompted many enterprising individuals to enter into the arena of professional sports agency. Visions of rubbing elbows with superstars and, more importantly, receiving percentages of their lucrative contracts are enticing to most sports enthusiasts. With the proliferation of sports agents, competition among them to represent the relatively few athletes whose talents are in demand by professional sports franchises has increased significantly. The agent who complies with NCAA rules and refrains from entering into a representational contract with a student-athlete until his eligibility has naturally expired will often find that the most coveted athletes have already contracted for the services of an agent. For purposes of survival in the trade, it has become common practice to disregard NCAA rules by secretly contracting with student-athletes before their eligibility is up. It is not uncommon for the student-athlete to sign a representational contract with one agent, only to be confronted by another who will perform the same services for a lesser percentage. Induced by the latter agent's contention that the athlete's contract with the initial agent is not legally enforceable because it was made in violation of NCAA rules, the student-athlete will frequently renege on his original contract and accept the more profitable offer of the latter agent. Because the initial contract violated NCAA rules, an agent in this predicament may be hesitant to enforce it. The publicity accompanying such a lawsuit could render the agent inherently suspect in the eyes of the NCAA, its member institutions and future student-athletes. The agent's reluctance to enforce the

12. Id.
13. The fuse was ignited during the 1960's when teams from competing leagues, such as the National and American Football Leagues and the National and American Basketball Associations, commenced a bidding war in efforts to secure the services of star athletes.
14. It has been maintained that 60% of the players drafted in the first three rounds of the 1979 National Football League draft had made a commitment to an agent of some form before their college eligibility had expired. Johnson & Reid, supra note 7, at 35.
15. Id. See also N.Y. Times, Feb. 2, 1978, at D15, col. 3. Agent Richard Sorkin admitted to the New York State Senate Select Committee that he had signed many student-athletes to contracts of representation while they still had college eligibility. Sorkin also testified that such practices were widespread among agents. Id.
17. In the long run, it might not be economically profitable for an agent who repeatedly contracts with student-athletes in violation of NCAA rules to attempt to enforce such a breach. The publicity accompanying such a lawsuit would alert the NCAA that the agent had violated its rules and would undoubtedly prompt its enforcement division to probe the
breached contract may also arise from apprehension that a court will look unfavorably on a contract made in violation of NCAA regulations.\textsuperscript{18} The agent, therefore, is frequently compelled to accept such piracy as a trade hazard.

While the offer sheet is merely a revocable offer and does not secure a commitment from the student-athlete that he will be represented by the agent, it does vest the power of acceptance with the agent. In so doing, if the athlete does not wish to be represented by the agent, he must take affirmative action to notify the agent of his revocation of the offer.\textsuperscript{19} The offer is subject to interference by other agents prior to its acceptance and may be revoked by the student-athlete. Once the offer sheet is accepted by the agent, however, (assuming it does not violate NCAA rules) it is an enforceable contract.\textsuperscript{20} The primary attribute of the offer sheet is that it secures a non-contractual relationship with the student-athlete prior to the expiration of his senior year of eligibility. Barring revocation by the athlete, the mere signing of the offer sheet by the agent on the date specified, along with the agent's notification of acceptance, enables this relationship to mature into a contract solely through the efforts of the agent. However, if the athlete reneges after the agent's acceptance, a court of law would be more inclined to enforce a contract which did not violate NCAA provisions.\textsuperscript{21}

The enforceability of the offer sheet has recently been tested in court. Fourteen breach of contract suits were initiated by one sports agent against his former athlete-clients, alleging that each had secured representation by other agents in breach of the offer sheet that each athlete had executed.\textsuperscript{22} To date, all but one of the suits have been settled.\textsuperscript{23} It appears, therefore, that the offer sheet approach to the formation of representational contracts between student-athletes and agents will not be judicially scrutinized in the near future.

agent's future dealings with student-athletes. This ultimately could discourage future student-athletes from dealing with the agent.

18. In at least one case, New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471, 474-75 (5th Cir. 1961), the court invoked the "clean hands" doctrine and refused to enforce a contract between a student-athlete and a professional sports franchise because it was secretly formed prior to the lapse of the student's eligibility, and therefore, in violation of NCAA rules.

19. \textsc{Restatement (Second) of Contracts} § 41 (1973) provides: "An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract." \textit{See also id.} § 35.

20. If use of an offer sheet is a violation of NCAA rules, the offer sheet's utility is nullified in that it is regarded as an outright contract that is blatantly violative of NCAA rules.

21. \textit{See} note 18 \textit{supra}.

22. Johnson & Reid, \textit{supra} note 7, at 29.

B. The NCAA

The NCAA's Committee on Infractions is responsible for the administration of the NCAA's enforcement program.\(^{24}\) It investigates alleged violations and has the authority to either impose penalties on the member educational institution, or recommend to the NCAA Council that the institution's membership be either suspended or terminated.\(^{25}\) The student-athlete is not declared ineligible directly by the NCAA, but rather by the member institution that he is attending.\(^{26}\) By mandating the institution to apply eligibility rules to student-athletes, the NCAA indirectly accomplishes its objective. The failure of an institution to comply with NCAA policy invites a broad spectrum of sanctions ranging from reprimand and censure to the termination of the institution's membership in the NCAA.\(^{27}\)

The NCAA's power to impose sanctions on its member institutions, which in turn discipline the student-athlete, has been consistently upheld by the courts. The courts have held that the right to compete in intercollegiate athletics is not protected by either the fifth or fourteenth amendments to the United States Constitution. In *Colorado Seminary v. National Collegiate Athletic Association*,\(^{28}\) the court found that the NCAA's imposition of sanctions on Denver University, accompanied by the deprivation of several athletes' eligibility due to their violation of the NCAA's regulations against professionalism, were proper functions of the association. The court stated that "student athletes have no constitutionally protected property or liberty interests in participation in intercollegiate athletics, post-season competition, or appearances on television."\(^{29}\)

\(^{24}\) *NCAA Manual*, supra note 5, at 141.

\(^{25}\) Id. § 1(a)(3)-(4).

\(^{26}\) NCAA Const. art. 4, § 2(a) provides: "Section 2. Conditions and Obligations of Membership. The members of this association agree: (a) To administer their athletic programs in accordance with the constitution, the bylaws and other legislation of the Association. . . ." *See* Official Interpretation in *NCAA Manual*, supra note 5, at 25.

\(^{27}\) *NCAA Manual*, supra note 5, at 145-46. *See also* Regents of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158 (D. Minn. 1976) (mem.), rev'd 560 F.2d 352 (8th Cir. 1977) (University of Minnesota's refusal to comply with the NCAA's determination that three of its student-athletes be declared ineligible prompted the NCAA to declare the institution's entire intercollegiate athletic program ineligible for competition in NCAA Championship events and appearances on television for an indefinite period).

\(^{28}\) 417 F. Supp. 885 (D. Colo. 1976) (mem.), aff'd *per curiam*, 570 F.2d 520 (10th Cir. 1978).

\(^{29}\) Id. at 896. *But see* Behagan v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972) (mem.). In *Behagen*, the court regarded the student-athlete's eligibility as a property right which was subject to due process. The court stated: [T]he opportunity to participate in intercollegiate athletics is of substantial eco-
However, the actions of the NCAA in supervising and policing intercollegiate athletics are subject to constitutional scrutiny. The degree of scrutiny to which such an action is subject varies, however, depending on its discriminatory effects. NCAA policies and actions which tend to arbitrarily discriminate on the basis of alienage or against some clearly defined group are subject to strict judicial scrutiny. The NCAA must "bear the heavy burden of demonstrating that the (policy) is justified by a compelling interest."

If the NCAA policy does not appear to discriminate against a clearly defined class of people, it is subject to the "minimum rationality" standard of scrutiny. Thus, it will be upheld if it merely bears some rational relationship to a legitimate purpose of the NCAA.

When a court determines that an NCAA objective is legitimate and the means of promoting that objective do not deprive the insti-

cnomic value to many students. In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, . . . the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education.

Id. at 604.

30. In Buckton v. NCAA, 366 F. Supp. 1152, 1156 (D. Mass. 1973), the court stated, "the NCAA in supervising and policing the majority of intercollegiate athletics and athletes nationwide performs a public function, sovereign in nature, that subjects it to constitutional scrutiny."

31. In Howard Univ. V. NCAA, 510 F.2d 213, 215 (D.C. Cir. 1975), the court declared unconstitutional the NCAA's "foreign student" rule which stated: "Participation as an individual or as a representative of any team whatever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member institution shall count as one year of varsity competition." Id. at 215 n.1. The court reasoned that "the rule clearly establishes an alienage classification, treating foreign student-athletes differently than American student-athletes, and thus must be subjected to close judicial scrutiny." Id. at 222.

At the same time, the court scrutinized the NCAA's "1.600 rule." The 1.600 rule required that freshman athletic eligibility be limited to those student-athletes whose high school academic performance indicated their ability to maintain a 1.600 grade point average while in college. Id. at 216 n.3. The court upheld the rule as being reasonably related to proper objectives of the NCAA. Apparently the rule did not discriminate against any clearly defined group and thus was subject to a lesser standard of scrutiny. The rule merely needed to be rationally related to a legitimate objective of the NCAA. Id. at 221.

32. Id. at 222.


34. Parish v. NCAA, 361 F. Supp. 1220, 1226 (W.D. La. 1973), aff'd, 506 F.2d 1028, 1034 (5th Cir. 1975) (affirming the district court's ruling that the NCAA's 1.600 rule was rationally related to the NCAA's goal of insuring that the student-athlete be an integral part of his institution's student body and educational program).

35. Id.
tion or the student-athlete of their constitutional rights, the disciplinary action taken by the NCAA will be upheld.  

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C. The Student-Athlete

The student-athlete and his relationship with the institution that he attends have been the subject of various controversies. The court's characterization of this relationship is essential to a thorough analysis of the viability of the offer sheet as a means of forming a legally binding contract.

The status of the student-athlete, who frequently derives financial support from the institution, varies depending upon the context in which the relationship is being considered. The courts have determined the nature of the student-athlete's relationship with the institution in three types of situations: scholarship cases, income tax cases, and workman's compensation cases.

A pertinent issue that arises out of such litigation is whether the relationship between the student-athlete and the institution is contractual or purely academic. The academic interpretation centers on the scholarship money received by the athlete and his participation in intercollegiate sports as facets of the overall educational process. Intercollegiate athletics are perceived to be one of many extracurricular activities offered by the educational institution, while the scholarship provided for the athlete is viewed as financial assistance intended to defray educational costs. The scholarship awarded to the student-athlete on the basis of his future participation in a sport is analogous to financial aid provided to a student in recognition of his or her academic record or theatrical talents. Such scholarships may be contingent on that student maintaining a minimum grade point average or performing in certain theatrical productions.

The NCAA apparently concurs in this interpretation. Its constitution states:

36. Compare Parish v. NCAA, 361 F. Supp. 1220 (W.D. La. 1973) with Buckton v. NCAA, 366 F. Supp. 1152 (1972), in which the NCAA's efforts to keep professionalism out of intercollegiate sports were deemed unconstitutional because they were held "to irrationally discriminate against Canadian players who were resident aliens." 366 F. Supp. at 1160. See note 35 supra and accompanying text.

37. NCAA CONST. art. III, § 4 sets forth the principles governing financial aid.

38. WEISTART & LOWELL, supra note 11, at 8.

39. Id.

40. Id.

41. Id. at 8-9.

42. Id.
Section 2. Fundamental Policy. (2) The competitive athletic programs of colleges are designed to be a vital part of the educational system.

A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body . . . .

While the educational aspect of intercollegiate athletic participation has been acknowledged by the courts, the judiciary has tended to ignore the traditional educational approach espoused by the NCAA and its member institutions, and has found contractual relationships between student-athletes and their schools on numerous occasions.

For example, in *Taylor v. Wake Forest*, a student-athlete and his father sued Wake Forest University for the wrongful termination of his athletic scholarship. The court regarded the application for a football grant-in-aid, in which the student-athlete had agreed to maintain eligibility pursuant to NCAA rules, as a contract with the university. It denied any relief however, because the student-athlete, by refusing to participate in the football program, had not complied with his contractual obligations. His failure to perform relieved the university of its obligation to maintain his scholarship.

The finding of a contract between the athlete and the university infers that the athlete’s participation in intercollegiate sports is consideration for his scholarship, which is in turn regarded as compensation for his athletic services. The failure to participate results in the cancellation of the compensation. The court’s failure in *Taylor* to characterize the scholarship as academic contradicts the NCAA’s fundamental view of collegiate sports as an integral component of the educational process.

The court in *Colorado Seminary*, similarly refers to the athlete-

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43. NCAA Const. art. II, § 2.
44. See, e.g., the court’s discussion of the NCAA’s emphasis on the educational aspects of sport in *Colorado Seminary v. NCAA*, 417 F. Supp. 885, 889 (D. Colo. 1976) (mem.), aff’d per curiam, 570 F.2d 320 (10th Cir. 1978).
46. Id. at 121, 191 S.E.2d at 382.
47. NCAA Const. art. III, § 4(c)(2) provides in pertinent part: "(2) Aid may be gradated or cancelled if the recipient . . . (i) renders himself ineligible for intercollegiate competition; or . . . (iv) voluntarily withdraws from a sport for his own personal reasons. . . . Under (iv) above, such gradation or cancellation of aid may not occur prior to the conclusion of that term (semester or quarter)."
institution relationship as contractual. In assessing the property rights of student-athletes who were declared ineligible by the NCAA, it stated:

the contracted for property interest is not just the scholarship funds received in exchange for the athlete's services. The contractual interest includes the expectation that the student will be allowed to participate in intercollegiate competition, the only contingency being that he be good enough to make the team and that he avoid injury. Thus, the services offered is what is also sought-the playing of collegiate sports. The "liberty interest" in a forum . . . becomes a property interest provided by contract in a forum. And the claimed property interest in intercollegiate athletics has the added dimension of a contract to play intercollegiate athletics.\textsuperscript{49}

It is apparent that the courts are not adverse to characterizing the athlete-institution relationship as contractual.

The Internal Revenue Service (IRS) has also been confronted with the task of determining the nature of financial assistance from the institution to the athlete. The Internal Revenue Code generally provides that the recipient of a scholarship is not taxed on the income derived therefrom.\textsuperscript{50} In Revenue Ruling 77-263,\textsuperscript{51} the IRS ruled that an athletic scholarship was non-taxable income if it could not be cancelled in the year of its award due to the athlete's non-participation. The NCAA, however, permits its member institutions to cancel or graduate financial aid if a student withdraws from participation in a sport.\textsuperscript{52} Most universities award athletic scholarships on a year to year basis. If a scholarship athlete decides after a year to withdraw from athletics, renewal of his financial aid will undoubtedly be denied for the remainder of his college career. It can be inferred that the student-athlete's participation in intercollegiate sports is, in reality, consideration for the scholarship. This approach adds credence to the view that the athlete-institution relationship is contractual in nature.

Worker's compensation claims on behalf of student-athletes have likewise mandated the court's analysis of the athlete-institution relationship.\textsuperscript{53} The ultimate issues are whether the scholarship athlete may

\textsuperscript{49} Id. at 895 n.5.
\textsuperscript{50} I.R.C. § 117(A).
\textsuperscript{51} 1977-2 C.B. 47.
\textsuperscript{52} NCAA Const. art. III, § 4(c)(2). \textit{See} note 47 \textit{supra} for the text of this provision.
\textsuperscript{53} \textit{See} Cross, The College Athlete and the Institution, 38 Law & Contemp. Prob. 151, 165 (1973). Cross states:

It should be apparent, however, that the typical relationship between a student-
be regarded as an employee of the college or university, thereby giving rise to a contractual relationship.

The worker's compensation cases indicate that the courts will find an employer-employee relationship only if it appears that the scholarship or outside employment obtained by the student is compensation for his participation in an intercollegiate sport. Barring any extrinsic employment with the university or special circumstances surrounding his scholarship, the student-athlete will not be regarded as an employee of the institution. Whether the scholarship provided to the student-athlete is regarded as compensation seems to depend on the circumstances of each case. Absent any indications that the athletic scholar-

54. In Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 451, 33 Cal. Rptr. 169 (1963) (per curiam), a student athlete received $50 per quarter scholarship and rent money during the football season. Subsequent to his death in a plane crash on the return flight from a road game, his widow sought death benefits under the California worker's compensation laws. The California Court of Appeals annulled the Industrial Accident Commission's decision that the student-athlete was not an employee under the Worker's Compensation Act, CAL. LAB. CODE §§ 3200-5911 (1971). The court, however, stated:

It cannot be said as a matter of law that every student who received an "athletic scholarship" and plays on the school athletic team is an employee of the school. To so hold would be to thrust upon every student who so participates as an employee status to which he has never consented. . . . Only where the evidence establishes a contract of employment is such an inference reasonably to be drawn.

219 Cal. App. 2d at 467, 33 Cal. Rptr. at 175.

In University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953) (en banc), a student-athlete was employed in the maintenance of tennis courts. This employment was found to be contingent on his participation in football. As a result of sustaining an injury in football practice, he sought worker's compensation benefits. Because his employment was dependent on his playing football, the Supreme Court of Colorado affirmed the award of the Industrial Commission, concluding that the injuries sustained by the student-athlete in football practice arose out of his employment. The benefits received by the athlete were viewed as compensation for his football abilities.

Four years later, however, in State Compensation Ins. Fund v. Industrial Comm'n, 135 Colo. 570, 314 P.2d 288 (1957) (en banc), a student-athlete was fatally injured in a football game. The student-athlete had been on a football scholarship and was a part time employee of the school. The Colorado Supreme Court reversed and remanded the judgment of the trial court, which affirmed an award of death benefits to the athlete's widow by the Industrial Commission of Colorado. The court stated: "Since the evidence does not disclose any contractual obligations to play football, then the employer-employee relationship does not exist and there is no contract. . . . A review of the evidence disclosed that none of the benefits he received could, in any way, be claimed as consideration to play football . . . ."

135 Colo. at 572, 314 P.2d at 289-90. The court based its decision on the finding that the benefits conferred on the student-athlete were not given in consideration for participation in athletics as in Nemeth. Id.

55. Id.
ship is consideration for the student's participation in an intercollegiate sport, the courts will most likely deny the existence of an employment relationship and its contractual consequences.\textsuperscript{56}

Under the present interpretation of the Internal Revenue Code provisions, athletic scholarships appear to be taxable.\textsuperscript{57} The IRS, however, has apparently not enforced this interpretation and has refrained from taxing athletic scholarships.

The above analysis may suggest that public policy plays an integral role in both the IRS and judiciary characterizations of the relationship between the student-athlete and his institution. The hesitance of the IRS to tax in this area is probably attributable to the potentially negative effect that it might have on intercollegiate athletics. Because most scholarship student-athletes receive room and board and payment of educational expenses, taxation on the value of these benefits would be extremely burdensome for many student-athletes.\textsuperscript{58} The need for money to pay taxes would encourage professional influences in college athletics. Classification of scholarships as taxable compensation would also obscure the fine line between amateurism and professionalism. The court's aversion to characterizing all athletic scholarships as employment relationships similarly seems to stem from the adverse effect that it might have on intercollegiate sports by forcing the educational institutions to bear the responsibility and costs of providing unemployment compensation for injured student-athletes. This burden would be likely to impede the development of intercollegiate sports, which have experienced tremendous growth in the past 25 years.\textsuperscript{59}

III. THE OFFER SHEET

The primary area of concern in assessing the offer sheet and other

\textsuperscript{56} Id.

\textsuperscript{57} According to Rev. Rul. 77-263, an athletic scholarship is nontaxable income if it cannot be cancelled in the year of its award due to the athlete's non-participation. 1977-2 C.B. 47. The NCAA Constitution allows the institution to cancel or grade a scholarship at the end of the quarter or semester due to non-participation. NCAA Const. art. III, § 4(c)(2). Because a student-athlete's scholarship may be cancelled or graded at the end of the quarter or semester, it can be argued that the money received by him should be taxed by the IRS.

\textsuperscript{58} A student-athlete attending a private university in which the tuition is much higher than a state supported university would have to pay higher taxes although he is not actually receiving more income.

\textsuperscript{59} For example, since 1953 the total college football attendance figures have increased every year, except for one. Attendance has exceeded 31 million every year since 1973. NCAA, General Information Pamphlet 13 (1978). In 1979, over 35 million people attended college football games. L.A. Times, Jan. 22, 1980, § 3 (Sports), at 4, col. 1.
efforts by agents to evade NCAA regulations is whether there is a violation of the NCAA's constitution and bylaws, which can result in the termination of a student-athlete's eligibility. Although the NCAA has unequivocally stated that the offer sheet is violative of its constitution, a court will not enforce a declaration of ineligibility unless the it is rationally related to a legitimate objective of the association.

The objective that the NCAA purports to promote in this instance is amateurism. Its rules prohibit the student-athlete from even entering into an “agreement” to be represented by an agent. It can reasonably be argued that in signing the offer sheet, the student-athlete has legally agreed to nothing and therefore, has made no legal commitments. The signing of an offer sheet can be regarded as merely preliminary negotiations to a contract that will be made subsequent to the athlete's final season of eligibility. Thus, the signing of an offer sheet would not constitute an agreement or be an infraction of the NCAA's rules.

Conversely, the NCAA could maintain that the offer itself is sufficient “agreement,” even though it is not legally binding. Because the agent in most cases initiates the dealings with the student-athlete, the signing of the agent's offer sheet is evidence of the student-athlete's consent to a future representational contract. The offer signifies an agreement to be represented, even though the agreement can be revoked. As stated by Williston, an offer “is an expression by the offeror of his agreement that something over which he at least assumes to have control shall be done or happen or shall not be done or happen until the conditions stated in the offer are complied with.” Such analysis indicates that the offer sheet could be considered an agreement between the student-athlete and agent, violating the NCAA's rule barring agreements with agents.

For an NCAA rule to be upheld by a court, it must be rationally related to a legitimate goal of the association. It is debatable whether a rule that prohibits the student-athlete from signing an offer sheet that has no legally binding effect until after the athlete's intercollegiate ca-

60. See note 10 supra.
61. See notes 30-36 supra and accompanying text.
62. See note 5 supra. Williston states: “An agreement as the courts have said ‘is nothing more than a manifestation of mutual assent’ by two or more legally competent to one another.” WILLISTON, supra note 9, § 2.
63. No enforceable contractual relationship has been secured between the agent and athlete. The offer extended by the student-athlete is merely a part of the preliminary negotiations to the contract.
64. WILLISTON, supra note 9, § 24A.
65. See notes 29-35 supra and accompanying text.
reer is over, if at all, is rationally related to the preservation of amateurism in intercollegiate athletics. It is essential to analyze the rationale behind the NCAA's rule prohibiting agreements between student-athletes and agents in an attempt to preserve amateurism.

Amateur sports focus on the educational physical, mental and social benefits that the athlete derives from them. Theoretically, the athlete is motivated not by monetary benefits, but by his love of the sport. To preserve the purity of amateur competition, the NCAA seeks to exclude any influences which challenge the ideals of amateurism. Such influences include professional sports agents and teams. Payments by agents to student-athletes in contemplation of securing services in the future is repugnant to amateurism. While it would be an injustice to accuse all agents of such improprieties, it is no secret that non-repayable loans and under-the-table payments to athletes are pervasive in the athlete-agent relationship. To discourage transactions of this nature, the NCAA has enacted rules barring "agreements" between the student-athlete and the agent. A student-athlete who violates these rules is declared ineligible and is no longer allowed to compete in intercollegiate sports.

The student-athlete's right to make preparations for his future financial security by making a non-binding offer is impaired by the threat of ineligibility. The student-athlete's right to make such a non-binding offer must be balanced with the NCAA's right to promote amateurism. This obvious conflict is not easily amenable to resolution. Although the NCAA expressed itself adversely to the use of offer sheets, it did not impose any sanctions upon the colleges and universities whose student-athletes allegedly were parties to offer sheets. Future infractions, however, are likely to be pursued by the NCAA. Its uncompromising stance acts as fair warning to future student-athletes who contemplate entering offer sheet agreements.

The courts have previously upheld NCAA regulations barring the student-athlete from contracting to play a professional sport on the basis that the regulation, which would ultimately deprive the student-athlete of his eligibility, was rationally related to the legitimate NCAA

66. NCAA Const. art. III, § 1.
67. See generally NCAA Const. art. III.
68. See NCAA Const. art. III, § 1(a).
69. Johnson & Reid, supra note 7, at 57.
70. See note 10 supra.
71. Players who allegedly signed the offer sheets include: Ottis Anderson, University of Miami, Steve Atkins, University of Maryland, and Theotis Brown and Jerry Robinson, University of California, Los Angeles.
objective of preserving amateurism. Although the parties to an offer sheet do not contend that they have formed an enforceable contract until after the athlete’s senior season of eligibility, the Ninth Circuit has upheld the deprivation of a student athlete’s eligibility in an analogous situation. In *Shelton v. NCAA*, Shelton, a student-athlete, was declared ineligible to play college basketball at Oregon State University because he had signed a purportedly unenforceable contract to play for a professional basketball team. Shelton contended that the NCAA rule which rendered him ineligible regardless of the unenforceability of the contract created “an impermissible classification in violation of the Equal Protection Clause.” Shelton also maintained that it was “unreasonable to treat as a professional one who alleges that the contract which he signed is unenforceable.” The court acknowledged the occasional hardships caused by the NCAA’s rule prohibiting both enforceable and unenforceable contracts to play professionally. It upheld the NCAA regulation, however, stating, “[r]eliance on a signed contract as an indication that a student’s amateur status has been compromised is rationally related to the goal of preserving amateurism in intercollegiate athletics.”

The court further stated:

The NCAA and its member institutions cannot simply take an athlete’s word that the signed contract is void. An eligibility rule limited to contracts that would withstand a court test would be no rule at all. One could sign a contract, then allege that it was unenforceable and participate at will in college athletics while maintaining an option to enter the professional ranks at any time. Clearly, this would obliterate any remaining distinctions between amateur and professional athletes.

In *Shelton*, the Ninth Circuit clearly indicated that a student-athlete who has signed a contract to play a professional sport regardless of its legal enforceability, can constitutionally be declared ineligible for further competition in that sport by the NCAA. Although an offer sheet is not purported to create a contract at the time it is signed by the

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72. 539 F.2d 1197 (9th Cir. 1976).
73. Shelton contended that the contract he had signed with an American Basketball Association team was unenforceable because he had been induced to sign it by means of fraud and undue influence. *Id.* at 1198. The legal enforceability of the contract was the subject of another suit brought by Shelton against the professional team, which was pending at the same time as his action against the NCAA.
74. 539 F.2d at 1198.
75. *Id.*
76. *Id.*
77. *Id.* at 1199.
student-athlete, it is probable that the courts would similarly condone an NCAA rule prohibiting the signing of an offer sheet. A conclusion upholding such a regulation could reasonably be reached by looking through the form of the offer sheet to its substance. It is essentially a means of side-stepping the NCAA's objective of preserving amateurism in intercollegiate sports, an objective which has been deemed legitimate by the courts. While a contractual obligation is not created by a student-athlete's signature on an offer sheet, the relationship secured by the offer sheet between the student-athlete and the agent may frequently be accompanied by those aspects of professionalism, such as under-the-table loans, payments, and other extra benefits that the NCAA has endeavored to prevent. In this respect, the offer sheet may be equated with an actual contract to be represented by an agent. Thus, although the signing of an offer sheet may be innocuous in itself, the NCAA is justifiably apprehensive of the professional influences inherent in such a relationship. Because the NCAA's prohibiting the formation of representational contracts by means of the offer sheets appears to be rationally related to the NCAA's objective of excluding professionalism in intercollegiate sports, it will most likely be upheld by the courts.

IV. Is a Contract Formed in Violation of NCAA Rules Enforceable?

Assuming that the use of the offer sheet or any similar device is upheld by the courts as violative of NCAA rules, the question arises whether a contract formed by such means is valid and enforceable in the event of a breach by one of the parties.

As previously stated, student-athletes are frequently induced to breach a contract with one agent by another whose terms are more favorable. The rights of the agent who initially contracted with the student-athlete in violation of NCAA rules are uncertain. Cases dealing with breaches of professional sports contracts that are violative of NCAA rules exclusively involve student-athletes and professional

78. See note 76 supra and accompanying text.

79. In Shelton, the Ninth Circuit stated: “It is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules.” 539 F.2d at 1198. Thus, it appears that if an NCAA rule even remotely promotes a legitimate goal of the association, it will not be closely scrutinized by the courts. It may further be argued by the NCAA that the regulation barring the signing of an offer sheet does not prohibit the student athlete from entering into such an agreement, but merely precludes him from participating in NCAA sports after he has done so.

80. Johnson & Reid, supra note 7, at 30.
sports teams. An important analogy, however, can be drawn from such cases, providing the student-athlete with a viable defense to a breach of contract action initiated by an agent. Primarily, the student-athlete may utilize the unclean hands doctrine as a defense.

A. The Unclean Hands Defense

The adage that "he who comes into equity must come with clean hands" has been utilized as a defense in actions against student-athletes who have reneged on contracts made with professional teams. The unclean hands defense may similarly be used by a student-athlete in an action against him for breach of a contract formed by means of an offer sheet. The unclean hands defense closes the doors of the court to a party to a contract which is "tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." It may, therefore, preclude recovery by an agent who has secretly contracted with a student-athlete in violation of NCAA rules because of the bad faith and possible illegality of such a contract.

81. The competition for top rate players between the old AFL and NFL in the 1960's prompted many teams to contract with promising college players before their senior seasons of eligibility had ended. If a team selected a player in the first round of the draft, it wanted to ensure that the player would not sign with a team in the rival league. Induced by substantial amounts of money, numerous college players signed contracts to play professional football prior to the draft and the end of their senior seasons. See Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir.), cert. denied, 385 U.S. 840 (1966) (contract between pro football team and a student-athlete made in violation of NCAA rules held enforceable); New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961) (undisclosed contract between pro football team and a student-athlete held unenforceable on the basis of the clean hands doctrine); Detroit Football Co. v. Robinson, 186 F. Supp. 933 (E.D. La.) aff'd, 283 F.2d 657 (5th Cir. 1960) (the signing of contractual forms by a student-athlete to play for a pro football team merely constituted an offer because of the team's failure to satisfy a condition precedent of obtaining the NFL Commissioner's approval); Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717 (S.D. Cal. 1960) (same).

82. "He who comes into equity must come with clean hands. A court will neither aid in the commission of a fraud by enforcing a contract nor relieve one of two parties to a fraud from its consequences where both are in pari delicto." 7 B. Witkin, Summary of California Law 5233 (8th ed. 1974) [hereinafter cited as Witkin].

83. California courts have long acknowledged that the unclean hands defense is available in actions at law as well as those in equity. In Terry Trading Corp. v. Barsky, 210 Cal. 428, 437, 292 P. 474, 478 (1930), the court stated: "It is well settled that under the system of code pleading equitable defenses and equitable counterclaims may be set up in actions at law, as well as legal defenses and counterclaims in suits in equity." Accord, Goldstein v. Lees, 46 Cal. App. 3d 614, 120 Cal. Rptr. 253 (1975); Fibreboard Paper Prod. Corp. v. East Bay Union, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964).

84. Witkin, supra note 82, at 5233.
An example of the usage of the unclean hands defense as a result of the bad faith inherent to a contract made in violation of NCAA rules is found in *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.* In that case, Wellington Mara, the owner of the New York Football Giants persuaded Charles Flowers, a senior at the University of Mississippi, to sign a contract to play professional football prior to the expiration of his collegiate eligibility. The contract was violative of NCAA rules because it was made prior to the Sugar Bowl, where Flowers was scheduled to play his final game for the University of Mississippi. Mara and flowers agreed, however, to refrain from disclosing the signing until after the Sugar Bowl so that Flowers could not be declared ineligible.

The Fifth Circuit affirmed the district court's judgment denying Mara's request for specific performance by invoking the clean hands doctrine. The court focused on the deceptive intent of both Mara and Flowers in their conspiracy to conceal the existence of the contract.

We think no party has the right to create problems by its devious and deceitful conduct and then approach a court of equity with a plea that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout.

Thus, even though the court did not regard Mara's conduct as illegal, the clean hands doctrine was nevertheless applicable because it is based on equitable, not legal principles. The inequitable conduct was not in the signing of the contract to play professional football, but rather in the attempt to conceal the student-athlete's ineligibility, thereby deceiving the NCAA, the institution, and the public into be-

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85. 291 F.2d 471 (5th Cir. 1961).
86. Flowers also received a $3,500 bonus at the time of signing the contract. *Id.* at 473.
87. To ensure confidentiality, Mara agreed not to submit the contract to the NFL Commissioner for approval until after the Sugar Bowl. When Flowers unsuccessfully attempted to withdraw from the contract by telephone, Mara immediately filed the contract with the Commissioner who approved it. Flowers subsequently wrote a letter to Mara, returning the bonus money and informing him of his withdrawal from the contract. *Id.*
88. *Id.* at 474-75.
89. In describing the application of the clean hands doctrine, the United States Supreme Court has stated:

   Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim. . . .

lying that the student-athlete was still an amateur.90 The Fifth Circuit refused to consider the legal merits of the case and premised its decision exclusively on the parties inequitable intent to defraud interested third parties.91

However, the Tenth Circuit in Houston Oilers v. Neely92 regarded the secrecy of a contract which violated NCAA rules as an inadequate reason for the denial of equitable relief. The facts in Neely resembled those in New York Football Giants, Inc.93 Ralph Neely, a student-athlete from the University of Oklahoma contracted with the Houston Oilers thus rendering himself ineligible to play in the post-season Gator Bowl game. To enable Neely to participate in the Gator Bowl, it was agreed in an extrinsic oral understanding that the existence of the contract would not be disclosed until after the game.94 After apprising the Oklahoma coach of his contract with Houston, however, Neely was declared ineligible and did not play in the Gator Bowl.

The trial court denied injunctive relief on the basis of the clean hands doctrine. In reversing the trial court, the Tenth Circuit regarded the secretive nature and the deceitful intent of the parties to be of minimal significance.95 The court stated:

"[T]he above-mentioned conduct . . . does not furnish athletes with a legal excuse to avoid their contracts for reasons other than the temptations of more attractive offer. Although there are many dismal indications to the contrary, athletes, amateur or professional, and those connected with athletics, are bound by their contracts to the same extent as anyone else, and"

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90. 291 F.2d at 474.
91. The court states: "Without considering the legal issues on the merits, we affirm the judgment of the trial court. We do so by application of the age-old, but sometimes overlooked, doctrine that 'he who comes into equity must come with clean hands.'" Id. at 473.
93. 291 F.2d 471 (5th Cir. 1961).
94. Prior to the Gator Bowl, however, Neely entered negotiations with the Dallas Cowboys. He returned the bonus checks that had been conveyed to him upon his signing the Houston contract and advised the Oilers that he did not consider himself bound by his previously signed contract. 361 F.2d at 39.
95. The Tenth Circuit stated:

It is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time. Neely was free to bind himself to such a contract on December 1, 1964 (prior to the expiration of his eligibility) as he would have been after January 2, 1965 (after the expiration of his eligibility). Nor was Houston under any legal duty to publicize the contract or to keep it secret. Its agreement to keep secret that which it has a legal right to keep secret cannot be considered inequitable or unconscionable as those terms are ordinarily used in contract negotiations.

Id. at 42.
should not be allowed to repudiate them at their pleasure.\textsuperscript{96}

There are only two apparent disimilarities between \textit{New York Football Giants, Inc.} and \textit{Neely}. First, Neely's ineligibility was exposed prior to the Gator Bowl and he didn't play in the game whereas, Flowers played in the Sugar Bowl despite his ineligibility.\textsuperscript{97} Second, Neely was accompanied by a third party during the negotiation of the contract. Neither dissimilarity, however, appears to be of any significance in the court's reasoning.\textsuperscript{98} It is suggested, therefore, that the difference in the outcomes of \textit{Neely} and \textit{New York Football Giants, Inc.} is based primarily on the Tenth Circuit's apparent requirement of a higher degree of culpability on behalf of the plaintiff before it will apply the clean hands doctrine.

As previously stated, the clean hands doctrine is based on equitable principles. Illegality is not a prerequisite for its application. Thus, the \textit{Neely} court's interpretation of the clean hands doctrine appears to be overly stringent. The surreptitious formation of the contract was expressly intended to deceive the public as to Neely's amateur status. Had Neely played in the Gator Bowl and had his ineligibility been subsequently disclosed, the NCAA could have ordered the University of Oklahoma to forfeit both its gate receipts and the game. The threat of such severe sanctions to the University and its fans seems to justify the application of the clean hands doctrine to contracts made in this manner. A team which has worked diligently all season long can be stripped of a championship title if one of its members had been a party to an undisclosed contract which violated NCAA rules.\textsuperscript{99} The uniform

\begin{itemize}
\item \textsuperscript{96} \textit{Id.} at 41.
\item \textsuperscript{97} In reference to the \textit{New York Football Giants} case, however, the Tenth Circuit in \textit{Neely} asserted:

\begin{quote}
It is quite apparent that the player contract in \textit{[New York Football Giants]} was acquired under circumstances much different from those in this case, but if the rule announced in that case was intended to apply to every instance in which a contract is entered into with a college football player before a post season game with an understanding that it be kept secret to permit the player to compete in the game, then we must respectfully disagree with the conclusion.
\end{quote}

\textit{Id.} at 42.
\item \textsuperscript{98} \textit{See} notes 95-96 \textit{supra} and accompanying text. The Tenth Circuit based its decision on the premise that the contract was not formed in an inequitable manner.
\item \textsuperscript{99} \textit{NCAA MANUAL}, \textit{supra} note 5, at 148.

Section 10. If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the association is permitted to participate in intercollegiate competition contrary to such NCAA legislation \ldots, the Council may take any one or more of the following actions against such institutions in the interest of restitution and fairness to competing institutions:

\begin{itemize}
\item (b) Requirement that team victories achieved during participation by such ineligi-
denial of either specific performance or damages by the courts would seem to serve as an adequate deterrent to the formation of such contracts. The Tenth Circuit’s refusal to uniformly deny specific performance or damages\(^{100}\) can only encourage those who wish to contract with a student-athlete in violation of NCAA rules.\(^{101}\)

\section*{B. Illegality of the Contract as a Defense}

Although the courts have assessed only the equitable implications of such an agreement, if the relationship between the student-athlete and the institution is deemed contractual by the court as in \textit{Taylor},\(^{102}\) a student-athlete who is a party to a contract made by means of an offer sheet or any other similar device that violates NCAA rules may have another defense in a breach of contract action. It can be argued that a contract formed in violation of NCAA rules is also illegal. The \textit{Restatement of Contracts} provides that, “a bargain, the making or performance of which involves a breach of contract with a third person is illegal.”\(^{103}\) If the formation of a representational contract between the student-athlete and the agent was upheld as violative of NCAA rules and resulted in the ineligibility of the student-athlete, he would be precluded from complying with his contractual obligations to the university. According to \textit{Taylor}, the student-athlete’s contractual obligations include maintaining his athletic eligibility, both physically and scholastically.\(^{104}\) Because the formation of a representational contract by means of an offer sheet will probably render the student-athlete physically ineligible,\(^{105}\) thereby preventing him from performing on his contract with the school, such a contract could conceivably be held unenforceable due to its illicit nature.

The \textit{Restatement of Contracts}, further provides: “A bargain the

\begin{itemize}
  \item[(d)] Determination of ineligibility for one or more National Collegiate Championships in the sports and in the seasons in which such ineligible student-athlete participated.
\end{itemize}

\textit{Id.}

\(^{100}\) See note 95 \textit{supra}.

\(^{101}\) In \textit{Contractual Rights and Duties of the Professional Athlete—Playing the Game in a Bidding War}, 77 DICK L. REV. 352, 378 (1972) [hereinafter cited as \textit{Contractual Rights}], the author suggests that the refusal of all courts to enforce such secretive contracts on the basis of the clean hands doctrine would eliminate the problems caused by contracting with college athletes prior to the expiration of their eligibility.

\(^{102}\) See note 45-47 \textit{supra} and accompanying text.

\(^{103}\) \textit{RESTATEMENT OF CONTRACTS} § 576 (1932).

\(^{104}\) 16 N.C. App. at 121, 191 S.E.2d at 382.

\(^{105}\) See note 79 \textit{supra} and accompanying text.
performance of which would tend to harm third persons by deceiving them as to material facts, or by defrauding them, or without justification by other means is illegal."\textsuperscript{106} It cannot be disputed that the surreptitious formation of a contract in violation of NCAA rules "would tend to harm third persons by deceiving them as to material facts."\textsuperscript{107} Accordingly, if a secretly formed representational contract was held to be violative of NCAA rules, the contract could possibly be deemed illegal on this basis.

If a student-athlete competes in intercollegiate sports and is later found to have been a party to an offer sheet or any similar instrument that violates NCAA rules, he can be declared retroactively ineligible. Thus, the unpublicized signing of any such instrument in violation of NCAA rules that results in the athlete's ineligibility could have severe ramifications for both the student-athlete's team and school.\textsuperscript{108}

C. Possible Tort Liability of the Agent

At the same time, an agent who has induced a student-athlete into breaching his contractual relationship with the institution may have committed a tort. As previously indicated, the repercussions of a student-athlete participating in an intercollegiate sport despite his ineligibility may be disastrous to the university at which the athlete is a student. Taken to an extreme, a university could be compelled to forfeit the enormous gate receipts from a prestigious bowl game as well as its National Championship status. An agent who induces a student-athlete to enter into a contract which violates NCAA rules and, thereafter, participates in its concealment, could conceivably be liable in tort to the university that the student-athlete attends. Should a court determine that the athlete-institution relationship is contractual,\textsuperscript{109} an agent might be liable for interference with contractual relations.\textsuperscript{110} Should a court find no contract, the agent might still be liable for interference

\textsuperscript{106}. Restatement of Contracts § 577 (1932).
\textsuperscript{107}. Id.
\textsuperscript{108}. For example, in 1971, Villanova and Western Kentucky Universities were forced by the NCAA to return all gate receipts from the NCAA Championship Basketball Tournament because student-athletes on their teams had secretly signed contracts to play professional basketball. The teams were also deprived of the victories in which the ineligible players had participated. N.Y. Times, Mar. 8, 1972, at 50, col. 6. See also NCAA Manual, supra note 5, at 148.
\textsuperscript{109}. See notes 45-49 supra and accompanying text.
\textsuperscript{110}. W. Prosser, The Law of Torts § 129, at 929 (4th ed. 1971) [hereinafter cited as Prosser] states: "One type of interference with economic relations has been marked out rather definitely by the courts, and regarded as a separate tort, under the name of inducing breach of contract, or interference with contract."
with an advantageous relationship.\textsuperscript{111}

The fact that a scholarship contract between a student-athlete and an institution is terminable at will may be insignificant for the purpose of an action in tort for the inducement of its breach.\textsuperscript{112} In \textit{Buckaloo v. Johnson},\textsuperscript{113} the California Supreme Court stated:

The tort of interference with an advantageous relationship, or with a contract, does not, however, disintegrate because it relates to a contract not written or an advantageous relationship not articulated into a contract. The nature of the tort does not vary with the legal strength or enforceability of the relation disputed. The actionable wrong lies in the inducement to break the contract or sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.\textsuperscript{114}

Whether or not a contract exists, it cannot be disputed that there is an advantageous relationship between a star athlete and his university. An agent's disruption of such a relationship, which results in the loss of championship status or gate receipts, could render him liable in tort to the student-athlete's institution. A prerequisite to a cause of action for interference is that the agent actually induce the breach. Prosser states that "[a]cceptance of an offered bargain is not in itself inducement of the breach of a prior inconsistent contract. . . ."\textsuperscript{115} While an agent could utilize the offer sheet as evidence that he merely accepted the student-athlete's offer and did not induce the breach, the fact that the offer sheet was provided by the agent would mitigate this argument. Because the agent generally initiates and pursues negotiations with the student-athlete, denial of inducement would rarely be a viable defense to a cause of action for interference.

The possibility of a cause of action on behalf of a university against a professional sports agent for interference with either a contractual or advantageous relationship exists, especially where an agent

\textsuperscript{111} Prosser further states: "The subsequent development of the law has extended the principle to interference with advantageous economic relations even where they have not been cemented by contract. . . ." \textit{Id.} § 129, at 931.

\textsuperscript{112} "[T]he overwhelming majority of cases have held that interference with employments or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation of value to the plaintiff, and presumably to continue in effect." \textit{Id.} § 129, at 932-33.

\textsuperscript{113} 14 Cal. 3d 815, 537 P.2d 865, 122 Cal. Rptr. 745 (1975) (en banc).

\textsuperscript{114} \textit{Id.} at 822, 537 P.2d at 868, 122 Cal. Rptr. at 748.

\textsuperscript{115} PROSSER, \textit{supra} note 110, § 129, at 934.
conspires with the student-athlete to conceal the student-athlete's ineligibility. The potential liability of an agent in this respect is enormous.

**CONCLUSION**

The NCAA's interpretation that the offer sheet violates its rules due to the threat it poses to amateurism will most likely be upheld by the courts because the prohibition is rationally related to furthering the NCAA's legitimate objective of preserving amateurism in intercollegiate athletics. Thus, the utility of the offer sheet as the most recent means used to circumvent NCAA restrictions has been severely impaired.

The minimum rationality standard of scrutiny to which NCAA rules are subject would similarly serve to preclude any other schemes devised by agents to contract with a student-athlete before his eligibility has expired.

The signing of an offer sheet or any other agreement that violates NCAA rules by the student-athlete results in his ineligibility to compete in intercollegiate sports. If the student-athlete immediately ceases to participate in the collegiate sport and his relationship with the institution that he is attending is not regarded as contractual, an offer sheet or any other agreement with a student-athlete that violates NCAA rules will probably be held enforceable against the breaching party. If, however, the signing of the instrument that violates NCAA rules is not disclosed and the student athlete continues to participate in the intercollegiate sport, thus deceiving the NCAA, the university and the public as to his eligibility, the resulting contract will most probably be held unenforceable on the basis of the clean hands doctrine. Similarly, if a contract is determined to exist between the student-athlete and his institution, a subsequent representational agreement which forces the student-athlete to renege on his commitment to the institution could be found to be unenforceable on the grounds of its illegality, regardless of whether it is publicized or concealed. At the same time, the agent in such a contract could be exposed to tort liability for his improper interference with the college or university's contract or advantageous relationship with the student-athlete.

The future of the offer sheet and any other means of forming a representational contract with the student-athlete prior to the expiration of his eligibility appear bleak. The beneficial aspects of such schemes are outweighed by their inherent deficiencies. The likelihood that the signing of such agreements will be upheld by the courts as being violative of the NCAA Constitution and bylaws render them ter-
minally defective. Therefore, agents in the future may either comply with NCAA rules and sign a student-athlete to a representational contract after his eligibility has expired, or may contract with the student-athlete in violation of NCAA rules. The dilemma of the agent is obvious. The latter course of action threatens him with numerous potentially adverse legal repercussions and the former threatens him with starvation.

Joseph Michael Manisco
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