STUDENT-ATHLETE PROSPECTIVE ECONOMIC INTERESTS: CONTRACTUAL DIMENSIONS

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I. INTRODUCTION

The linebacker switched to defensive end sues for potential lost revenues. The star suspended for insufficient grades takes his professors to court for diminishing his worth. The whole team sues its head coach for a losing season and the resulting decline in interest in their individual talents.¹

The foregoing is illustrative of the unsympathetic reaction² to a $10,000,000 lawsuit filed by a student-athlete.³ Bryan Fortay alleges

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2. The sarcastic wit with which many media commentators responded to Fortay's lawsuit fails to conceal their outrage that a student-athlete, one of a privileged class of individuals in our society, would have the audacity to sue his institution for failure to award him a starting position. See e.g., William F. Reed, Plaintive Plaintiff, SPORTS ILLUSTRATED, Nov. 22, 1993, at 74 (describing Fortay as the "Non-Player of the Week"); Rick Reilly, See You in Court, SPORTS ILLUSTRATED, Aug. 30, 1993, at 112 (mockingly noting that Fortay's case will provide precedent for "scrubs" to sue their coaches); George Díaz, A Fortay for Whining Makes Fortay Ripe for Discipline by Hurricanes, ORLANDO SENTINEL, Nov. 12, 1993, at D3 (objecting to the lawsuit filed by Fortay). But see, Tim Layden, Fortay May Be Wave of Future, NEWSDAY, Aug. 30, 1993, at 91 (noting that Fortay's suit raises issues which cut to the heart of big-time college football and basketball).

Fortay's lawsuit generated a similar reaction from sports fans, particularly those in Florida. One of the most popular selling T-shirts in South Florida carried an unflattering depiction of Fortay as a baby sucking his thumb. See Randy Cremer, Fortay Stays Tight-Lipped While Others Do the Talking, ST. PETERSBURG TIMES, Nov. 11, 1993, at 9C; Randall Mell, Glimmer of Miami QB Glory Fades into a Bitter Lawsuit, CHICAGO TRIBUNE, Nov. 14, 1993, at C6 (pointing out that many commentators and fans believe that Fortay and his father are to blame for any misfortune which has befallen him).

The foregoing reactions are reflective, in part, of the extent to which we idealize student-athletes. We often student-athletes to be more than mere mortals and expect them to be respecters of society's highest qualities. DONALD CHU, THE CHARACTER OF AMERICAN HIGHER EDUCATION AND INTERCOLLEGIATE SPORT 179 (1989) [hereinafter INTERCOLLEGIATE SPORT]. As
that his former college, the University of Miami, improperly interfered with his opportunity to reap the financial rewards of a professional football career.

Upon reading a headline announcing Fortay's allegation concerning breach of a promise to make him starting quarterback, my initial reaction was not dissimilar to those expressed by many media commentators. After all, everyone knows that college sports, like other levels of athletics, is a competitive enterprise in which athletes must compete for the glory and opportunities attendant to carrying their institution's prestige onto the playing field against talented yet always less worthy and deserving opponents. Indeed no athlete could reasonably believe that he was guaranteed a position to start as

pointed out by Professor Donald Chu, "[t]he college athlete becomes a vessel for our hopes. He or she symbolizes in bold relief our struggles, and models of greatness that are part of the American dream — a dream which requires periodic reaffirmation in a cynical world." See also Id. at 10. When the behavior of student-athletes is inconsistent with the idealized status they are afforded, the reaction is often unpleasant as demonstrated in the Fortay matter.

Such visceral reactions are not surprising given the diverse functions which sports serve in our society. For instance, some sociologists see strong similarities between the functions and process of religion and sport. "Sports are organized and dramatized in a religious manner, with rituals and vestments that speak to the deep hunger for knowledge of one's place in the cosmos. Sports are religious in that they are organized institutions with disciplines and liturgies that teach religious qualities of heart, soul, and moral courage." (citations omitted). Id. at 177-78. See also, D. STANLEY EITZEN & GEORGE H. SAGE, SOCIOLOGY OF NORTH AMERICAN SPORT 189 (2d Ed. 1993) (commenting that sport has assumed so many characteristics of religion that it has emerged as a new religion which supplements and, at times, supplants traditional forms of religious expression).


4. EITZEN & SAGE, supra note 2, at 56-57 (critically commenting on the extent to which sports reflects the competitiveness which pervades American society); HARRY EDWARDS, SOCIOLOGY OF SPORT 119 (1973) "The competitiveness of sport is thus seen as a means of imbuing youth with the "spirit" and fortitude necessary to face the challenges of adult life and to make a social system work that is philosophically founded upon the notion of free and open competition"; See also BRUCE D. OLIVE & THOMAS A. UTTO, SPORT: If You Want to Build Character, Try Something Else, DONALD CHU, SPORT AND HIGHER EDUCATION 267 (1985) (acknowledging the competitiveness of organized sports, but challenging the widely held belief that it builds character and prepares young people to face the rigors of everyday life).

5. Athletic success is popularly believed to be an important means of enhancing a college or university's prestige which for institutions constitutes a significant symbolic asset important for internal and external reasons. D. CHU, INTERCOLLEGIATE SPORT, supra note 2, at 164-166. In addition to the enhancement of prestige, Professor Chu theorizes that college sports helps fulfill the mission of American higher education by: "(1) providing a vehicle for a sense of community, promoting student commitment to the institution, (3) helping label its graduates as successful, and (4) elevating individual beyond the limits of mundane realities to show then what they can be." Id. at 158. See, D. EITZEN & G. SAGE, supra note 4, at 189 (commenting that sport has assumed so many characteristics of religion that it has emerged as a new religion which supplements and, at times, supplants traditional forms of religious expression.)
quarterback for one of college football's premier athletic institutions. As repeatedly pointed out by one of my research assistants, a former student-athlete, it is commonly understood by those in and outside of college athletics that no one is guaranteed either a starting or reserve position on a sports team whether it be collegiate or professional. Moreover, even high school athletes are aware of the often repeated odds that of the approximately 5.4 million junior varsity and varsity high school athletes, only one in fifty will make a college team and of those only one in one thousand will compete at a professional level. Finally, Mr. Fortay and other student-athletes are members of a privileged class who are offered a rare opportunity to develop educationally at no cost to them. In short, what do they have to complain about?

Overcoming my visceral reaction (no doubt resulting from my temporary belief in the myths and romanticism associated with college

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6. The University of Miami has a distinguished history of producing outstanding football teams that compete in post-season bowls on a regular basis. See Murray Sperber, College Sports, Inc. 39 (1990) (noting the success of the University of Miami's football program during the 1980's). In addition, the school has produced its fair share of quarterbacks who graduate to professional football teams. Jim Kelly, Bernie Kosar and Vinny Testaverde are among the more distinguished of the former University of Miami quarterbacks who have gone on to have professional football careers. See, Rick Reilly, supra note 2, at 112; Gene Wojciechowski, Miami's Tradition of Talented Quarterbacks has Made if Tough for Torretta to Gain any Recognition, L.A. TIMES, Dec. 31, 1991, at C6 (discussing the highly acclaimed quarterbacks who have played for the University of Miami). In fact, Gino Torretta, the player selected to start at quarterback over Bryan Fortay, was the 1992 Heisman Trophy recipient. Michael Vega, Game, Name at Stake Amid Controversy, Rutgers' Fortay Tries to Focus on BC, BOSTON GLOBE, Oct. 8, 1993, at 94.

7. "Everyone in the country who is playing college football has got to go out every day and compete and win a 'job' on the football field." Ed Sherman, Defensive Coaches Beefing About New Hash Marks Rule, CHICAGO TRIBUNE, Aug. 15, 1993 at p. 8C (quoting University of Miami football coach, Dennis Erickson).


9. Sharon E. Rush, Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers, 31 ARIZ. L. REV. 549, 575, 586 (1989). As eluded to earlier, American society's relationship with its student and professional athletes is schizophrenic. On the one hand, society reveres student-athletes, who with their unique physical abilities also embody the most virtuous of values such as selflessness, devotion, and purity. On the other hand, because of their unique talents and the special status often afforded student-athletes, they are viewed with envy and at times hostility (as exemplified by Bryan Fortay's case) if they are perceived as departing from the neatly defined parameters of appropriate behavior to which they are supposed to adhere. Id. at 559-60. See also, CHU, INTERCOLLEGIATE SPORT, supra note 2, at 181 (We identify better with the college athlete than the professional athlete because of our ability to believe that they are less tainted by commercialism).

10. My departure from the realm of collegiate athletic mysticism was aided by my review of Fortay's 40 page complaint.

11. Refer to discussion in note 2 supra. See also, Rush, supra note 9, (discussing the myth of amateurism); Kenneth L. Shropshire, Legislation for the Glory of Sport: Amateurism and Compensation, 1 SETON HALL J. OF SPORT L. 7 (1991) (effectively describing the development
athletics), it became increasingly apparent that Bryan Fortay's case conceivably involved more than a case of a "Crybaby Quarterback" as he has become popularly known. This disparagement ensued in large part due to the media's almost singular focus on Fortay's allegations that the University of Miami improperly refused to award him the starting quarterback position. Beyond this allegation, the scenario presented in the lawsuit raises legitimate issues which require examination of the very essence of the student-athlete's relationship with his or her university. Preeminent among such issues is whether colleges and universities are obliged to provide an opportunity for student-athletes to enhance their athletic prowess so that such skills can be exploited in the professional sports market. Do contractual (express and implied) or tort theories, provide substantive bases for imposing any such duty on colleges and universities? These specific inquiries give rise to questions concerning whether the circumstances attendant to the student-athlete's relationship with his or her university support fashioning any such obligation. Indeed, do these circumstances warrant characterizing the student-athlete/university relationship as special or fiduciary? Finally, what if any, are the societal costs which may ensue from imposing such a duty on colleges and universities?

This article will not attempt to address, let alone, provide answers to all of the questions posed above. In a more modest endeavor, this

of the amateurism myth); Timothy Davis, Intercollegiate Athletics: Competing Models and Conflicting Realities, 24:2 Rutg. L. J. 36 (forthcoming March 1994) [hereinafter, Competing Models] (discussing the amateurism myth and other faulty assumptions associated with college athletes).

Commenting on the function of the mythology surrounding sports, Professor Chu states that "[t]he sports hero serves as a 'character myth' that encodes the value system of the society simply and efficiently. Such myths are an efficient means of presenting and transmitting that system. Such myths, because they are rooted in the society's past, create a sense of continuity, and contribute to the strengthening of group identity." (citations omitted). CHU, INTERCOLLEGIATE SPORT, supra note 2, at 173. Professor Shropshire examines the development and perpetuation of the amateurism myth from a more pragmatic and cynical perspective. In his view, it was deliberately promoted by those who stood to gain from the implementation of such a system. Shropshire, supra note 11, at 11.

12. John D. McKinnon, Struggling QB Sues School, ABA JOURNAL, December 1993, at 27 (noting that the "Crybaby Quarterback" characterization was coined by a sportswriter).

13. The claim which has placed Mr. Fortay into the media limelight revolves around assertions that the University of Miami failed to honor express oral promises that Fortay would be awarded the football team's starting quarterback position. Fortay v. University of Miami, No. 2:93cv03443 (U.S. D.N.J., filed Aug. 4, 1993) [hereinafter Complaint]. According to Fortay, Dennis Erickson, head coach for the Miami Hurricane's football team, promised that he would promote Fortay to the starting position from backup after the then present starting quarterback completed his final season. Complaint, ¶ 7, at 5. Fortay alleges what when the position became vacant, Erickson selected another quarterback to be the starter. Id. The Complaint also alleges that when Fortay realized Erickson would not abide by his promises, Fortay transferred to play for Rutgers University. Id. ¶ 8, at 6. The NCAA mandated requirement that he sit out a year, allegedly resulted in an impairment of his football skills. Id. ¶ 9, at 7.
article attempts to provide a skeletal framework for analyzing the contractual dimensions of a proposed obligation on institutions to provide student-athletes with an opportunity to participate in intercollegiate athletics and to develop athletic skills.

In this regard, the article first examines breach of express promise as providing the source of such a duty. Next, the paper briefly reviews the arguments which support implying a duty on colleges and universities to provide an educational opportunity to student-athletes. Drawing from this body of analytical work, this article further considers the appropriateness of imposing an implied duty on institutions to provide an opportunity for the student-athlete to participate in intercollegiate athletics and to enhance his or her athletic skills. The article also discusses the justifications, both theoretical and practical, for imposing such an implied obligation on institutions. Finally, the article proposes that fashioning a duty, albeit very limited, will promote the reasonable expectations of student-athletes while allowing institutions sufficient discretion to run their athletic programs. The article concludes that despite impediments, under limited circumstances, it is reasonable to hold colleges and universities accountable for conduct which obstructs a student-athlete’s professional career opportunities.

II. EXPRESS PROMISE AS A BASIS FOR RECOVERY

A. The Contractual Nature of the Relationship

In Bryan Fortay’s complaint against the University of Miami, certain of the claims resort to contract theory, \textit{inter alia}, as providing the substantive basis for the redress he seeks. Given the contractual nature of the student-athlete’s relationship with his or her university,\textsuperscript{20}

\begin{itemize}
  \item \textsuperscript{14} See infra, text accompanying notes.
  \item \textsuperscript{15} See infra text accompanying notes.
  \item \textsuperscript{16} See infra text accompanying notes.
  \item \textsuperscript{17} See infra text accompanying notes.
  \item \textsuperscript{18} See infra text accompanying notes.
  \item \textsuperscript{19} See infra text accompanying notes.
  \item \textsuperscript{20} Judicial authority and scholarly comment recognize that "[t]he Letter of Intent, the Statement of Financial Assistance, and various university publications such as bulletins and catalogues," create an express contract between a student-athlete and his or her institution. Davis, \textit{Competing Models}, supra note 11, at . Other commentators who recognize and discuss the contractual aspects of this relationship include: Michael J. Cozzillio, \textit{The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name}, 35 \textit{Wayne L. Rev.} 1275 (1989); Michael N. Widener, \textit{Suits by Student-Athletes Against Colleges for Obstructing

it is not surprising that contract would be turned to in efforts to hold institutions accountable for conduct which arguably interferes with a student-athlete's professional career opportunities. More importantly, resorting to contract theory seems appropriate in light of the promises and representations often made to recruit student-athletes to attend a particular school. Indeed it is the reliance and expectations occasioned by these representations which lead the way to contract. Given this, it is necessary to examine the circumstances in which contract can protect expectations created by express promises regarding the student-athlete's opportunities for participation in college sports and ultimately professional careers.\textsuperscript{21}

Yet resort to contract as a theoretical basis for redress is encumbered by both policy, conceptual and practical impediments. Indeed, imposing liability based upon a failure of institutions to honor express promises, is subject to principles which constrain and limit judicial intervention into a university's management of its affairs with students.\textsuperscript{22} Moreover, contract doctrine regulates whether representations made to student-athletes give rise to legally enforceable rights against colleges and universities.\textsuperscript{23}

As the following discussion reveals established principles and doctrine fail automatically to shield colleges from liability based on


But see John C. Weistart & Cym H. Lowell, \textit{The Law of Sports 11} (1978) (arguing courts and commentators have failed to fully consider whether the athletic scholarship could be characterized as a grant-in-aid which undercuts the contract formulation of the relationship).

21. As discussed below, such promises could give rise to a breach of contract action by virtue, in the college context, of the "specific promise" exception. Ordinarily, contract is the substantive theory for providing relief for unfulfilled representations which are promissory in nature. E.g., Brown v. Lockwood, 432 N.Y.S.2d 186, 194 (N.Y. App. Div. 1980); Yet, representations which relate to future actions also can give rise to fraud claims if at the time the defendant made the promise as to such future action or conduct, he had no intention of fulfilling what was promised. W. Page Keeton, \textit{Prosser and Keeton on the Law of Torts 763} (5th Ed. 1984) (promise made without intention to perform is actionable as fraud); see e.g., Dicke, Brown v. Kaplan, 763 F.Supp. 694, 701 (E.D. N.Y. 1990); Brown, 432 N.Y.S.2d at 194; The elements of this rule were succinctly described by a New York court as follows: An exception to this rule is that where the defendant makes a promise as to future action for the purpose of inducing the plaintiff to enter into a contract and does not fulfill that promise, a party who relies thereon to his detriment may recover for fraud where he can prove that at the time the promise was made the defendant had no intention of carrying it out. Brown, 432 N.Y.S.2d at 194.

22. See infra text accompanying notes.

23. See infra text accompanying notes.
conduct which improperly interferes with a student-athlete's athletic development and participation. A body of law has emerged which conceptually supports holding institutions accountable for interference of this sort which adversely impacts the professional opportunities of their student-athletes. As noted by Professors Weistart and Lowell, "the opportunity to participate is both a means of enabling the athlete to gain the requisite skill development for professional participation and to demonstrate those skills to the parties who 'scout' talent for professional competition." As detailed below, the economic interests which the student-athlete possesses is quite real and tangible.

24. Weistart and Lowell supra note 20, at 23.
25. See infra text accompanying notes.
26. Professors Weistart and Lowell suggest that the amateur athlete's, including the student-athlete, interest in participating in sports can be analyzed from an economic perspective. The economic aspect of sports participation ensues because of the potential student-athletes have to derive substantial economic benefits from competing in professional athletics. Weistart & Lowell supra note 20, at 22-3. These authors add that "[a]thletic participation may also be of economic importance to the extent that the athlete, through publicity and media exposure, becomes a public personality, thereby facilitating future employment." Id. at 23. The economic benefits which potentially accrue from participation in collegiate sports competition are discussed in considerable detail in the text accompanying notes infra.

Similarly, in Behagen v. Intercollegiate Conference of Faculty Representative, 346 F. Supp. 602 (D. Minn. 1972) the court took judicial notice of the student-athlete's economic interest in intercollegiate athletics. While 'big-time' college athletics may not be a 'total part of the educational process,' as are athletics in high school, . . . nonetheless the opportunity to participate in intercollegiate athletics is of substantial economic 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, this Court takes judicial notice of the fact that, to many, 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.

Behagen at 604.

27. In addition to these pecuniary benefits, some assert that educational value resides in sports participation. See, Weistart & Lowell, supra note 20, at 23 (suggesting that one benefit derived by the student-athlete from his or her participation in its substantial value as a part of the education process); John P. Sahl, College Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian, 21 Ariz. St. L. J. 621, 656 (1989) (noting that some view participation in a college's athletic program as an integral part of the educational experience since it "instills in student-athletes a desire for excellence, builds character, and encourages important concepts of cooperation and teamwork"); See, Regents of the University of Minnesota v. NCAA, 422 F. Supp. 1158, 1161 (D. Minn. 1976) (student-athlete participation in a college's sports program is an important part of his education).

In contrast to the views expressed above, some commentators argue that the supposed educational benefits derived specifically from participation in college sports, such as instilling within the student-athlete aspirations for excellence and other intangibles (e.g., internalization of norms of teamwork, cooperation and motivation), are illusory. See generally, Gary M. Travali, Values and Schizophrenia in Intercollegiate Athletics, 20 Cap. U. L. Rev. 587 (1991) challenging both what he characterizes as the untested benefits supposedly derived from
As a preliminary step to analyzing the contractual dimensions of this interest, the paper discusses the circumstances under which it is appropriate to afford judicial protection of these interests. It begins with a discussion of the broader constraints on the propriety of judicial intervention of institutional governance of student affairs. Addressed first is the effectiveness of the academic abstention doctrine as a mechanism of insulating colleges from judicial intervention.

B. Academic Abstention

Pursuant to the principle of academic abstention, courts defer to the decisions made by academic institutions regarding the affairs of their students. One area, in particular, where courts have afforded academic institutions considerable deference relates to suits by students challenging the adequacy or quality of the educational experience provided by an academic institution. Relying on notions of academic participation in collegiate sports and whether colleges, assuming such benefits do accrue therefrom, is the proper vehicle for instilling such values and benefits. As stated by Professor Travajo,

These former athletes talk in general terms about the values of leadership, discipline, hard work, and sportsmanship, which they attribute to the football field, the basketball court...

What I am not so certain about is whether I can believe that these people would not have incorporated these same values had they never set foot on a football field or a basketball court. I also wonder whether there is anything about intercollegiate athletics (particularly in its “big-time” form) that makes it a unique, or even particularly good, vehicle for transmitting these values. In fact, it is not clear to me that it is necessarily part of the university’s mission to inculcate such values. Even if one accepts this premise, is this a sufficiently important part of the university’s mission to justify the acceptance of big-time intercollegiate athletics.

*Id.* at 587.


29. See Mathewson, *supra* note 28, at 49 (pointing out that the academic abstention doctrine recently has shown signs of erosion). Cozzillo, *supra* note 20, at 1296-97 (academic abstention does not automatically insulate university decision-making from the judicial review, particularly regarding substantive issues implicating university-student relations).
abstention and other policy considerations, courts have uniformly invalidated educational malpractice claims, whether premised in tort or contract.

1. The Specific Promise Exception

Despite the impressive body of law rejecting educational malpractice causes of action, the judiciary has created limited exceptions to the rule of non-liability. College students have been permitted to successfully sue their institutions for breach of specific promises. Thus, when the implied contract between students and their institution obligates the latter to provide certain services, failure to comply gives rise to a cognizable breach of contract claim.

30. The policy reasons traditionally espoused for rejecting educational malpractice actions include: the difficulties in formulating a workable standard of care inasmuch as “the science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught”; the difficulty involved in proving the causal connection between the improper conduct and the injury, since external factors affect a student’s performance; and, the potential flood of litigation which might ensue from recognizing such a cause of action. John G. Culhane, Reinvigorating Educational Malpractice Claims: A Representational Focus, 67 WASH. L. REV. 349, 358-59 (1992). Professor Culhane, emphasizes, however, that commentators have not only rejected but effectively refuted the substantive policy reasons traditionally articulated for denying recovery for educational malpractice claims. Id. at 359. Commentators challenging these policy considerations in the context of educational malpractice claims asserted by student-athletes include: Timothy Davis, Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student-Athletes, 69 DEN. U. L. REV. 57 (1992) [hereinafter, Davis, Educational Malpractice]; See Daniel P. Rafferty, Note, Technical Foul! Ross v. Creighton University Allows Courts to Penalize Universities Which Do Not Perform Specific Promises Made to Student-Athletes, 38 S. DAK. L. REV. 173 (1993).

31. Culhane, supra note 30, at 350-51 (noting courts, with impressive uniformity, have rejected educational malpractice claims).

32. The relationship between non-athlete students and their colleges and universities is widely recognized as arising primarily from implied contract. Davis, Good Faith, supra note 28, at 786. The implied contract is created by virtue of “[t]he catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant. . . .” Virginia Davis Nordin, The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship, 8 J.C. & U.L. 141, 156 n.63 (1981-82).

33. Davis, Educational Malpractice, supra note 30, at 73 n.134 (1992). Judicial relief may be available where a student can demonstrate that the institution failed to deliver a “certain educational ‘package’”. In those cases, the student seeks relief arising from an institution’s promise to provide specific skills versus a general education. Culhane, supra note 30, at 356; See, Rafferty, supra note 30, at 181 (noting courts will allow contract claims to proceed against academic institutions when they have acted arbitrarily or the plaintiff pleads breach of a specific contractual obligation).

Another exception to the preclusive effect of the academic abstention doctrine is illustrated by cases in which an institution has accepted tuition but has failed to provide any educational services. Davis, Educational Malpractice, supra note 30 (citing to Peretti v. State of Mont., 464 F. Supp. 784 (D. Mont. 1979) as illustrative of the type of case which falls within this category).
have exhibited a willingness to apply this "specific promise exception" even in cases where the promise relates to the provision of educational services and other matters traditionally viewed as falling within the discretion of the educational institution.

(a) Illustrative Cases

For instance, the Colorado Court of Appeals recently adopted the specific promise exception as a device to circumvent the academic abstention doctrine and the rule of non-liability flowing therefrom. In *Tolman v. Censor Career Colleges, Inc.*, a former student sued a technical school challenging the overall quality of the instruction provided. Reasoning that general allegations attacking the academic quality of the instruction amounted to an educational malpractice claim, the court held such allegations were properly subject to dismissal. The court nevertheless held that allegations asserting that the institution failed to honor specific promises could present cognizable contract and fraud claims. Thus, the court adopted the "specific promise exception" even though the allegedly breached promises related to matters which typically fall within the discretion of the educational institution.

Similarly in *Cavaliere v. Duff's Business Institute*, students who had enrolled in a court reporting program at a private school alleged that the latter "failed to provide 'adequate, proper and quality' instruction and proper instructional tools." Plaintiffs alleged these inadequacies in the educational training provided by the institute precluded their advancement to the next level of course work. Unfortunately for plaintiffs, they failed to allege how specific deficiencies constituted a failure by the school to comply with the express promises it had made. Based on these shortcomings, the court, consistent with the limitations which inure with the specific promise exception, dismissed the complaint.

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35.  Id. at 103.
36.  Id. at 203.
37.  Id.
39.  Id. at 360.
40.  Id.
41.  Id. The court concluded that the difficulties with plaintiffs' suit lie in their failure to assert anything more than a general allegation concerning the lack of quality of the educational program. "The complaint does not allege that there was any specific undertaking, in the student handbook and catalog or otherwise, to provide a specific course of instruction which was not provided. There was no allegation that any of the courses which the handbook included in the school's curriculum were not offered. . . . Finally, there is no pleading of any other specific misrepresentation or failure to perform a contractual undertaking."  Id. at 370.
The court nevertheless noted the distinction between cases alleging educational malpractice where a plaintiff generally assails the quality of the educational instruction provided and those alleging breach of specific and express promises. In this regard, the court stated:

We can fathom no policy against permitting a cause of action for breach of contract or misrepresentation where, for example, a private trade school has made positive representations that a certain curriculum will be offered and the student then finds that such curriculum is not available or where the school has asserted that it is accredited or licensed to give a certain degree and it is later discovered that this is false. In such a case, the nature of the contractual undertaking and the breach thereof are clear and the plaintiff may be able to establish a cause of action against the offending institution. 42

(b) "Specific Promise Exception" Applied in College Sports

What I have characterized as the "specific promise exception" also has been recognized in the context of intercollegiate athletics. In Ross v. Creighton University 43, a former student-athlete sued his college

42. Id. at 369-70. Other courts have similarly held that colleges may be held liable for breach of express promises to their students under theories of breach of contract or fraud. Squires v. Sierra Nevada Educational Foundation Inc., 823 P.2d 256, 258 ( Nev. 1991) (contract and fraud claims alleging failure to provide specific educational services present cognizable causes of action); Wickstrom v. North Idaho College, 725 P.2d 155, 157 (Idaho 1986) (in a suit by college students alleging institution failed to educate them as promised in bulletin, courts recognized as dictum viability of breach of contract claim if students could demonstrate college failed to comply with express terms of contract between them and college); Malone v. Academy of Court Reporting, 582 N.E.2d 54, 58-59 (Ohio Ct. App. 1990) (in suit by students challenging paralegal curriculum, court recognizes distinction between general allegations of educational malpractice and allegations seeking redress for specific instances of misrepresentation and failure to comply with specific contractual undertakings); see, Helbig v. City of New York, 597 N.Y.S.2d 585, 587 (N.Y. Sup. Ct. 1993) (recognizing suits against educational institutions for their intentional misrepresentations even if the educational instruction provided is implicated). For discussion of and citations to additional cases recognizing the viability of contract and fraud actions against post-secondary institutions see, Davis, Ross v. Creighton University: Seventh Circuit Recognition of Limited Judicial Regulation of Intercollegiate Athletics, 17 S. Ill. Univ. L. J. 85, 107-109 (1992) [hereinafter Davis, Ross v. Creighton].

43. 957 F.2d 410 (7th Cir. 1992). The significance of the issues addressed in the Ross case have provided the fodder for recent articles including: Rafferty, supra note 30; Davis, Ross v. Creighton, supra note 42; Davis, Educational Malpractice supra note 30; Lesa A. Barkowsky, Note, The Illiteracy Problem and College Athletes: An Argument for Educational Malpractice, 16 Col.-VLA J.L. & Arts 537 (1992); Edmund J. Sherman, Good Sports, Bad Sports: The District Court Abandons College Athletes in Ross v. Creighton University, 11 Loyola Enter. L. J. 657 (1991).
alleging, *inter alia*, educational malpractice. The Seventh Circuit Court of Appeals concluded as follows:

To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor.\(^{44}\)

In recognizing the student-athlete’s right to sue his former college for breaches of specific contractual undertakings, the court did not impose new duties on the university but merely followed an emerging body of case law.\(^{45}\)

In summary, despite the considerable discretion the academic abstention doctrine affords institutions freely to govern the affairs of their students, existing precedent provides the availability of relief under contract and tort theory (typical pursuant to a fraud) for students dissatisfied with institutional conduct. A significant consequence of the specific promise and other exceptions\(^{46}\) to the doctrine of academic abstention is to pave the way for greater judicial intervention into universities’ relations with their students.

C. *Authority of the College Coach*

The applicability of the specific promise exception as a means of redress for representations affecting a student-athlete’s interest in athletic participation must take into account the role of the college coach. Coaches are afforded considerable discretion with respect to basic coaching prerogatives such as game strategy and player

\(^{44}\) Ross, 957 F.2d at 416.

\(^{45}\) For a discussion of the broader implications in the context of educational malpractice claims of the Seventh Circuit’s decision in Ross v. Creighton, see, Davis, *Ross v. Creighton* *supra* note 42; Rafferty, *supra* note 30.

\(^{46}\) At the collegiate level, courts also increasingly exhibit a willingness to intervene into administrative and business functions of colleges and universities. Nordin, *supra* note 32; accord, Latourette & King, *supra* note 28, at 200, 227 (notwithstanding a judicial policy of non-interference, college students are provided due process protection in regard to disciplinary, and to a lesser extent academic matters); Cozzillo, *supra* note 20, at 1296 (the discretion afforded schools to govern the affairs of their students is less pronounced when due process claims are involved); see also, William H. Sullivan, Note, *College or University Power to Withhold Diplomas*, 15 J.C. & U.L. 335, 337 (1989) (courts are more willing to intervene in university decision-making involving disciplinary rather than academic matters).
substitutions. They possess broad authority to control those aspects of student-athletes' lives which are related to their athletic performance. In this regard, the college coach's authority has been described as including "the power to establish and maintain health and training rules, to direct and conduct practice sessions, and to issue reasonable instructions during competition which will be accepted and followed without question."  

Just as the academic abstention doctrine no longer affords colleges and universities unlimited discretion in administering the academic and disciplinary affairs of non-athlete students, the discretion afforded coaches to control the athletic aspects of student-athletes' college experience is limited. Indeed the discretion granted college coaches relating to athletic matters, such as player positions, playing time, practice schedules, or curfews, can be analogized to the discretion afforded college professors with respect to academic prerogatives, such as developing lesson plans and awarding grades. Thus, the discretion available to college coaches, and professors alike, can be viewed as specific applications of the academic abstention doctrine. The doctrine then provides a mechanism for insulating from judicial scrutiny decisions within the professor's and the coach's professional expertise.

Yet, as is true with regard to academic matters, the academic abstention doctrine will not automatically preclude a court from exercising its prerogative to assert jurisdiction to adjudicate a dispute concerning a college and a student-athlete. Assuming that notions which underlie the academic abstention doctrine provide the source of the college coach's authority, the specific promise exception is

47. Cozzillio supra note 20, at 1367.

48. Weistart & Lowell, supra note 20, at 25. Professors Weistart and Lowell add that it is commonly understood that coaches are afforded the authority to supervise an athlete's conduct. Id. See Harry M. Cross, The College Athlete and the Institution, 38 LAW & CONTEM. PROBLEMS 151, 168 (1973) (suggesting the authority of coaches to control the athletic aspects of a student-athlete's affairs is based on the need to further the purpose of the athletic program).

49. Weistart and Lowell, supra note 20, at 25-6. The extent to which institutions through their athletic departments dominate virtually all aspects of a student-athlete's college experience is detailed in text accompanying notes, infra.

50. Cozzillio, supra note 20, at 1300-01 n.103.

51. Id. at 1300-01 n.103 (concluding that coaching decisions regarding the conduct of the athlete program and a student-athlete's playing time and the like should not be subjected to strict judicial scrutiny); see, Felix Springier, A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions, 10 CONN. L. REV. 318, 347 n. 164 (1978) (decisions regarding who should play ultimately rests with coach).

52. Cozzillio, supra note 20, at 1296-97 (the contractual underpinnings of the student-athlete/university relationship reduces the availability of the academic abstention doctrine).

53. See generally, Omar S. Parker, Comment, The Authority of a College Coach: A Legal Analysis, 49 OREGON L. REV. 442 (1970) (discussing possible sources of coaching
available as a means of limiting this authority even with regard to matters typically within the coach’s athletic prerogative. In short, the academic abstention doctrine, regardless of the precise context to which it applies cannot nullify the right of students to enforce specific promises made by their institutions.\textsuperscript{54}

D. Actionable Representations

The ability of a student-athlete to overcome the potential preclusiveness of the academic abstention doctrine is intimately tied to the most critical inquiry — what types of representations are actionable. Stated somewhat differently, under what circumstances will statements by agents of the institutions (most often these would be coaches) be sufficient to create duties, the breach of which, may impact a student-athlete’s interest in athletic participation.

Promises regarding the student-athlete’s athletic participation which are explicitly delineated in the contract might be actionable. Yet the odds of this occurring are highly unlikely given the use of the standard form documents, principally the Letter of Intent and the Statement of Financial Aid, which comprise the express contract between colleges and student-athletes.\textsuperscript{55}

In light of this, oral representations intended to induce student-athletes to attend a particular school are more likely candidates for bestowing enforceable rights on the student-athlete related to their athletic participation. The following discussion proposes that with regard to these representations, the extent to which they are actionable will turn on their level of specificity and the reasonable expectations arising therefrom. This in turn, requires consideration of the circumstances attendant to the relationship — in particular the circumstances surrounding the process by which student-athletes are recruited to attend college. As demonstrated below, examination of

\textsuperscript{54} Cozzillo, \textit{supra} note 20, at 1301 n.103. (concluding the academic abstention doctrine operates only to qualify those elements of the student-athlete/university relationship which rests beyond the bounds of their express contract. The doctrine will not "\textit{IPSO FACTO}" negate enforcement of obligations created by promises exchanged between parties to the agreement).

\textsuperscript{55} Unequal bargaining power coupled with the athletic department’s desire to maintain flexibility, prevent a student-athlete from negotiating for the inclusion of specific promises relating to his or her athletic participation into the express contract.
the recruitment process aids in determining where to draw the line between statements which are deemed worthy of enforcement since they express an intention by the promisor to be bound in some way. 56

1. The Recruitment Process

The evolution of college athletics over the past century has resulted in fierce pursuit by colleges of high school athletes. 57 One all too common consequence of this intense competition for the best athletes has been recruiting violations by athletic programs seeking an advantage over the competition. 58 In addition, the process by which colleges procure the services of high school athletes has become more sophisticated 59 and costly devouring substantial amounts of athletic department resources. 60

The commercialization of big-time college athletics and the concomitant pressure on college coaches to field successful sports programs underlie this competitiveness in the recruitment process. 61 The factors which propel recruiting have been adroitly described by one commentator as follows:

The pressure to produce winning teams increases efforts to recruit for athletic purposes. 'Recruiting is the name of the game' is the cliche reflecting the necessity to have a team of superior

56. See generally, Culhane, supra note 30, at 398 (noting the distinction between those representations for which a party intends to be legally bound and those representations which merely amount to puffing and consequently express no such intention).
58. A study of ethical abuses in college athletics commissioned by the American Council of Education revealed the following kinds of recruiting violations: altering high school academic transcripts and admission test scores; using substitutes to take admissions tests; offering jobs to relatives of recruits; and providing extra benefits such as money, cars and apartments. EITZEN & SAGE, supra note 2, at 132-33.
Additional examples of recruiting violations engaged in by colleges and universities as a result of the increased pressures to win are documented in Davis, Good Faith supra note 28, at 751-52; See generally Sperber, supra note 6, at 249-55 (outlining the improper techniques employed to gain a recruiting advantage).
59. For a detailed description of the recruitment process see generally J. ROONEY, supra note 57. A less detailed yet useful account of the recruitment process, particularly the financial aspects of recruiting, can be found in M. SPERBER, supra note 6, at 229-55.
60. Athletic departments over time have increased the amount of resources which are devoted entirely to recruitment efforts. M. SPERBER, supra note 6, at 110-11.
61. One writer provided the following explanation as to why schools engage in improper recruiting activities. "The commercial atmosphere that hovers over big-time sport is a major contributor. Schools are in the entertainment business—a business separate in almost all respects from their primary educational purpose. They must offer a quality product to their customers to insure [sic] success, and that quality product is a good team, year after year." J. ROONEY, supra note 57, at 141-42.
athletic ability to win. The important variable is likely to be the ability of team members rather than the quality of the coaching or the desire to win. The coach’s desire to excel, to do a superior job in training, to have players who achieve distinction, all can incline him to recruit. Yet, the primary pressure is usually external, from the institution or its alumni or supporters, in a ‘job-on-the-line’ manner.62

Given these dynamics, encouraging high school athletes to attend his or her college is a principal function of the college coach.63 Indeed, coaches have been described as salesmen whose job is to convince high school seniors to sign the Letter of Intent signifying the prospective student-athlete will compete for their college.64 As expressed by a sports journalist: “Coaches, after all, are salesman. Their jobs depend mainly on convincing high school seniors to sign on the dotted line the first Wednesday in February. Doing that requires painting a rosy picture. The glass isn’t half empty or half full in recruiting, it’s flowing over the top.”65

The recruitment efforts of athletic departments are also influenced by the student-athlete’s professional aspirations. High school recruits are interested in attending a school which will enable them to enhance their opportunity to compete professionally. These professional aspirations play a significant role in the student-athlete’s school selection decision. For instance, because of professional aspirations, the amount of playing time likely to be afforded becomes a key consideration in a high school athlete’s selection of a college sports

63. Layden, supra note 2, at 91. The source of the competition to recruit the top players, is the pressure placed on coaches to win. See generally, Bobby Bowden, Tension, Pain, Satisfaction: Inside the Recruiting Game, N.Y. TIMES, Feb. 14, 1988, § 5, at p. 7 (describing the pressures associated with college recruiting); EITZEN & SAGE supra note 2, at 131-134 (discussing the way in which the commercialization of college sports has increased the pressure on coaches to field winning teams).

The competition for blue-chip basketball players is particularly intense since one player can transform a mediocre basketball program into a contender. McMILLEN & COGGINS, supra note 8, at 44.

64. Barry Temkin, Suit Could Chill Recruiters’ Pledges, CHICAGO TRIBUNE, Sept. 5, 1993, at 20C. Some suggest that the job of a college coach often hinges on the high-school players who he has been able to recruit. University of Kansas basketball coach, Roy Williams, states that “[i]t seems like it’s gotten to the point where a coach can go 0-27, but if he signs big-name recruits, his job is safe.” Alexander Wolff, Finders, Keepers, Losers, Sleepers, SPORTS ILL., Feb. 19, 1993, at 52. See also Temkin, supra and SPERBER supra note 6, at 111; see, EITZEN & SAGE, supra note 2, at 61 (all the foregoing sources note that a coaches’ jobs depend on who they recruit).

65. Temkin, supra note 64.

As noted by another writer, “[r]are is the athlete who chooses a college because he’s told, Son, if you work your butt off, study real hard and eat bread and water, maybe you can make the traveling squad.” Layden, supra note 2, at 91.
program. In addition many high school athletes believe that starting as a freshman on a winning team will afford the maximum amount of playing time and television exposure. All of this will presumably improve their preparation and chances for the illusive, yet highly sought after professional career.

In attempting to sell their athletic programs, college coaches will often exploit the professional aspirations of student-athletes. A recruiter will emphasize the number of graduates of his institution who have signed professional contracts. Basketball coach Larry Brown, explained the way in which coaches will exploit this dream. “Every kid I recruited for college felt he had an opportunity to play in the NBA and I liked them to have those expectations. So they give themselves, their trust, to you from day one, hoping to reach that goal.”

Due to the high school athlete’s professional aspirations and the college coach’s desire to field a winning team, the recruitment process has been defined as a negotiation. The prospective student-athlete will want to know when they will play, what position they will play, whether the college is recruiting other athletes for the same position and which student-athlete currently occupies the position the athlete presumably is being recruited to fill. Coaches often provide answers which are motivated by their desire for the high school athlete to matriculate and participate in intercollegiate competition at a particular school, but which fail to comport with reality. For instance, a coach may inform a student-athlete that he is the only one being recruited to fill a particular position when in reality the college may be recruiting

66. M. Sperber, supra note 6, at 230.
67. Id. Specific representations which are often made in order to induce a high school athlete to matriculate and compete athletically are discussed in the text accompanying notes 68-70 infra.
68. M. Sperber, supra note 6, at 229.
69. Layden, supra note 2, (referring to comments of renowned USC football coach John Robinson).

This is not intended to suggest that student-athletes enter into contracts from a perspective of relative equality of bargaining power with the college or university. Professor Cozzillio believes that the time constraints involved in the recruiting process, the presence of multiple persuaders and the absence of advisors who have no stake in the student-athlete’s decision converge to create a process which is “rife with potential abuse through both blatant coercion and subtle coaxing. . . . The fawning and gentle arm twisting by college coaches, athletic directors, alumni and parents often creates a blurred line between friendly persuasion and cajolery that impinges upon the student-athlete’s ability to contract freely.” Cozzillio, supra note 20, at 1332.

70. Temkin, supra note 64 (providing examples, such as that of a blue chip student-athlete, Felipe Lopez, who stated he refused to attend the University of Kentucky because another star who played the same position was already on the team). For other illustrations see, M. Sperber supra note 6, at 230.
71. Temkin, supra note 64.
several other high school athletes for the same position. With the pressure on institutions to field winning teams, and the student-athlete's professional aspirations as a backdrop, the pertinent issue can be framed as when will such statements provide the basis for cognizable claims for relief?

2. Determining the Requisite Specificity

A leading contracts scholar has written that "[t]he law of contract is for the most part the law of promises. Therefore, the first great question of contract law . . . is, what kinds of promises should the law enforce?" Indeed in this context, the pertinent question can be more narrowly defined as when does a representation by a college constitute a promise on which a student-athlete can sue to protect his expectation interest.

The Restatement (Second) of Contracts defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Thus, the representation must be of such a nature that it makes assurances as to the future conduct of the institution and thereby creates expectations in the student-athlete. Therefore, to be actionable, the representation must be such that the student-athlete believes that the coach has made a commitment which creates an obligation, on the part of the coach, to engage or to refrain from engaging in certain conduct.

In attempting to determine whether a representation is actionable, the reasoning employed in analyzing the viability of educational malpractice claims by student-athletes is instructive. As noted above, in the educational malpractice context, commentators propose that institutions should be held liable for breach of specific promises. These commentators note, however, that not all representations will provide

72. Such statements when coupled with the "delusion-filled" atmosphere which pervades athletics leads to the inevitable misunderstanding between coaches, student-athlete and the latter's parents as to exactly what promises were made. Temkin, supra note 64. "The bottom line is you're selling fantasy, dreams, hopes, possibilities. . . . In that way, it's no different from any other part of society. Every business is trying to attract greater talent as compared to its adversaries, and they say things to represent a better picture than really exists." Id. (quoting the editor of a recruiting magazine).


75. This type of statement would no doubt amount to a promise which would possess the degree of specificity necessary to deprive the coach of the discretion which he would otherwise be granted to run his program and to avoid application of the academic abstention doctrine.
the basis for relief. Thus, in order to be sufficient, the representation must be more than mere puffing or sales talk intended to persuade the student-athlete to attend the recruiter's institution. With respect to claims pertaining to educational matters, absent specific statements concerning the value of the proffered education, no expectation interest worthy of judicial protection can be reasonably formed by the student-athlete. If, however, the circumstances create a reasonable belief that the student-athlete was "receiving assurance as to specific facts about his forthcoming education," relief may be available. Moreover, it has been persuasively argued that express promises made by athletic department representatives assuring student-athletes that they will receive a valuable education while attending the institution, arguably become a part of the contract between the student-athlete and the institution.

This reasoning, recognized in part by the Seventh Circuit in Ross v. Creighton University, applies both to unequivocal representations concerning the quality of the education as well as to representations concerning the student-athlete's athletic participation. Accordingly, an institution's failure to honor specific covenants related to these matters may constitute a failure of the institution to fulfill its performance obligations under its contract with the student-athlete.

76. Widener, supra note 20, at 483.
77. Id.
78. Id.
79. Id. at 476 (also commenting that even if the express terms do not become a part of the contract, they may nevertheless provide the basis for a deceit cause of action).

Professor Cozzillio suggests that express representations made to induce a student-athlete to attend a particular institution become a part of the express contract between the institution and the student-athlete. Cozzillio, supra note 20, at 1367.

The student-athlete may encounter obstacles in arguing that oral promises, albeit specific, should become a part of the express contract between the student-athlete and the university. The parol evidence rule may operate as a doctrinal obstacle to recovery. Id. at 1291, n.55 (pointing out that attempts to include prior agreements into the Letter of Intent might run afoul of the parol evidence rule). However, given the modern tendency to restrict the operation of the rule, as well as the plethora of judicially recognized exceptions, it would be unwise for a college to place too much reliance on the parol rule as a means of preventing the oral promises from becoming a part of the express terms of the contract. See generally, Michael B. Metzger, The Parol Evidence Rule: Promissory Estoppel's Next Conquest?, 36 Vand. L. Rev. 1383, 1398-1403 (1983) (commenting on the numerous judicially created exceptions to the rule and the modern trend toward liberally applying the parol evidence rule); Michael A. Lawrence, Comment, The Parol Evidence Rule in Wisconsin: Status in the Law of Contract, Revisited, 1991 Wis. L. Rev. 1071 (also noting the trend toward liberally applying the rule).

80. Refer to discussion accompanying notes 70-80, supra.
81. Cozzillio, supra note 20, at 1367.
82. Id. See also Ron Wacukauksi, The Regulation of Academic Standard in Intercollegiate Athletics, 1982 Ariz. St. L.J. 79, 100 (concluding in the educational malpractice context that if the student-athlete proves a specific promise to provide a particular service, the law should provide a remedy either under a contract or promissory estoppel theory).
As noted above, because of the discretion afforded college coaches to run their programs by determining such matters as game strategy and substitutions, the promises must be specific. Thus the types of representations which arguably would have the requisite degree of specificity to override the coaches discretion and to create reasonable expectations on the part of the student-athlete include promises that: (1) a student-athlete will be given a starting position; (2) a student-athlete will be provided with a minimal amount of playing time; (3) a particular coach will remain; (4) the institution will provide additional and specialized training to enhance the student-athlete's athletic skills; (5) the athletic department will not recruit or sign other players to a particular position so as to ensure sufficient playing time for the recruited athlete; (6) red shirted players will be guaranteed a scholarship for five years; and (7) a student-athlete will start during his first year. Absent express representations concerning such matters, student-athletes will fail to present justiciable breach of express contract claims.

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83. Cozzillio, supra note 20, at 1367.
84. Id. (arguing such a promise, if made, could create a binding obligation on the college).
85. Id.
86. Id.

In commenting on this, Professor Cozzillio concludes that a college which fails to honor its promise to maintain its current coaching staff runs a risk of legal reprisal since many schools use such representations as a key incentive for the student-athlete's commitment. He also argues however that student-athletes would have to overcome language in the Letter of Intent which attempts to restrict their ability to transfer from a college in the event a coach departs. Id. at 1291 n.55.

Elaborate on difficulties with regard to this promise.

87. It is worth noting that such a promise also runs afoul of NCAA regulations. The NCAA Constitution mandates that scholarships will be awarded for one-year terms. MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION § 15.3.3.1. (1993) [Hereinafter cited as NCAA MANUAL].

88. Statements which might fall short of the degree of specificity required to obligate an institution might include the following: (1) the student-athlete will be an All American; (2) the student-athlete will be an impact player; (3) you will become a well rounded individual; (4) you will become a professional lottery pick; (5) your athletic abilities will be enhanced if you attend this institution; (6) the university will see to it that you remain academically and therefore athletically eligible; and (7) the institution's extensive red shirt program will permit you to get an extra step or two on other athletes.

The foregoing representations on their face appear too general to amount to the type of specific promise for which liability may be imposed. It should be noted, however, that under some circumstances statements which appear merely to constitute expressions of opinion may be actionable where special circumstances are present. These circumstances were aptly described in the context of fraud claims by student-athletes seeking relief for conduct by the institutions which improperly interferes with educational opportunity.

One such special circumstance exists where the high school recruit reposes trust and confidence in the college recruiter, who is a member of the institution's athletic coaching staff. In this situation, reliance on the speaker's opinion is
3. The Certainty Limitation

A student-athlete who successfully establishes an express promise related to his athletic participation was made and breach will encounter other doctrinal impediments to recovery. Student-athlete claims alleging that an institution's breach of contractual obligations adversely impacted the potential economic gain to be derived from developing and displaying their athletic abilities, are likely to be challenged as too speculative.\(^\text{89}\) Despite the real potential for economic gain resulting from sports participation, this argument has been successfully asserted in other contexts. For instance, most courts have relied on lack of certainty reasoning in rejecting student-athlete claims that their eligibility to participate in college sports constitutes a property interest for constitutional purposes.\(^\text{90}\) "Most courts have simply characterized

\[\text{justifiable and enables relief. If the relationship of special trust and repose confidence is maintained after matriculation, liability may attach where the institution's representatives, after the scholarship agreement is executed, fail to disclose material facts relating to its bargain with the student athlete.}\]

A second special circumstance enabling a cause of action for deceit to go forward concerns the knowledge of one party to a transaction. This circumstance arises where the deceived party understands the misrepresenting party to have special knowledge regarding the subject matter of the transaction, to which the former has no access. Because the expressed opinion contains an implied assertion that the knowledgeable party possesses facts justifying his opinion, the non-expert party may rely on the speaker's words. Widener, supra note 20, at 476-77. Accord, Keeton, supra note 21, at 760-61; West v. Western Casualty and Surety Co., 846 F.2d 387, 393-94 (7th Cir. 1988).

The special circumstances identified above are as likely to be present in those cases in which a student-athlete alleges improper interference with athletic opportunity as educational opportunity.

\(^\text{89}\) This argument will be asserted whether the claim is premised on breach of a duty arising either out of an express promise or some how implied into the relationship between the parties. The extent to which institutions may possess implied obligations to further the athletic development of their student-athletes is discussed below.

\(^\text{90}\) Most courts have concluded that for constitutional purposes, student-athletes do not have a property interest in intercollegiate eligibility because the nature of the proposed property interest is too speculative. Sahl, supra note 27, at 655. According to Professor Sahl, student-athletes have most often advanced three theories in arguing that they possess a constitutionally protected property interest in sports eligibility. He summarizes these theories, which for the most part have been judicially rejected as follows: (1) the athletic participation is an integral part of the educational process theory; (2) the contract theory that the student-athlete's contractual relationship with his institution creates a legitimate expectation and entitlement to due process to protect his or her eligibility interest; and (3) economic benefit of athletic participation theory. Id. at 656-58.

The economic benefit theory views college sports, at least in part, as providing a training ground for student-athletes and their property interest arises from the student-athletes' interests in preparing for careers as professional athletes. Brian L. Porto, Note, Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility, 62 Ind. L. J. 1151, 1159 (1987). The majority of courts have rejected this argument on grounds that "because so few former college athletes ever sign a professional
student-athletes’ claims, based on an implied understanding that they would be eligible to compete, as too speculative and unilateral in nature.”91 Thus it has been argued that “it would be impossible to assess the potential economic value of a student-athlete and whether that value is directly related to intercollegiate eligibility.”92

It is a basic tenet of contract law that damages for breach of contract must be established with “certainty, and not left to speculation or conjecture.”93 In determining the utility of this limitation in assessing the recoverability of damages by student-athletes, the existing realities contract, the college athletes’ economic interests in professional sports opportunities are speculative and not of constitutional dimensions.” Id.

In discussing the contract rationale, the foregoing student author concluded that it is premised on the idea that a property interest arises from the contractual provisions of the athletic scholarship. The scholarships are contracts which confer benefits, including the right to participate in intercollegiate sports, onto the student-athlete. Porto, supra, at 1160. He adds that the contractual argument for alleging that a student-athlete’s eligibility interest is subject to due process protections has met with mixed results in court. He points to Colorado Seminary, 417 F.Supp. 885 (1976), as illustrative of the view most courts take. There the court held that notwithstanding that athletic scholarships are contracts, they fail to confer upon student-athletes the requisite entitlement to benefits which creates a property interest. The Colorado Seminary court concluded that student-athletes have a “unilateral expectation of participation, not a right to compete.” The court said, the athlete on scholarship has no more right to play than the athlete who walks on.

Not all courts adopt the position that the student-athlete’s interest is too speculative. In Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972) the court recognized, in the context of determining whether student-athletes possess a constitutional property interest in eligibility to compete, that student-athletes stand to gain prospective financial gain from their participation in intercollegiate competition. Accord, Sahl, supra at 658-59 (concurring with Behagen court’s analysis); See, Buckton v. National Collegiate Athletic Association, 366 F.Supp. 1152, 1160 (D. Mass. 1973) (recognizing that an interruption in a student-athlete’s participation in intercollegiate competition could negatively affect his professional opportunity even though the effect would be difficult to determine with precision); see also WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW 299-302 (1990) (noting the divergent ways which participation in intercollegiate athletics has been viewed).

See, Rafferty, supra note 30, at 183 (noting that an argument made against permitting educational malpractice suits or breach of contract suits against educational institutions is the difficulty of awarding expectation damages).

91. Sahl, supra note 27, at 658.

92. Sahl, supra note 27, at 659-660. Professor Sahl adds that these critics also argue that any attempt to place an economic value on participation in college sports would further blur the line between amateur and professional sports inasmuch as student-athletes would view their college careers more as farm systems for professional sports and less as opportunities to develop intellectually and socially.

For a discussion on the merit of these arguments as they relate to the model which this view reflects see generally, Davis, Competing Models, supra note 11.

93. E. ALLAN FARNWORTH, CONTRACTS § 12.15, at 921 (1990 2ed). The certainty limitation on the recovery of damages for breach of contract is articulated in a more relaxed form in the Second Restatement. ”Damage are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.” RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979). See, Rafferty, supra note 30, at 183 (noting the injured party does not have a right to recover damages for loss beyond the amount proved with reasonable certainty and discussing this defense in context of educational malpractice claims).
of intercollegiate athletics must be taken into account. First, as noted above, many student-athletes attend college — because of the potential financial benefits to be reaped either before or after they have exhausted their collegiate eligibility. Indeed, the potential economic value to be derived from sports participation is substantial due to the possibility of competing professionally as well as the possibility of gaining financially from other pursuits. As noted by one commentator:

The substantiality of the interest increases at the college level. This is due in part to the economic stake of the student in certain important college sports. In addition, not only is the athlete often exchanging his prowess for an education, ‘the chance to display ... athletic prowess in college stadiums and arenas throughout the county [may be] worth more in economic terms than the chance to get a college education.’ Even if the college athlete does not reach the professional ranks, our sports-dominated culture often rewards outstanding college athletes in both tangible and intangible ways. Viewed from several different perspectives, the interests of athletes cannot be lightly disregarded.

The potential economic benefits accruing from college sports participation were recently recognized by the Colorado Supreme Court. In University of Colorado v. Derdeyn, student-athletes challenged a random drug testing program instituted by the University of Colorado in 1984. Participation in the program was mandatory and student-athletes who refused to sign a consent form whereby they submitted to urinalysis were prohibited from participating in intercollegiate athletics at CU. The program, as originally constructed, included the following penalties for positive test results: counseling following the first positive test; a seven-day suspension from intercollegiate athletic participation following the second positive result; and a minimum one

94. Sahl, supra note 27, at 660 n. 258.
96. 1993 WL 440024 (Colo. 1993).
97. Id. at 1.
98. Id. at 1. The program as originally developed required that student-athletes submit to urinalysis at the time of each athlete's annual physical. Random urine test were required thereafter. Id.
year suspension from competition following the third positive result.\textsuperscript{99} The first time it was amended, the program more severely impacted a student-athlete's eligibility to participate in intercollegiate competition.\textsuperscript{100} Subsequent amendments to the program enhanced the severity of the penalties,\textsuperscript{101} modified the testing methodology,\textsuperscript{102} increased the number of substances for which a student-athlete could be tested,\textsuperscript{103} revised the definition of athlete so as to increase those who were subject to the drug testing program.\textsuperscript{104}

The Colorado Supreme Court found, "based on a balancing of the privacy interest of the student athletes and the governmental interests of CU, that CU's drug-testing program" was unconstitutional.\textsuperscript{105} The court rejected the university's argument that the privacy expectation of student-athletes was diminished because the consequences from their refusal to comply were not severe. Expressing sentiments similar to those of Professor Green, the court focused on the benefits both present and prospective which student-athletes derive from intercollegiate sports participation.

It is, to be sure, only a very small percentage of college athletes whose college 'careers' are essential as stepping stones to lucrative contracts—or to any contract—as professional athletes. On the other hand, however, we must also recognize that many intercollegiate athletes who otherwise could not afford a college

\textsuperscript{99} Id.

\textsuperscript{100} "The penalty for a first positive was changed to include suspension for 'the current competitive season.' After a first positive result, a return to athletic participation was conditioned on the student-athlete successfully completing a substance abuse rehabilitation program. The penalty for a second positive was changed to include permanent suspension form 'any activity sponsored by the University of Colorado Athletic Department.'" Id. at 2. The program, as amended the first time, also permitted the university to demand that the student-athlete disrobe during collection of the sample "in order to protect the integrity of the testing procedure." Id. at 2. The athletes were also required to consent to release of test results to a litany of individuals including the head athletic trainer, the athletic director, the student-athlete's coach and parents or guardians. Id. at 2. There was however, no guarantee of confidentiality.

\textsuperscript{101} The period of suspension for a first time positive test was lengthened from the 'current competitive season' to a 'twelve month period.' Id. at 2.

\textsuperscript{102} Random "rapid eye examination" was substituted for urinalysis which would only be conducted upon a finding of reasonable suspicion that the athlete used drugs and at the student-athlete's annual physical. Id. at 2. In addition, "physical and/or behavioral characteristics indicating drug use," such as "tardiness, absenteeism, poor health [sic] habits, emotional swings, and unexplained performance changes and/or excessive aggressiveness," created reasonable suspicion of drug use so as to justify mandating that the athlete submit to a urine test. Id. at 2.

\textsuperscript{103} Alcohol, over-the-counter drugs and performance enhancing substances such as anabolic steroids were added to the list of prohibited substances. Id. at 2.

\textsuperscript{104} For instance the term athlete was defined to include cheerleaders, student trainers and student managers. Id. at 2.

\textsuperscript{105} Id. at 14. In addition, it found that CU failed to show that its student-athletes voluntarily submit to drug testing. Id. at 5.
education receive athletic scholarships that enable them to obtain a college degree and thereby increase their earning potential. Continuation of such scholarships at CU is dependent upon continued participation in the intercollegiate athletic program, which in turn requires consent to the drug-testing program. Furthermore, many intercollegiate athletes pursue professional careers as high school or college coaches, or as administrators in athletic or recreational programs. While having participated in intercollegiate athletics may not be a formal requirement for such jobs, it is commonplace that applicants with experience at the intercollegiate level will not be disadvantaged in seeking such jobs in comparison with those who lack such experience.106

In addition to focusing on the real economic benefits which are derived from sports participation, student-athletes attempting to overcome the certainty defense can emphasize the recent relaxation of this limitation. Both the Restatement Second of Contracts107 and the Uniform Commercial Code108 only require that damages be proved with "reasonable certainty." What is meant by this it that it is not necessary that the amount of damages be proven with mathematical precision.109 Moreover, doubts with regard to the degree of certainty will be resolved in favor of the aggrieved party.110 Professor Farnsworth notes that in cases involving lost business opportunities, "courts have shown remarkable willingness at least to give the injured party a chance to prove loss of prospective profits."111

106. Id. at 11.
107. Restatement (Second) of Contracts, § 352.
109. A growing number of jurisdictions have adopted the liberal view that if certainty as to damages is proven, "relative uncertainty of amount will be tolerated." Widener, supra note 76, at 488. Under this view, all that a plaintiff must do in order to recover is to present evidence which will provide a basis for making reasonable estimates. Id.
110. E. Farnsworth, supra note 93, at 922.
111. Id. See Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988) (recognizing that loss of future professional opportunities of entertainer may not be so speculative as to deny recovery for breach of contract);

In cases involving negligence, courts have recognized the plaintiff's ability to recover damages for lost opportunity to pursue career aspirations. See e.g., Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127 (E.D. 1973) (court held that expert could predict the plaintiff's prospective opportunity as an opera singer); Lee v. USAA Casualty Ins. Co., 540 So.2d 1083 (La. Ct. App. 1989) (high school student injured in automobile accident able to recover for lost future earnings in math related career even though she had never worked in any such capacity); Wattingney v. Government Employees Insurance Co., 407 So.2d 1261 (La. Ct. App. 1981) (bodybuilder injured in automobile accident entitled to recover for loss ensuing from inability to pursue career in bodybuilding); Horan v. Dormitory Authority, 349 N.Y.S.2d 448 (N.Y. App. Div. 1973) (plaintiff who as a result of defendant's negligence was unable to complete studies at college of pharmacy and become a pharmacist allowed to recover for loss of potential earnings).
The certainty defense will constitute a formidable obstacle to student-athlete claims relating to lost professional opportunities. However, given the real economic potential to be gained from college sports participation and more liberal views regarding the certainty defense, student-athletes may be able to surmount it. Indeed, a recent initiative taken by the NCAA supports the notion that damages related to lost professional opportunity are not too uncertain. In 1991, the NCAA created a disability insurance plan for what it characterized as "exceptional athletes." Under this plan, exceptional athletes are those who have demonstrated potential to play basketball, football and baseball at the professional level. The underlying purpose of the insurance plan is to provide protection for these "exceptional athletes" against loss of future earnings they expect to receive as professionals if they are injured while still in college. The NCAA limits eligibility for the policy to student-athletes which it and its underwriters project "as potential first round picks in the basketball or baseball drafts, and first or second round picks in football." This implicitly recognizes that certain student-athletes are not only viewed as having the potential to play professional sports, but the losses resulting from their inability to pursue professional career opportunities are not incapable of calculation.

III. IMPLIED OBLIGATION AS BASIS FOR REDRESS

A. Omissions in Student-Athlete/University Contract

Despite obstacles, student-athletes alleging breach of specific promises related to their athletic development and participation may present cognizable contractual causes of action. The utility of this cause of action may, however, be constrained by problems of proof

112. Id.
113. Id.

The maximum coverages provided under the plan are as follows: $2,700,000 for basketball, $1,800,000 for football and $900,000 for baseball. Baker, at 664. "Exceptional athletes" are automatically approved for loans to pay premiums. The loans are to be repaid if the student-athlete signs a professional contract or in the case of injury when benefits under the plan are paid. In the event, a student-athlete does not sign a professional contract the loan is repaid once the coverage ceases to exist. Baker, supra, at 664; Weiler & Roberts, supra, at 739-40.
concerning whether a specific promise was actually made\textsuperscript{115} and if so, exactly what was promised. Indeed, Bryan Fortay's case is unique because of the explicit nature of the alleged express promise that he would be made starting quarterback if he remained at the University of Miami.\textsuperscript{116}

In his complaint, Fortay alleges another possible basis for imposing contractual liability on institutions for interference with a student-athlete's prospective professional career. Fortay alleges that the "University of Miami owed a duty to comply with their obligations to [him]. According to Fortay, "that duty was to provide him with an education and to develop his football future with the University of Miami Hurricanes football team which could ultimately lead to participation as a player in the National Football League."\textsuperscript{117} At first glance, this allegation suggests that the express contract between student-athletes and their colleges specifically delineates the latter's commitment so as to impose a contractual duty on institutions to provide student-athletes with some sort of an opportunity to develop athletically. A review of the documents comprising the express contract,\textsuperscript{118} principally the Letter of Intent, and the Statement of Financial Aid, between student-athletes and universities quickly deflates any such notion.

The express contract fails to impose explicitly obligations on the part of colleges and universities to assist student-athletes in developing athletically. This is consistent with the notable incongruence present in the extent to which the student-athlete/university contract delineates the respective obligations of the parties. On the one hand, the contract documents specifically spell out the student-athlete's contractual obligations. These duties include the student-athlete's commitment to attend a particular institution where he or she will participate in sports and in the educational process.\textsuperscript{119} In contrast, except for the institution's

\textsuperscript{115} See Cozzillio, supra note 20, at 1367 (noting that because coaches rarely make representations concerning playing time, guarantees of a starting position, and the like, such matters are not actionable since the coach is afforded considerable prerogative to dictate these matters absent an express promise. Conversations which I have had with student-athletes suggest that Professor Cozzillio may have underestimated the extent to which coaches make promises related to the athletic development and participation of their student-athletes. Nevertheless, his point, that actionable claims for breach of express contract are likely to be rare, is well taken.

\textsuperscript{116} Complaint, ¶ 7 at 5-6.

\textsuperscript{117} Complaint, ¶ 5, at 15.

\textsuperscript{118} To reiterate, the documents which together comprise the express contract are the Letter of Intent, the Statement of Financial Assistance, and various university publications, including bulletins and catalogues. Cozzillio, supra note 20, at 1293; Davis, Good Faith supra note 28, at 770-71; Rafferty, supra note 30, at 180.

\textsuperscript{119} Davis, Good Faith, supra note 28, at 773.
commitment to provide financial assistance, the college’s obligations to the student-athlete “remain virtually undisclosed.”

B. Implied Obligation to Provide Educational Opportunity

In a previous article, I analyzed the implications of the failure of the contract documents to expressly impose a commitment on colleges and universities to provide an educational opportunity to their student-athletes. Examining this particular shortcoming in the contract documents, I concluded that while the contract documents suggest an educational component to the student-athlete/university relationship, the exact contours of any such obligation remain unclear. Arguing that many high school athletes enter college with the desire not only to participate in an institution’s athletic program, but also to participate in and derive value from the educational process, the article concludes that:

institutions deny student-athletes the full value they expect to derive from the transaction when they refuse to provide them with an educational opportunity. By diminishing the contract’s value, the institution does not merely frustrate, but actually defeats the student-athlete’s reasonable expectations. Thus, defining the university’s educational obligation beyond the commitment to provide financial aid serves to protect the reasonable expectations of student-athletes.

It is equally true that the express contract between student-athletes and their schools fails to specify any precise obligations on the part of institutions to provide their athletes with an opportunity to develop their athletic abilities. At least three issues arise from this omission. First, is the implication of such an obligation necessary? Secondly, what is the theoretical mechanism for engaging in the process of implication in this context? Finally, assuming it is appropriate to impose an obligation on colleges and universities, how should it be defined? These questions are now addressed.

120. Id. at 772; See also, Rafferty, supra note 30, at 180 (a problem associated with student-athlete/university contract is its failure to express the obligations of the university other than the provision of tuition, books, rooms and board).
121: Davis, Good Faith, supra note 28, at 772.
122. Id. at 778. The article proposes that “[a]pplication of the good faith doctrine could serve to clarify the nature of the institution’s obligation to the student-athlete.” Id. at 773.
123. Refer to text accompanying notes 126-130 infra.
124. Refer to text accompanying notes 126-130 infra.
125. Refer to text accompanying notes 126-130 infra.
1. The Essential Character of the Relationship

Although student-athletes attend college to obtain an educational experience, it is equally true that many (if not most) attend college with aspirations of developing their athletic skills so that they have a realistic opportunity to pursue professional sport career.126 As critically stated by a student author:

the student-athlete's underlying reasons to attend college are too often dominated by the perception that enrollment will enable the athlete to hone his or her athletic skill and enhance his or her potential of breaking into the professional ranks. In turn, many colleges intensely recruit talented athletes knowing that they lack the qualification and desire to attend, and then academically carrying them provided they participate athletically. From this point of view, colleges have degenerated into stepping stones to the pro leagues. . . .127

The odds are heavily weighted against the vast majority of student-athletes having professional sports careers. Nevertheless, as discussed below, many enter college with the expectation of participating in intercollegiate sports so that their professional aspirations will become a reality. Ultimately, the question becomes whether the judiciary should intervene in the student-athlete/university relationship to not only define but also to enforce the athletic expectations of student-athletes.

2. Implicit Expectations and Understandings

As eluded to above, colleges make promises and representations in recruiting student-athletes. Even if these representations fail to


The student-athlete’s professional aspirations and the legitimate interest which it represents was described by another writer as follows:

For the student-athlete, participation in a big-time intercollegiate athletic program may represent both fulfillment of childhood desires and an opportunity to prepare for a professional career. . . . Big-time college sports programs often provide such an opportunity. Superior prowess in big-time sports almost invariably leads to an athletic scholarship, affording a chance to obtain a college education which might not otherwise be available. Moreover, the recent proliferation of professional teams has created a large demand for talent. This increased demand and the million-dollar contracts these teams offers to college athletes has generated a growing supply of student-athletes with aspirations to turn pro. College years are thus viewed as a chance to hone and to demonstrate skill in order to attract the interest of professional teams.


127. Huelbig, supra note 126, at 292.
constitute express promises, they do implicitly and significantly, contribute to the formation of expectations related to the student-athlete’s athletic development.\textsuperscript{128} Illustrations abound of the extent to which recruiting aids in creating such expectations. One highly recruited student-athlete noted: “Coaches would come up and tell you, ‘I can see the NBA written on your forehead,’ and stuff like that.”\textsuperscript{129} Another blue-chip student-athlete recounted this concerning his recruiting experience: “People told me I had the talent. Dean Smith [coach at the University of North Carolina], he told me so. He said I sure had the ability to play pro basketball, I probably would’a had the chance, tha’s what he said. He said that I would make the pros, definitely, if I would’a came there. And played four years, or however many years, because of his program.”\textsuperscript{130}

Recruiters emphasize, in attempting to persuade high school athletes to attend their institution, that college is a forum within which they can develop their athletic abilities. Therefore the inducement of the opportunity to develop athletically pervades the recruitment process and relatedly contributes to expectations formed by the student-athlete.\textsuperscript{131}

\begin{footnotes}
\item[128.] Mathewson, supra note 28, at 72.

\item[129.] Patricia Adler \& Peter Adler, Backboards and Blackboards (1991). In their research concerning the expectations and socialization of college basketball players, the Adlers concluded that athletic related concerns most influenced the highly sought after high school athlete’s decision to attend a particular institution. “Coach’s reputation (he was known as a winner and as a disciplinarian with ‘good values’); the style of game he played (running, fast break); how much playing time they thought they would get (‘He plays everybody—he don’t have no starting five’); how much television exposure the team received (‘I wanted to go somewhere people could see me on TV’), and the chances they thought they would have of making it in the pros.” Id. at 53.

In their research, the Adlers found that athletic considerations, while important, were less influential for high schools athletes who were not blue-chippers but were nevertheless sought after by institutions. They concluded that most of the athletes who fall within this category developed athletic aspirations, in particular making it to the NBA, at a latter stage than blue-chippers. Id. at 56. In short, the athletic and future career aspirations of this group, which comprises most student-athletes, are far more modest than the blue-chippers, who the Adlers characterize in their research as the inundated players. See Id. at 61.

The Adlers research also found that in contrast to the popular myth many of these students enter college with high expectations to perform well and benefit academically from the experience. Id. at 62. Nevertheless they conclude that most of the athletes which they studied entered college emersed in their athletic role. Moreover, as a result of the socialization which occurs during college, the student-athlete’s athletic role subjugated all other roles during their college careers. Id. at 176.

\item[129.] Adler \& Adler, supra note 128, at 52.

\item[130.] Id. at 52-53.

\item[131.] One commentator suggests that the understanding may not be mutual.

Therefore it comes as no surprise that, to the student athlete, the expectancy of professional earnings constitutes the principal component of the perceived value of the right to participate. . . . He virtually must participate in intercollegiate
\end{footnotes}
Provisions of the express contract also support the notion that the student-athletes' athletic development and participation are essential aspects of their relationship with colleges and universities. First, the express contract obligates a student-athlete to participate in intercollegiate athletic competition for his or her institution. The award of a scholarship is contingent, in part, upon the student-athlete's continued participation. In addition, NCAA rules and regulations indicate that a significant aspect of the relationship is the athletic participation of the student-athlete.

Thus the terms of the express contract as well as the circumstances attendant to the student-athlete/university relationship converge to create mutual expectations that the student-athlete's college experience will provide a minimal opportunity for athletic development and participation. Indeed, what results is a package of benefits which are afforded to the student-athlete. Included within this package of benefits are the rights explicitly delineated in the express contract and those rights which implicitly arise out of the relationship.

The notion of the express contract obligating colleges and universities beyond the provision of financial aid has arisen in other

athletics for a lengthy period. His chances of a professional career are enhanced only after extended training and participation. . . . The irony in all this is that student athletes expect to receive value from the professional earnings component while universities expect them to receive value from the educational component.

Mathewson, supra note 28, at 77.

132. In support of the implied contract proposition, one commentator has argued in the due process context that:

Implied contracts exist where the schools and the student athletes anticipate the latter's participation in the athletic program. . . . In college sports, intense recruiting battles among schools for the services of highly skilled athletes are commonplace. These battles indicate that the combatant universities will represent that institution in athletic competition. the scholarship agreement is the sort of 'mutually explicitly understanding,' . . which supports a claim of entitlement to participate in intercollegiate athletics. Porto, supra note 90, at 1168-69.

133. Student-athletes promise to participate in intercollegiate athletics when the sign the Letter of Intent. Davis, Good Faith supra note 28, at 771; Cozzillo, supra note 20, at 1290; Johnson, supra, note 3, at 114-15.

134. Davis, Good Faith supra note 28, at 772.

135. See e.g., NCAA Manual §§ 2.7, 15.3.3.1.2, 15.3.4(d).

136. One commentator suggests that the agreement between student-athletes and their colleges, at a minimum, affords the student-athlete the right to engage in certain conduct which will presumably assist them in developing their athletic skills and thereby enhance their professional opportunities. These include the right to "participate in practice sessions, conditioning programs, games with other universities, and post-season and television appearances when merited." Mathewson, supra note 28, at 51. See, Springier supra note 51, at 348 (arguing that for due process purposes, the contract between the student-athlete and university indicates that they share a mutual expectancy that the student-athlete will participate in the college's athletic program).
contexts. One illustration is the group of cases involving the question of whether the student-athlete possesses a property interest in athletic eligibility. Adopting the idea that the contractual relationship confers a package of benefits upon student-athletes, one commentator had this to say in arguing that student-athlete's possess a property interest in athletic eligibility.

Advocates of this theory argue that what is bargained for between the student-athlete and the institution is not merely the express provisions of the scholarship agreement, but instead a broader package of benefits. In return for signing a scholarship agreement, there arises an implicit and mutual understanding between the student-athlete and the school that, in addition to receiving scholarship funds, he will also be eligible to compete. This view arguably reflects the pressure in recruiting scholarship athletes. Most student-athletes have a choice as to where they will compete, and they would probably not select a school that would not let them play.

The conclusion that student-athletes reasonably expect to participate in athletics does not necessarily translate into implying such an obligation into the student-athlete/university contractual relationship. Indeed, difficulties abound if such an obligation is implied. Notwithstanding these difficulties, theoretical bases support the notion of implying a term into the agreement to promote the student-athlete's reasonable expectation of athletic development and participation. These conceptual theories are now discussed.

137. Refer to text accompanying notes 126-130 supra for discussion of idea that the obligations of colleges to student-athletes extend beyond provision of financial aid in situations involving educational malpractice claims.


   Noted another commentator in describing in general the parameters of a college's obligations to its students:
   The student-university arrangement should therefore be recognized as a consensual relationship with certain commonly understood, intrinsic characteristics which should be retained regardless of the language contained in the registration form, the bursar's receipt or the school bulletin. It is an arrangement in which the incidents of relationship overshadow the contractual verbiage imposed upon the students.

3. Justifications for Protecting Reasonable Expectations

   (i) Duty of Good Faith and Fair Dealing

Several theories may justify protecting the unexpressed yet implicit understandings of student-athletes. As was true in the case of the implied obligation to provide an educational opportunity, the duty of good faith may be available as a mechanism for implying an athletic component into the student-athlete/university contract.

The good faith doctrine has been formulated such that it is capable of performing various functions. The doctrine has been employed to explicitly define rights and obligations which implicitly arise from contractual relationships. As was expressed by Professor Summers, "the good faith doctrine functions as a tool for enforcing . . . the 'unspecified inner logic' of a transaction. . . ." The rationale which underlies use of the good faith doctrine in this manner is the furtherance of the essence of the exchange between two parties. With respect to the student-athlete/university relationship, the good faith doctrine is conceivably available as a mechanism for explicitly defining the institution's unexpressed, yet implicit obligations to student-athletes.

In as much as both parties understand that student-athletes enter colleges with an expectation to have a reasonable opportunity to participate athletically, implying such an obligation will promote an essential aspect of the contractual relationship. Conversely, not to imply this understanding into the agreement tends to deny student-athletes the full value of what they expected to derive from the relationship. Thus, implying a minimal obligation on the part of

139. See generally, Davis, Good Faith supra note 28.
140. The different formulations of the good faith doctrine have been summarized in several articles including: Barbara A Fure, Contracts as Literature: A Hermeneutic Approach to the Implied Duty of Good Faith and Fair Dealing in Commercial Loan Agreements, 31 Duq. L. Rev. 729 (1993); Davis, Good Faith supra note 28.
141. See, Davis, Good Faith supra note 28, at 777.
142. Id. at 774.
143. Id. See infra notes 144-146.
144. This is particularly true given that the circumstances which surround the relationship indicate that an athletic development and participation expectation exists. See, Barbara A. Fure, Contract as Literature: A Hermeneutic approach to the implied Duty of Good Faith and Fair Dealing in Commercial Loan Agreements, 31 Duq. L. Rev. 729, 734 (1993) (some courts use the good faith doctrine to determine the expectations of parties as revealed by the circumstances existing when an agreement is made).
145. See Davis, Good Faith supra note 28, at 778 (arguing that the good faith doctrine justifies implying a duty on institutions to provide an educational opportunity in order to protect the reasonable expectations of student-athletes).
institutions to provide their student-athletes with a reasonable opportunity to develop and to participate athletically serves to promote the student-athlete's reasonable expectations.\textsuperscript{146}

Moreover, implying such an obligation will not be inconsistent with the contractual intentions of colleges and universities.\textsuperscript{147} As noted above, colleges and universities share in the student-athlete's expectation that college provides an opportunity for the student-athlete to develop and participate athletically. In short, use of the good faith doctrine, in this context, will supplement the express terms of the contract that vaguely acknowledge the existence of an athletic component to the relationship. More specifically, it will imply into the agreement the idea that student-athletes are entitled to a package of benefits including a reasonable opportunity to develop their athletic abilities. Imposing such an obligation, in the context of the justifiable expectations created by circumstances existing at the time the agreement is made, appears consistent with the agreed common purpose of the relationship.

(ii) Fiduciary Nature of Relationship

The essential character of the student-athlete/university relationship may also justify protecting the athletic participation expectation.\textsuperscript{148} The relative positions of student-athletes vis-a-vis their

\textsuperscript{146} See Mathewson, supra note 28, at 88 (arguing that courts should recognize and give life to the reasonable expectations of the student-athletes created by his university).

\textsuperscript{147} The [good faith] doctrine . . . protects and promotes the contracting parties' expectations by implying into the contract an affirmative duty to cooperate, which goes beyond, but is consistent with, the express terms of the contract". Davis, Good Faith, supra note 28, at 776. See also, Fuhr, supra note 140, at 734 ("Many courts and commentators already explicitly equate the duty of good faith with a duty to fulfill the justifiable, reasonable expectations of the parties"); Steven J. Burton, More on Good Faith Performance of a Contract: A Reply to Professor Summers, 69 Iowa L. Rev. 497, 499 (1984) (the good faith performance doctrine can protect the reasonable expectations of parties through interpretation and implication); Dennis M. Patterson, Good Faith and Lender Liability ix (1990) (reasonable expectation is the core of good faith).

148. The good faith doctrine generally is unavailable for implying terms which conflict with the express terms of an agreement. Davis, Good Faith, supra note 28, at 779 n.209 (see authority cited therein).

Whether an obligation conflicts or is consistent with the expressed intentions of the parties must be made in light of all the surrounding circumstances including the customs in which the agreement arose. See also, Dennis M. Patterson, Good Faith and Lender Liability 7, 38 (1990) (good faith doctrine protects reasonable expectations of contracting parties in light of the circumstances in which the agreement arose).

148. The notion of relying on the nature of relationships as a basis for protecting the reasonable, yet unexpressed expectations of parties to relationships, is not foreign to the law. A good illustration of focusing on the nature of a relationship as justifiably protecting unexpressed or ambiguously expressed expectations occurs through deployment of the reasonable
colleges and universities support labeling the relationship as fiduciary or at least quasi-fiduciary.

Certain relations, historically have been viewed as possessing characteristics which give rise to fiduciary duties. Included within this category of relationships, pursuant to which a fiduciary duty is said to arise as a matter of law,149 the husband and wife, trustee and beneficiary, attorney and client, physician and patient and minister and parishioner.150 Yet, these traditionally recognized fiduciary relations do not encompass all of the situations in which a fiduciary obligation may arise. Fiduciary relation can also emerge, as a matter of fact, from various relationships.151 As stated by one scholar:

The question — who is a fiduciary? — is answered very simply or only after a detailed examination of the facts. It is simply

expectations doctrine in the insurance context. Robert Keeton formulates the doctrine as follows: “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” Robert Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967(1970).

The doctrine has been viewed as resting on the following underlying policy themes: “the adhesive nature of the typical insurance contract; the resulting risk of ‘unconscionability, and the likelihood, in many situations, that the insured detrimentally relied on implicit or explicit promises of protection.” Mark C. Rahdert, Reasonable Expectations Reconsidered, 18 Conn. L. Rev. 323, 337 (1986). Professor Rahdert also notes that one commentator has viewed the doctrine in terms of policy goals which the doctrine may serve: information, equity and risk distribution. Id. at 337, n.42.

One way in which courts have employed the reasonable expectations doctrine is to “use the insured’s reasonable expectations to fill gaps left by ambiguous contract terms...” Stephen J. Ware, A Critique of the Reasonable Expectations Doctrine, 56 U. Chi. L. Rev. 1461, n.32 (1989).

The corporate context provides another illustration of an instance where the nature of relationships provides the basis for protecting the unexpressed yet reasonable expectations of a party to the relationship. E.g., O’Donnel v. Marine Repair Services, Inc., 530 F. Supp. 1199 (S.D. N.Y. 1982); Balvik v. Sylvester, 411 N.W.2d 383 (S. Dak. 1987) (those in control of close corporation must not act so as to defeat reasonable expectations of minority shareholders); Matter of Kemp & Beatley, Inc., 484 N.Y.S.2d 799 (N.Y. App. 1984) (reasonable expectations of shareholders are protected against oppressive conduct);


150. Goldman, supra note 138, at 669; Accord, Anderson & Steele, supra note 149, at 792.

151. Anderson & Steele, supra note 149, at 792 (fiduciary relation is created as a matter of fact based upon relations of trust and confidence); Goldman, supra note 138 (the fiduciary concept extends to those situations where a “confidential or dominating relation exists in fact”); BA Mortgage & International Realty Corp. v. American National Bank & Trust Co. of Chicago, 706 F. Supp. 1364, 1372 (N.D. Ill., E.D. 1989) (a fiduciary relationship exists “when one party reposes trust and confidence in another who thereby gains a resulting influence and superiority over the first...” Texas Bank & Trust Co. v. A.E. Moore, 595 S.W.2d 502, 507 (Tex. 1980) (fiduciary relationships include those technical relationships and those where one party trusts and relies upon another).
answered if the relationship falls within the nominate categories deemed to be fiduciary. ... Other relationships may exceptionally involve a trust equivalent to or stronger than even the closest relationship, for example, a solicitor and a client. ... These are ‘fact-based’ fiduciary relationships.¹⁵²

Whether the fiduciary relation is premised in law or in fact, the premise which underlies the imposition of fiduciary obligation is the same.¹⁵³ The fiduciary relation arises from trust¹⁵⁴ and confidence,¹⁵⁵ as well as the dominance of one party over another.¹⁵⁶ Thus a “fiduciary relation arises where ‘one person reposes trust or confidence or reliance in another’ and where ‘there is established an inequality of footing between the parties.’ In these situations, courts feel justified in holding the more powerful party to a higher standard of care.”¹⁵⁷ Are such features present in the student-athlete/university relationship?

(iii) Fiduciary Character of Student-Athlete/University Relationship

Several characteristics attendant to the student-athlete/university relationship suggest it may be appropriate to extend fiduciary concepts to the relationship.¹⁵⁸ The most prominent of these factors is the


¹⁵⁴ In commenting on the nature of “trust” one scholar stated often cases of deferential trust, where one defers to the judgment of the trusted person, are often accompanied by elements of necessity, dependence or submission. In other cases there is no demonstrated vulnerability. But the trusted person knows that his or her judgment is being relied on in the circumstances. *Id.* at 286-87.

¹⁵⁵ *Id.* at 2286. (fiduciary relations are associated with “trust-like relationships” which give rise to conflicts of interest and duty); Goldman, *supra* note 138, at 668 (what characterizes the fiduciary relation is the trust existing between two parties).

¹⁵⁶ See, Goldman *supra* note 138, at 669. A fiduciary relation may exist even where confidence may actually be lacking if one exercises dominance over another. In this setting, the law presumes the requisite confidence “because of the function and nature of the position or role which one person holds in relation to the other.” *Id.*

¹⁵⁷ Goldman *supra* note 138, at 855-56.

¹⁵⁸ The judiciary has considerable experience in applying fiduciary concepts to new contexts. As noted by one author:

Because of the wide range of situations in which the obligation may arise, the law of fiduciary obligation has developed through analogy to contexts in which the obligation conventionally applies. Judicial opinions in this well-established
dominance and control which a university exercises over the lives of student-athletes. 159

The pervasive nature of the control was recently acknowledged by the Colorado Supreme Court. In attempting to justify its random drug testing program (by devaluing student-athlete’s privacy expectation) the University of Colorado in University of Colorado v. Dryden, emphasized the considerable regulation which the university exerts over the student-athlete’s on-and-off-campus behavior. This regulation includes: “maintenance of required level of academic performance, monitoring of course selection, training rules, mandatory practice sessions, diet restrictions, attendance at study halls, curfews, and prohibitions on alcohol and drug use.”160 CU’s athletic director testified as follows with respect to the extensive regulation by the university of the student-athlete activities:

[T]he NCAA sets limits on financial aid awards, playing seasons, squad size, and years of eligibility; that the NCAA requires that CU maintain records of each athlete’s academic performance; that the ‘athletes that eat at training tables are football and men’s basketball and other athletes eat in the dorms or at their off-campus residences;’ that some coaches within their discretion impose curfew; that athletes are required to show up for practice; that athletes are ‘advised . . . on what they should take for classes;’ and that ‘we have a required study hall in the morning and in the

tradition first identify paradigm cases in which fiduciary obligation applies and then examine whether the relationship involved in the litigation is sufficiently like those in the paradigm cases to support an extension of the obligation to that relationship. Courts also resort to analogy in order to determine the rules applicable to a fiduciary in a particular situation.

DeMott, supra note 153, at 879.

The approach described by Professor DeMott has been adopted by those who argue in favor of extending the fiduciary concept into the relationship between colleges and their students. Robert Faulkner, Note, Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit — The Fiduciary Alternative, 40 Syracuse L. Rev. 837 (1989) (proposing that adopting the fiduciary model in this context comports more closely with the legal perceptions of the relationship and the expectations of the parties); Alvin L. Goldman, The University and the Liberty of Its Students—A Fiduciary Theory, 54 Kent. L. J. 643, 672 (1966) (concluding the student-university relationship is imbued with the elements of a fiduciary relation. “It is no small trust—no small display of confidence to place one self under the educational mentorship of a particular university”).


159. Dominance and control are extant in both the pre-contractual and performance aspects of the relationship. As discussed previously, there is an imbalance of bargaining power in the pre-contractual stage of the student-athlete/university relationship. Refer to text and accompanying notes 150-158 supra and inequality of relation is even more pronounced during the performance stage of the relationship.

160. Id. at 7.
evening;’ and that it is ‘fair to say that the athletes are fairly well regulated.’

The foregoing supports the idea that the student-athlete’s relationship with his or her institution is marked by dominance by institutions over most aspects of his or her college life. ‘‘The end result of athletic department control is limited autonomy of student-athletes over academic decisions and their ability to handle such matter independently.’ This control also extends into the student-athlete’s social affairs. The role of the coach becomes critically important in the control exercised over student-athletes. Coaches, because of the multiple roles they play in student-athletes’ lives, obtain an ability to assume influence over student-athletes. The extensiveness of the control creates a relationship in which trust and dependence inures. The unique attributes of student-athletes’ relationships with their

161. Id. at 10.

The type of control and dominance which is consciously assumed by universities with regard to student-athletes warrants characterizing the relationship as fiduciary. It fits within the broad contours of the factors which are considered in determining the existence of a fiduciary relationship. The factors as articulated by one court are particularly telling with respect to the student-athlete/university relationship.

A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise, and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the care of the fiduciary. . . . It is only when, by their concerted action, [parties] willingly and knowingly act for one another in a manner to impose trust and confidence that a fiduciary relation arises.


This control justifies the imposition of higher standards of conduct on the fiduciary. ‘‘[A] fiduciary relationship, whatever it may be, creates obligations on the part of the fiduciary that are much more onerous than those normally required by the common law of contract.’’ Anderson & Steele, supra note 149, at 793; Goldman, supra note 670 (The fiduciary’s dominance provides a considerable degree of effective control over the ‘‘dominated’’ party’s conduct. This and the potential for undue influence warrant imposing special standards of conduct on the fiduciary); See Hajmm Co. v. House of Raeford Farms, Inc., E., 403 S.E.2d 483, 587 (N.C. 1991) (a fiduciary relationship arises in cases where one in whom a special confidence has been reposed is bound to act not only in good faith but with due regard for the interests of the one who has reposed the confidence); Texas Bank & Trust Co. v. A.E. Moore, 595 S.W.2d 502, 507 (Tex. 1980) (the fiduciary concept contemplates fair dealing and good faith as the basis for transactions); Lappas v. Barker, 375 S.W.2d 248, 251 (Ky.App. 1964) (‘‘Fiduciary relationship exists when the parties are ‘under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation.’’’)

162. Davis, Educational Malpractice, supra note 30, at 93.
163. Id.
164. Id. at 94.
165. Id. at 93.
institutions were recently recognized in *Kleinknecht v. Gettysburg*\(^{166}\) where the Third Circuit Court of Appeals became the first court to recognize the relationship as "special" for tort purposes. In *Kleinknecht*, a student-athlete collapsed, during a lacrosse practice, as a result of cardiac arrest.\(^{167}\) The school argued that it owed no duty to the student-athlete to implement safety measures. Such measures would assure prompt assistance if a student-athlete suffered cardiac arrest. Rejecting this argument, the court relied upon the concept of a special relationship as providing the theoretical basis for imposing a duty of care on the school.\(^{168}\)

Because of the fiduciary or quasi-fiduciary nature of the relationship, the student-athlete/university contract is a type or class of contract for which the court should recognize the understood, yet unexpressed intentions and expectations of the student-athlete and university. A principal function of the fiduciary concept is to "carry out the reasonable expectations of the parties."\(^{169}\) Thus, imposing such an obligation is consistent with an obligation which should be imposed on universities in any event to promote and protect the interest of student-athletes which grow out of their quasi-fiduciary relationship with student-athletes.

4. Defining the Duty

Assuming theoretical justifications support implying an athletic component into the student-athlete/university relationship, defining the contours of the institution’s obligation in this regard is fraught with difficulty. First, devising a standard of conduct will be difficult due to the differing interests and doctrine which intersect. For instance, the imposition of a duty to provide a reasonable athletic development and participation opportunity must take into account the unique circumstances of athletics and the uncertainties which are inherent in the athletic development of college athletes. In this sense, one is reminded of the opposition to educational malpractice claims related to the difficulties inherent in establishing causation and defining a standard of care.\(^{170}\) In that context, it has been argued that the many

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166. 989 F.2d 1360 (3rd Cir. 1993).
167. *Id.* at 1363.
168. *Id.* at 1366.
factors often external to the education process which impact whether a student will develop a minimal level of academic skills makes it virtually impossible to establish a standard of care.\textsuperscript{171} Factors such as "physical, neurological, emotional, cultural, and environmental"\textsuperscript{172}, are also implicated in the context of claims alleging failure of a student-athlete to develop athletically.

To further complicate matters is the competitive nature of the sports enterprise. Players understand that they must compete for positions and that coaches will likely provide student-athletes with varying and often times disproportionate opportunities for athletic development.

Added to this is the discretion of coaches. As discussed above,\textsuperscript{173} unless they have contracted it away, coaches have considerable discretion to run their athletic programs. Thus, a coach is likely, in exercising his or her discretion, to devote more time and attention to the athletic development of student-athletes who are starters, or whom in the coach's eyes have more potential. Such an imbalance will no doubt have an adverse effect on the athletic development and participation opportunities of some student-athletes. In the normal case, however, the proper exercise of a coach's discretion and professional judgment would seem not to constitute a violation of the implied obligation.

Because of these competing considerations, any duty implied should be very limited in scope to institutional conduct which unreasonably interferes with the student-athletes ability to develop and participate athletically. Thus, arbitrary and capricious conduct which interferes with this opportunity would be precluded. Also, instances in which institutions did nothing to attempt to further the athletic development of a student-athlete would likely violate the obligation. Moreover, conduct on the part of an institution which promotes its interests ahead of that of the student-athlete would fall within the category of proscribed conduct.\textsuperscript{174}

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\textsuperscript{171} Culhane, \textit{supra} note 30, at 358-59; Davis, \textit{Educational Malpractice supra} note 30, at 75.

\textsuperscript{172} Ron Waicukauski, \textit{The Regulation of Academic Standards in Intercollegiate Athletics}, 1982 \textit{Ariz. St. L.J.} 79, 98 (referring to factors articulated in cases such as Peter W. v. San Francisco United School District where the court rejected educational malpractice claims).

\textsuperscript{173} Refer to text and accompanying \textit{infra} note 174.

\textsuperscript{174} "Thus, a fiduciary's 'power at all times subject to the equitable limitation that it may not be exercise for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestui.'" Goldman, \textit{supra} note 138, at 670.

In this regard, the Fortay case may provide an illustration of the type of conduct which would give the student-athlete a cause of action. Fortay alleges he unknowingly became involved in a Pell Grant scandal which was administered by an employee of the University of
Beyond what is stated above, it is difficult to predict the precise parameters or contours of the implied duty. This does not necessarily support the view, that a difficulty in defining a standard, warrants not creating a duty. Given that determinations as to whether the duty was breached will be so fact specific, perhaps the best approach is to not attempt to define a specific standard of care. Rather, resort should be made to the underlying principle in determining whether an athlete should be afforded relief. One way to approach the question of what form of conduct would amount to improper interference with a student-athlete’s athletic expectation is to adopt a broad and flexible standard focusing on the manner in which the institution exercises its discretion. This general standard which attempt to limit the discretion of the institution so as to further the reasonable expectations of student-athletes to develop and to participate athletically.

IV. Conclusion

Significant economic benefits may be derived from by the student-athlete as a result of participation in intercollegiate athletics. For those with special talents, those economic benefits include the financial rewards which could be gained from professional sports careers. Indeed with respect to these gifted athletes, the extent to which they can turn to the judiciary to protect their interest remains is fraught with difficulty. The student-athlete must overcome years of judiciously developed attitudes which manifest in a reluctance to intervene in the student-athlete/university relationship. Moreover, the competitive nature of the athletic enterprise and multitude of factors which influence whether a student-athlete's professional aspirations will come to fruition argue suggest that the judiciary will continue its policy of restraint in this context. The uncertain liability exposure which colleges and universities could conceivably face militate against judicial intervention. Concomitant with this concern is the extent to which increased liability exposure could result in diminishing scholarship opportunities.

Miami. This employee served as his guidance and academic counselor. Fortay alleges that Russell fraudulently misrepresented to him that he was eligible to receive federal financial aid. Complaint ¶ 4, at 8. He further alleges that his involvement was the result of the failure on the part of the university to supervise the conduct of Russell, the administrator of the program. According to Fortay, this failure resulted in trauma which left him “unable to concentrate and focus his athletic skills while playing at Rutgers University. For this reason, plaintiff’s prospects of obtaining the successful, lucrative professional football career forecasted through his athletic life have diminished greatly.” Id. ¶ 8, at 10. In short, he alleges this conduct also constituted a breach of the university’s fiduciary obligation which it owes to student-athletes. Id. ¶ 2. at 11. The breach of fiduciary duty occurred, according to Fortay, because, the University protected its interests but sacrificed the interest of the student-athlete.
particularly for student-athletes who might otherwise not have access to college.

However doctrinal, sociological and practical impediments should not automatically shield colleges and universities from the consequences of improper institutional behavior. The critical issue becomes one of accountability. In other words, should or to what extent should colleges and universities be held accountable for their role in inducing reliance and creating reasonable expectations on the part of student-athletes? To what extent should institutions be held accountable to student-athletes for the former's express promises as well has promises which are implicit in the relation? This article suggests that in certain instances contractual principles may provide a viable method by which the goal of accountability may be effectuated. In effectuating accountability, contract and related doctrine may provide a limited means of protecting the expectation and reliance interests of the student-athlete with respect to their athletic participation and development.