

Winter 2009

Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation

Katherine Sulentic

Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Sulentic, Katherine (2009) "Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation," *Roger Williams University Law Review*: Vol. 14: Iss. 1, Article 7.
Available at: http://docs.rwu.edu/rwu_LR/vol14/iss1/7

This Notes and Comments is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation

*To me, the coaching profession is one of the noblest and most far-reaching in building manhood. . .to be fair-minded. . .to deal justly. . .to be honest in thinking and square in dealing. . .these should be the ideals of the coach.”—
Amos Alonzo Stagg¹*

I. INTRODUCTION

The Sugar Bowl game played on January 7, 2008, saw the culmination of arguably one of the most intriguing years in the history of college football. The BCS National Championship Game pitted the Louisiana State Tigers, a team with two losses during the regular season, against the Ohio State Buckeyes, a team with one loss during the regular season and no conference title game under its belt. While some argued that this type of season was good for the game, the familiar chants of the desire for a national championship playoff echoed through the halls of many sports networks and the pages of many sports columnists.² However, there was another word on the tip of the tongue of many college football fans, sports columnists and especially college football coaches: parity.³

With the 2007-2008 season being deemed the “year of the

1. Rick Telander, *THE HUNDRED YARD LIE* 81 (University of Illinois Press 1996) (1989).

2. See Pete Thamel, *For B.C.S., Let the Season of Discussion Begin*, N.Y. TIMES, Jan. 8, 2008, at D3.

3. See Pete Thamel, *Rich Rodriguez*, N.Y. TIMES, Dec. 30, 2007, at 8.

upset,”⁴ the issue of parity is now discussed in college football circles. This begs the question of why do we no longer have dominating football teams in college football. Certainly, this topic is well outside the scope of this paper and more suitable for discussion in a less academic venue. However, one strong argument is particularly relevant for this paper: coaches have become more sophisticated at recruiting high school athletes. Many college football coaches will stop at nothing in order to obtain the best players for their team. During recruiting, “the coach promises them the world: that over the next four or five years they will become a star, be ready for the pros, or get into the academic program they want.”⁵ Sometimes, they push the boundaries of civilized behavior and arguably the boundaries of tort law. Great football players mean wins and wins mean job security or advancement to the “perfect” coaching job. The coaching carousel in college football is well-known.⁶ However, this is more of a modern day phenomena. Gone are the days when coaches such as Dr. Tom Osborne stayed with the same institution for 25 years and later came out of retirement to help their former employer.⁷ Some would also suggest that gone are the days of the honest football coach.

There are three historical events that made recruiting high school football players particularly important to the success of college football teams and the men who coach them. College football is heavily regulated by the NCAA with rules that govern both universities and student-athletes.⁸ Changes in these rules helped create this level of parity and the overwhelming competition for the best recruits.⁹ The first change was a

4. Larry Dorman, *For U.S.C. and Illinois, Upsets Aren't Foreign*, N.Y. TIMES, Jan. 1, 2008, at D3.

5. Stacey Meyer, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L.J. 227, 227 (Fall 2004).

6. See Dave Fairbank, *Coaches Talk the Talk, Then Walk*, DAILY PRESS, Dec. 20, 2007, at C1.

7. Brian Christopherson, *Osborne's No Longer Interim*, LINCOLN JOURNAL STAR, Dec. 20, 2007, at D1.

8. 27A Am. Jur. 2d Entertainment and Sports Law §53.

9. As a matter of fact, one of the primary goals of the NCAA constitution and its bylaws is to create a “level playing field”. See NCAA General Brochure 2003 at 4, http://www.ncaa.org/library/general/general_brochure/2003/2003_gen_info.pdf (last visited Feb. 10, 2008).

reduction in the number of allowable scholarships from an unlimited number to 95 in 1977, then to 85 in 1992 with no more than 25 in one year.¹⁰ Because each prospect's value increased with the reduction in the total amount of scholarships, it became critical to avoid the "recruiting mistake" through solid investigation of high school players. Second, there came an end to freshman football teams. Prior to 1968, Division I football teams could maintain a "freshman squad" because all freshmen were ineligible to play their first year in school.¹¹ These freshman squads had their own coaches, played other teams, and often practiced against the varsity squad.¹² Arguably, this allowed for the physical, intellectual and emotional development of young football players. Today, many freshman football players are expected to contribute immediately and are often told as much during the recruiting process. Third, the NCAA continuing eligibility rules were reformed for all student-athletes. The so-called "40/60/80" rule,¹³ the "6 hour rule",¹⁴ the implementation of the Graduation Success Rate¹⁵ and the Academic Progress Rate¹⁶

10. Daniel Sutter & Stephen Winkler, *NCAA Scholarship Limits and Competitive Balance in College Football*, 4 JOURNAL OF SPORTS ECON. 3, 3 (February 2003). These scholarship limits apply to Football Bowl Subdivision (former Division I) only. *Id.*

11. NCAA Presidential Task Force on the Future of Division I Intercollegiate Athletics Student-Athlete Well-Being Subcommittee, (June 2005), www.ncaa.org/portal/legislation_and_governance/committees/future_task_force/well-being/freshman.doc (last visited Jan. 28, 2008).

12. *See id.*

13. For a student-athlete to be eligible to compete, he must have 40% of his degree program completed by the end of his second year in school, 60% by the end of his third year, and 80% by the end of his fourth year. NCAA, 2007-2008 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS, Bylaw 14.4.3.2 (National Collegiate Athletic Association 2007) [hereinafter NCAA MANUAL].

14. In order to be eligible for post season competition, a student-athlete must pass, "Six semester or six quarter hours of academic credit during the preceding regular academic term..." NCAA MANUAL, *supra* note 14, Bylaw 14.4.3.1(c). Florida State played without 23 football players in the Music City Bowl because of academic ineligibility. *See* Joshua Robinson, *New Rule May Factor Into Bowl Ineligibility*, N.Y. TIMES, Jan. 2, 2008, at D3.

15. *See* NCAA MANUAL, *supra* note 14, Bylaw 23.02.2 requiring each member institution to maintain long term graduation statistics on those scholarship student-athletes who have exhausted their eligibility. Penalties are imposed for failure to maintain a minimum rate. *See* NCAA MANUAL, *supra* note 14, Bylaw 23.2.

have imposed harsh penalties on both the athlete and the institution if a player thinks he will just “play ball” and avoid going to school. Recruiting the whole person, rather than just the athlete, is now the mantra that the majority of most college football coaches follow.

Naturally, when you find a player who is an exceptional athlete, student and person, the competition to sign him to a National Letter of Intent (“NLI”)¹⁷ on signing day is intense. The NCAA has attempted to mitigate this intensity by imposing a wide variety of recruiting rules including “Dead Periods”,¹⁸ official visit limitations,¹⁹ and limits on telephone calls.²⁰ These are but a few examples from an entire chapter dedicated to recruiting rules in the NCAA Division I Handbook. However, what is noticeably absent in the NCAA regulations or anywhere else are restrictions on what a college football coach can say to a prospective student athlete during the recruiting process to entice them to commit. Prospective student-athletes sign an NLI binding them to a list of things that they agree to do for the university.²¹ Very little, other than a financial aid agreement, lists what the coach will do for the athlete. What happens when a coach says he will or will not do something for the prospective

16. See NCAA MANUAL, *supra* note 14, Bylaw 23.02.1 requiring each member institution to maintain statistics on the academic eligibility and the retention of scholarship athletes currently enrolled at their respective institution. Penalties are imposed for failure to maintain a minimum rate. See NCAA MANUAL, *supra* note 14, Bylaw 23.2.

17. The National Letter of intent is a program run by the Collegiate Commissioners Association where prospective student athletes sign a letter certifying they will enroll at a college or university during a specific academic term. See <http://www.national-letter.org/overview/> (last visited Mar. 16, 2008).

18. “A dead period is that period of time when it is not permissible to make in-person recruiting contacts or evaluations on or off the member institution’s campus or to permit official or unofficial visits...” NCAA MANUAL, *supra* note 14, Bylaw 13.02.4.4.

19. “A member institution may finance only one visit to its campus for a prospective student-athlete” NCAA MANUAL, *supra* note 14, Bylaw 13.6.2.1.

20. “...staff members shall not make such telephone calls more than once per week.” NCAA MANUAL, *supra* note 14, Bylaw 13.1.3.1.

21. The full text of an actual NLI and guidelines of the National Letter of Intent program can be seen at, <http://www.national-letter.org/> (last visited Jan. 28, 2008). Scholarship award letters vary by institution and are only for one year terms. See NCAA MANUAL, *supra* note 14, Bylaw 15.3.3.1.

student-athlete and fails to keep his promise? If a Prospective Student-Athlete (“PSA”) fails to keep his promise he loses a year of eligibility. What happens when a coach fails to keep his?

A tremendous amount of excellent legal research has been done on the contractual obligations of a student-athlete when signing an NLI or a scholarship award letter.²² In fact, the majority of the research examining a PSA’s legal rights in the recruiting process has focused on contractual rights.²³ Additionally, a significant amount of research has been performed on alleged PSA fraud, such as PSAs lying about their academic record in order to meet NCAA initial eligibility requirements.²⁴ However, little research has been done on what type of repercussions there are for the *coaching staff* when they commit fraud during the recruiting process.

This article will address fraudulent misrepresentation committed by coaches during the recruiting process and whether there is any cause of action in tort as opposed to contract. Current NCAA legislation focuses on the misconduct of the PSA rather than the misconduct of the coaching staff. There is little if any remedy for a PSA who has been “wronged” during the recruiting process. Further, it is important to note that fraudulent misrepresentation during recruiting is particularly damaging for a college football player’s career as opposed to future careers in other sports. Because of the “three year rule”²⁵ in the NFL requiring NFL prospects to be three years removed from high school before becoming eligible for the draft, a premium is placed on a football player’s college career. Baseball players, hockey players and college basketball players either have shorter wait times for draft eligibility²⁶ or are eligible for the draft any time

22. For example see Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275 (1989).

23. See *id.*

24. For example see Josephine R. Potuto, *Academic Misconduct, Athletics Academic Support Services, and the NCAA*, 95 KY. L.J. 447 (2006-2007).

25. See Memorandum from Rachel Newman Baker, director of Agent, Gambling and Amateurism Activities to the Collegiate Commissioners Ass’n of Compliance Administrators (April 20, 2007), available at www1.ncaa.org/membership/enforcement/amateurism/resources/2007_NFLP_AContractAdvisorNewRegulationsFAQ.doc.

26. A basketball player is eligible for the NBA draft one year out of high

after high school.²⁷ The importance for the PSA of making the right decision during recruiting is much higher in football than in other sports.²⁸ If a PSA has the goal of playing in the NFL, the “three year rule” and the NCAA Football Bowl Subdivision transfer rules²⁹ (to be discussed *infra*) make it difficult to mitigate any damages that may result in making the wrong decision. Therefore this article will focus on the sport of football.³⁰

First, this paper will take a brief look at the recruiting process to expose how the potential avenues for fraud can be high in spite of NCAA regulations. Second, this article will address the three most common ways coaches entice a PSA to sign an NLI: promising to change the playbook for him, promising he will not leave the institution and promising that the PSA will start as a true freshman. Third, this paper will discuss the difficulties of pursuing a cause of action in contract under an NLI or a financial aid agreement. Finally, this paper will address a possible cause of action for a PSA in tort, what a possible remedy could be, how potential proof problems can be overcome and how a plaintiff can address the difficulty in quantifying damages.

school. See 2007-2008 NBA CBA, Article X § 1, http://www.nbpa.com/cba_articles/article-X.php (last visited Mar. 30, 2008).

27. A baseball player is eligible for the draft immediately out of high school. See MLB First Year Player Draft, Official Rules, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Feb. 18, 2008).

28. Adding to this urgency is the NCAA rule for the sports of football, men’s and women’s basketball and men’s ice hockey that if a student-athlete transfers to another Division I institution, they must sit out one year while their 5-year “clock” continues to run. If he transfers within the same conference, the student-athlete must sit out two years. See NCAA MANUAL, *supra* note 14, Bylaw 14.5.1.

29. It should be noted that a football student-athlete could transfer down a division to the Football Championship Subdivision (former I-AA) and become immediately eligible. See NCAA MANUAL, *supra* note 14, Bylaw 14.5.5.2.10 (a).

30. This is not to say that misrepresentation by head coaches during recruiting does not occur in other sports. The trials and tribulations of Indiana’s former head basketball coach Kelvin Sampson is just one notable example. See *N.C.A.A. says Sampson Made Illegal Calls at Indiana*, N.Y. TIMES, Feb. 14, 2008, at D4.

II. THE COLLEGE FOOTBALL RECRUITING PROCESS: A PRIMER

Recruiting is arguably one of the most regulated aspects of college football and college athletics in general.³¹ It all begins September 1st of the PSA's junior year of high school when recruiting materials may be sent to the PSA.³² These materials are printed materials and encompass items such as questionnaires, athletics publications, game programs, pre-enrollment information and institutional note cards.³³ The majority of these documents are general in nature discussing the virtues of both the football program and the university.³⁴ Occasionally there will be a personalized message to the PSA, but the majority of the correspondence is broad in nature.

Not until telephone conversations are allowed does the intensity of recruiting begin to heat up. A college football "representative"³⁵ can make only one call between April 15th and May 31st of a PSA's junior year.³⁶ There can be no further verbal discussions between the PSA and the coach until the beginning of the PSA's senior year.³⁷ This makes the first impression critical. There will be a long time period before the coach will talk with the student again. Little is known about what the coach says to the

31. In fact, an entire bylaw is devoted to recruiting, *See* NCAA MANUAL, *supra* note 14, Bylaw 13. It encompasses 47 pages in the Division I manual. *Id.* A very close second is Academic Edibility (Bylaw 14) with 42 pages. *See* NCAA MANUAL, *supra* note 14, Bylaw 14. However, many of those pages in bylaw 14 involve initial eligibility, academic requirements needed to begin participation in Division I sports. *Id.*

32. NCAA MANUAL, *supra* note 14, Bylaw 13.4.1.

33. NCAA MANUAL, *supra* note 14, Bylaw 13.4.1.1.

34. Because of the competitiveness of college football recruiting, it is almost impossible to obtain actual copies of recruiting letters. An example of one can be found at <http://athletics.sewanee.edu/athletics/football/recletter?id=17378> (Last visited Mar. 30, 2008). However, this letter is not from a Football Bowl Subdivision School. For an example of a Football Bowl Subdivision questionnaire *see*, https://www.cyberquestlive.com/schools/coloradofb/?SPSID=3843&SPID=255&DB_OEM_ID=600 (last visited Mar. 30, 2007).

35. This is the terminology used by the NCAA. *See* NCAA MANUAL, *supra* note 14, Bylaw 13.02.13. As noted in the description, a representative is more than just a coach, but includes a wide variety of people. *Id.* But due to the limited amount of calls each institution has per PSA, it is more than likely to be a football coach making the call.

36. NCAA MANUAL, *supra* note 14, Bylaw 13.1.3.1.1.

37. *Id.*

PSA, and the NCAA rules provide almost no guidance as to what is appropriate conduct during this telephone conversation.³⁸ The other interactions between a PSA and a coach during his junior year are limited to evaluations where coaches watch a PSA either practice or play in an actual football game.³⁹

The most critical time in the recruiting cycle of a football PSA is during his senior year when college football coaches are allowed to dramatically step up their personal recruitment of PSAs. Beginning on September 1st of a PSA's senior year an athletics representative may call the PSA once *per week*.⁴⁰ While that may seem like an insignificant amount, there are 120 institutions that sponsor Football Bowl Subdivision football,⁴¹ all competing against each other for the top prospects. This could lead to an astounding number of phone calls each week between eager coaches and PSAs. During the PSA's senior year, official visits are allowed beginning on the first day of the recruiting institution's classes.⁴² Official visits are visits to the recruiting institution's campus that are paid for by the university subject to certain limitations.⁴³ Official visits are critical for a PSA because he is limited to five total visits to five different institutions.⁴⁴ By the time a PSA goes on an official visit, it is more than likely the sponsoring institution represents one of the PSA's top choices.

38. The only warning is at the beginning of bylaw 13 stating if a PSA is recruited in violation of NCAA rules it, "shall result in the student-athlete's becoming ineligible to represent that institution in intercollegiate athletics." See NCAA MANUAL, *supra* note 14, Bylaw 10.01.1. There is little discussion about the coach's responsibility other than a general warning to recruit PSA's according to the rules. NCAA MANUAL, *supra* note 14, Bylaw 10.01.2. There is no discussion of the penalties for a coaching staff. *Id.*

39. See NCAA MANUAL, *supra* note 14, Bylaw 13.1. Rarely does actual contact between a PSA and a college football coach occur during this time unless it is "unavoidable incidental contact." See NCAA MANUAL, *supra* note 14, Bylaw 13.1.2.2 (g).

40. NCAA MANUAL, *supra* note 14, Bylaw 13.1.3.1.1.

41. Football Bowl Subdivision, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=0&division=1 A&sport=MFB> (Last visited, Jan. 21, 2008).

42. NCAA MANUAL, *supra* note 14, Bylaw 13.6.2.2.1

43. NCAA MANUAL, *supra* note 14, Bylaw 13.02.5.1 (e).

44. NCAA MANUAL, *supra* note 14, Bylaw 13.6.2.2. However, unofficial visits, where the PSA pays his own way are unlimited. See NCAA MANUAL, *supra* note 14, Bylaw 13.7.1.

A. Opportunities for Fraudulent or Negligent Misrepresentation During Recruiting: Three Scenarios

After a PSA has limited his decision to his top five teams, the competition to secure a PSA by having him sign an NLI⁴⁵ becomes increasingly intense. The plethora of college football recruiting websites⁴⁶ helps add to the drama by announcing who is recruiting whom. During a typical official visit, a PSA will tour the campus, meet with campus professors, current football players and most importantly, have the closed door visit with the head football coach. While coaches are certainly “selling” their program throughout the entire recruiting process, it is during these private meetings, outside the view of the NCAA,⁴⁷ where what is told to a football recruit is both influential and potentially troubling.

The push to obtain the best of the best often causes coaches to bring their promises to the edge of truthfulness and beyond. The stakes are incredibly high for both the PSA and the college football coach. As stated previously, the majority of NCAA rules focus on the misconduct of the PSA or student-athlete, not the coach. Even if a coach does commit a recruiting violation, it is the institution that must bear the burden of punishment.⁴⁸ While the PSA may not have a remedy from the NCAA when he has been lied to in the recruiting process, he does have a remedy against the coach in tort: fraudulent or negligent misrepresentation. A statement becomes a fraudulent misrepresentation when, “the maker knows or believes that the matter is not as he represents it to be, does not have the confidence in the accuracy of his representation that he states or

45. The National Letter of Intent program (NLI) is not sponsored by the NCAA but serves as a contractual way to bind the PSA to the institution. See NCAA MANUAL, *supra* note 14 Bylaw 13.02.10. After a PSA signs an NLI, he must now abide the transfer rules discussed in the introduction.

46. For example see www.rivals.com (Last visited Mar. 30, 2008).

47. There are many things that must be documented during the recruiting process including the number of official visits taken, who were the student hosts during the trip, and receipt of official transcripts. Discussions with the head football coach are not documented in any way.

48. See B.G. Brooks, *Athlete's Meal Violations Prove Costly; NCAA Levies Fine of \$100,000 as well as Probation*, ROCKY MTN. NEWS, June 22, 2007 at 11. The University of Colorado lost football scholarships for a period of three years for the recruiting violations of their previous football coach Rich Neuheisel. *Id.*

implies, or knows that he does not have the basis for his representation that he states or implies.”⁴⁹ A statement is classified as negligent misrepresentation when one, “supplies false information for the guidance of others . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information.”⁵⁰ As the following three scenarios indicate, the plausibility of football coaches committing misrepresentation is real.

(1) Scenario One: Son, I’m Changing the Playbook for You

One of the top prospects of the 2008 college football recruiting class is Terrelle Pryor, a 6-foot-6 quarterback from Pennsylvania, whose autographed footballs sell for \$99.99 on eBay, who has his own Wikipedia entry,⁵¹ and who is compared to former University of Texas quarterback Vince Young.⁵² The intensity among schools competing for Pryor’s services has been so extreme that, at one point, he received up to 50 text messages per hour from recruiters, and one football coach asked if he could bring a helicopter to land on the front lawn of his high school.⁵³ The first school Pryor visited was Ohio State, and he mentioned how much he enjoyed quarterback coach Joe Daniels, head coach Jim Tressel and the other recruits.⁵⁴ The type of offense that Pryor ran while in high school and what he seeks to run in college is the spread offense, a type of offense involving a strong focus on the passing game with many receivers “spread” over the width of the field. Ohio State runs the traditional I-formation offense with a strong emphasis on the power running game. This type of offense has been Ohio State’s staple for many years and is a common offense played in the Big Ten conference. Pryor mentioned that during recruiting Tressel promised he would change the offense from the I-

49. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

50. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

51. See [www.Wikipedia.com, Terrelle Pryor](http://en.wikipedia.org/wiki/Terrelle_Pryor), http://en.wikipedia.org/wiki/Terrelle_Pryor (last visited, Feb. 15, 2008).

52. Thayer Evans, *Recruiting Intensifies for Can’t Miss Prospect*, N.Y. TIMES, January 5, 2008 at D4. Vince Young was named one top 25 players in the history of college football by ESPN. See <http://sports.espn.go.com/nfl/news/story?id=3086827> (last visited, Jan. 21, 2008).

53. Evans, *supra* note 53, at D4.

54. *Id.*

formation to the spread.⁵⁵ When asked if he thought Tressel would indeed change the offense for him, Pryor stated, "I believe him because he said he would, but I really don't know."⁵⁶ Yet, Ohio State is not the only major university saying they will change their offense for Pryor. He noted that while he does not like Penn State's offense, "They said they'll bring the spread with me, but I don't know."⁵⁷

A casual observer might wonder what the harm is in suggesting to a PSA that a football team is willing to change their system for a particular player and then renege on the promise. After all, athletes are expected to be versatile, especially when they are young. However, college football is unique in that the offensive or defensive scheme run by a particular university has a dramatic impact on the type of athlete needed for each position.⁵⁸ If a PSA signs with a particular institution expecting that institution to run a particular style of play and the coaching staff fails to follow through, the potential playing time for that student-athlete could diminish dramatically. Not all football skills are easily transferable, particularly for those playing the so-called "skill" positions of quarterback, wide receiver and running back.

Diminished playing time means diminished opportunities to be seen by NFL scouts, which in turn makes a future NFL career less and less likely.⁵⁹ While a student has the ability to transfer to another institution, he can transfer only if the head football coach of his current school grants him a release.⁶⁰ The football player then must agree to sit out for one year if transferring within the Football Bowl Subdivision and two years if transferring

55. *Id.*

56. *Id.*

57. *Id.*

58. Nowhere can this be best illustrated than by the struggles of the University of Nebraska after its football team when from a team that ran the option for around four decades to one that moved to the so-called "West Coast Offense". See Brian Christopherson, *Bo's Show: Pelini becomes Nebraska's 28th Head Football Coach*, LINCOLN J. STAR, Dec. 3, 2007 at D1. Changing an entire play-calling scheme is not a small thing and often takes years of adjustment.

59. The vast majority of college football players see the potential of playing in the NFL as one of the major reasons for picking a University. See Robert Andrew Powell, *For Lesser Talents, It's the Hard Way Every Time*, N.Y. TIMES, Feb. 4, 2004, at D2.

60. See NCAA MANUAL, *supra* note 14, Bylaw 13.1.1.3.

within a conference.⁶¹ For an athlete who spends his entire career working for the possibility at becoming an NFL draft pick,⁶² the misrepresentation is not a small one and can dramatically affect his future earning potential. Meanwhile, there are no NCAA sanctions for coaches who engage in this activity.⁶³

Why would a coach tell a PSA that he is willing to change the playbook for him and then refuse to do so? It seems like a waste of time and effort to make these promises and then renege. It could be that simple inertia keeps a coach from changing the playbook even after he promised to do so. However, a more disturbing possibility is that coaches recruit top athletes not necessarily for their program, but to keep them away from the competition. For example, Team A may not run the option, but Team B does and its Team A's strongest competitor. By keeping a talent option-running PSA away from the competition, a coach still gains an advantage over Team B, even if the PSA never steps on the football field. It is easy to see why a coach could have the incentive to lie in this situation. The NCAA transfer rules aid the coach because once a student-athlete realizes his situation and decides to transfer, he will be forced to sit out a minimum of one year.⁶⁴ Perhaps Terrelle Pryor said it best that when it comes to changing a football playbook it is extraordinarily difficult to determine, "who's lying and who's not."⁶⁵

(2) Scenario Two: I'm Not Leaving this University, it's My Dream Job

Head coaches are often the heart of a college football program and often "receive most of the credit and criticism of an athletic program."⁶⁶ Because of this pressure and high visibility, college

61. NCAA MANUAL, *supra* note 14, Bylaw 14.5.1.

62. This is not to suggest that all college football players attend a university with the sole intention of playing professional football. However, the majority of *Football Bowl Subdivision* football players have that dream, even if it is an unrealistic one.

63. One could argue that the coach will suffer "reputational harm" but that provides little comfort for an athlete who never gets the chance to step out on the field.

64. NCAA MANUAL, *supra* note 14, Bylaw 14.5.1.

65. Evans, *supra* note 53, at D4.

66. Martin J. Greenberg & Jay J. Smith, *A Study of Division I Assistant Football and Men's Basketball Coaches Contracts*, 18 MARQ. SPORTS L. J. 25,

football coaches are highly compensated with fourteen coaches making over \$2 million per year and four coaches earning over \$3 million per year during the 2006 season.⁶⁷ Nowhere are the stakes higher and the pressure more intense than at the University of Michigan. Former head football coach and athletic director Bo Schembeckler, when asked about loyalty to the University, famously quipped, “A Michigan Man is going to coach at Michigan.”⁶⁸ After the 2007 football season when long time coach Lloyd Carr announced he would retire from coaching, the question became who is this “Michigan Man” going to be?

Rumors abounded shortly after Carr’s retirement with the most likely candidate, LSU’s Les Miles, stating he was not interested in the job.⁶⁹ However, Michigan found their “Michigan Man” in the University of West Virginia’s Rich Rodriguez. Michigan has a reputation of honesty and integrity when dealing with football players, coaches and staff⁷⁰ yet the hiring of Rodriguez has been extraordinarily controversial. The controversy extends to Rodriguez’s days at West Virginia when he used the University of Alabama’s interest in him to “leverage” salary increases and perks.⁷¹ In exchange for those perks, Rodriguez had a \$4 million dollar buyout written into his contract at the University of West Virginia.⁷² Currently, the University of West Virginia is suing Rodriguez for breach of contract after Rodriguez failed to pay the buyout on time.⁷³ Further, some of

26 (Fall 2007).

67. *Id.*

68. *WVU’s Reputation Damaged? WVU’s Reputation at Stake?*, PITTSBURG POST-GAZETTE, Jan. 22, 2008, at D1. In the interest of full disclosure, this comment was actually made regarding a basketball coach, but it maintains the same applicability when discussing college football. *Id.*

69. Pete Thamel, *With Miles Staying Put, Michigan Talks to Schiano*, N.Y. TIMES, Dec. 7, 2007, at D1.

70. Mitch Albom, *Rodriguez Mess: West Virginia’s Troubles Could One Day be Michigan’s*, DETROIT FREE PRESS, Jan. 20, 2008. However, not even Michigan is immune from criticism. Rodriguez’s hiring created resentment among current Michigan football players who openly criticized the team. See Angelique S. Chengelis, “Departing U-M lineman blasts program”, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20080326/SPORTS0201/803260444>, (Last Visited, March 28, 2008).

71. *Id.*

72. Stephanie Loh, *WVU Files Amended Complaint: Asserts Breach of Contract Against Rod*, THE DOMINION POST, Jan. 22, 2008.

73. *Id.*

Rodriguez's conduct during the negotiations between himself and the University of Michigan was described as "unethical."⁷⁴ Eight hours away from giving his official resignation, Rodriguez had yet to tell his players that he was leaving and he allegedly shredded documents at West Virginia before he left.⁷⁵ However, what was arguably the most scandalous part of Rodriguez's departure was that while he did not tell his players that he was leaving, he did manage to make one phone call before he left; he called Terrelle Pryor to let him know that he was leaving West Virginia for Michigan.⁷⁶ Making matters even worse, Rodriguez utilized West Virginia's one phone call per week allowed for Terrelle Pryor as he was walking out the door.⁷⁷ This made it impossible for West Virginia to call him and mitigate any damage done by Rodriguez.

Even in his last hours at West Virginia, Rodriguez's first thought was to call a top college recruit to let him know of his plans. This emphasizes the influence the head football coach has on the decision made by the PSA. It has been noted that, "A coach is often the most influential reason for a recruit choosing a school."⁷⁸ Because of this influence, a head coach may conceal or lie to a PSA during recruiting in order to get him to commit to his program. The rationale is if the coach decides to stay at his institution, either because other offers were not as lucrative or he used his leverage to improve his contract, he will need that PSA to play for him. If he does leave his institution, he can use his new exposure to recruit new players or attempt to try and sway other recruits. However it turns out, it is a win-win situation for the coach. As one sports writer noted, "A head coach can sign a 10-year deal, say he's found his final job, promise recruits they'll be part of a glorious future at XYZ U and then leave before the first year's over."⁷⁹

Again, for a coach committing this type of fraud, there is no

74. Dave Hickman, *Rodriguez's Selfish Acts May Well be His Downfall*, CHARLESTON GAZETTE, Jan. 17, 2008, at 1B.

75. *Id.*

76. *Id.*

77. *Id.*

78. Art Thiel, *If Coach Bolts, Let the Players Go Too*, SEATTLE POST INTELLIGENCER, Dec. 19, 2007, at F1.

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

punishment within the NCAA rules, while the potential consequences for the student-athlete are immense. Other than the repercussions mentioned in Section II. A., there is the emotional trauma of dealing with a new head coach and the time and effort spent learning a new football system. Proposals have been made such as forcing college coaches who leave to sit out a year before they are eligible to coach again⁸⁰ or immediately releasing all players from their institution, making them a type of “free agent.”⁸¹ However, none of these suggestions have been implemented and NCAA reform continues to focus on the misconduct of the PSA or student-athlete.⁸² Luckily for the University of Michigan, few of Lloyd Carr’s recruits have revoked their verbal commitments.⁸³ This is unusual for universities undergoing coaching changes.⁸⁴ Meanwhile, any player at West Virginia who wants to play for his beloved former head coach must sit out a year and obtain a release from their new head coach.⁸⁵

(3) Scenario Three: You will Start as a True Freshman

We return once again to Terrelle Pryor, who has coaches asking to land helicopters at his high school and receives breaking news directly from head coaches discussing their next coaching job. Apparently, Rich Rodriguez’s last minute phone call from West Virginia had an impact on Pryor. He decided to spend one of his official visits at the University of Michigan.⁸⁶ During his visit, Pryor attended the Michigan-Iowa basketball game and was

80. See *Fleeing Coaches Should Redshirt*, LONG BEACH PRESS-TELEGRAM, Dec. 18, 2007, at 1C.

81. See Theil, *supra* note 79, at F1.

82. For example see NCAA MANUAL, *supra* note 14, Bylaw 13.2.2.1, requiring the PSA to repay any improper benefit in order to regain his eligibility.

83. See Antione Pitts, *U-M Hasn’t Lost Recruits ...Yet*, GRAND RAPIDS PRESS, Dec. 16, 2007, at D10.

84. *Id.*

85. See NCAA MANUAL, *supra* note 14, Bylaw 13.1.1.3, “An athletics staff member or other representative...shall not make contact with the student-athlete of another NCAA or NAIA four-year collegiate institution, directly or indirectly, without first obtaining the written permission of the first institution’s athletic director...” While the language of the rule says athletic director, it is the head coach who will ultimately make this decision.

86. Bernard Fernandez, *Penn State off Pryor’s List?*, PHILA. DAILY NEWS, Jan. 21, 2008, at 107.

greeted by the student section chanting, "We want Pryor" and "Come to Michigan."⁸⁷ One of the most appealing aspects of playing at Michigan is the fact that Michigan could give Pryor the chance to start as a true freshman because Rodriguez is bringing the spread offense he ran at West Virginia with him.⁸⁸ LSU, a recent player in the competition for Pryor's services, cannot make the same promise because of the number of players available to play quarterback.⁸⁹ The chance that Pryor would need to "wait his turn" is high, particularly with LSU's success at the quarterback position. For athletes, playing time is the ultimate indicator of current talent and future success. Not only is there the ability to compete that most athletes crave, there is also the attention that follows on the field success such as television appearances and the notice of NFL scouts. There is little doubt that starting as a true freshman will have a significant impact on Pryor's decision.

The importance of playing time for a college football player cannot be understated. This is demonstrated by the rash of "disappointment lawsuits" that occur when student-athletes and their parents sue on the basis that athletic talent has been misused.⁹⁰ The promise of playing time for a college football player has been litigated as far back as 1993 with the case of the "crybaby quarterback,"⁹¹ *Fortay v. University of Miami*.⁹² Fortay alleged there existed an oral contract between himself and former head football coach Dennis Erickson in which Erickson promised to give Fortay the starting quarterback position if he signed an NLI with the University of Miami.⁹³ Further, Fortay claimed that the "representations by Miami athletic officials were the principal

87. *Id.*

88. *Id.*

89. *Id.*

90. Timothy Epstein, *Splinters from the Bench: Feasibility of Lawsuits by Athletes Against Coaches and Schools for Lack of Playing Time*, 4 VA. SPORTS & ENT. L.J. 174, 187 (2005). It is worth noting that lawsuits for lack of playing time are not unique to college football. *See Id.*

91. Timothy Davis, *College Athletics: Testing the Boundaries of Contract and Tort*, 29 U.C. DAVIS L. REV. 971, 974 (1996).

92. *Fortay v. Univ. of Miami*, Civ. A. No 93-3443, 1994 WL 62319, Feb. 17, 1994 at *1. Additionally there was a charge of negligent misrepresentation which will be discussed in Section V *infra*.

93. Epstein, *supra* note 90, at 187.

reasons he matriculated to the institution.”⁹⁴ During his recruitment, the University of Miami advertised their ability to develop NFL-quality quarterbacks.⁹⁵ Further, Fortay stated that he committed to Miami believing he would, “be the starting quarterback at UM and the team would be built around him.”⁹⁶ Instead of obtaining the starting position, Gino Torretta was named the starting quarterback and he went on to win the Heisman Trophy in 1992.⁹⁷ Fortay transferred to Rutgers, but was never able to realize the promise he had at Miami.⁹⁸ Eventually the University of Miami and Fortay settled the case out of court.⁹⁹

Promising playing time as a true freshman is yet another example of how coaches can mislead top prospects in order to get them to commit to their university. Arguably, there are very few PSAs who would be content with sitting on the bench. With the desire to play in the NFL motivating the majority of college football recruits,¹⁰⁰ the promise of immediate playing time seems all too tempting. What increases the temptation to rely on the coach’s promise for playing time is that many college football players *do* play immediately as a true freshman.¹⁰¹ As stated in Section I, the NCAA legislation making freshman football players immediately eligible and the reduction in the maximum number of scholarships to eighty-five had a tremendous impact on both the sport and recruiting. While being told by Penn State and Ohio State that they will change their offense might seem a little suspicious to Terrelle Pryor, hearing that he will start as a true freshmen seems much more realistic.

Nevertheless, young PSAs are unfamiliar with the process that goes into picking a starting line up. Some returning players dramatically improve during summer conditioning and true

94. Davis, *supra* note 91, at 975.

95. Fortay, 1994 WL 62319 at *3.

96. *Id.* at *4.

97. Epstein, *supra* note 90, at 187.

98. Davis, *supra* note 91, at 975.

99. Epstein, *supra* note 90, at 187.

100. See Powell, *supra* note 59, at D2.

101. See Tommy Bowman, *ASU to Start Six Newcomers against Michigan*, WINSTON-SALEM J. Aug. 28, 2007. Interestingly enough, Appalachian State (ASU) beat Michigan in the 2007-2008 college football season in one of the greatest upsets in college football history.

freshmen have the huge obstacle of learning the playbook. What is more compelling is the fact that many true freshmen must adjust to life away from home and all freshmen must adjust to life as a collegiate student-athlete. These are factors that veteran players do not need to experience. Finally, every freshman football player believes they will be the one who will start as a true freshman, but out of the entire freshman class that a football team brings in, only a handful will play as a true freshman. Many of those obtain their positions because of injury or as an option of last resort. Even though some freshmen do play, the statistics are against a true freshman setting foot on the field.

III. A CAUSE OF ACTION: TORT VS. CONTRACT

The thought of bringing a cause of action against a coach and a university is not a new idea, as demonstrated by Fortay and his lawsuit against the University of Miami. The majority of legal scholarship and litigation regarding student-athletes involves lawsuits grounded in contract. This is a natural inclination because a PSA signs an NLI after committing to a university, a document that does resemble a contract in many ways.¹⁰² Further, a student-athlete signs a financial aid agreement outlining the terms and conditions for his scholarship. Some tort litigation and legal scholarship has been generated mostly in the area of personal injury from injuries suffered on the field and the unique area of educational malpractice.¹⁰³ However, little litigation has been pursued under the theory of fraudulent or negligent misrepresentation. The most common rationale for the lack of tort lawsuits under the fraudulent or negligent misrepresentation theory is the problem of quantifying damages for the student-athlete. Additionally, there are potential proof problems because many of the conversations between PSAs and football coaches occur in private. This could turn the cause of

102. "The NLI is 'a contract of sorts a written agreement...The most important service the program does is cease the recruiting process when the kid signs.'" Michael Riella, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2187 (2002).

103. See Thomas R. Hurst and James N. Knight, *Coaches Liability for Athletes' Injuries and Deaths*, 13 SETON HALL J. SPORT L. 27 (2003).

action into a “he said, she said” disagreement. However, juries deal with these types of issues on a routine basis and to deny a student-athlete a remedy in tort would essentially create a wrong without a remedy. Additionally, fraudulent misrepresentation claims outside of the sports arena are common and many times successful.¹⁰⁴ By analogizing to these successful claims, a student-athlete could legitimately frame a cause of action under misrepresentation. Finally, one of the most important reasons for initiating a tort cause of action is to encourage the NCAA to reform its current policies. By winning a tort claim and obtaining the corresponding monetary judgment, the NCAA will need to reevaluate its policies to prevent further lawsuits.

A. Student-Athlete Lawsuits and Legal Scholarship in Contract: the NLI and the Financial Aid Agreement

Before the merits of a tort lawsuit can be fully illustrated, it is important to outline why suits by student-athletes under contract prove ineffective. The most common target for both lawsuits and criticism in the coach/student-athlete relationship is the NLI. Both student-athletes and legal scholars have argued the NLI is an adhesion contract because the terms of the NLI are “take it or leave it.”¹⁰⁵ PSAs are not allowed to go out and negotiate the terms of their scholarship on an individual basis. In fact, the NLI itself states that no changes of any sort may be made to the document.¹⁰⁶ The only bargaining power that a PSA possesses is the opportunity to decide which school they choose to attend.¹⁰⁷ While the athlete does have the ability to choose which university and football coach he will play for, the terms of the “contract” are the same wherever he goes, making his choice “devoid of consequence.”¹⁰⁸

The major problem with pursuing a cause of action under

104. For example see *Price v. Highland Community Bank*, 932 F. 2d 601 (7th Cir. 1991); *Wilson v. S & L. Acquisition Co.*, 940 F.2d 1429 (11th Cir. 1991); *Berger v. Security Pacific Information Systems, Inc.*, 795 P.2d 1380 (Colo. Ct. App. 1990).

105. Riella, *supra* note 102, at 2209-10.

106. Stacey Meyer, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L. REV. 227, 234 (2004).

107. *Id.*

108. Riella, *supra* note 102, at 2212.

contract using the NLI as the foundation for the suit is that while the NLI is a binding agreement, all it promises is to provide financial aid for a PSA who attends a university for one academic year.¹⁰⁹ There are no other promises such as guaranteeing playing time, turning the PSA into a "star," or building the team around him.¹¹⁰ This is not to say that these promises have not been made, but they are not documented in the NLI. Further, attempting to enforce oral promises made under an NLI runs into the parol evidence rule, making proof of the promises incredibly difficult. Another problem with the NLI is that it is only a one-year agreement. After that one year is over, renewal of a student-athlete's scholarship is based on the opinion of the head coach and the athletic director.¹¹¹ After the PSA's first year at the university, "neither the institution nor the athlete carries any obligations under the NLI."¹¹² A student-athlete might not recognize that he has made a bad choice until well after that first year is over. To rely on the NLI as the basis for a cause of action under contract provides too narrow a window under which to bring suit.

In addition to the NLI, a financial aid agreement must be signed by both the PSA and the institution in order to make the NLI valid.¹¹³ The NLI states that by itself it does not constitute a contract because it requires an offer of athletics financial aid for it to become binding.¹¹⁴ The financial aid agreement dictates the terms of the scholarship, including the length of the scholarship and the requirement that all NCAA and conference rules must be followed.¹¹⁵ The financial aid agreement, unlike the NLI, is signed on a year-by-year basis. Some courts have found a protected interest in the financial aid agreement guaranteeing a scholarship for one academic year.¹¹⁶ Yet, the only interest

109. Meyer, *supra* note 106, at 233.

110. *Id.*

111. Riella, *supra* note 102, at 2187.

112. *Id.*

113. Meyer, *supra* note 106, at 229.

114. *Id.*

115. *Id.* at 230. Currently, all scholarships for the sport of football are so-called "full" scholarships because they include room, board, books, tuition and fees, the maximum allowed by the NCAA. See NCAA MANUAL, *supra* note 14, Bylaw 15.1.

116. See Meyer, *supra* note 106, at 232. See also, *Hysaw v. Washburn*

protected in the financial aid agreement is the promise of a scholarship. There is nothing in the financial aid agreement that confirms any promises made by a coach during the recruiting process.¹¹⁷ Further, the financial aid agreement suffers from the same problem as that of the NLI; it is only valid on a yearly basis and by the time the student-athlete realizes he was lied to, the financial aid agreement may have expired.

The most famous case dealing with the possibility of a contractual relationship between a student-athlete and an institution is *Ross v. Creighton University*.¹¹⁸ In *Ross*, the plaintiff alleged that Creighton University, in exchange for his commitment to play basketball, would provide educational assistance for him because he came from an “academically disadvantaged background.”¹¹⁹ When Ross left Creighton University, he maintained a D average, had only 96 of the 128 credits required for graduation and had the reading skills of a fourth grader.¹²⁰ Ross sued under contract alleging that Creighton breached their contractual obligation by failing to provide, “any real opportunity to participate in and benefit from the University’s academic program.”¹²¹ The *Ross* court found that a contractual relationship did exist between Ross and Creighton University but severely limited its holding by stating, “[Ross] must point to an *identifiable contractual promise* that the defendant failed to honor.”¹²²

As stated previously, both an NLI and a financial aid agreement are limited in what they promise a student-athlete. Essentially, all that is promised is a scholarship for a one-year term in exchange for the student-athlete committing to play for the respective institution. Both documents cannot be modified by the student-athlete, coach or institution. If a plaintiff attempts to sue under contract based on promises that the coach will not leave the university, the coach will change the playbook, or the student-athlete will receive playing time, it will be impossible to find this

Univ., 690 F. Supp. 940, 945-47 (D. Kan. 1987).

117. Meyer, *supra* note 106, at 232.

118. *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

119. *Id.* at 411.

120. *Id.* at 412.

121. *Id.* at 416.

122. *Id.* at 417 (emphasis added).

documented in either the NLI or the financial aid agreement. Additionally, the parol evidence rule bars any admission of oral promises. The courts have set the bar extraordinarily high when it comes to pleading a successful claim by a student-athlete against an institution in contract. When a wrong has been committed against these plaintiffs, it is better to seek a remedy under tort theories than under contract.

B. Tort Suits Providing Regulation of the NCAA and Football Coaches

Even though the courts¹²³ have acknowledged a contractual relationship between a student-athlete and the university, the problems with the parol evidence rule and the very narrow grounds upon which the court will find a breach of contract make contract based lawsuits prohibitive. A financial aid agreement and an NLI promise very little to a student-athlete in exchange for their services. However, most football coaches make several oral promises on which it is reasonable for a PSA to rely. Further, student-athletes with goals of playing in the NFL suffer significant harm because of reliance on those promises. While a harm has been committed, a remedy must be found in another area, specifically through tort lawsuits.

While the majority of claims by student-athletes are based in contract, tort lawsuits are not unusual. Two of the most common tort lawsuits are personal injury based on a negligence theory¹²⁴ and educational hindrance claims when student-athletes leave a university without a degree or any educational skills.¹²⁵ These examples illustrate a growing willingness by the courts to recognize the tort claims of student-athletes. More importantly, tort represents an area of the law where plaintiffs seek relief against big organizations and powerful individuals who take

123. For an additional case noting a contractual relationship between a student-athlete and a university, see *Taylor v. Wake Forest University*, 191 S.E.2d 379 (N.C. Ct. App. 1972).

124. For example, see Thomas R. Hurst and James N. Knight, *Coaches' Liability for Athlete's Injuries and Deaths*, 13 SETON HALL J. SPORT L. 27 (2003).

125. For example, see Monica L. Emerick, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865 (1997).

advantage of those in a weaker position. Whether it is product liability claims, environmental hazard claims, or personal injury claims, the law provides plaintiffs with a remedy in tort. As mentioned previously, the majority of NCAA regulation focuses on the misconduct of the PSA or the student-athlete, not the head football coach. Even if a coach violates NCAA rules, it is the institution and the team that bears the consequences.¹²⁶ Yet, the person suffering the most from the misrepresentations made by coaches are the student-athletes themselves and they are left with no remedy. The NCAA and college football coaches should not be immune from the civil justice system simply because of their power or iconic status. By supplying student-athletes with a remedy in tort, it places college football coaches on notice that they will be held liable for the promises they make during recruiting. The most effective way to make a tort claim by a student-athlete is through the torts of fraudulent and negligent misrepresentation.

IV. APPLYING THE FRAUDULENT MISREPRESENTATION ELEMENTS TO RECRUITING PROMISES

Under a claim for fraudulent misrepresentation a person who “fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance. . . is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation.”¹²⁷ Arguably, torts of this type are rampant throughout the recruiting process. Each of the three scenarios discussed in section III, *supra*, illustrate how coaches commit fraudulent misrepresentation in order to influence the conduct of the PSA. However, like all torts, a student-athlete must prove all of the elements in order to state a claim. The elements of fraudulent misrepresentation include scienter, inducement, justifiable reliance and harm. When applying these to oral

126. The most common sanction for NCAA recruiting violations is the, “student-athlete’s becoming ineligible to represent that institution in intercollegiate athletics.” NCAA MANUAL, *supra* note 14, Bylaw 13.01.1. However, a university can be fined and lose scholarships based on repeated violations. See Brooks, *supra* note 49, at 11.

127. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

promises made by football coaches, it is apparent that a claim under fraudulent misrepresentation is a genuine prospect.

A. Element one: Scierter

The word "fraudulent" refers to a person's knowledge that what they are saying is untrue and is sometimes called scierter.¹²⁸ This element is evident in all three scenarios where coaching misconduct occurs during the recruiting process. First, coaches know how difficult it is to change an entire play-calling scheme. There is usually a huge adjustment period when a coach changes the style of offense or defense they are accustomed to running. Further, when the coach changes the play calling system, it involves personnel changes at *many* positions, not just a few. To suggest that a coach is willing to change their entire playbook just for one player is a stretch at best. Secondly, the yearly head coaching changes within college football are legendary. For a coach to suggest that he is committed to staying at one institution for an extended period of time defies the realities of college football. Finally, to tell a PSA that he will start as a true freshman fails to take into consideration the dynamics of a football team itself. A veteran on the team could make huge strides during the off season and in a head to head competition for a position, the PSA could find himself left out of the starting lineup. A coach, no matter what promises are made, will put the best eleven players out on the field because it is these eleven players that give him the best opportunity to win. As stated previously, winning means job security or they chance to obtain his "dream job."

One could argue that a coach has no idea what he is telling a PSA is false. It is possible that the coach genuinely believes that what he is telling the PSA is true, but circumstances change making it impossible for him to fulfill his promise. However, a statement that is a prediction or a promise can be construed as, "a statement that the maker knows of nothing which will make the fulfillment of his prediction or promise impossible or improbable."¹²⁹ To suggest that coaches are unaware of the difficulties of changing play calling, the likelihood of accepting

128. RESTATEMENT (SECOND) OF TORTS § 526, cmt. a (1977).

129. RESTATEMENT (SECOND) OF TORTS § 525 cmt. f (1977).

another coaching position, or who will be the best fit for a particular position is to deny the intellect of those who coach the game. Arguably, football coaches are making promises to PSAs that they, at best, do not know if they will be able to fulfill and, at worst, know are impossibilities. Also, they are making these promises with the intent that the PSAs act or not act.

Because of the lack of case law regarding student-athletes suing in tort, it is necessary to analogize student-athlete claims to other successful claims brought under fraudulent misrepresentation. The type of scienter involving the recruiting of student-athletes is most analogous to the scienter involving an employer's misrepresentations made to a prospective employee regarding the terms of employment.¹³⁰ Courts have held that a promise for a job or the continuation of a current one combined with the intent not to carry out the promise represents actionable fraud.¹³¹ While the athlete-coach relationship is not defined as an employer-employee relationship,¹³² there are many aspects of both relationships that are similar. In particular, the way a football coach recruits a student-athlete is comparable to when an employer recruits a highly paid, high profile corporate executive. Both coaches and corporations believe that this person could make the difference for their organization. In order to obtain the services of a CEO who can turn around a company, oral promises are made about benefits such as stock options, housing benefits, or various corporate perks.¹³³ While football coaches are precluded by NCAA rules to make any type of monetary promises,¹³⁴ they do make promises that impact a player's future career. If employers

130. P.G. Guthrie, Annotation, *Employer's misrepresentation as to prospect, or duration, of employment as actionable fraud*, 24 A.L.R. 3d 1412, (1969).

131. *Id.*

132. College football players are considered amateurs because they cannot receive "pay" for their services. This has not stopped legal scholars from arguing that an employer-employee relationship exists. See Jonathan L.H. Nygren, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359 (2003).

133. It is interesting to note that these highly compensated individuals are often successful when they sue for the enforcement of oral promises made during recruiting. See e.g., *Ohanian v. Avis Rent a Car System, Inc.*, 779 F.2d 101 (2d. Cir. 1985).

134. NCAA MANUAL, *supra* note 13, Bylaw 13.2.2.

are held accountable for fraud during “recruiting” there is no reason why football coaches should not be held liable.

B. Element two: Inducement

Under the tort of fraudulent misrepresentation, the maker of the misrepresentation is liable to the people, “to whom it [the promise] is made with the intent to cause them to act in reliance upon it.”¹³⁵ To fulfill the requirement of inducement the plaintiff must show that, “he acts for the purpose of causing it [action] or acts believing that there is a substantial certainty that such a result will follow from his conduct.”¹³⁶ In other words, inducement occurs when a tortfeasor makes a particular statement with the goal of producing a certain result. This is arguably the easiest element to prove when looking at the coach/PSA relationship during recruiting. The whole purpose of official visits, telephone conversations, direct mailings and text messages are to induce the PSA to sign an NLI for one school while refusing an opportunity to sign with another. It would be difficult to find a situation where a coach was acting for a reason other than to induce the PSA to make a choice. It could be argued that a coach is simply giving a PSA advice and is not inducing him to act. However, this is highly unlikely and the NCAA rules reflect that coaches, through the recruiting process, are trying to induce PSAs to act.¹³⁷ Further, there is strong incentive for the coach to get the PSA to act or not act so he can plan what type of personnel he will need for the future.

When analogizing inducement to successful fraudulent misrepresentation claims, the most logical analogy is when an employer successfully induces a prospective employee to either retire or quit his previous job in favor of a new job at the employer’s company. There are numerous cases illustrating a successful claim under this cause of action as demonstrated by the case selections following the Restatement’s illustration of fraudulent misrepresentation.¹³⁸ However, the case containing

135. RESTATEMENT OF TORTS § 531 (1938).

136. RESTATEMENT OF TORTS § 531 cmt. a (1938).

137. See, e.g., NCAA MANUAL, *supra* note 14, Bylaw 13.1 limiting the number of times a coach can contact and evaluate a PSA.

138. See RESTATEMENT OF TORTS § 531 (1938).

facts most analogous to the recruiting of college football players is *Smyth v. Fleishmann*.¹³⁹ In *Smyth*, the South Carolina Supreme Court held that cause of action for fraudulent misrepresentation could be brought when a hotel owner lured away a popular employee of a rival hotel with the intention of never offering her long-term employment.¹⁴⁰ This is similar to the situation where football coaches induce PSAs to sign with their program in an effort to keep them away from the competition. These coaches never intend to actually let the student-athlete play for them, they only seek to disadvantage the competition. By inducing these athletes into this decision, they are deprived of the opportunity to play for a team that actually wants to utilize the PSA's talent. This deprivation of playing time causes harm to the student-athlete, especially if his goal is to pursue a career in the NFL.¹⁴¹

C. Element Three: Justifiable Reliance

While it may be relatively easy to show that a coach intends to induce action on behalf of the PSA, it is more difficult to show that a PSA's reliance on what the coach said was justifiable. In order for reliance to be justifiable, the fact misrepresented must be material.¹⁴² A fact is defined as material "if its existence or nonexistence is a matter to which a reasonable man would attach importance in determining his choice of action. . . or the maker of the representation knows that its recipient is likely to regard that fact as important although a reasonable man would not so regard it."¹⁴³ It can be argued that it is unreasonable for a PSA to rely on the promise that a coach stay at a university or that a coach will change the playbook because all of the evidence suggests that these things do not occur. The media constantly reports on coaching changes¹⁴⁴ and fans are often in an uproar when coaches

139. *Smyth v. Fleischmann*, 52 S.E. 2d 199, (S.C. 1949)

140. *Id.*

141. It is extraordinarily rare for a student-athlete to not harbor dreams of playing in the NFL. Even if he does not maintain a desire to play professionally, he still suffers harm because the coach is depriving him of the chance to play football. To remove such an important part of one's life is not a small matter.

142. RESTATEMENT OF TORTS § 538 (1938).

143. *Id.*

144. Thomas, *supra* note 79, at C3.

suggest changes to the playbook. Even though it is not unusual for true freshman to get playing time, the odds are still stacked against him. Only a handful of recruits from a recruiting class numbering up to 25 players¹⁴⁵ will ever see the field their first year. With all of these facts, how can a PSA justifiably rely?

The answer to this question comes from the second prong of a material misrepresentation: the person making the misrepresentation knows that the recipient will rely even if a reasonable person would not.¹⁴⁶ Athletes are taught from a very early age to follow the recommendations of their coach to the letter. Due to the size of a football team's squad¹⁴⁷ it is particularly important to follow the rules made by the coach in order to prevent disorder among such a large group of people. Having been a part of this culture for such a long time, football players are accustomed to taking coaches at their word. The importance of a coach in a football player's life is tremendous and coaches are even more influential on athletes that come from disadvantaged backgrounds. When looking at the unique culture of football, it is easy to see how a reasonable person may not rely on the promises made by a football coach, but a reasonable *football player* would.

One of the more famous cases involving justifiable reliance is *SEC v. Texas Gulf Sulfur*.¹⁴⁸ In that case, executives of an oil and gas company exercised their stock options before it became public knowledge that the company found a large reserve of minerals in Canada.¹⁴⁹ The defendants attempted to argue that they did not need to disclose the findings before they purchased stock because the prospect at any gain from the mineral discovery was still speculative¹⁵⁰ and that a reasonable person would not have relied on that information.¹⁵¹ The Second Circuit Court held that it did not matter that the gain was speculative because a reasonable

145. See NCAA MANUAL, *supra* note 13, Bylaw 15.5.1 limiting the number of new scholarships to 25 per year.

146. RESTATEMENT OF TORTS § 538 (1938).

147. While the NCAA limits available scholarships to 85 per football team, squad sizes can be much larger when non-scholarship "walk-ons" are added to the roster. See NCAA MANUAL, *supra* note 14, Bylaw 15.5.1.

148. *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968).

149. *Id.* at 840.

150. *Id.* at 849.

151. *Id.*

person would want to know this information before making a decision.¹⁵² While this case involved a lawsuit based on securities law, it is significant for the definition of what a reasonable person would want to know. A reasonable football player would want to know if a coach might entertain offers from other schools, if there is a possibility a coach will not change the playbook, and if there are other “rising stars” on the team who might compete for his position. A coach cannot use the defense that the answers to all of these questions are speculative; a PSA has the right to know the answers. Additionally, this case is significant because PSAs are in a similar position to that of the stockholders in *Texas Gulf Sulfur*; they place their trust in those in control to make the best decisions for all parties involved. A coach is supposed to put the best players on the field so the team can win. A CEO is supposed to make financial decisions that will benefit all stockholders. This makes PSAs like stockholders because both groups are particularly susceptible to misconduct from those in control.

D. Element Four: Harm

Perhaps the most difficult element to prove in a fraudulent misrepresentation claim is the type of harm that has been caused. The measure of damages in a fraudulent misrepresentation claim is “the pecuniary loss which results from the falsity of the matter misrepresented.”¹⁵³ A difficult obstacle to overcome is the exact measure of pecuniary damages a plaintiff suffers from. A student-athlete could claim that a coach cost him his opportunity at a long professional football career because he did not keep the promises made during recruiting. He could point to the fact that he was forced to sit on the bench while others received playing time because the coach failed to change the play-calling scheme or did not put him on the field when he was a true freshman. Also, a student-athlete could state that when the coach left the university for another job, a new coach came in who wanted to bring in “his guys” and the student-athlete was forced to transfer and sit out a year losing valuable time.

The problem with these arguments is it is difficult to quantify

152. *Id.*

153. RESTATEMENT OF TORTS § 549 (1938).

the plaintiff's damages. The opportunity to play in the NFL is not guaranteed and to suggest that a plaintiff would have a long career in the NFL provided a coach would not have induced him to make a poor recruiting choice involves some amount of speculation. Yet one author noted, "At first glance, an individual's claim that a university ruined a lifelong dream of playing in the NFL might seem a bit tenuous. However, the basic issues are familiar ones for which the law has cleared a fairly defined path over the years."¹⁵⁴ By committing fraud during the recruiting process, the coach denies the ability of a PSA to make an informed choice; a choice that could make a substantial difference in his ability to earn future profits. This is analogous to the situation of the shareholders in *Texas Gulf Sulfur*. The court noted in *Texas Gulf Sulfur*, it did not matter that the potential profits were speculative.¹⁵⁵ The failure of the corporate executives to tell the shareholders of the discovery of significant mineral rights denied them the opportunity to make a financial decision to buy more stock or keep the stock they already owned. It did not matter to the court whether they did make a profit or did not make a profit, only that they lacked an informed choice.¹⁵⁶ Juries are asked to make monetary determinations regarding damages all the time and they understand when someone has been wronged and how to best compensate that person. While this is not to suggest that determining monetary damages will be easy, it can be overcome.

It is worth noting that because the use of these fraudulent recruiting promises is widespread, there are a significant number of PSAs who suffer from harm as a result of those promises. Yet, the NCAA continues to focus on the misconduct of student-athletes rather than the misconduct of coaches. Some type of reform within the NCAA is needed to protect the student-athlete from fraudulent misrepresentation during recruiting. A jury would be able to see the abuses by coaching staffs across the country and by providing a monetary remedy could precipitate the needed reform. Traditionally, tort law has served this role within

154. James Ornstein, *Broken Promises and Broken Dreams: Should we Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?*, 6 SETON HALL J. SPORT L. 641, 647 (1996).

155. *Texas Gulf Sulfur Co.*, 401 F.2d at 849.

156. *Id.*

the American legal system. It would only take a handful of successful lawsuits for both the NCAA and college football coaches to be put on notice that fraud committed during the recruiting process is unacceptable and reform within the NCAA is required.¹⁵⁷ A harm is entitled to a remedy and a well-prepared lawyer could use not only the pecuniary loss, but the series of systematic abuses as a way to win a PSA's claim.

V. APPLYING NEGLIGENT MISREPRESENTATION TO RECRUITING PROMISES

As the previous discussion indicates, fraudulent misrepresentation is applicable when a football coach is consciously aware of his fraud and that fraud causes harm to a student-athlete. Yet, there are times when it could be extraordinarily difficult to prove that a football coach had the required scienter to prove fraudulent misrepresentation.¹⁵⁸ There may also be circumstances when the coach did intend to keep his recruiting promises, but something unforeseen prevented him from carrying them out. For example, a football coach may plan to give the starting position to a recruit, but an upper classman may have a spectacular off-season and become the logical choice for the starting position. Despite this change in circumstances, it does not excuse the *negligence*¹⁵⁹ of the coach in making these promises in the first place. Even if the coach believed the statement to be

157. As a matter of fact, using the legal system as a way to change NCAA regulation has already been a successful tactic. A series of lawsuits based under the ADA were brought by learning disabled PSAs alleging the NCAA's initial eligibility requirements violated their rights. See Paul M. Anderson, *A Cart that Accommodates: Using Case Law to understand the ADA, Sports and Casey Martin*, 1 VA. SPORTS & ENT. L.J. 211, 224-25 (2002). The PSAs won and the NCAA was forced to dramatically change their initial eligibility requirements. *Id.*

158. Negligent misrepresentation requires some of the same elements of fraudulent misrepresentation including misrepresentation of a material fact, justifiable reliance and damages. 37 C.J.S. *Fraud* § 59 (2008). However, the element of scienter is removed. *Id.* For a detailed explanation of how a student-athlete can make a claim under these elements, see *supra* section IV. See discussion *infra* section V.A. regarding the duty element.

159. It could even be argued that the coach's conduct in using one of these three recruiting promises is reckless because the coach, "does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk." BLACK'S LAW DICTIONARY 1298 (8th ed. 2004).

true, a cause of action for negligent misrepresentation may still lie if the coach failed to investigate the facts.¹⁶⁰ Further, negligent misrepresentation is still actionable even if the misrepresentation was an "honest mistake."¹⁶¹ In the *Fortay* case, section III. C. *supra*, Fortay stated a claim for negligent misrepresentation arguing that the University of Miami, "negligently misrepresented that he would become UM's starting quarterback luring him to sign with and enroll at UM."¹⁶² It is unclear how the court would have responded to this claim because Fortay eventually settled out of court.¹⁶³ It is also unclear from the facts of the case why Fortay argued a negligent misrepresentation claim rather than a fraudulent misrepresentation claim. Nevertheless, negligent misrepresentation is a viable alternative for plaintiffs when the scienter element is absent or there are proof problems.

A. Is there a Duty of Care to the Student-Athlete?

In order for a student-athlete to state a viable claim for negligent misrepresentation, he must show that the football coach owes a duty of care to the student-athlete.¹⁶⁴ Negligent misrepresentation occurs when there is a breach of that duty to provide correct information to the recruit.¹⁶⁵ The court has been willing to recognize a duty between a university and a student-athlete.¹⁶⁶ It has been suggested that a university owes a duty of care to a student-athlete because he has signed an NLI with the institution.¹⁶⁷ However, by relying on the NLI as a document triggering a duty between student-athlete and coach, a potential plaintiff runs into problems with the inherent limitations of the NLI.¹⁶⁸ Because an NLI makes few if any promises to the PSA¹⁶⁹ and does not claim to have any obligations to the PSA other than

160. See *Merrill v. William F. Ward Ins.*, 622 N.E. 2d 743 (Ohio Ct. App. 1993).

161. See *Perez Trucking Inc., v. Ryder Truck Rental Inc.*, 886 P.2d 196 (Wash. App. Ct. 1994).

162. *Fortay*, 1994 WL 62319 at *6.

163. Epstein, *supra* note 90, at 187.

164. 37 C.J.S. *Fraud* § 59 (2008).

165. *Id.*

166. Ornstein, *supra* note 154, at 657.

167. *Id.* at 666.

168. See *supra* section III.A.

169. *Id.*

to bind them to an institution, relying on the NLI as a document creating a duty could be a flawed strategy.

A better foundation for a duty of care between a coach and a student-athlete is based on the “special relationship” between the football coach and the student-athlete. The United States Court of Appeals for the Third Circuit found a duty of care between a student-athlete and the university based on a “special relationship.”¹⁷⁰ The court noted that, “when a student is participating as a student-athlete of that university, especially when that student had been *actively and continually recruited*, the same requisite duty of care is instilled.”¹⁷¹ It would seem logical to extend that “special relationship” to the relationship between a student-athlete and a coach. First, the coach is an agent of the university because of his status as an employee of the university. Both the coach and the university should be held liable for a breach of this duty.¹⁷² Second, with recruiting of the student-athlete serving as a tie to create this “special relationship,” it makes sense to hold accountable the person most active in the recruiting.

B. Breach of the Duty of Care During Recruiting

While a coach’s duty to a student-athlete can be established, any prospective plaintiff must also show a breach of that duty. One of the reasons why a court can impose a duty on the coach-athlete relationship is because of, “his superior position to obtain the needed knowledge and his pecuniary interest in the transaction.”¹⁷³ When a coach makes a promise to a PSA, yet fails to use the information he has correctly or fails to obtain any information at all, negligent misrepresentation may occur. The most common scenario where this would happen is when a head coach fails to check on the athletic development of his upperclassmen. For example, an upperclassman who suffered

170. *Kleinknect v. Gettysburg College*, 989 F.2d 1360, 1367 (3d Cir. 1993). *Kleinknect* was a lacrosse player who died of cardiac arrest during practice. *Id.* at 1363.

171. Ornstein, *supra* note 154, at 658 (emphasis added).

172. While it may make sense to sue the university in an effort to find the “deep pocket,” the extraordinary salaries of many of these coaches make them an equally attractive plaintiff.

173. 37 C.J.S. *Fraud* § 59 (2008).

from a debilitating injury during the prior season might be making remarkable strides during his rehabilitation in the training room. A coach may promise a starting position to a PSA based on his belief that the upperclassman will be unable to play during the upcoming season or will be less than one hundred percent. Despite the fact that this was an "honest mistake," the coach did not obtain the most current health information on this upperclassman and made a promise to a PSA based on that lack of knowledge. If coaches are not held accountable for this type of ignorance, they may purposefully under inform themselves during the recruiting season to shield themselves from liability.

There are examples of successful negligent misrepresentation claims that are analogous to college football recruiting. In the case *Galloway v. Afco Development Corp.* the defendant managed to secure investment in a real estate venture from his next-door neighbors.¹⁷⁴ The defendant maintained to the plaintiffs that the security of their investment was sound when in actuality the investment was not adequately secured.¹⁷⁵ The court held that because the defendant was in "a far better position" than the plaintiffs to determine the adequacy of the investment, he was under a duty to determine the truth of his statements.¹⁷⁶ This case is relevant for two distinct reasons. First, it is important to note that the defendant in *Galloway* was seeking investment in his real estate venture from his neighbors. During recruiting, coaches often make visits to the home of the recruit¹⁷⁷ in an effort to become "part of the family." While this is not against the rules, it is worth noting that this familial relationship between a coach and a student-athlete intensifies the argument that a coach owes a duty to a student-athlete. Furthermore, coaches, like the defendant in *Galloway*, are in a far better position to know what the PSA needs to hear. By not informing himself of this information, a coach may make a promise to a PSA that cannot be fulfilled.

174. 777 P. 2d 506, 507 (Utah Ct. App. 1989).

175. *Id.* at 509.

176. *Id.*

177. NCAA MANUAL, *supra* note 13, Bylaw 13.14.2.

V. CONCLUSION

The torts of fraudulent and negligent misrepresentation have become part of the college football recruiting landscape. There are powerful incentives for a coach to commit these torts and few if any repercussions. Furthermore, this type of behavior by coaches happens on a routine basis. While proving a fraudulent or negligent misrepresentation claim by a student-athlete against a coach may be difficult, it is critical to provide student-athletes with this sort of remedy because without it, you have a wrong without a remedy. Coaches are free to commit recruiting violations and continue in their respective careers¹⁷⁸ yet it is the student-athlete who suffers the most from a coach's misdeeds. Making the situation worse is the reality that the majority of NCAA legislation focuses on student-athlete misconduct and not coaching misconduct. Even if a coach does commit a recruiting violation, it is the institution that bears the punishment sometimes long after the coach has left.¹⁷⁹

All of these facts warrant one last look at Terrelle Pryor. After much deliberation, On March 19, 2008 Pryor eventually decided to sign an NLI with Ohio State.¹⁸⁰ One of the factors that drew Pryor to Ohio State was head coach Jim Tressel's idea of using him in a role much like Heisman Trophy winner Tim Tebow was used during his freshman year at the University of Florida; while acting as a backup, Pryor would be brought into play on occasional running plays.¹⁸¹ However, the single most important factor was Pryor's relationship with Tressel.¹⁸² A sports journalist noted, "If the analysts and prognosticators are right about his abilities, that choice could help determine the relative fortunes not only for Ohio State, but for the three other programs

178. Rick Neuheisel was recently named the head football coach at UCLA despite the fact that the football programs at the University of Colorado and the University of Washington committed suffered from NCAA violations under his leadership. See *Neuheisel Lands at U.C.L.A.*, N.Y. TIMES, Dec. 30, 2007, at 8.

179. Brooks, *supra* note 48, at 11.

180. Sean D. Hamill, *Ending Suspense, Top Prospect Pryor Picks Ohio State*, N.Y. TIMES, Mar. 20, 2008 at D2.

181. *Id.*

182. *Id.*

he did not choose.”¹⁸³ This seems like a tremendous amount of pressure on a young man. Hopefully, he will live up to his billing and that his recruiting choice will not be one he comes to regret.

Katherine Sulentic*

183. *Id.*

* May 2009 JD candidate Roger Williams University School of Law. The author would like to thank Professor Larry Ritchie for providing assistance on this research topic. Additionally, the author would like to thank Estes Banks and Megan Maciasz for their guidance on this comment.