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ARTICLE

**CONSENT THEORY AS A POSSIBLE CURE
FOR UNCONSCIONABLE TERMS IN
STUDENT-ATHLETE CONTRACTS**

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I. INTRODUCTION

“One of the most hateful acts of the ill-famed Roman tyrant Caligula was that of having the laws inscribed upon pillars so high that the people could not read them.”¹

A door opens and a group of college student-athletes is herded into a room with the rest of their teammates where they are presented with standard-form contracts and the mandate that they either sign the documents or forfeit the opportunity to compete in National Collegiate Athletic Association (NCAA) events for the upcoming academic year. The student-athletes have no legal representation. There is no negotiation about the terms of the contract. The contracts that these students (some still minors) are about to sign are take-it-or-leave-it and include much more than just the simple terms of their athletic-based academic scholarships (e.g., attend class, make good grades, practice, and play for their team). They also include the release of important commercial rights like the right of publicity in their names and likenesses for perpetuity. Some of these terms are buried in the text of the documents placed before the student-athletes; others are incorporated into the documents by reference to NCAA rules and regulations. This scene takes place in some form or another every year on the campus of each NCAA member institution.

The quote from Justice Musmanno serves as an example of judicial

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1. Cutler Corp. v. Latshaw, 97 A.2d 234, 237 (Pa. 1953) (opinion by Musmanno, J.).

disapproval directed at take-it-or-leave-it contracts with unclear or hidden terms and conditions. But does that statement fit the take-it-or-leave-it agreements put before student-athletes? Admittedly, it would be unfair to liken the treatment and regulation of student-athletes to that of ancient Romans under the rule of Caligula.² Nonetheless, universities enjoy an enormous advantage in terms of bargaining power that allows them to dictate terms and conditions to student-athletes, who have no real voice in the negotiation. Not only do student-athletes lack equal bargaining power, they lack meaningful choice because if they do not agree to the terms put before them, they are declared ineligible to participate in intercollegiate athletic competitions sanctioned by the NCAA. Lack of choice is contractually problematic because the essence of contract is volition (free exercise of will).³ Contractual volition is undermined when one party enjoys an enormous bargaining advantage, permitting the stronger party to dictate the terms of the contract to the weaker party.⁴ The absence of contractual volition in an agreement could result in judicial use of the doctrine of unconscionability to prevent enforcement of the challenged contractual term(s). This begs the question: Do student-athletes lack volition in their contractual relationships with universities to the point that these contracts should be found unconscionable if challenged in court?

This study analyzes that question by examining the doctrine of unconscionability and how it could apply to the contractual permission for use of name and likeness that student-athletes provide the NCAA and its member institutions. The study includes analysis of the doctrine of unconscionability, with specific emphasis placed on the application of consent theory of unconscionability to the name and likeness provisions in student-athlete agreements. Specifically, this study applies the consent theory approach to the waiver of publicity rights in Part IV of Form 11-3a to examine how the NCAA and its member institutions can better protect this contract and its terms and conditions from unconscionability claims brought by student-athletes.

II. DEVELOPMENT OF UNCONSCIONABILITY, FROM COVERT TOOL TO CODIFICATION

The roots of the doctrine of unconscionability can be traced back over centuries to the equity of redemption.⁵ Some even suggest that the doctrine

2. Caligula was the agnomen for Gaius Julius Caesar Augustus Germanicus, the third Roman Emperor who had a reputation for being a cruel, extravagant, and perverse tyrant. *See generally* ANTHONY A. BARRETT, *CALIGULA: THE CORRUPTION OF POWER* (1989).

3. JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* 482 (3d ed. 1990).

4. *Id.*

5. John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 28 (1969);

dates back to the Aristotelian ideal that justice required equality in contractual exchange.⁶ Yet, despite its ancient lineage in equity, the doctrine did not serve as a contractual limitation until the creation of Uniform Commercial Code (U.C.C.) section 2-302 by Karl Llewellyn in the first version of Article 2 of the Uniform Commercial Code.⁷ Prior to section 2-302, unconscionable contracts and clauses were “surreptitiously invalidated” by courts through the use of covert tools.⁸ The term “covert tools” described methods used by courts to achieve equitable results by “knocking over” oppressive agreements without having to find them unconscionable.⁹ These covert methods took the form of strained contractual interpretations or manipulations of traditional contractual doctrines.¹⁰

Courts resorted to covert methods that concealed the doctrine of unconscionability rather than a direct and express approach so as not to interfere with freedom of contract.¹¹ A tension has always existed between the idea that society should protect its people from the potentially harsh effects of an unchecked market system and the concept of freedom of contract, “which has long been basic to our socioeconomic system.”¹² Pulling in one direction is the belief that a free enterprise system requires courts to delegate legislation to contracting parties absent a finding of fraud or a violation of public policy.¹³ Pulling in the other direction is the belief that courts exist to administer justice and should have the power to refuse enforcement of the literal meaning of written documents when such enforcement would lead to unjust results.¹⁴

With covert tools, courts attempted to find balance between these two

see also United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting) (“Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?”).

6. See James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 Calif. L. Rev. 1815 (2000). See generally Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73 (2006).

7. See Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 152 (2005).

8. John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 934 (1969).

9. MURRAY, *supra* note 3, at 486.

10. See Murray, *supra* note 5, at 17, 28–29.

11. See Spanogle, *supra* note 8, at 934.

12. *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 569 (N.Y. 1978).

13. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629 (1943).

14. Murray, *supra* note 5, at 2.

competing interests by administering justice without the use of an express doctrine that threatened contractual freedom. Over time, it became very evident that the stretching, misconstruing, and abusing of legal doctrines by courts in covert tools cases clouded the application of those doctrines.¹⁵ For example, courts applied concepts like mutuality and consideration to resolve cases that they would not traditionally have been used.¹⁶ If precedent from covert tools cases only controlled unconscionable contract cases, then it could have been argued that their equitable ends justified the legal means. However, covert tools cases did not mention unconscionability, and as a result, they distorted the general application of the legal doctrines relied upon by the courts.¹⁷ Covert tools cases also sent mixed signals to litigants. Parties with form contracts that were rejected by courts through the use of covert tools were provided with incentives to fix purported, rather than actual, contractual problems.¹⁸ As a result, drafters would remedy unconscionable form contracts by making them longer, more technical, and harder for the nondrafting party to comprehend.¹⁹

The problems associated with the skewing of legal doctrine led Llewellyn to opine that “[c]overt tools are never reliable tools”²⁰ and prompted the creation of an explicit tool in U.C.C. section 2-302. The U.C.C. was the product of a collaborative effort from the American Law Institute and the National Conference of Commissioners on Uniform State Laws to establish unified rules, standards, and norms for commercial transactions and dealings.²¹ Article 2 of the U.C.C. governs the sale of consumer goods, and it is within this Article that section 2-302 codifies unconscionability.²² As Chief Reporter of Article 2, Llewellyn is credited as the architect of section 2-302.²³ In its entirety, the section provides

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time

15. Spanogle, *supra* note 8, at 934.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. K. N. Llewellyn, Book Reviews, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

21. HENRY D. GABRIEL & LINDA J. RUSCH, *THE ABCS OF THE UCC (REVISED) ARTICLE 2: SALES 1* (Amelia H. Boss ed., 2004).

22. Louisiana is the only state that has not adopted some form of Article 2.

23. Schmitz, *supra* note 6, at 85.

it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.²⁴

Llewellyn viewed this section as providing courts with a mandate to police contracts so as to protect against unconscionable bargains.²⁵ Absent from the section is a workable application for unconscionability. For this reason, Professor Arthur Leff criticized section 2-302 as providing nothing more than “an emotionally satisfying incantation” that says “nothing with words.”²⁶ However, Llewellyn never intended to provide certainty, stability, or even predictability through the creation of section 2-302.²⁷ In fact, Llewellyn believed that a statutory approach to unconscionability was “dubious, uncertain, and likely to be both awkward in manner and deficient or spotty in scope.”²⁸ Instead, Llewellyn wanted the section to serve as a catalyst for the creation of an analytical structure of unconscionability.²⁹ Llewellyn intended for the judiciary to erect the structure for unconscionability, and that is why section 2-302 commands courts to resolve unconscionability issues, even though decisions would require factual determinations.³⁰ The section was designed to coerce courts away from the use of covert tools and charge them with the power and responsibility to develop reliable tools under the heading of unconscionability.³¹

24. U.C.C. § 2-302 (2011).

25. See William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).

26. Arthur Allen Leff, *Unconscionability and the Code—the Emperor’s New Clause*, 115 U. PA. L. REV. 485, 558–59 (1967) [hereinafter Leff, *the Emperor’s New Clause*].

27. MURRAY, *supra* note 3, at 487.

28. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

29. Murray, *supra* note 5, at 37 (also stating that section 2-302 was the “first footstep on the distant analytical planet.”).

30. MURRAY, *supra* note 3, at 487.

31. Murray, *supra* note 5, at 36–37 (“The [s]ection does not provide the machinery; it will lead courts to that machinery, machinery which courts themselves must create.” *Id.* at 36.); see also U.C.C. § 2-302, cmt.1 (1972).

Like the provision, the official comments to U.C.C. section 2-302 do nothing to clarify the meaning of unconscionability. They do, however, provide courts with some modicum of guidance for applying the section. Comment 1 provides that courts should consider the general commercial background and commercial needs of the case in determining whether challenged clauses are so one-sided at the time of contract formation as to be rendered unconscionable.³² The comment calls for courts to use the section to prevent “oppression and unfair surprise” while being careful not to disturb the “allocation of risks” that result from “superior bargaining power.”³³ The comment makes clear that superior bargaining power alone will not provide the basis for “oppression” or “unfair surprise.”³⁴ The existence of those elements turns on whether the party with superior power operated in a commercially reasonable manner and with good faith.³⁵ Comment 2 permits courts to refuse the enforcement of the entire contract or to strike clauses individually or in groups.³⁶ This allows courts to enforce contracts sans the unconscionably defective terms or conditions.

Article 2 of the U.C.C. only governs contracts for the sale of consumer goods, but courts have extended section 2-302’s application to other types of contracts.³⁷ Professor Allen E. Farnsworth, reporter for the RESTATEMENT (SECOND) OF CONTRACTS, reinforced the extension of section 2-302 with the recognition of unconscionability as a basis for contract limitation in section 208 of the *Restatement*.³⁸ The Restatement version replicates its U.C.C. predecessor in that it does not define unconscionability. Instead, it recognizes that courts have discretionary power to render contracts or terms of contracts unconscionable if they were so at the time they were made.³⁹ Section 208 has general application to all contracts.

III. THE BIFURCATION OF THE DOCTRINE AND ITS APPLICATION TO CONTRACTS OF ADHESION

The previous section made mention of Professor Leff’s criticism of the lack of clarity provided by section 2-302. Leff penned that criticism in arguably the most significant article ever written on the doctrine of

32. U.C.C. § 2-302, cmt. 1.

33. *Id.*

34. *Id.*

35. Murray, *supra* note 5, at 41.

36. U.C.C. § 2-302, cmt. 2.

37. MURRAY, *supra* note 3, at 489.

38. *Id.*

39. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

unconscionability, *Unconscionability and the Code: the Emperor's New Clause*.⁴⁰ It was in that seminal article that Leff introduced the concepts of procedural and substantive unconscionability. The majority of courts have adopted Leff's bifurcation of unconscionability and apply the doctrine to only those cases in which elements of both procedural and substantive unconscionability are proven.⁴¹ Courts have attempted to identify factors necessary for finding unconscionability with little success.⁴² Even in those jurisdictions, the factors are either procedural or substantive in nature.⁴³ Accordingly, it is necessary to analyze both concepts and the elements that guide courts in applying them to a given set of facts.

A. Procedural Unconscionability

Procedural unconscionability refers to what Leff called "bargaining naughtiness" and occurs when a party uses superior bargaining power unreasonably to take advantage of the weaker party to the contract.⁴⁴ This prong is typically found when the imbalance of power is so great that the weaker party to the transaction is unable to negotiate the terms of the agreement.⁴⁵ These take-it-or-leave-it contracts are often called "contracts of adhesion." The model example of an adhesion contract, as defined by Rakoff, meets the following seven criteria:⁴⁶ (1) the document at issue is a printed form containing many terms and claims to be a contract; (2) one party to the transaction drafted the form, or it was drafted on their behalf; (3) the drafting party routinely uses the form in numerous transactions; (4) the form is presented to the adhering party for entrance into the transaction only on the terms contained in the document, with limited exceptions, through explicit or implicit representation understood by the adherent; (5) the adherent signs the document after dickering over terms open to bargaining; (6) the adhering party, in comparison with the drafting party, enters into few transactions of the type represented; and (7) the principal obligation of the adhering party in the

40. See generally Leff, *the Emperor's New Clause*, *supra* note 26.

41. Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1073 (2006); see also Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51 (Ariz. 1995).

42. MURRAY, *supra* note 3, at 492 (stating that these "blunderbuss efforts" are inconsistent and do not provide any meaningful or workable analysis for unconscionability).

43. See Wille v. Sw. Bell Tel. Co., 549 P.2d 903 (Kan. 1976) (providing a ten-factor test for procedural and substantive unconscionability).

44. Leff, *the Emperor's New Clause*, *supra* note 26, at 487.

45. MURRAY, *supra* note 3, at 491.

46. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1983).

transaction considered as a whole is the payment of money.⁴⁷ Although courts have found contracts of adhesion that do not meet all the criteria listed, Rakoff's model outlines the indicators that courts have used to find contractual adhesion.

The lack of genuine choice in contracts of adhesion calls into question whether the weaker party's signature on the contract manifested true assent.⁴⁸ The potential for absence of assent is even more pronounced in employment contracts or when the subject of the contract is necessary to the physical and economic well-being of the buyer, who cannot procure the item elsewhere in the relevant market absent the clause.⁴⁹ The abuse of power in procedurally defective agreements can rise to such a degree that it resembles something like duress, referred to as "quasi duress."⁵⁰

Procedural unconscionability also exists when the drafting party abuses the negotiation by interfering with the nondrafting party's understanding of the contractual terms. This lack of knowledge or understanding results in the type of unfair surprise proscribed in comment 1 to section 2-302. It is necessary to note that the doctrine of unconscionability does not protect those who do not reasonably inform themselves as to the terms of the agreements that they sign.⁵¹ However, the doctrine has been used to guard against the "bargaining naughtiness" found in contracts that contain inconspicuous clauses that result in the assumption of unexpected risks.⁵² For example, courts have found that procedural unconscionability is present in the hiding of contract terms in a mass of fine print trivia.⁵³ Drafting parties can also unfairly interfere with the nondrafting party's understanding by phrasing contract terms in language that is incomprehensible to a layperson or in a way that diverts attention away from shifts in material risks.⁵⁴ The concealment of risk-shifting terms can be so great that it "bears a strong resemblance to fraud."⁵⁵ In reviewing cases alleging this type of bargaining naughtiness, courts have gone beyond the contractual terms and looked to the nondrafting party's age, education, intelligence, business acumen, and experience to determine whether that party

47. *Id.*

48. Murray, *supra* note 5, at 41.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 18.

53. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

54. *Wille*, 549 P.2d at 907.

55. *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572-73 (E.D. La. 2002).

could have reasonably known or understood the terms of the agreement.⁵⁶ Further, emphasis is placed on whether the contractual terms at controversy were explained to the weaker party.⁵⁷ The unfair surprise found in this second type of procedural defect also compromises the consent requirement of contract formation. Parties do not truly consent to risk-shifting clauses that were unknown to them at the time of contract formation. The idea that courts should protect parties from procedurally unconscionable contracts is consistent with classical will theories of contractual obligation because both types of procedural defects threaten contractual volition.⁵⁸

B. Substantive Unconscionability

Substantive unconscionability is the more controversial of Leff's concepts and concerns what he called the "evils in the resulting contract."⁵⁹ The substantive component of unconscionability requires courts to focus on the fairness of the contract terms to protect against unreasonably oppressive obligations.⁶⁰ Oppression exists when contracts deny the nondrafting party of basic rights or remedies or when terms result in an overall imbalance of obligations and rights imposed by the contract.⁶¹ However, this is a very intrusive determination that can serve as an "invitation to disrespect the parties' autonomy."⁶² After all, should the unconscionability machine be used to disrupt a nondrafting party's right to consent to what the court perceives to be an unreasonable bargain? The intrusive nature of substantive unconscionability inquiries tends to offend those who believe that courts

56. See *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264 (E.D. Mich. 1976); accord *Konica Minolta Bus. Solutions, U.S.A., Inc. v. Allied Office Prods., Inc.*, 724 F. Supp. 2d 861 (S.D. Ohio 2010); *High v. Capital Senior Living Props. 2 — Heatherwood, Inc.*, 594 F. Supp. 2d 789 (E.D. Mich. 2008); *Vistein v. Am. Registry of Radiologic Technologists*, 509 F. Supp. 2d 666 (N.D. Ohio 2007); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007); *In re "Apollo" Air Passenger Computer Reservation Sys.*, 720 F. Supp. 1061 (S.D.N.Y. 1989); *Maxwell*, 907 P.2d 51; *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886 (Ill. App. Ct. 2003).

57. *Johnson*, 415 F. Supp. at 268.

58. Schmitz, *supra* note 6, at 92; see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272 (1986) (stating that "will theories" is a name given to a classical set of theories based on the belief that contracts should be enforced because the promisor has chosen, or willed, to be bound by the bargain).

59. Leff, *the Emperor's New Clause*, *supra* note 26, at 487.

60. Schmitz, *supra* note 6, at 92.

61. *Wille*, 549 P.2d at 907 (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)); accord *Transamerica Oil Corp. v. Lynes, Inc.*, 723 F.2d 758 (10th Cir. 1983); *Millett v. Truelink Inc.*, 533 F. Supp. 2d 479 (D. Del. 2008).

62. Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 634 (1997).

should not interfere with contractual terms absent a finding of fraud or violation of public policy. Some in that number have questioned the appropriateness of substantive inquires altogether, while others insist that cases should be limited to instances where it is proved that terms are so one-sided as to “shock the judgment of a person of good sense” with terms so unreasonable that “no man in his senses and not under delusion” would make and “no honest and fair man would accept.”⁶³

C. *Balancing Procedural and Substantive Unconscionability*

Perhaps the biggest problem posed by bifurcated unconscionability is in the need for finding both types of unconscionability in a given case. Specifically, what should a court do with a contract that was corrupted by only one of the two concepts? Can an agreement survive an unconscionability attack if the terms are reasonable but the negotiations were procedurally defective? Conversely, should a court find unconscionable an oppressively one-sided agreement that was entered into freely and the product of extensive negotiation between two sophisticated contracting parties? These and other questions concerning the application of unconscionability were addressed in an extensive study by DiMatteo and Rich in which 187 cases⁶⁴ were analyzed to empirically examine how courts apply the doctrine.⁶⁵ The results of this study revealed an “overwhelming judicial belief” that evidence of both procedural and substantive unconscionability is needed to knock over an otherwise enforceable contract.⁶⁶ Although, the results also found that the majority of jurisdictions recognized that the threshold needed to prove both types of unconscionability is not fixed.⁶⁷ Instead, courts may apply a balancing approach (or sliding scale approach) in which a substantial amount of one form of unconscionability can offset a much lesser amount of the other.⁶⁸ This leads to the primary research question addressed by this study: How would a balancing or sliding scale approach for procedural and substantive unconscionability apply to the release of publicity rights by student-athletes in form contracts with NCAA member institutions?

63. *Grady v. Grady*, 504 A.2d 444, 446–47 (R.I. 1986) (quoting *Hume v. United States*, 132 U.S. 406 (1889)); *see also* *Kinney v. United Healthcare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 353 (Ct. App. 1999); *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 482 (Ct. App. 1996).

64. DiMatteo and Rich pulled cases from two eras: (1) first generation U.C.C. section 2-302 cases (1968–1980), and (2) second generation U.C.C. section 2-302 cases (1991–2003).

65. DiMatteo & Rich, *supra* note 41, at 1092–93.

66. *Id.* at 1073; *see also* Schmitz, *supra* note 6, at 91 (discussing the sliding scale approach to procedural and substantive unconscionability).

67. DiMatteo & Rich, *supra* note 41, at 1074.

68. *Id.*

IV. APPLICATION OF UNCONSCIONABILITY TO STUDENT-ATHLETE AGREEMENTS

In order to analyze the arguments related to finding currently utilized student-athletes' eligibility agreements as potentially unconscionable, a better understanding of the various agreements that the student-athletes must sign in order to be eligible to compete is needed. Understanding the context that these so-called "promotional uses" involving student-athletes might appear is also necessary to appreciate the complexity of the current phenomenon. The use of student-athletes' names and likenesses by their respective universities has gradually evolved over time from strictly promotional uses (trading cards, team jerseys) to blatantly commercial uses (video games, fantasy sports).⁶⁹ Current uses of student-athletes' likenesses, most notably in EA Sports video games, parallel the video games produced for their counterparts in the professional sport leagues, albeit without use of players' names, and revive new legal concerns without clear answers.⁷⁰

Pursuant to the NCAA's constitution, bylaws, and regulations, students are not allowed to play intercollegiate sports unless they meet all NCAA requirements.⁷¹ "Courts have recognized the National Letter of Intent ("NLI") and the Statement of Financial Aid as the two main documents that form a contract between the student-athlete and the university or college."⁷² In addition, "As a general matter, courts have found that the NCAA Constitution and Bylaws constitute a contract between the NCAA and member schools and the student-athlete."⁷³ The court in *Oliver v. National Collegiate Athletic Ass'n* found that "[a] contractual relationship was formed by the plaintiff's

69. John Grady et al., *Opportunities and Limitations in Licensing Student-Athlete Likenesses in NCAA Proposed Bylaw No. 2010-26*, Presentation at the Scholarly Conference on College Sport (Apr. 21, 2011); see also James S. Thompson, Comment, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity?*, 4 SETON HALL J. SPORT L. 143 (1994); Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133 (1996); Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227 (2001); Nando Di Fino, *College Football Fantasy Game to Name Names*, WALL ST. J. SPORTS (July 31, 2008), <http://online.wsj.com/article/SB121733679819593215.html>.

70. Grady et al., *supra* note 69.

71. *Oliver v. NCAA*, 155 Ohio Misc. 2d 8, 14 (Ohio Ct. C.P. Erie Cnty. 2008). See also Sean Hanlon & Ray Yasser, "J.J. Morrison" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 275 n.217 (2008); Kristal S. Stippich & Kadence A. Otto, *Carrying a Good Joke Too Far? An Analysis of the Enforceability of Student-Athlete Consent to Use of Name & Likeness*, 20 J. LEGAL ASPECTS SPORT 151, 157 n.32 (2010).

72. Hanlon & Yasser, *supra* note 71, at 283.

73. Stippich & Otto, *supra* note 71, at 157 n.32.

status as an intended third-party beneficiary between the NCAA and [the member institution].”⁷⁴ “The plaintiff, who is not a party to the contract between NCAA and [the member institution], stands to benefit from the contract’s performance, and thus he acquires rights under the contract as well as the ability to enforce the contract once those rights have vested.”⁷⁵ In regard to the NCAA and student-athletes, “courts have consistently determined that the athletic scholarship is a contract, and thus recognize a student-athlete’s right to assert a breach of contract action against the college institution.”⁷⁶ Thus, it can be presumed that a contract exists between the NCAA, the academic institution, and the student-athlete.⁷⁷

Of focal interest to this article is Part IV of Form 11-3a related to “Promotion of NCAA Championships, Events, Activities or Programs.”⁷⁸ The language of Part IV requires the student-athlete to authorize the NCAA—or a third party acting on behalf of the NCAA (e.g., host institution, conference, and local organizing committee)—to use the student-athlete’s name or picture to generally promote NCAA championships or other NCAA events, activities, or programs. It is required to be signed each year by the student-athlete prior to competition. This particular part of the student-athlete eligibility forms has been the subject of increased scrutiny by legal and sport management scholars.⁷⁹ The scrutiny has been centered on the waiver of the amateur student-athlete’s right to publicity in perpetuity. Under the current system, by signing Part IV of Form 11-3a, the student-athlete not only permits the university, their athletic conference, and the NCAA to use their name or picture to promote NCAA events, they also are compelled to simultaneously assign the rights to use their name and likeness to their respective universities who can subsequently license the rights to others for arguably promotional purposes.⁸⁰ Because the terms of the NCAA eligibility forms cannot be negotiated or altered in any way, student-athletes ostensibly cannot opt out of

74. *Oliver*, 155 Ohio Misc. 2d at 13.

75. *Id.* at 13–14.

76. Hanlon & Yasser, *supra* note 71, at 281; *see, e.g.*, *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992); *see also Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972).

77. Stippich & Otto, *supra* note 71, at 157 n.32.

78. *See* Appendix 1: Form 11-3a (irrelevant sections omitted).

79. *See* Hanlon & Yasser, *supra* note 71; Stippich & Otto, *supra* note 71; Anastasios Kaburakis et al., *NCAA Student-Athletes’ Rights of Publicity, EA Sports, and the Video-Game Industry*, 27 ENT. & SPORTS LAW. 1 (2009); John Grady & Sam Arthur, *Predicting the Future of Licensing Student-Athletes’ Likenesses after Keller and O’Bannon*, Presentation at the 2010 Scholarly Conference on College Sport (Apr. 23, 2010); Grady et al., *supra* note 69; Richard M. Southall, *College Athletes’ Image Rights: The State of the Game*, Presentation at the Craig Kelly Sport and Entertainment Law Symposium (Nov. 13, 2009).

80. Grady & Arthur, *supra* note 79.

their inclusion in certain promotional (commercial) activities. This creates fundamental problems with the current licensing scheme.⁸¹ Because student-athletes essentially assign the right to license their name and picture (i.e., image and likeness) to their university, the student-athlete has “no meaningful choice” in determining the types of promotional materials or commercial products on which his or her name or image is used.⁸² In addition, “the athlete . . . may well have no knowledge or awareness that his or her reputation, image or name is being used for these commercial purposes.”⁸³

While the current system whereby universities acquire the rights to their student-athletes names and likenesses for promotional purposes seems grossly unfair to the student-athlete and very lopsided in favor of the member institutions,⁸⁴ is there a remedy available in contract law for these student-athletes? The answer is complicated given the current state of the law with regard to both contract law and recent state law decisions related to right of publicity involving student-athletes. In looking to the law of contracts for an answer, it is clear that in order for a student-athlete to state a claim for breach of contract against his or her university, the student-athlete “must point to an identifiable contractual promise that the [university] failed to honor.”⁸⁵ However, because the student-athlete cannot “negotiate, change, or delete any of the provisions”⁸⁶ in his or her athletic scholarship agreement and must agree to the boilerplate contractual terms that are identical for all student-athletes, this “has the effect of eliminating a student-athlete’s capability to assert a contractual claim based on a failure to perform implied promises”⁸⁷ The student-athlete is therefore left to seek an alternative remedy in contract law or in equity. One such remedy is to utilize the unconscionability doctrine to invalidate all or part of the agreement.

To prevail on an unconscionability claim, the student-athlete plaintiff must establish the following: “(1) an inequality of bargaining power between the institution granting the athletic scholarship and the student-athlete, (2) a lack of meaningful choice or alternative for the student-athlete, (3) supposedly agreed-upon terms hidden or concealed in the contract, and (4) terms that

81. *Id.*

82. Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 697 (2003).

83. Southall, *supra* note 79.

84. Grady & Arthur, *supra* note 79.

85. *Ross*, 957 F.2d at 417.

86. Hanlon & Yasser, *supra* note 71, at 292.

87. *Id.* at 283 (discussing the possible existence of implied promises to protect student-athletes from commercial exploitation).

unreasonably favor the institution.”⁸⁸ As discussed in Part III of this paper, cases of unconscionability typically require some combination of procedural unconscionability and substantive unconscionability.⁸⁹ Furthermore, it is generally accepted that if more of one of the categories is present, then less of the other is required.⁹⁰ Thus, use of a balancing or sliding scale approach, in which a substantial amount of one category of unconscionability can offset a much lesser amount of the other,⁹¹ may offer the most promise for student-athletes asserting unconscionability related to the release of publicity rights in the form contracts student-athletes enter into with their universities.

A. Arguments in Favor of Procedural Unconscionability

Procedural unconscionability focuses on whether there was oppression or unfair surprise present at the time of contract formation.⁹² In determining whether there was “oppression,” the court must determine if, as a result of signing Part IV of Form 11-3a, which requires the student-athlete to waive the right to the use of his or her name and likeness as a condition of athletic eligibility and, in effect, assigns this licensing right to their respective university so that the university may engage in undefined “promotional purposes,” there is “an inequality of bargaining power resulting in no meaningful choice for the weaker party.”⁹³ Because student-athletes all must sign the same standardized “boilerplate” agreement and cannot alter its terms in any way, there is a persuasive argument that oppression exists.

Additionally, as noted by the court in *Williams v. Walker-Thomas Furniture Co.*, “In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.”⁹⁴ In the case of the contracts between student-athletes and their university, the gross inequality of bargaining power of any university, much less one with an elite athletics program, given their dominant position and vast experience related to contractual matters involving athletics and licensing, is clear when compared to the (lack of) knowledge and experience of contracts and business matters that an eighteen-year-old (if not a seventeen-year-old in some cases) freshman student-athlete would even remotely possess. Stippich and Otto highlighted that the freshmen student-athletes are “the weaker party susceptible to

88. *Id.* at 291.

89. *Id.* at 289.

90. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28 at 585 (3d ed. 2004).

91. DiMatteo & Rich, *supra* note 41, at 1074.

92. Hanlon & Yasser, *supra* note 71, at 289.

93. *Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001).

94. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

persuasion by the NCAA, school administrators, and coaches by virtue of their age, lack of knowledge and experience, and need/desire to play intercollegiate athletics.”⁹⁵ The situation is further complicated by the fact that, procedurally speaking, the student-athlete most likely signs these forms without the assistance of legal counsel and without adequate time to thoroughly review the substance of the agreements or comprehend the ramifications of signing such documents. Furthermore, as a practical matter, because the mode used at many schools is to have the student-athletes sign these forms in a group or team setting,⁹⁶ described by one student-athlete as a “cattle-call,” it is quite possible that the student-athlete is not reading the forms carefully, if at all, before signing.

An additional concern is that student-athletes are likely unaware of the legal effects of waiving their right to use of their name and likeness in promotional purposes in perpetuity,⁹⁷ specifically their publicity rights. Because the student-athlete cannot “negotiate, change, or delete any of the provisions”⁹⁸ that might benefit himself or herself individually, each student-athlete must abide by the same rules applicable to all student-athletes regarding use of their name and likeness in unspecified promotions. The only realistic option to not signing the forms is to forgo athletic eligibility at an NCAA member institution. Admittedly, the student-athlete does have other athletic alternatives besides playing at an NCAA member institution, including “scholarship offers by, e.g., National Association of Intercollegiate Athletics (“NAIA”) or National Junior College Athletic Association (“NJCAA”) member institutions, or the progressively more available options for talented young athletes to play in semi-professional leagues both in the United States and overseas”⁹⁹

However, as noted by Kaburakis et al., “critics protest that this is no alternative to the NCAA.”¹⁰⁰ This essentially creates a “take-it-or-leave-it” proposition for the student-athlete, especially when the myriad types of promotional activities currently used by the NCAA and its corporate partners not specified in the form seem to be ever-expanding due to technology. Given this complex situation, student-athletes have “no meaningful choice” in determining the types of promotional materials or commercial products on

95. Stippich & Otto, *supra* note 71, at 178.

96. *Id.*

97. Grady & Arthur, *supra* note 79.

98. Hanlon & Yasser, *supra* note 71, at 292.

99. Kaburakis et al., *supra* note 79, at 18.

100. *Id.*

which his or her name or image is used.¹⁰¹ Furthermore, as the types of promotional purposes that incorporate student-athlete likenesses become more commercial in nature (e.g., video games featuring amateur athletes), “the . . . athlete may well have no knowledge or awareness that his or her reputation, image or name is being used for these commercial purposes.”¹⁰²

An alternative to finding oppression would be for the court to find unfair surprise. This requires demonstrating that “the supposedly agreed-upon terms are hidden or concealed.”¹⁰³ Because the language in Part IV of Form 11-3a mirrors the language in NCAA Bylaw 12.5 and, in the version of the form currently used, now explicitly incorporates Bylaw 12.5 by reference, it can be argued that the student-athlete should have some knowledge and familiarity with the substance of this specific bylaw before signing the form. Furthermore, it is unreasonable to believe that the student-athlete, with little to no experience in matters of business, finance, or law in most cases, would understand the significance of these terms or the substance or potential value of forgoing the publicity rights at issue. This is particularly true given that the assignment exists in perpetuity. How many of these student-athletes know that they are forfeiting use of commercial rights to their names and likeness for all eternity? The rule against perpetuities would disallow this type of assignment if the proprietary interests conveyed concerned real property. So, should an assignment of this magnitude be tolerated for a conveyance made by a student-athlete who is probably unsophisticated in contracts and unaware of the legal ramifications of commercial transactions?

As noted by Stippich and Otto,

[A] student-athlete signing eligibility forms would not reasonably expect that he or she signs away valuable publicity rights indefinitely to promote commercial endeavors, including third party contracts for video games. Not only does such a broad release not have anything to do with eligibility to compete in intercollegiate sports . . . but it is inconsistent and, indeed, contrary to the main purposes of the NCAA contract, which is to uphold the principle of amateurism and protect the student-athlete from commercial exploitation.¹⁰⁴

101. Freedman, *supra* note 82, at 697.

102. Southall, *supra* note 79.

103. Hanlon & Yasser, *supra* note 71, at 290.

104. Stippich & Otto, *supra* note 71, at 165.

On balance, however, when compared to the requirements for finding oppression, a plaintiff's ability to establish unfair surprise would be a more difficult argument.¹⁰⁵

B. Arguments in Favor of Substantive Unconscionability

In order to establish substantive unconscionability, the plaintiff must establish that the terms are unreasonably favorable to the member institution. Arguments necessary to establish this category of unconscionability include the fact that the agreement is “one-sided or overly harsh,”¹⁰⁶ and the “sum total of the provisions of a contract drive too hard a bargain.”¹⁰⁷ The one-sided nature of standardized form contracts, drafted by experienced lawyers for the NCAA who have the benefit of time and expertise, suggests that they are drafted in favor of the stronger party. This creates the current system whereby the NCAA requires the student-athletes to forfeit potentially lucrative rights and member institutions, and by default the NCAA essentially acquires the licensing rights (veiled as a promotional right) for their student-athletes' images. “[T]here is a striking imbalance in the resulting bargain in that the restriction is unfairly one-sided—the student-athlete must forego potential rights to profit from its image but the NCAA does not.”¹⁰⁸ As noted by Baker and Grady,¹⁰⁹ the use of Part IV of Form 11-3a to acquire these rights is not only grossly unfair to the student-athlete, but also very lopsided in favor of the member institutions. The member institutions and the NCAA subsequently have almost unfettered authority to subsequently license these rights, *in perpetuity*, within the boundaries of the ever-evolving interpretation of the NCAA bylaws.¹¹⁰ Thus, an argument exists that the grossly one-sided nature of Part IV of Form 11-3a evidences the requisite degree of substantive unconscionability. Accordingly, it is possible for a student-athlete plaintiff to proffer enough proof of both procedural and substantive unconscionability to convince a court that the sliding scale should balance in favor of refusing enforcement of the use of likeness provision in Part IV of Form 11-3a.

105. Kaburakis et al., *supra* note 79.

106. Hanlon & Yasser, *supra* note 71, at 294 n.352 (quoting *State v. Brown*, 965 P.2d 1102, 1110 (Wash. Ct. App. 1998)); see *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 206 (D. Mass. 1998).

107. *United Cos. Lending Corp.*, 20 F. Supp. 2d at 206 (quoting *Waters v. Min Ltd.*, 587 N.E.2d 231, 234 (1992)).

108. Stippich & Otto, *supra* note 71, at 178.

109. Thomas A. Baker III & John Grady, *That's Unconscionable! Analyzing the Contractual Rights of Student-Athletes*, Presentation at the North American Society for Sport Management Conference (June 5, 2010).

110. *Id.* (emphasis added).

V. CONSENT THEORY AS ONE POSSIBLE ANSWER

Whether deemed remote or realistic, there exists a legitimate threat that some aspects of student-athlete contracts could be found unconscionable and therefore unenforceable.¹¹¹ This is particularly true for the provision that permits the use of student-athletes' likenesses in perpetuity by their universities, the NCAA, and other corporate partners involved in promotional uses that include student-athletes' likenesses. This begs the question: What can NCAA member institutions, and the NCAA, do to better safeguard these contracts from an unconscionability challenge? Perhaps the answer can be pulled from Professor Murray's seminal counter to Leff's critique, *Unconscionability: Unconscionability*.¹¹² It was in that article that Murray presented his consent theory for addressing unconscionability cases. Murray's consent theory challenges the existence of both apparent and genuine assent in an agreement. Although this theory may appear more as a sword for attacking unconscionable bargains for want of genuine consent, it may be possible to use the theory as a shield by actually enhancing contractual consent. Recall that courts will only invalidate contracts that contain both substantive and procedural elements of unconscionability.¹¹³ Thus, the use of consent-enhancing elements in contract formation should insulate a contract from unconscionability claims. To understand the workings of this approach, it is necessary to further explore Murray's consent theory to unconscionability.

A. Murray's Approach: The Three Steps

Murray recognized that a clause may be the product of apparent, rather than true assent, and therefore argued that Leff's bifurcation did "little but add more labels to the increasing number of substitutes for analysis."¹¹⁴ Instead, Murray believed that courts should focus on what he believed was the "true aim" of the doctrine, genuine consent.¹¹⁵ In addressing that target, Murray created a three-step approach. The first step addressed apparent assent and sought to determine the apparent allocation of risk. The second step focused on the materiality of the risk to discern if a substantial burden would be imposed through enforcement. The third step called for verification of assent to determine whether apparent assent reflected true assent. The first and the third steps require further elaboration because they provide possible guidance

111. Hanlon & Yasser, *supra* note 71, at 296.

112. *See generally* Murray, *supra* note 5.

113. DiMatteo & Rich, *supra* note 41, at 1073, 1110.

114. Murray, *supra* note 5, at 21.

115. *Id.*

to NCAA member institutions in dealing with student-athletes. The second step, assessment of materiality, does not. After all, the materiality of terms and conditions, like use of likeness, is not subject to modification by parties in privity. Accordingly, this article will further limit its focus to the first and third steps to Murray's approach. In these two sections, suggestions will be made for how Form 11-3a is administered to student-athletes. These suggestions are directed at both the NCAA and its member institutions. The member institutions administer the signing of this and other student-athlete contracts, but the NCAA is the drafter of Form 11-3a and requires student-athletes to sign the document as a condition to participation in NCAA-sanctioned intercollegiate athletics. Therefore, the NCAA would need to participate in amendments to the process of administering Form 11-3a and possible other required eligibility forms as well. Furthermore, both the NCAA and its members would stand to lose the lucrative rights to use of student-athlete publicity rights if Part IV of Form 11-3a was deemed unconscionable.

1. Step One: The Apparent Allocation of Risks

The first step to Murray's consent theory approach requires the court to examine how the parties reasonably expected to allocate the risks in the contract. Through contract, it is possible for parties to assume both expected and unexpected risks. When risk assumption through contract is reasonable, it occurs because: (1) the surrounding circumstances (i.e., trade usage, prior course of dealing, or course of performance) indicated that one of the bases of the agreement concerned the particular allocation of risks, or because (2) the parties have clearly expressed an intention to assume a particular risk.¹¹⁶ The typical unconscionability case involves an unreasonable attempt to shift an unexpected risk.¹¹⁷ A party to a contract does not assume unexpected risks.¹¹⁸ So, when one party attempts to alter the normal allocation of risks with the contract, that alteration must result from agreement.¹¹⁹ In these situations, some greater evidence of assent is needed than mere apparent assent.¹²⁰ Otherwise, the risk will not shift if the facts do not indicate that a reasonable person would assume such a risk.¹²¹ Specifically, shifts of unexpected risks should be conspicuous.

Murray believed that an attempt to shift an inconspicuous unexpected risk

116. *Id.* at 14.

117. *Id.* at 18.

118. *Id.* at 16.

119. *Id.*

120. *Id.* at 21.

121. *Id.* at 17.

should be deemed defective and provides the court with a basis to refuse enforcement.¹²² Murray supported this belief with the argument that apparent allocations of risk should not include unexpected risks.¹²³ After all, without even the appearance of assent, there is no need to determine the existence of true assent.¹²⁴ Murray would classify a failed attempt to shift an unexpected risk as procedural and the lack of genuine assent as substantive.¹²⁵ But, he did not value these terms as they do nothing more than add labels to an increasing number of substitutes for analysis.¹²⁶ Thus, a condition precedent must be met before unexpected risk-shifting clauses are even apparently enforceable; the conspicuousness of the clauses must give rise to the reasonable inference of assent.¹²⁷

Accordingly, contracts that fail at risk alteration could be deemed per se unconscionable because they facially fail to effectively alter the risks between the parties. However, Murray believed it unworkable to set forth a bright-line test for courts to use in determining whether unexpected risks have been altered by conspicuous contractual terms.¹²⁸ The guideline proposed by Murray is whether a reasonable person in the position of the party against whom enforcement would be imposed should have been made aware of the risk through the express terms of the contract.¹²⁹ As a caveat, Murray warned that bold-faced print located just above the signature line might not provide a reasonable person with the requisite degree of conspicuousness to shift an unexpected risk.¹³⁰ Contractual conspicuousness to Murray was not limited to referring “merely . . . to the placement of the clause in the writing.”¹³¹ Instead, the facts surrounding the contract may require an objective search for a truer form of apparent assent that focuses on the appearance of knowledge.¹³² However, it is not necessary that the enforcing party provide proof of subjective knowledge. Instead, what is needed is evidence that the drafting party made the other aware of the risk alteration. DiMatteo and Rich proposed that this evidence could take the form of clear disclosure (written,

122. *Id.* at 20.

123. *Id.* at 21.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 22.

128. *See generally id.*

129. *Id.*

130. *Id.* at 23.

131. *Id.* at 22.

132. DiMatteo & Rich, *supra* note 41, at 1110.

oral, or both) and “signing off”, the process whereby the drafting party has the nondrafting party initial clauses found in a contract to evidence that the nondrafting party is aware of their existence.¹³³

The NCAA and its member institutions need to make student-athletes aware of the shift in risk found in Part IV of Form 11-3a. Specifically, they should increase the conspicuousness of the conveyance of likeness in the form so that those signing it easily understand its terms and conditions. Murray suggests that allegedly unconscionable terms should be analyzed to determine whether a reasonable person would be aware of the shift in risk. Stippich and Otto found that student-athletes do not reasonably expect that Form 11-3a releases valuable publicity rights indefinitely.¹³⁴ In fact, they found that student-athletes view this document as nothing more than an eligibility form.¹³⁵ This finding is reasonable given that the stated purpose on the form is “[t]o assist in certifying eligibility.”¹³⁶ Furthermore, the form is labeled as the “NCAA Division I Student-Athlete Statement/Drug-Testing Consent Form.”¹³⁷ Nowhere in its title or stated purpose is there mention that the form concerns the right to use student-athletes’ names and likenesses. Thus, a strong argument could be made that Form 11-3a does not provide even the appearance of assent that student-athletes contractually released their publicity rights. This, however, is easy to remedy.

Form 11-3a should be drafted so that it explains that it is much more than just an eligibility and drug-testing consent form; it is an instrument that conveys what could prove to be very valuable publicity rights. Currently, Part IV provides that student-athlete likeness could be used to generally “promote NCAA championships or other NCAA events, activities or programs.”¹³⁸ Instead, the form should use very straightforward language to describe the nature of this conveyance and the possible uses of a student-athlete’s name and likeness by member institutions and the NCAA. Furthermore, Part IV should detail the extent of this permission by describing that this right of use exists indefinitely. This type of contractual alteration would provide the necessary appearance of assent needed to establish a consent theory. Additionally, it would counter any claim of unfair surprise by student-athletes to the use of likeness provision.

133. *Id.* at 1112.

134. Stippich & Otto, *supra* note 71, at 165.

135. *Id.*

136. See Appendix 1: Form 11-3a (irrelevant sections omitted).

137. *See id.*

138. *See id.*

2. Step Two: Materiality of Risks

The second step to Murray's consent theory approach requires courts to determine the materiality of the risk that the contract purported to alter.¹³⁹ Murray believed materiality to be a better alternative to the use of words like "oppressive," "one-sided," "indecent," or even "naughty" for the purpose of determining if the shift in risk inflicts enough damage to warrant use of the unconscionability doctrine.¹⁴⁰ Murray, like Leff before him, recognized that these terms required too much subjectivity from the court.¹⁴¹ Conversely, Murray suggested use of materiality as a requirement because the *Restatement* already recognizes the existence of materiality and even defines it in section 275.¹⁴² The section provides a list of factors for courts to consider, and from that list, Murray emphasized two points: (1) whether the party against whom the clause would operate would still obtain the substantial benefit of the bargain, and (2) the extent of the hardship on the enforcing party if the court refused its application.¹⁴³

While it is necessary to discuss the second step to Murray's approach in order to better understand how the totality of the approach works, this step is not relevant to the scope of this section of the article. Recall that this section aims to provide an alternative approach for NCAA member institutions in better safeguarding student-athlete contracts from unconscionability claims. The materiality of a term or condition is not subject to alteration in contract formation. NCAA member institutions may deem the use of student-athletes' likenesses to be immaterial because student-athletes still receive the substantial benefit that they bargained for despite the inclusion of the clause. However, a reviewing court may disagree, especially given the millions of dollars that are made by the NCAA and member institutions off of the use of said likeness in video games. The loss of this use would impose a significant financial hardship that student-athletes could use to provide evidence of materiality. Therefore, it is more necessary to focus on the first and third steps to Murray's approach because they provide a guide to consent enhancement.

3. Step Three: Verification of Assent

The first two steps to Murray's version of the unconscionability machine

139. Murray, *supra* note 5, at 23.

140. *Id.* at 23–24.

141. *Id.* at 25; Leff, *the Emperor's New Clause*, *supra* note 26, at 500 (taking issue with the term "oppression").

142. Murray, *supra* note 5, at 25.

143. *Id.*

serve as prerequisites for activating the verification of assent step. It is in this step that the court would need to look past the appearance of assent and determine whether the disfavored party had any meaningful choice in the matter.¹⁴⁴ If volition is the essence of contract,¹⁴⁵ then the removal of free will from the negotiation should negate the existence of the contract. The problem is that many mass contracts contain take-it-or-leave-it terms or conditions. Murray called for courts to look to the true contractual relationship to discern whether genuine assent exists, even in form contracts that include take-it-or-leave-it terms or conditions.¹⁴⁶ To do this, courts must look to the bargaining positions of the parties in light of the subject matter of the agreement.¹⁴⁷ Specifically, the court must gauge the necessity of the subject and whether the disfavored party could obtain that subject matter from another source.¹⁴⁸ The bargaining power of the disfavored party determines how much free choice that party possessed in agreeing to the controversial clause. Accordingly, competition for the commodity at the center of the contract controls the degree of bargaining power and the presence of meaningful choice.¹⁴⁹ If the disfavored party is unable to procure that commodity from another purveyor, then the party had no bargaining power and consequently, no free choice.¹⁵⁰

Student-athletes have little to no volition in agreeing to Part IV of Form 11-3a. The form is a take-it-or-leave-it agreement that must be signed in order for the student-athlete to be eligible for intercollegiate competition sanctioned by the NCAA.¹⁵¹ If the student-athlete wants an athletic scholarship to matriculate at an NCAA institution, the form must be signed and his or her publicity rights must be released. The lack of volition in this negotiation is compounded by the fact that there is no reasonable alternative market for student-athletes who desire both an education and the opportunity to compete at the highest levels of college sports.¹⁵² This is also important because the

144. *Id.* at 28.

145. MURRAY, *supra* note 3, at 482.

146. Murray, *supra* note 5, at 30.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Michael J. Riella, Note, *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, 2212 (2002) (discussing how the student-athlete contracts like the National Letter of Intent are not optional for student-athletes who desire to participate in “big time” NCAA-sanctioned intercollegiate athletics).

152. Hanlon & Yasser, *supra* 71, at 291–92; *see also* Thomas A. Baker III et al., *White v.*

NCAA provides future professional athletes for several sports (football and men's and women's basketball, in particular) with the best opportunity to hone and display their athletic skills prior to entering the professional ranks.¹⁵³ Some defenders of the NCAA contend that intercollegiate sports offered by the NAIA and the NJCAA provide reasonable alternative markets to NCAA sports.¹⁵⁴ But, a deeper look at relevant market analysis reveals that this is not the case.

The term "relevant market" concerns a market in which one or more goods or services compete within a specific geographic area.¹⁵⁵ Central to this concept is that the goods or services are interchangeable by consumers for the same purposes.¹⁵⁶ The problem with the defenders' position is that neither the NAIA nor the NJCAA provides a product for student-athletes that can be interchanged with the product provided by Division I of the NCAA. The NCAA is split into three divisions (I, II, and III). Division I is the highest division of the NCAA in terms of number of sports offered and quality of competition. The lower two divisions (II and III) are similar to the NAIA and NJCAA in that they provide fewer sport opportunities and a drastically lower quality of athletic competition. As a result, programs in neither the NAIA nor the NJCAA compete against Division I programs for the same student-athletes. At best, an argument could be made that NAIA programs provide a reasonable alternative to schools that compete in the lowest divisions of NCAA athletics (II and III).¹⁵⁷ As for NJCAA institutions, they typically serve as outlets for student-athletes who fail to academically qualify for NCAA participation.¹⁵⁸ Furthermore, the fact that NJCAA schools are two-year degree programs should render them ineffective to serve as interchangeable markets for institutions that provide four-year degree

NCAA: *A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 86 (2011).

153. The collective bargaining agreements for the National Football League (NFL), National Basketball Association (NBA), and Women's National Basketball Association (WNBA) all require athletes to be one (for the NBA), three (for the NFL) or four (for the WNBA) years removed from high school before they are allowed to participate in their professional leagues. Future professional athletes for these leagues are effectively forced to participate in intercollegiate sports or leave the country to play professionally.

154. Kaburakis et al., *supra* note 79, at 18.

155. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956).

156. *Id.*

157. See *NCAA and NAIA University Sports Divisions*, INTUITION SCHOLARSHIPS, <http://www.student-scholarships.com/sports-award-scheme/ncaa-naia-sports-divisions.html> (last visited Mar. 12, 2012).

158. The NCAA sets a minimum test score and grade point average requirement for student-athletes, while NJCAA programs have open enrollment in that they require no SAT score, ACT score, or minimum grade point average.

programs because the quality of the degree program is not the same. Thus, there exists no competitor in intercollegiate sports that is interchangeable in terms of quality of athletic competition and quality of education with Division I of the NCAA.

Those same critics also contest that semi-professional leagues and overseas professional sports leagues provide relevant markets for would-be student-athletes who elect against signing Form 11-3a.¹⁵⁹ This position is also flawed. First, neither of these two opportunities offers educational degree programs for students, and this alone should remove them from the reasonable alternative market analysis. Second, semi-professional sports in the United States provide a product that in no way resembles NCAA intercollegiate athletics in terms of quality of competition or media exposure. As a result, these leagues are not scouted by professional talent evaluators for professional sports organizations to the same degree that NCAA programs are scouted, and this severely limits the likelihood that an athlete from a semi-professional sports league will transition to professional sports. Furthermore, not all NCAA-sanctioned sports have semi-professional equivalents. As for professional sports leagues outside of the United States, reasonable alternative market analysis has geographic constraints. It is unreasonable to force student-athletes to leave the country to find an alternative market for NCAA intercollegiate athletics. Accordingly, there is no reasonable substitute market for the unique educational and professional development provided by NCAA Division I athletics, and those who desire that development have no choice but to sign away their likeness rights through Form 11-3a.¹⁶⁰ Because student-athletes have no choice in this matter, there exists a want of genuine consent.

However, the lack of choice is not the only factor that works against the existence of genuine consent with Form 11-3a. Another problem is found in the fact that the terms of Part IV are ambiguous and arguably misleading. Earlier it was mentioned that this ambiguity needed to be amended to result in the appearance of assent. The ambiguity problem, however, also affects the existence of genuine consent. Adding to this is the fact that student-athletes typically lack the experience with contracts and understanding of commercial and intellectual property law. Not just that, but student-athletes are not even represented at the signing by legal counsel to explain to them the significance of their signature on Form 11-3a. How can student-athletes consent to something they do not even understand? How can they consent to terms that are unclear to them?

Accordingly, it is recommended that the NCAA and its member

159. Kaburakis et al., *supra* note 79, at 18.

160. Hanlon & Yasser, *supra* 71, at 291–92.

institutions revise Form 11-3a to make clear that it is a permanent assignment of name and likeness rights. It is also recommended that member institutions inform student-athletes of the significance of this assignment and afford them the benefit of legal representation in this process. Perhaps schools should provide the form to student-athletes and their parents in advance so that they can better review the terms of the document and have legal representation review it as well. These measures would enhance student-athlete understanding of the document and increase the potential for genuine consent.

But most importantly, the NCAA and its member institutions should allow student-athletes to opt out of Part IV of Form 11-3a. From a contractual perspective, this allowance would infuse some semblance of genuine consent into the negotiation of Form 11-3a. No longer would the provision be forced on student-athletes, as they would be permitted to retain their publicity rights and still participate in NCAA-sanctioned intercollegiate athletics. And those who grant their rights to the NCAA and its member institutions by agreeing to the terms of Part IV will have done so willingly and of their own volition. From a practical perspective, allowance of this option also makes sense. After all, neither the NCAA nor its members need student-athlete likeness to operate amateur athletics. Certainly, use would benefit both in promoting events and in continuing their relationship with EA Sports, the manufacturer of the NCAA Football video game that allegedly uses student-athletes' likenesses. However, the viability and success of intercollegiate athletics does not depend upon the assignment of student-athlete likeness through Part IV of Form 11-3a. Furthermore, it is possible, if not probable, that a significant number of student-athletes will permit their schools and the NCAA to use their names and likenesses. After all, this use promotes the student-athlete in addition to the institution, the NCAA, and intercollegiate sport events. In fact, some student-athletes may like the fact that they are featured in promotional materials. This may even hold true for the use of student-athlete likeness in EA's NCAA Football video games because students may enjoy seeing and playing with a virtual representation of themselves in the game. If given a choice of being in the game or not, many may elect to allow the use of their names and likeness.

Thus, application of Murray's consent theory to the negotiation of Form 11-3a reveals flaws with both apparent assent and genuine consent that merit attention if the NCAA and its member institutions are to better protect this document and its conveyance of publicity rights. However, the application also reveals that it is very possible for the NCAA and member institutions to enhance the existence of apparent assent and genuine consent by: (1) making Form 11-3a more detailed and explanatory so that student-athletes know what they are signing away, (2) explaining the terms to the student-athletes, (3)

allowing (and perhaps even encouraging) legal representation for them when they sign the form, and (4) giving student-athletes the option to participate in intercollegiate sports without the conveyance.

B. Benefits of Consent Enhancement

There exists both theoretical and empirical support for the use of consent enhancement to fortify contracts from unconscionability claims. In addition to Murray's consent theory to unconscionability, Leff also recognized the idea that enhanced consent could be used to protect a bargain. Leff referred to this approach as "super-assent."¹⁶¹ DiMatteo and Rich also recognized the use of consent enhancement under the title "superconscionability."¹⁶² But, in addition to a review of relevant literature and case law, DiMatteo and Rich also performed a quantitative study, discussed earlier, that utilized consent analysis to code 187 cases involving the issue of unconscionability. The results of that study revealed statistical support for the premise that a party could better protect a contract through consent-enhancing factors.¹⁶³ In fact, the study found that consent-questioning factors (young or elderly age, lack of sophistication, lack of education, low socioeconomic status, low business acumen, relative bargaining power, etc.) were nullified by consent-enhancing factors (conspicuousness, negotiations, and existence of legal counsel).¹⁶⁴ In fact, contracts in cases that included some evidence of conspicuousness or negotiation were held unconscionable only twenty-two percent of the time.¹⁶⁵ And, not a single contract from the sample population was found unconscionable when the challenging party was represented by legal counsel at the moment of contract formation.¹⁶⁶

Accordingly, there is empirical support for the NCAA and its member institutions infusing Form 11-3a with consent-enhancing elements. Thus, we suggest making the conveyance of publicity rights in Form 11-3a more conspicuous, and this modification to the contract would decrease any likelihood of unconscionability to only twenty-two percent. We also suggest that member institutions explain the terms and conditions to student-athletes so that they know what they are signing. Further, we suggest that the NCAA and its members allow and encourage legal representation for student-athletes

161. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349–50 (1970).

162. DiMatteo & Rich, *supra* note 41, at 1112.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

in the negotiation of Form 11-3a. If legal representation were present in this process, then that would align the agreement with those that courts have never been found unconscionable.¹⁶⁷ Lastly, we suggest the inclusion of an option that would allow student-athletes to refuse to release their publicity rights and still participate in NCAA intercollegiate athletics. This option would make Part IV of Form 11-3a negotiable. No longer would it be a contract of adhesion. Instead, there would exist some semblance of actual volition.

It is true that these remedial, consent-enhancing measures focus primarily on the procedural elements of unconscionability. Thus, Form 11-3a may still be vulnerable to claims that the terms of the conveyance in Part IV remain grossly one-sided. After all, the student-athletes receive no additional compensation for the release of their publicity rights. However, the majority of cases require some showing of both procedural and substantive unconscionability, and these measures would drastically reduce the likelihood that the negotiation of Form 11-3a would be deemed procedurally defective. Scholars have recognized that student-athlete plaintiffs would have a difficult time, an uphill battle even, in convincing a court to find Form 11-3a unconscionable.¹⁶⁸ This is probably correct given that courts have provided the NCAA and its member institutions with “ample latitude” to regulate student-athletes.¹⁶⁹ That deference could be reinforced with the addition of consent-enhancing measures aimed at amplifying the level of student-athlete volition in Form 11-3a. It is very possible that consent-enhancement measures taken by the NCAA and its members would make the uphill battle even more of a climb, further fortifying Form 11-3a from unconscionability attacks. After all, judicial application of the doctrine of unconscionability is discretionary. If the NCAA and its members can convince a court that they have taken reasonable steps to educate and protect student-athletes in this process, it seems highly unlikely that a court will exercise its equitable authority to knock over Part IV of Form 11-3a.

VI. SUMMARY

Llewellyn’s vision for the doctrine of unconscionability has come true;

167. *See id.*

168. Kaburakis et al., *supra* note 79, at 18; *see also* Schmitz, *supra* note 6, at 91 (discussing how courts have allowed cases of contractual unfairness to survive because the two-prong unconscionability approach is too rigid for plaintiffs).

169. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 96 (1984). For a discussion on judicial deference provided to the NCAA, *see* Baker III et al., *supra* note 152; Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97 (2007).

courts have developed a machinery for its application through the use of procedural and substantive unconscionability. But that machinery remains a work in progress. Murray suggested a more contractual approach to the doctrine that focused on consent. While no jurisdiction has followed Murray's lead, the theory continues to draw attention in scholarship on unconscionability.¹⁷⁰ This article adds to the literature calling for a reform of the doctrine of unconscionability through use of Murray's consent theory. Instead, we suggest that the theory can be used to strengthen the evidence of both apparent and genuine consent. In doing so, drafting parties can essentially fortify contracts from unconscionability attack because the majority of jurisdictions require showings of both procedural and substantive unconscionability. The addition of true volition in the contracting process would leave plaintiffs with only substantive grounds for attacking a bargain that they willfully agreed upon. This position has been supported through empirical research revealing that the addition of consent-enhancing factors nullifies consent-questioning factors.

It is suggested that the NCAA and its member institutions add consent-enhancing factors to the negotiation of Form 11-3a. Specific measures include: (1) making Form 11-3a more detailed and explanatory so that student-athletes know what they are signing away, (2) explaining the terms to the student-athletes, (3) allowing (and perhaps even encouraging) legal representation for them when they sign the form, and (4) giving student-athletes the option to participate in intercollegiate sports without the conveyance. By taking these steps, the NCAA and its members would make it very difficult for a student-athlete plaintiff, or class thereof, to convince a court that the equities favor the application of the unconscionability machine to refuse enforcement of Part IV of Form 11-3a. But, it is also important to note that there is another court that should be considered, the court of public opinion.

Critics continue to attack the NCAA and its member institutions for exploiting student-athletes.¹⁷¹ They challenge the big business notion of

170. See DiMatteo & Rich, *supra* note 41.

171. See BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* (2010); ALAN WERTHEIMER, *EXPLOITATION 77* (1996); Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L. REV. 307 (1998); Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17 (2010); Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221 (2005); Hanlon & Yasser, *supra* note 71; Kim Hidlay, *Commercial Exploitation of Student-Athletes in Video Games: The Need for Revisions in the NCAA Amateurism Bylaws*, 1 J. ENT. & SPORTS L. 70 (2009); Wilbert M. Leonard II, *Exploitation in Collegiate Sport: The Views of Basketball Players in NCAA Divisions I, II, and III*,

intercollegiate sports and the fact that student-athletes do not receive fair compensation for their labors or the use of their names and likeness in commercial products.¹⁷² If student-athlete plaintiffs were to challenge the conscionability of Form 11-3a, that complaint would give critics even more fodder for their scrutiny. This is particularly true given the nature of unconscionability, which focuses on fairness in the bargaining process. If Form 11-3a were to be found unconscionable, that finding would imply that the NCAA and its member institutions were not fair in their treatment of student-athletes and that they took advantage of them. It is the mission of the NCAA to protect its student-athletes,¹⁷³ including specifically protecting them from commercial exploitation. If the organization and its members want to live up to that mission, then they should put before the student-athletes clear and understandable contracts that do not conceal important terms and conditions. They should also properly educate student-athletes on the forms they sign. They should encourage student-athletes to rely on the advice of counsel when signing important documents that affect their legal rights. They should allow student-athletes to opt out of a transfer of publicity rights that in no way limits the NCAA and its members in organizing and operating amateur athletics. They should elect to incorporate these consent-enhancing measures not only to strengthen Form 11-3a against claims of unconscionability, but also because adding these measures would be a positive step in helping to fulfill their mission to protect student-athletes.

9 J. OF SPORT BEHAV. 11 (1986); John Stieber, *The Behavior of the NCAA: A Question of Ethics*, 10 J. BUS. ETHICS 445 (1991).

172. See Hawkins, *supra* note 171; Wertheimer, *supra* note 171, at 77; Acain, *supra* note 171; Carrabis, *supra* note 171; Dennie, *supra* note 171; Hanlon & Yasser, *supra* note 71, Hidlay, *supra* note 171; Leonard, *supra* note 171; Stieber, *supra* note 171.

173. See *About the NCAA: Core Values*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/core+values+landing+page> (last visited Mar. 20, 2012).

APPENDIX I
PARTS I-III, V-VII OMITTED

Form 11-3a

Academic Year 2011-12

Student-Athlete Statement – NCAA Division I

For:	Student-athletes.
Action:	Sign and return to your director of athletics.
Due date:	Before you first compete each year.
Required by:	NCAA Constitution 3.2.4.6 and NCAA Bylaw 14.1.3.
Purpose:	To assist in certifying eligibility.
Effective Date:	This NCAA Division I Student-Athlete Statement/Drug-Testing Consent form shall be in effect from the date this document is signed and shall remain in effect until a subsequent Division I Student-Athlete Statement/Drug-Testing Consent form is executed.

Student-Athlete: _____
(Please print name)

Name of your institution: _____

This form has seven parts:

1. A statement concerning eligibility;
2. A Buckley Amendment consent;
3. An affirmation of status as an amateur athlete;
4. A statement concerning the promotion of NCAA championships and other NCAA events;
5. Results of drug tests;
6. Previous involvement in NCAA rules violation(s); and
7. An affirmation of valid and accurate information provided to the NCAA Eligibility Center and admissions office, including ACT or SAT scores, high school attendance, completion of coursework and high school grades.

If you are an incoming freshman, you must complete and sign Parts I, II, III, IV, V and VII to participate in intercollegiate competition. If you are an incoming transfer student or a continuing student, you must complete and sign Parts I, II, III, IV, V and VI to participate in intercollegiate competition.

Before you sign this form, you should read the Summary of NCAA Regulations, or another outline or summary of NCAA legislation, provided by your director of athletics or his or her designee or read the bylaws of the NCAA Division I Manual that deal with your eligibility. You are responsible for knowing and understanding the application of all NCAA Division I bylaws related to your eligibility. If you have any questions, you should discuss them with your director of athletics or your institution's compliance officer, or you may contact the NCAA at 317/917-6222.

Part IV: Promotion of NCAA Championships, Events, Activities or Programs.

You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture in accordance with NCAA Bylaw 12.5, including to promote NCAA championships or other NCAA events, activities or programs.

Student-Athlete Statement – Division I
Form 11-3a
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Name (please print)

Signature of student-athlete

Date

What to do with this form: Sign and return it to your director of athletics or his or her designee before you first compete. This form is to be kept in the director of athletics' office for six years.

Any questions regarding this form should be referred to your director of athletics or your institution's NCAA compliance staff, or you may contact the NCAA at 317/917-6222.