WHERE DID THE HANDSHAKE GO? A LEGAL ANAYLYSIS OF COLLEGE COACHING CONTRACT LITIGATION

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ABSTRACT

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BRANDON JAMES MADDUX: WHERE DID THE HANDSHAKE GO? A LEGAL ANAYLYSIS OF COLLEGE COACHING CONTRACT LITIGATION
(Under the supervision of Barbara Osborne J.D.)

The current culture of the National Collegiate Athletic Association (NCAA) driven by commercial and professional movements has experienced increasing trends in big-time coaching salaries and media attention of coaching contracts. The purpose of this study was to identify the legal issues and clauses that were presented in head coach litigation involving NCAA Division I football and basketball coaches. The study set out to answer the following questions: 1) What general contract issues are being litigated in breach of contract cases involving coaches?, 2) Are there certain clause that are frequently covered in contract lawsuits?, 3) What contract clauses protect head coaches in contract formation?, and 4) What contract clauses protect institutions in contract formation? The study found the importance of a thoughtful negotiation process and concluded with 19 recommendations for drafting Division I college coaching contracts that will help minimize the costly consequences of premature termination.

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CHAPTER I

Introduction

Intercollegiate athletics has endured many changes from the time of its inception in the late nineteenth century and continues to change each day. The very mention of the NCAA or college sport in the current culture creates images of big business for much of the general public (Southall & Nagel, 2008). This mental imagery creates picture of athletic departments turning to commercialism for more and more ways to create revenues in the current environment. Commercialism may be defined several ways, but the connotation of commercialization of college sports has become such a hot topic that it has been reflected in reports and committees by the NCAA and the Knight Commission (Knight Commission on Intercollegiate Athletics, College Sports 101). The idea of commercialism, while currently often in the news, is nothing new. The Carnegie Commission addressed this issue as far back as 1929. The report focused on the threats in college athletics, and making mention to the high coaching salaries of the time (Savage, 1929). Beyond today's commercialization of the student-athletes, the marketing, and the sponsorships, the money trail still finds its way to the current coaching environment.

Salaries continue to grow. The average person's salary does not begin to compare to the compensation of today's professional athlete (Anderson, 2000). The multi-million dollar

contracts of the top-tier football and basketball coaches are unfathomable to the typical blue collar American. It may not always receive the same amount of attention in the media, but "Professional coaches receive salaries nearly as staggering as some of their players' contracts" (Champion, 2004 p. 469). This fact is where a connection can be made between the commercialization of the professional sports world and the commercialization of college sports discussed in the media. Rising costs have driven many institutions to develop more professional-style corporate models as they mold their athletic departments (Sack, 1987). The coaches' salaries in Division I football illustrate a prime example of similar NFL sized compensation reported in recent research on coaching salaries (Wieberg, 2007). According to a survey done by the USA Today in 2007, the average yearly salary for major-college football coaches has surpassed $1-million. To put this in perspective, in 1999 only five, coaches in NCAA Division I-A made over $1 million per year. As of 2009, there are fifty-six coaches who can make the claim that they make at least $1 million per year (Wieberg, 2009). The average salaries of major college football and basketball coaches has not quite reached that of the NFL and NBA, but they are closer (Van Riper, 2009).

In December of 2009, Mack Brown became the first coach in intercollegiate athletics to receive a salary equal to or above $5 million (Berkowitz, 2009). This amount is staggering, but the bump in salary did not come to without critics. At a Faculty Council meeting at The University of Texas, a resolution was passed by way of an unofficial vote that deemed the salary "unseemly and inappropriate" (Haurwitz, 2009, para. 1). William Powers Jr., president of the University of Texas, defended the raise in pay by citing the fact "the athletic program under Brown has had no subsidies or deficits and has channeled $6.6 million into academic programs in recent years" (Haurwitz, 2009, para. 2). The way the market works it will not be

long before another school and coach will make headlines with a new contract to top the last as salaries increase almost as fast as the turnover of the coaches.

The increasing salaries institutions are willing to pay to keep or get the best coach is one of the several explanations for the high turnover rate of head coaches in the revenue sports of college sports. As the dollar signs of coaching salaries continue spin so does the revolving door of college coaching jobs. "Coaching is a tenuous position in a very fragile world" (Greenberg, 1992). The large monetary implications of present day contracts boost the importance of the contract writing process. Several lawsuits have been filed over contract breaches in intercollegiate athletics of coaches jumping ship for more money or schools not seeing the certain performances in which they were looking to obtain. The fiscal significance of contracts and potential lawsuits necessitate the need to get contracts right the first time to avoid the loss of large sums of money to the involved parties.

Statement of Purpose

The purpose of this study was to analyze breach of contract cases in college coaching with the hope of finding a set of recommendation or areas of focus in the negotiation and creation of head-coaching contracts. Through the research, the study expects to highlight the important elements that should be included in the formation of head-coaching contracts at NCAA institutions in order to provide for protection of the head coach and the institution. The study's goal is to educate athletic departments and coaches in the commonly occurring clauses seen in the research of litigation. The identification of important contractual clauses to be established by the study are intended to best protect all involved parties when contracts are created in order to prevent disaster should a party breach.

Research Questions

The instability of college head coaching tenure and a lack of current universal research and guidance of the formation of coaching contracts creates several issues in the college athletic setting. The media with their affinity for any controversy or conflict have recently been consistent and visible on reporting the premature ending of relationships between head coaches and their school of employment. With many significant questions unanswered in the wake of this increased media attention, the study will search to answer the following questions:

Research Question 1: What contract issues are being litigated in breach of contract cases involving coaches?

Research Question 2: Are there certain clauses that are frequently covered in contract lawsuits?

Research Question 3: What contract clauses protect head coaches in contract formation?

Research Question 4: What contract clauses protect institutions in contract formation?

Definition of Terms

1. National Collegiate Athletic Association (NCAA): The National Collegiate Athletic Association (NCAA) is a voluntary organization comprised of institutions, conferences, organizations, and individuals committed to the best interests, education, and athletics participation of student-athletes through which the nation's colleges and universities govern their athletics programs (NCAA.org, 2010).

2. Bowl Championship Series (BCS) school: Terminology term used term to describe certain institutions from one of the six conferences (ACC, Big XII, Big Ten, Big East, Pac-10, and SEC) with historic bowl tie-ins and commonly thought of as the power, money, and major conferences.

3. Revenue Sport: Jargon created to describe specific sports in college sport that are high profile and able to generate revenue normally referring to sports of men's football and basketball

4. Coaches: Male head coaches in revenue sports.

5. Commercialization: The process of looking to the commercial world for ways to generate revenue for expanding costs in college athletics.

6. Contract: A contract is a promise, or set of promises, for breach which the law gives a remedy, or the performance of which in some way recognizes a duty" (Sharp, 2007, p.364).

7. Contract of employment (contract of service): A contract by which a person agrees to undertake certain duties under the direction and control of the employer in return for a specified wage or salary (Law & Martin, 2009).

8. Legal Remedy: The means with which a court of law, usually in the exercise of civil law jurisdiction, enforces a right, imposes a penalty, or make some other court order to impose its will.

9. Liquidated Damages: A sum of money awarded by a court as compensation for a tort or a breach of contract (Law & Martin, 2009).

10. Litigation: The taking of legal action by a litigant (Law & Martin, 2009).

11. Agent: A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party (Law & Martin, 2009).

12. Material Breach: The failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract (Gorman, 2007).

13. Memorandum of Understanding: a document that sets out the main terms of an agreement between two or more parties and their intention to enter into a binding contact once certain details have been finalized (Law & Martin, 2009).

14. Due Process: A course of legal proceedings in accordance with a state's or nation's legal system, such that individual rights are protected (Oxford Dictionary of Current English, 1999).

15. Clause: A distinct section or provision of a legal document or instrument (Black's Law Dictionary, 2004).

16. NCAA violations: The act of breaking predetermined bylaws lain out in the division-specific manuals produced by the NCAA (NCAA.org, 2010).

17. Moral Turpitude: An act or behavior that gravely violates the sentiment or accepted standard of the community (Dictionary of Law, 1996).

18. Tortious Interference: A third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties (Black's Law Dictionary, 2004).

19. Jurisdiction: The geographic area over which authority extends; legal authority; the authority to hear and determine causes of action (Law & Martin, 2009).

20. Diversity Jurisdiction: Permits a federal court to hear a case involving questions of state law if the opposing parties fare citizens of different states (Rise & Wasby, 2005).

Limitations

The scope of the study was subject to limitations unique to the legal system and the collegiate contract process.

- Dealing with written contracts, there is the limitation of how a contract will be interpreted by all involved parties and a court of law from one case to the next.

- Contract law is limited by the state that holds jurisdiction.

- The details of coaches' contracts have not historically been public information thus potentially limiting the number of available records for the study.
- Either resolved through settlement or arbitration, employee contracts do not typically make it through the legal process limiting the number of contract lawsuits with actual holdings.

Delimitations

The study is delimited to Division I head coaches in the sports of men's basketball and football.

Significance of the Study

College athletics has seen an increasing number of lawsuits between a coach and an institution regarding the terms of their contractual relationship, and the need for both parties to become more versed in the clauses commonly used in solid contracts. Ideally, all involved parties should be protected from forming the contract to the end of a coach's tenure. This study hopes to be able to assist not only peer institutions, but also the individual head coaches through contract education to be used for contract negotiations and in the drafting of major contracts for the future.

The analysis of relevant litigation in breach of contract cases looks to find reoccurring and/or important clauses that will help to develop a list of recommendations useful to the aforementioned study's focused groups. The comprehensive look at high-profile litigation should uncover recommendations or guidelines to be used in contract formation. With high expenses and bad press coverage, neither party wants a lengthy court case in settling contract disputes. These recommendations will help schools and coaches form strong contracts on the

front-end of their relationships to help prevent later issues and protect both parties if a problem does occur. It is also an aspiration of the research to help not only with the researched sports of basketball and football but sports across the board.

Another expectation of the study is to serve as a potential learning tool for the common person that would fall outside the doors of contract negotiation for a major-college head coach. There may be individuals that may have a certain working knowledge of employee contracts, but the contract of the NCAA coach is rather different. The media provides an outlet covering the scandals and reporting the issues of many high-profile coaching departures, but the general public usually does not earn an understanding of what the actual specifics of the stories. Put another way, a goal of the study is to educate.

CHAPTER II

Review of Literature

Negotiation Theory

Contracts and the parties involved can easily be broken into several different areas of interest. A general look at contracts presents a challenge to pick a single focus of research. This study deals with the relationships between the coaches and the institutions in periods of conflict. Conflict occurs “when parties oppose each other because one or both perceives that the other is preventing achievement of a particular desired goal” (Goldman & Rojot, 2003, p. 7). This definition provides an appropriate breakdown of the conflict that can be found as a part of contract disputes. Negotiation addresses conflict as a way to resolve a dispute, or can be seen as a way to develop something innovative that could not be reached individually by a party (Lewicki, Barry, Saunders, & Minton, 2003). Negotiation theory is a theoretical component that can be found intertwined as a part of this study with relevance to formation of contracts on the front end and the breakdown on the back end. Negotiation theory has extensively evolved and developed from the original research conducted (Kolb, 1994). Research began around game theory in the subject of economics and has moved to today’s theory and practices that make up the wide scoped interdisciplinary study that now extends to include a number of topics such as the law (Kolb

Negotiation is not one cut and dry approach. I.W. Zartman framed how negotiated outcomes are reached through five distinct but not necessarily independent analytical processes (Breslin & Rubin, 1993). These five processes of negotiation processes are identified and described as:

> Structural analysis, which focuses on the distribution of various elements and the effects of such distribution on negotiation; strategic analysis, which involves the kinds of movement that are possible within the negotiations as a result of a series of interdependent choices made by the disputants; process analysis, which analyzes negotiating behavior as the result of some assessment by each side of the relative benefits and costs associated with reaching agreement; behavioral analysis, which uses the personalities of the negotiators as the point of departure; and integrative analysis, which…stresses the need to manipulate conceptualizations of the problem into mutually satisfying positive-sum outcomes before proceeding to an elaboration of a detailed division of the spoils' (Breslin & Rubin, p. 145).

Since Zartman's early work in the study of the strategic decisions during negotiation, there has been a more expanded theory of negotiation developed to include the important stages prior to negotiation (initiation) and those of resolution after the act (Lewicki, Barry, Saunders, & Minton, 2003). There have been a number of models developed through research of negotiation. Greenhalgh (2001) recently developed a negotiation model that lays out seven steps from the beginning to the end of the process (Lewicki et al., 2003). Where the models of negotiation can be either descriptive or prescriptive, Greenhalgh's model prescribed the phases in order as: preparation, relationship building, information gathering, information using, bidding, closing the deal, and implementing the agreement (Lewicki,

Barry, Saunders, & Minton, 2003). This is a proposed ideal model that is obviously not followed step for step in all negotiations, but does, however, make the point of the importance of understanding the phases from initiation to resolution to improve the negotiation process (Lewicki et al.).

This study recognizes negotiations take place in the environment surrounding contracts. Negotiation is a far reaching set of theories and practices. Contract-based negotiation is a small part of an overall complex view of the negotiations process. Carbogim and Robertson define contracts "as objects that can be adjusted based on reasoned arguments by the agents involved in the agreement", and therefore making the goal of contract-based negotiation to create a suitable agreement to satisfy all parties by amending the terms of the contract (1999, p. 1). Conflict can occur in contract negotiations and during the term of an actual contract. While some conflicts and disputes may be avoidable in the current times with negotiation techniques, conflict will never be eradicated in a world where dealing parties have differing interests (Breslin, 1993).

This study focuses on the "big-time" coaching contracts, which present themselves as complex agreements, and the contractual disputes that develop. Negotiation theory contains the idea of framing the problem at beginning of the negotiation process (Lewicki, Barry, Saunders, & Minton, 2003). Frames are important because they "define a person, event, or process and separate it from the complex world around us" (Lewicki et al., p. 37). Looking into contract negotiations, there is an importance to understanding the negotiations process as it can help form a stronger more protective contract that the parties involved believe will not fail (Carbogim & Robertson, 1999). Another recent study presents contracts as "consisting of multiple inter-dependent issues and intractable large contract spaces" (Klein, Faratin,

Sayama, & Bar-Yam, 2003, p.1). These authors believe complex contracts should be negotiated with different techniques than independent issue cases (Klein et al.). A technique of frequently compromising earlier in the contract negotiations process should be utilized to come up with a good contract for both parties (Klein et al.). Negotiation theory as an interdisciplinary study lays out many ideas that make it important to find the right process to follow for each individual situation that will hopefully lead to better contracts through an effective dispute resolution system (Breslin & Rubin, 1993).

Commercialism and Professionalism

The study focuses on the importance of have a working knowledge of the evolution of intercollegiate athletics. The review of literature aimed to be an integral part of understanding the contextual framework of the current environment inhabited by coaches and the institutions.

"College athletics is big business" (Graves, 1986). A simple statement that gives a quick summation of a prevailing view of intercollegiate athletics (Sperber, 1990; Sack, 1987; Zimbalist, 1999; Stangel, 2000; Southall & Nagel, 2008). Commercialism and Professionalism are terms linked to the transformation of college sports. As far back as 1987 in *College Sport and the Student-Athlete* research, Sack noted: "…the most striking feature of sport in many universities in the United States is its commercialization and the degree to which the athletes have been transformed into professional entertainers" (p.31). Framing this study, the combination of the presented issues are interesting looked as a whole. The subjects of professionalism and commercialization of college sports are presented solely as an issue of American colleges perpetuated by a capitalist American society (Sack & Staurowsky, 1998).

According to the 2009-2010 NCAA Division I manual, the basic purpose of the "Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear demarcation between intercollegiate athletics and professional sports" (National Collegiate Athletic Association, 2009, p.1). Looking to the reference of Andrew Zimbalist's Unpaid Professionals, the 2009-2010 NCAA manual maintains the identical basic purpose that Zimbalist referenced from the 1997-1998 manual (1997). The NCAA points to the topic of amateurism as the demarcation that separates itself from the professional organizations such as in the NFL or NBA. In the purpose statement, the NCAA separation argument also includes the educational mission. The idea of purity and amateurism never really was disconnected from commercial ideals (Zimbalist, 1997). The first intercollegiate contest ever occurred in 1852 by the way of a crew match between the famed Ivy League schools of Harvard and Yale, but the event was developed by the superintendent of the Boston, Concord, and Montreal Railroad organization and involved "lavish prizes" and "unlimited alcohol" (Zimbalist). The "integral part of the educational program" cited by the NCAA manual was also attacked in the famous Carnegie Commission report that expressed,

> The heart of the problem facing college sports was commercialization: an interlocking network that included expanded press coverage, public interest, alumni involvement and recruiting abuses. The victim was the student-athlete in particular, the diminishing educational and intellectual values in general. Also, students (including non-athletes) were the losers because they had been denied their rightful involvement in sport (Zimbalist, 1997, p. 8).

While the information presented to this point may seem negatively slanted, this unbiased study only seeks to frame the environment. It is important to not lose sight of the fact this study looks only to focus on the Division I sports of football and men's basketball. The recognition of this segment is significant realizing there is not one uniformed description of participants in intercollegiate athletics (Sack, 1987). Allen Sack pointed to this fact in developing his model that identified the typology of college sports in the following environments:

Table 1

College sports typology

	Commercialized	Less Commercialized
Professional Athletic Scholarships	**Cell A** Corporate Model	**Cell B** "Small Time" Corporate Model
Amateur No Athletic Scholarships	**Cell C** Ivy Model	**Cell D** Amateur Model

(Sack, 1987, p. 31)

The model makes distinctions between divisions and sports. Football and men's basketball of NCAA Division I institutions fall under the corporate model with heavy professionalism and commercialism (Sack). The study recognizes this as a key factor for the significance of the choice for research in litigation of the programs that fall under the corporate model.

Murray Sperber framed the transformation of college sports as a major entertainment business in the realm of College Sorts Inc. that has lead to the development of more professional-corporate style athletic departments (Sperber, 1990). Today the NCAA has

become a multi-billion dollar industry (Sack, 2009). Myles Brand, the late president of the NCAA, spoke to the fact that college sport relied on commercialism as a major part of creating sport revenues for schools (Brand, 2006). It is generally acknowledged that football and men's basketball are seen as the revenue generating sports in intercollegiate athletics. The head coaches of these teams are a fundamental part of that revenue generation. The media's role in commercialism and professionalism has been one of continually increasing the status and attention of college coaches in our society, and current head coaches have surpassed all other institutional employees in public recognition and compensation (Moberg, 2006). The money passing hands and the constant watchful public eye are two of the factors that have put constant pressures on the coaching environment.

The Environment and the Elements

Scholarly research of the specifics of college coaching contracts has been limited. The most extensive scholarly research has come from a handful of law reviews, and sports law textbooks. With the topic getting more publicity recently due to escalating coaches' salaries and high profile breach of contract cases, far more information exists in interest articles and blogs than in scholarly publications. The literature that best helps to understand the issues this study focuses on can be broken down into the areas of the physical contracts as well as the details surrounding them and the coaching environment (Greenberg, 2001).

The Coaching Environment.

The augmented exposure for head coaching salaries and terminations through all channels of media combined with the monetary implications in breach of contract litigation has brought to light many essential and relevant issues in coaches' contracts. If forced to

pick one word or phrase to describe the environment of college coaching, “the coaching carousel” comes to mind (Kardash, 2009). This may be one of the best descriptors to accurately depict the revolving door that is major college sports come the end of every particular sports season or now even in the middle of the season. The carousel also provides an interesting metaphor with the idea of the carnival of college sports. Martin J. Greenberg states, “In what field is an employment contract broken as easily as its made” in reference to college coaching (Greenberg, 2001 p. 128).

The dictionary defines a coach as “one who instructs players in the fundamental of a competitive sport and directs team strategy” (Merriam-Webster online, 2010). This is a simple definition when the college coach is expected “to be an instructor, but also a fund raiser, recruiter, academic coordinator, public figure, alumni glad handler, and whatever else the university’s athletic director or president may direct the coach to do in the interest of the university’s athletic program” (Greenberg, 2001, p. 130). Over time, the expectations of or on the coach head coach’s have grown causing a chance for more scrutiny outside the traditional field of play. The increased scrutiny provides an example of one of the driving factors of the “coaching carousel.”

Intercollegiate athletics have progressed significantly from that historic first crew match between Harvard and Yale in 1852 (Knight Commission on Intercollegiate Athletics, 2009). The “commercialism” of college sport is the popular buzz term mentioned earlier to describe the current culture seen in the institutions across all divisions and associations. The Knight Commission who has studied the issues of college sport and commercialism extensively state that “money madness is at the heart of the problem in the environment (Knight Commission on Intercollegiate Athletics, 2001 p. 14). Previously acknowledged

salaries have seen a significant increase throughout history and are currently positioned at their highest point ever both relative and absolute terms. In the culture of increased commercialism and professionalism, it is not only the coaching salaries that have increased. Rising expenses, a major challenge for college athletics, across the board in areas such as facilities ("the arms race"), scholarships, travel, and recruiting have set the stage for a very volatile environment in regards to millions of dollar that run through each athletic department (Knight Commission on Intercollegiate Athletics, 2009). Salaries are not the only rising expense, but according to the Knight Commission it does make up the highest percentage of cost for the average athletic department at thirty-two percent (2009). As a hefty cost, the compensation and potential economic repercussions at stake in coaching contracts is another explanation force for the turnover seen in college sports.

A coach's tenure is not only defined by the terms of the contract, but also by public opinion. Several constituencies appear to have a "voice" in the decision whether coaches are retained or fired. A coach's team and individual players have more say in the matter than some might guess. Today's college player is not the same than those of an earlier time, what some might describe as the "good ol' times" (Greenberg, 1993). Coaches have lost their job due to revolts and insurrections led by players (Greenberg, 2001). The expectations of the general public and the student athletes themselves of player treatment have seemed to evolve to more encompass the student athlete's physical and emotional health**.** The media has played a role in giving players a voice and the power to speak out against coaches. "The student athlete, who the coach has recruited, nurtured and potentially paved the path for a professional career, may be part of an insurrection, an insurgence, a boycott, a plaintiff in a defamation suit, or the focus of public disparagement" (Greenberg, 2001 p. 8). Recently,

there have been two coaches fired, Mike Leach and Jim Leavitt, and one forced to resign, Mark Mangino, due to abusiveness (Johnson, 2010).

For example, in December of 2009, Coach Mike Leach was removed as head coach for Texas Tech University after nine seasons, following an incident with sophomore receiver Adam James over the treatment after his concussion (Schad, 2009). There seemed to be no issues brought forth before this claim, but as soon as this issue was brought out in the open others were quick to make statements through the press. When asked about the termination, one player stated that "I have no complaints about the decision," and another said "It wasn't just about Adam. It was always a negative vibe (Schad)." Leach is not without his supporters, but it did not take long for some to turn on the coach only a year removed from being named Big XII coach of the year (Schad).

There are many things related and unrelated to the contract itself that effect the job movement of coaches. In the end in terms of employment, it always comes back to the contract regardless of the circumstances of how the relationship between the school and the coach came to an end. The study will now begin to research further to find what the involved parties might be able to do differently in regards to the contract negotiation and formation process.

Contract Essentials.

A contract in any form must contain the basic elements of an offer, acceptance, consideration, capacity, and legality to be legally binding and considered an "enforceable contract" (*Contract*, A Dictionary of Law). The first part of any contract is the offer. The offer is the proposal for parties to enter into an agreement of a contract. The parties involved

are generally referred to as the offeror and the offeree. The offer must be clear in its elements. The elements are normally: "(1) the parties involved; (2) the subject matter; (3) the time and place for the subject matter to be performed; and (4) the consideration, which usually is the price to be paid" (Sharp, 2007, p. 365).

The next step in forming a contract is the acceptance: a contract may not be formed until the offeree accepts the offeror's original offer. The offer can either be "accepted by the person whom it is made", the offeree can reject the offer, or if "the offeror dies, the offeree cannot then accept the same offer (Sharp, 2007, p. 365)".

After acceptance, a contract must consist of proper consideration. An enforceable contract must show an exchange of value between the two parties. The courts generally look only for consideration and not the "adequacy or inadequacy of the consideration" (Sharp, 2007, p. 365). The court will only use its judgment when there is a type of fraud, misrepresentation, duress, or mistake in the contract (Sharp, 2007).

Another key element of a contract is capacity. To enter into a legal and valid contract the party must be able "to understand the nature and consequences of the transaction in question" (Sharp, 2007, p. 366). This requirement precludes minors and the mentally incompetent from entering in an enforceable contract.

The last necessary element of a contract is the legality. This simply means that the terms listed in the contract must all be legal actions to constitute a valid contract (Sharp, 2007). These five elements must be present when creating an enforceable coaching contract. The new coaching contracts contain many complex terms, but all contracts begin with these basic ingredients.

Contract Elements.

Contracts range from a very simple agreement incorporated into a sentence to dozens of pages of complex clauses and extensive language (Greenberg, 2001). For the most part, coaches' contracts follow a general formula in the way they are drafted. College sport though is fundamentally different than professional sport, so the NCAA recommendations for contracts are different than professional leagues like the NBA and NFL.

Employment contracts in professional sport are standardized, but college coaches contracts are negotiated independently between the coach and the school and have no standard format (Greenberg, 2006). When contracts are not standardized, the language and clarity of the contract falls solely on those parties entering into the contract. This burden results in a wide spectrum of contracts drafted where no two may look alike (Greenberg). For this reason, the NCAA has a webpage on NCAA.org devoted to "drafting college coaching contracts." The webpage provides not strict guidelines, but rather suggestions for standardization since there is no mechanism that forces it. The NCAA goes a long way to make this point with the visible statement,

> This page is provided for ***educational purposes*** and only as a central space for various resources and information concerning drafting coaching contracts. The information provided is in no way to be considered legal advice, nor is the NCAA implying that any of these clauses are mandatory in the coaching contracts at NCAA institutions ("Drafting Resources," 2008, para. 1).

The webpage provides a contract checklist. The checklist offers six suggested areas of importance to be considered when drafting a contract for a coach. These suggested areas mixed with suggestions in academic literature help the study construct a picture of the current composition of college coaching contracts. It is necessary for the coach and university to be protected by an employment contract that pays attention to detail which meets the needs of both parties (Greenberg, 2001).

Purpose.

The first component of the checklist and most contracts is the purpose of the contract. Contracts can contain many of the same elements, but each contract should be defined uniquely to the particular coaching position (Greenberg, 2001)." This section comes first for reason. The Purpose's role is to introduce the contract with facts and brief background information relevant to the contract the purpose can be as simple as a sentence: This employment contract is made and entered into on (date), by and between (name of school athletic department) and (name of coach). The purpose can also be exhaustive and complex, containing facts, background information relevant to the contract, recitals and definitions and so on. This section defines the purpose of the contract agreed upon by the parties involved. The purpose consists also of recitals and definitions. The recitals and definitions clear up any questions in the purpose with facts and explanation. They are used, respectively, when anything varies from plain language. Plain language is defined as "speech or writing that is direct, straightforward, unostentatious, or easily understood" (Oxford English Dictionary, 2008). The definitions are important in the coaching contracts to stay away from ambiguity. Ambiguity and contradictions are two of the most common problems in contracts that can cause a contract to be misinterpreted ("Drafting Resources," 2008). An ambiguous contract is

bad because it causes the validity of the contract to be called into question. This leaves the contract open to the interpretation of the court.

Position/Duties.

The next section that can be found in a coach's contract is position/duties and responsibilities. This area may be one of the most important areas to focus and communicate crisp clear definitions. The definition and distinction of duties and responsibilities for a coach play a major role in case law history when it comes to the termination of coaching contracts by an institution. The head coach position is an important distinction that carries many responsibilities. A contract must address specific responsibilities and effort. The university is in charge of defining the duties and responsibilities expected of the head coach for the school. Depending on the position, the duties can generally be broken down "between coaching duties, administrative duties, travel duties, recruiting duties, student affairs, alumni relations development and other" (Greenberg, 2001, p.153). The duties can be broken down however the school chooses as long as they are properly defined. What some people believe may pass for "common sense" may not be recognized as such in a court of law in this section. An example of a duty that is included in some contracts is the coach's responsibility considering NCAA compliance. It may be understood that the coach is supposed to follow the rules, but for legal reasons, in a university perspective, it should be placed into the contract language. Responsibilities can be clarified to consist of specific NCAA bylaws cited directly in this section or duty to follow all constitution, bylaws, and interpretations set forth by the NCAA on their NCAA.org website (2008). Similar to the purpose, the list of duties can be a general job description from human resources as in "The head coach is responsible for the management and day to day operation of the men's basketball program including

budgeting, recruiting talent, supervising assistant coaches, planning and supervising athlete training, practice, and game or it can on for pages identifying and outlining every expectation. Martin Greenberg writes that generally the coach will lean toward the broad form responsibility statement whereas, the university's perspective by and large will want the most specific outlined set of duties possible (2001). The structure of this section can have a great impact in the courtroom understanding an athletic department's expectations.

Term of Employment.

The term of employment is an important element of a coaching contract. "Individually negotiated multi-year coaching agreements are generally accepted at institutions that hire full-time coaches for a single sport, have a high expectation with regard to competitive success, and/or expect the sport to produce significant revenues (Lopiano, 2008, para. 4)." Once again, the clarity and explicit terms are integral in the writing of contracts especially in regards to length (Greenberg, 2001). The importance of the term relates to the new wave of contracts in college football and basketball. Three to six years, that's the typical length for coaching contracts (Greenberg). This time period is not that unrealistic, but multi-year contracts mixed with the competitive culture of college football and basketball makes the length of the contracts a key component. Most coaches who enter in these long term contracts have proven their coaching abilities, but even after years of success one losing or subpar season can put a job in jeopardy (Greenberg). A three year contract is not outrageous, but recently, athletic administration have handed out longer extensions than the original terms of the contract such as Charlie Weis receiving a ten year extensions not long before his removal (Dodd, 2008). There is security and added benefits for coaches to

negotiate long-term deals and universities want to reward success and hang on to a good coach. At some point, does not someone have to ask how realistic are contracts of ten years?

Compensation.

Compensation is the next component in the typical coaching contract. The compensation portion of coaches' contracts has reached an all time high. According to a 2006 study by the USA Today, the average Division I head football salary was just under a million dollars (Upton & Wieberg, 2006). A million dollars at stake puts a great amount of pressure and stress on both the institution and the coach. The question is how the money is broken down. However the university decides to compensate the coach, the terms should be specifically written out and agreed upon by both parties. "The position of head coach may offer not only a base salary with institutional fringe benefits, but also additional compensation opportunities that are generally referred to as the "package" (Greenberg, 2001, p.104). The "package" breaks up the compensation so that the school is not bearing the full load of the sum listed in the contract. The school's main responsibility is the base salary which is only part of the whole. The USA TODAY coaches' salary study shows that the base salary consists of about 25% of the overall "package" in compensation (Upton & Wieberg, 2006). The package consists of the base salary and perquisites (Greenberg, 1992). "The package might include shoe, apparel and equipment endorsements, television, radio and Internet shows, speaking engagements, personal or public appearances, and summer instructional camps (Greenberg, 2001, p. 153).

The supplemental income portion of compensation has developed into a relevant issue in these contracts. There have been recent termination cases involving compensation

and the terms of questionable income. Head coach Dennis Franchione, a prime example of this topic, was remanded and lost his job after a supplemental scandal ("A&M," 2007). "According to NCAA Bylaw 11.2.2, a coach must get prior written consent from the university's chief executive officer before he may enter into outside income deals" (Greenberg, 1992, p.104). The bylaw is found in the NCAA compliance manual, but is also found written into many coaching contracts. The situation with Coach Franchione developed from him selling insider information in a pay-for newsletter bought by many big time boosters for $1200 ("A&M"). This not only was a NCAA infraction but also a breach in his contract. "A copy of Franchione's contract, obtained by The Associated Press, specifies the coach must report to the school president 'annually in writing' any outside income" ("A&M," para. 8). Coach Franchione was not fired immediately from the issue, but rather stayed on at Texas A&M University until an official review of his overall performance was conducted. ("A&M").

Termination.

Termination is an important part of the contract process. Cynics might argue that although compensation and benefits are the important issues on the front end of the relationship, the true purpose of the employment contract is to protect the parties (and define rights and obligations) when the relationship comes to an end. "If the coach doesn't win the organization will try to 'unload' them (as demonstrated in *Cole v. Valley Ice Garden*, 2005), in many cases by buying the coach or administrator's contract out to secure a new person for the position" (Caughron, 2007, p. 375). Within the termination portion of a contract, there are several areas and scenarios which should be covered for both sides to be equally protected. The broad areas of termination can be separated into termination by university or termination

by coach. The more specific elements of institutional termination are death and disability of coach, just cause, and termination without cause ("Drafting Resources," 2008). A comparison between termination without cause and a coach quitting for whatever reason of how they function similarly, but it is important to note they should be identified and treated separately in contract formation.

Termination by the university is a common issue of the coaching environment. "As a result, the coach's contract may be the most important armor that the coach has in protecting his entry and exit in the job" (Greenberg, 2001, p.127). The first form of termination by university to be put in place is automatic termination upon death or disability of employee. This clause generally states that a coach's contract will be terminated if he can no longer fulfill the duties and responsibilities of the contract whether it is through death or a permanent physical or mental disability (Greenberg, 2001).

The university will always want to include a *for cause* clause to terminate a coach. The clause gives the university the right to terminate a coach for actions defined within the contract such as "commission of a material breach, the commission of a felony or crime of moral turpitude, and serious or material violation of NCAA bylaws" and etc. (Karcher, 2009, p. 24). Moral turpitude is defined as "an act or behavior that gravely violates the sentiment or accepted standard of the community", but like many "just cause" issues are subject to interpretation (Dictionary of Law, 1996). Moral turpitude and violations of NCAA can go hand in hand. University of Washington fired head football coach Rick Neuheisel based on moral turpitude as he was under investigation by the NCAA (Greenberg, 2006). The university must have a good case and evidence to terminate based on "just cause" or it is likely the court will award the coach damages (Greenberg). Coach Neuheisel filed suit

against the University of Washington and received a large settlement due to the institutions haste (Greenberg). Moral turpitude is generally a hard sell because the words themselves are ambiguous, difficult to legally define, and ultimately require an independent trier of fact" (Greenberg, 2001, p. 215)."

An issue of the contract controversy in the termination of coaches develops from termination "without cause." The clause gives a school the right to terminate a coach for whatever reason they wish at any time a school seems fit. Termination "without cause" is part of the criticisms of the new coaching contracts. The clause could be called the not winning clause because "If a team is not winning, complaints go to the university president's office, donations decrease, television contracts disappear and everybody is depressed because the program just is not right" (Greenberg, 1992, p. 108). The coach is blamed and will usually take the fall. This clause, generally referred to as the "buyout", allows the institution the freedom to fire for whatever reason they choose, but it will normally come with a large cost to the school (Karcher, 2009). In negotiation, the buyout acts similarly to an employment insurance policy for a coach. The institution must pay to end the official relationship with a coach unless they have valid legal rationale.

Similarly, the athletics program needs to be protected from the coach that decides to breach the contract and depart before the end of the term. A school cannot make a coach work against his will, and the "possibility of protracted litigation, adverse publicity, a cloud over the athletic department, and presumably, a relationship that has deteriorated, most universities will allow their restless or ambitious coaches go without further ado" (Greenberg, 2001, p. 248). These reasons have let coaches have a certain freedom in their movement from one job to another. The main deterrence from termination "without cause" or

by the coach is drafted into most new contracts as a buyout provision. The buyout allows a coach or a university to opt out of a contract with a specified price (Greenberg, 2001). Liquidated damages are defined "as damages whose amount is agreed upon by the parties to a contract as adequately compensating for loss in the event of a breach ("Liquidated Damages," 1996). The party who terminates a contract with a buyout clause may be liable for payment of such defined liquidated damages. In the case *Vanderbilt University v. DiNardo*, Gerry DiNardo breached his contract with Vanderbilt by taking a coaching position with Louisiana State University, and thereby held responsible for the liquidated damages implicitly written in his contract (*Vanderbilt University v. DiNardo*, 1999). The buyout clauses in contracts have already reached large amounts like the $4 million dollar buyout found in the recent West Virginia case (Wasserman, 2008).

Miscellaneous.

The miscellaneous section that finds itself into most coaches contracts covers basically everything that does not fit into one of the other named provisions. This section is by no means extraneous. It usually holds several key elements that are very important to the overall contractual document. Miscellaneous provisions can cover a very broad spectrum depending on the coach and the university. Typical provisions can cover support of a program, governing law, limitation of remedies, restrictive covenant, assistant coaches, and scheduling ("Drafting Resources," 2008).

Martin J. Greenberg describes coaching contracts as, "sophisticated endeavors-no standard forms, no two that looks the same, no union protecting their interests, no data bank that correctly reports the intricacies of their packages" (Greenberg, 2001). No standard form

and the previously stated environment in college sports combine to make for fertile grounds for contract disputes

CHAPTER III

Methodology

This study utilized a standard legal research formula as laid out in *Conducting Legal Research* in Sport Law: a managerial approach by Linda Sharp, Anita Moorman, and Cathryn Claussen (2007). This study implemented four progressive steps of research.

Step One.

Two separate legal research databases will be utilized. On Lexis/Nexis, the preliminary search will be conducted in The "Federal and State Cases, Combined" database. Using Westlaw, the "All State and Federal Cases" database "ALLCASES" will be the starting point. These selections will allow the databases to narrow the search focus to only legal cases as well still provide broad access to all of the litigation contained on each search engine.

The specific terms "Breach of contract" and "coach" will be the language and connectors used for the initial search. "Termination", "just cause", and "cause" were also used in the search process. The research will utilize the "and" connector to locate cases with the selected combination of terms as the individual terms separate are too broad for the study.

The searches will not be confined to certain dates in the initial research to encompass all possible relevant cases.

Step Two.

After finding the results from the broad search for case, the next step will involve examining the results to find their relevance as pertaining to the study. The cases not directly related to athletics will be removed from the use of the study.

The results were dissected a step further by using the Lexis/Nexis search within results online feature and WestLaw. The term athlet! was first added to the original search to sort through the results to remove non significant cases by only looking at results that included some type of athletics. The ! connector allowed the search feature only to search cases with words including “athletic”, “athlete”, or other similar words. This search allowed only cases related to athletics to be used to keep any cases from being overlooked.

Step Three.

The final search should only return results relevant to athletics and the legal focus of the study. The results will need to be reviewed a final time to determine which cases are most relevant to the subjects selected for study, male head coaches of football or basketball teams. Using the relevant cases, case briefs will be developed for each individual case to provide a further breakdown of the information. The case briefs will contain the important components of:

- The citation information
- The facts
- The issue(s) presented

- The holding (final ruling on the issue being decided)
- The rationale (or reasoning) used by the court to justify the decision (Sharp, Moorman, & Claussen, 2007b)

Step Four.

Finally, the cases will need to be categorized in a uniformed fashion to make it easier to answer the research questions. First, the cases will be organized in chronological order. Then, the litigation can be organized by the type of case that occurred.

Removal brought by University

Removal brought by Coach

The cases also were sorted by the relevant issues established.

CHAPTER IV

The search of the legal database returned fifteen cases within the delimitation of the study. Case briefs for each case are included in Appendix A. The cases were chronologically ordered as seen in Table 2. The earliest case identified was from 1983 between Franklin "Pepper" Rodgers and the Georgia Institute of Technology (*Rodgers v. Georgia Tech Athletic Association,* 1983). Chronologically, there were relatively few cases in the 1980's decade, and 13 of 15 cases (86.67 percent) were litigated between 1995 and 2010, and 60% in just the last ten years. In eighty percent or 12 of the 15 lawsuits, removal was brought by the respective schools leaving twenty percent of the cases for removal brought by the coach. The cases can be broken down by those heard in state courts (9 of the 15 cases for 60.0 percent) or those heard in federal courts (six of 15 cases for 40 percent). Seven of the researched cases occurred in a court of appeals. Although there are not a staggering number of reported cases, 15 cases is an adequate population to provide insight into the primary areas of litigation involving coaches' contracts in collegiate sport.

Table 2

Chronological list of cases

Year	Case	Court
1983	Rodgers v. Georgia Tech Athletic Association	Court of Appeals of Georgia
1987	Lindsey v. University of Arizona	Court of Appeals of Arizona, Division 2, Department B
1995	Monson v. State	Court of Appeals of Oregon
1996	Campanelli v. Bockrath	United States Court of Appeals, Ninth Circuit
1999	Board of Trustees of State Institutions of Higher Learning v. Brewer	Supreme Court of Mississippi
1999	Vanderbilt University v. DiNardo	United States Court of Appeals, Sixth Circuit
2003	Price v. University of Alabama	United States District Court, N.D. Alabama, Western Division
2004	Northeastern University v. Brown	Superior Court of Massachusetts
2004	Richardson v. Sugg	United States Court of Appeals, Eighth Circuit
2006	O'Brien v. The Ohio State University	Court of Claims of Ohio
2008	West Virginia University Bd. of Governors v. Rodriguez	United States District Court, N.D. West Virginia, at Clarksburg
2009	Baldwin v. Board of Supervisors for University of Louisiana System	Court of Appeal of Louisiana, First Circuit
2009	Cyprien v. Board of Sup'rs ex rel. University of Louisiana System	Supreme Court of Louisiana
2009	Garland v. Cleveland State University	Court of Claims of Ohio
2009	Kansas State University v. Prince	United States District Court, D. Kansas

Research Question 1: What contract issues are being litigated in breach of contract cases involving coaches?

There were 15 legal issues indentified in the data set. All cases involved the removal or reassignment of the head basketball or football coach from their formal position. The primary issues litigated were: breach of contract, termination *for cause*, liquidated damages, reassignment, due process, court interpretation, jurisdiction, addendums, court fees, parol evidence, statute of frauds, discrimination, First Amendment claims, defamation, and inducement. Many of the cases involved more than one of the acknowledged legal issues. The following sections of the first research questions will individually expand on these issues. The liquidated damages issue had the most occurrences showing up in 33.3 percent of the data set. The next closest was found to be court interpretation at one less frequency and accounting for 26.7 percent of all cases.

Table 3

Legal issues by case

Case	Primary Issues
Rodgers v. Georgia Tech Athletic Association	Breach of contract; Interpretation
Lindsey v. University of Arizona	Breach of contract; Parol evidence; Court fees
Monson v. State	Breach of contract; Reassignment; Interpretation
Campanelli v. Bockrath	Breach of contract; Due process
Board of Trustees of State Institutions of Higher Learning v. Brewer	Breach of contract; Jurisdiction
Vanderbilt University v. DiNardo	Breach of contract; Liquidated damages; Validity of addendum; Interpretation; Parol evidence
Price v. University of Alabama	Breach of contract; Due process; Statue of Frauds
Northeastern University v. Brown	Breach of Contract; Liquidated damages, Inducement (Third-party)
Richardson v. Sugg	Breach of contract; Discrimination; Liquidated damages; First Amendment claim
O'Brien v. The Ohio State University	Breach of contract; Termination *for cause*; Material Breach
West Virginia University Bd. of Governors v. Rodriguez	Breach of contract; Jurisdiction; Liquidated damages; Court fees
Baldwin v. Board of Supervisors for University of Louisiana System	Breach of Contract; Defamation
Cyprien v. Board of Sup'rs ex rel. University of Louisiana System	Breach of Contract; Defamation
Garland v. Cleveland State University	Breach of Contract; Interpretation; Reassignment
Kansas State University v. Prince	Breach of Contract; Jurisdiction; Liquidated damages; Validity of Addendums; Court fees

Breach of Contract.

All of the data set included breach of contract cases. A breach of contract is defined by a "violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance" (Black's Law Dictionary, 2004). *Garland v. Cleveland State* (2009) provided a clear list of four elements for a plaintiff to recover for breach of contract: "contract existence, performance by the plaintiff, defendant's breach, and damages or loss as result of the breach" (p.7).

Termination by coach.

In three of the cases in this data set, the coach ended the relationship in the breach of contract case. The court ruled in favor of the universities in all of them. *Vanderbilt v. DiNardo* (1999) was a breach of contract case, and the first chronological breach in a termination initiated by the coach . After four years as the Head Coach of the Vanderbilt University football team, Coach Gerry DiNardo resigned and accepted the head coaching position at Louisiana State University (LSU) on December 12, 1994. Coach DiNardo was given permission to speak with LSU, but DiNardo left the contract term early to accept the position. The court's determination of the breach on the terms of the contract was important to support the University's claim to the monetary damages stipulated by the contract for a breach of the employment terms (*Vanderbilt v. DiNardo,*1999).

The second chronological termination by the coach came in *Northeastern University v. Brown* (2004). The case addressed the issue of breach by former head basketball coach Donald Brown at Northeastern University by "contract jumping" when he left to accept job at fellow conference member and rival University of Massachusetts (UMass) (*Northeastern*

University v. Brown, 2004, p.2). The court cited Judge J. Skelly Wright in *Detroit Fooball Co. v. Robinson* (1960) in describing contract jumping as "a fight which so conditions the minds and hearts of these athletes [and coaches] that one day they can agree to play [or coach] football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along" (*Northeastern University v. Brown,* 2004, p. 1). The contract under Section XII covered "outside employment" by stating the coach had to get written consent from the University president which was not acquired for the communication between UMass and Brown (*Northeastern University v. Brown*, 2004, p. 1). The court found a clear breach of duty by Coach Brown through the rationale that a contract for a major university is the same as contract in the rest of the world (*Northeastern University v. Brown,* 2004). In the evidence of irreparable harm, the court placed an injunction on Coach Brown. The preliminary injunction placed on Brown prevented him from "working as an employee, consultant, aide, assistant or in any other capacity for the defendant, University of Massachusetts until further order of this Court" (*Northeastern University v. Brown,* 2004, p. 5).

In *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004), the facts give a clear picture of a breach of contract by Richard Rodriguez the former football coach for West Virginia University (WVU). After extending his contract through 2014 in August of 2007, Coach Rodriguez resigned from his position as head football coach on December 19, 2007 to accept the same position at the University of Michigan. The resignation of Rodriguez created the breach issue with the WVU seeking a court decision that the contract was valid and enforceable as it called for damages of the coach if he ended the employee agreement early. The court refers to the money allegedly due

as *buy-out* money to which West Virginia seeks to recover for breach (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004). The contract terms of voluntary termination before the end of the agreement states that Rodriguez would pay four million dollars (Amended complaint, 2008).

Termination *for cause*.

Another legal issue raised in these cases is whether the university terminated the coach *for cause*. *For cause* termination can be defined as termination "for a legal reason or ground" (Black's Law Dictionary, 2004). Further, this can refer to the institution's contractual right to end a relationship without further compensation or benefits (*O'Brien v. The Ohio State University*, 2004). In *O'Brien v The Ohio State University* (2004), Coach Jim O'Brien committed an obvious NCAA infraction when he loaned "a potential recruit" money (p. 2). The main issue disputed in this case was not this breach of performance, but whether the coach's actions fell within the definition of termination *for cause*. The terms of termination *for cause* were limited as the Coach must either commit a "material breach", a "major violation", or engage in "criminal conduct" to be successfully terminated for cause (*O'Brien v The Ohio State University*, 2004, p.12). The Court of Claims of Ohio decided the reasoning of Ohio State for the termination did not fall under the terms of the contract to be considered termination *for cause* (*O'Brien v The Ohio State University*, 2004).

Liquidated damages.

The breach of contract cases include several occurrences of the parties trying to recover damages. "Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong" (Black's Law Dictionary, 2004).

Liquidated damages are the main way the damages issue is illustrated in the data set, and can be defined as "an amount determined by the parties to be just compensation for damages should a breach occur" to the contract (*Vanderbilt v. DiNardo*, 1999, p. 755). In all three cases where the coach terminated the contract, liquidated damages were at issue. Liquidated damages are more often sought after by the coach from the university, but clauses may also be enforceable against a coach. In *Vanderbilt v. DiNardo* (1999), DiNardo broke the employment agreement with Vanderbilt for a position at LSU. The court found that Vanderbilt did not waive its rights to liquidated damages by granting permission for DiNardo to speak with LSU. The court of appeals also agreed that DiNardo owed Vanderbilt the enforceable liquidated damages from the contract. Liquidated damages at issue in the *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004) and *Northeastern University v. Brown* (2004) cases were covered in the termination by coach section. There were two other cases where a buy-out or liquidated damages were mentioned in a case brought by the university. In *Richardson v. Sugg* (2005), Nolan Richardson was terminated as head coach of the University of Arkansas basketball team after seventeen seasons. Richardson allegedly made comments that were harmful to the University of Arkansas. The University gave Richardson the option to retire, and terminated him when he chose not to retire. One of the several legal issues in this case was whether the Richardson should be able to keep his $500,000 buy-out for the six years remaining under the contract along with other issues of the case (*Richardson v. Sugg*, 2006).

Reassignment.

While the majority of breach of contract cases examined occurred because of an outright termination by an institution, in some cases a coach was removed from the Head

Coach position and reassigned within the athletic department. Reassignment occurs when an employer "assign[s] (someone) to a different post or role" (Oxford Dictionary of English, 2005). In *Monson v. State* (1995), Don Monson entered into contract with the University of Oregon as the head men's basketball on March 23, 1983. With the approval of the administration, the coach's contract was extended on three separate occasions to eventually take the contract through June 30, 1994. After the decision of athletic director, Bill Byrne, that it was time for a new direction for the basketball team, Monson was first reassigned to head golf coach. The main issue was whether the University of Oregon breached the contract by reassigning Monson to the positions of golf coach, fundraiser, or basketball compliance officer. The court found no breach of contract issue as the reassignment was in accordance to the contract *(Monson v. State*, 1995).

More recently, former Cleveland State head basketball coach Michael Garland was removed in 2006 by Athletic Director, Lou Reed, who informed Garland they were going to make a change in the head coaching position (*Garland v. Cleveland State University,* 2009). Coach Garland was hired in April of 2003, and despite a tough first season with a record of 4-25, he received a contract extension through 2008. When Reed informed Coach Garland of Cleveland State's (CSU) decision for change in 2006, Garland interpreted the statement to mean he was terminated. The issue was whether Garland was terminated or properly reassigned. Upon a delayed notice, CSU notified Garland of his reassignment to the position of Special Assistant to the Athletic Director. During the period of delayed notice, Garland continued to use his office and even went to the Final Four Competition at the expense of CSU the day after he was notified of the change. The coach refused the reassignment whereby CSU notified him "his failure to appear for work on July 5, 2006, would be

construed as his decision to voluntarily terminate his employment" (*Garland v. Cleveland State University*, 2009, p. 23). Garland brought a breach of contract claim over the reassignment process. Coach Garland was properly reassigned with the contract terms under the decision of the court (*Garland v. Cleveland State University*, 2009).).

Due process.

Due process developed as a primary issue found in two cases from the data set. Due process is "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case" (Black's Law Dictionary, 2004). In *Campanelli v. Bockrath* (1996), Louis Campanelli was fired as an at-will termination on February 8, 1993 from his position as the University of California, Berkeley (CAL) head basketball coach. Campanelli's termination was accompanied by alleged defamatory statements made by the school's Chancellor and Athletic Director citing psychological and verbal abuse of his players as the reason for termination. Coach Campanelli claimed the negative statements deprived him of his "liberty interest without due process" (*Campanelli v. Bockrath*, 1996, p. 1479). A liberty interest is defined as "an interest protected by the due-process clauses of state and federal constitutions" (Black's Law Dictionary, 2004). The coach claimed because of the statements by CAL he could not find employment, and by due process he was owed a name-clearing case that would have helped alleviate the damage of the statements made by CAL administration (*Campanelli v. Bockrath*, 1996). The court found the seven to nine-day period between Campanelli's termination and publication of statements did not reduce the temporal connection, therefore establishing that the alleged defamatory statements were made in the course of termination to substantiate the claim that

officials deprived him of a liberty interest without due process. The court reversed the dismissal of Campanelli's complaint as the district court improperly played fact finder, and the evidence did not to support the district court's dismissal for failure to state claim (*Campanelli v. Bockrath*, 1996).

In *Price v. Alabama University* (2003), Michael Price was terminated as Head Football Coach at Alabama University for reasons of "conduct inconsistent with the policies of the University" (p. 1086). The coach filed suit claiming that he was deprived of a liberty interest for "improper notice and failure to give a hearing" (*Price v. Alabama University*, 2003, p. 1086). The court showed that in order for Price to support this contention he must show: "(1) a false statement (2) of stigmatizing nature (3) attending a governmental employee's discharge (4) made public (5) by government employer (6) without meaningful opportunity for [an] employee name clearing hearing" (*Price v. Alabama University*, 2003, p. 1094). The court held that there was no support to claim violation of due process rights as the evidence did not support establishing of stigmatizing statements (*Price v. Alabama University*, 2003)

Contract interpretation.

Interpretation of contract language was an issue found in four separate cases. The majority of the focus on interpretation surrounded the idea of ambiguous or unambiguous language. A contract and certain language are considered ambiguous when it is predisposed to more than one construction (*Rodgers v. Georgia Tech Athletic Association*, 1983). The issue in the *Rodgers* case is whether the head coach was due certain perquisites after his reassignment. The Association offered Rodgers his annual salary, health insurance, and

pension plan benefits as he was not terminated for cause, but the coach sought 29 additional perquisites. Ambiguity was caused by two constructions in the contract that were conflicting as to whether perquisites outside those common to all employees were due to Coach Rodgers. Court took general position of reading ambiguous language least favorable to the author, Georgia Tech. Under their interpretation, the court awarded Rodgers 19 of the 29 perquisites (*Rodgers v. Georgia Tech Athletic Association,* 1983). Ambiguity was also an issue in *Vanderbilt v. DiNardo* (1999). DiNardo claimed the "plain, unambiguous language of the addendum did not extend" the liquidated damages section of the original contract in the same way as it did with other sections in the contract (*Vanderbilt v. DiNardo*, 1999, p. 758). The court found the addendum to be unambiguous under state law, and therefore should be enforced by the plain terms as a question of law. The plain language provided for a comprehensive extension of the contract including liquidated damages even though the addendum did not specifically extend the clause *(Vanderbilt v. DiNardo*, 1999). Also, in one of the most recent cases, *Garland v. Cleveland State* (2009), former Head Coach Michael Garland was reassigned following poor performance of his basketball team. The court discussed the relevance of the language in the employee agreement. The case looked at the interpretation of the specific language of the questioned reassignment. The court found the terms of the reassignment from the agreement were clear and unambiguous (*Garland v. Cleveland State,* 2009)

Monson v. State (1995), discussed previously, also dealt with the issue of interpreting contract wording. The court was tasked with determining the intent of the State Board of Higher Education, and in doing so gave commonly used words their "plain, natural and

ordinary meaning" (*Monson v. State*, 1995, p. 909). In the review of the language, the court held there was a valid reassignment clause in place (*Monson v. State*, 1995).

Jurisdiction.

Issues of jurisdiction were raised in three cases. Jurisdiction is "the geographic area over which authority extends; legal authority; the authority to hear and determine causes of action" (Law & Martin, 2009). In *Board of Trustees of State Institutions of Higher Learning v. Brewer* (1999), the sole issue was whether the circuit court in Mississippi had jurisdiction to hear the breach of contract claim. Head Coach Billy Brewer was terminated on July 15, 1994 after the University of Mississippi concluded he had failed to control the football program following two separate NCAA recruiting violations. The case developed from the procedural history in which the Board was granted interlocutory appeal after being denied dismissal as the court believed Coach Brewer followed the proper procedure filing his complaint in the circuit court (*Board of Trustees of State Institutions of Higher Learning v. Brewer*, 1999). Interlocutory appeal is defined as "an appeal that occurs before the trial court's final ruling on the entire case" (Black's Law Dictionary, 2004). The court could not approve a proposed requirement for Brewer to pursue the claim "against the Board in an administrative tribunal ultimately answerable to the Board itself and subject to the limited review of the circuit court (*Board of Trustees of State Institutions of Higher Learning v. Brewer*, 1999, p. 937). The Supreme Court of Mississippi affirmed the circuit court's denial to dismiss for lack of jurisdiction, and held the circuit court had original jurisdiction from the beginning (*Board of Trustees of State Institutions of Higher Learning v. Brewer*, 1999).

The diversity jurisdiction issue was litigated in two specific cases with the coaches pushing for the specific type of jurisdiction. As state jurisdiction may favor state institutions, diversity jurisdiction allows a federal court to hear a case involving questions of state law if the opposing parties are of different citizenship (Rise & Wasby, 2005). Diversity of Citizenship is "a basis for federal-court jurisdiction that exists when (1) a case is between citizens of different states, or between a citizen of a state and an alien, and (2) the matter in controversy exceeds a specific value (now $75,000)" (Black's Law Dictionary, 2004). Former West Virginia University head football coach, Richard Rodriguez, removed the breach of contract case brought by West Virginia University after he had accepted the Head Coaching position at the University of Michigan, on the basis of diversity jurisdiction as he claimed diverse citizenship in Michigan (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004). The diversity issue had two grounds for decision in determination if the University was an arm or alter ego of the State of West Virginia and where Coach Rodriguez's citizenship would be for the purposes of the case. The case stated federal courts must interpret removal statutes strictly due to *federalism concerns* in removal jurisdiction. Federalism lays out the balance of powers between the regional and national governments, with the understanding that diversity jurisdiction does not exist between a state and a citizen of another state. The case showed a public entity is not a "citizen of the state" if they are determined to be an "arm or alter ego of the state" under one of the four requirements of the diversity statute:

1. whether the judgment will have an effect on the state treasury
2. whether the entity exercises a significant degree of autonomy from the state
3. whether the entity is involved in local versus statewide concerns

4. how the entity is treated as a matter of state law. (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004, p.530)

By the four factor test, the federal court found that West Virginia University and its board of governors were *arms and alter egos of the state* under the diversity jurisdiction statute therefore not *citizens* because damages sought would affect state funds, numerous states ties, educating youth was statewide concern, and West Virginia law clearly defined a university as a part of the state. Therefore, the basis for diversity jurisdiction was not met, and no other diversity issue needed to be determined (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004). *Kansas State University v. Prince* (2009) also ruled on the issue of diversity jurisdiction. In this case, Kansas State terminated the head football coach without cause, and a dispute arose over money owed for a signed Memorandum of Understanding (MOU) that called for more damages above and beyond the employee agreement. Like the *Rodriguez* case, the coach petitioned for diversity jurisdiction (*Kansas State University v. Prince,* 2009). The removal was based on the diversity jurisdiction "which provides that federal courts have original jurisdiction of civil actions where complete diversity and an amount in excess of $75, 000 in controversy exist" (*Kansas State University v. Prince,* 2009, p. 1293). The court looked into the determination of citizenship for both Kansas State University (KSU) and the athletic department of KSU as the monetary dispute in question exceeded the required amount. *Arm-of-the-state doctrine*, normally used for bestowing sovereign immunity, was applied in the case to determine Kansas State University and its athletic department as arms of the state in order to defeat diversity jurisdiction as in Rodriguez case. Among the citizenship question of the athletic department, the court determined K-State Athletics, Inc. (IAC) was an instrumentality of

Kansas State University (KSU), and therefore with KSU established as an *arm of the state* the diversity statute could not be satisfied (*Kansas State University v.* Prince, 2009).

Validity of Addendums.

Contract addendums and extensions were also issues that were litigated in coaches' contracts cases. An addendum is simply a supplement to a document, and the document is identified as a contract of the purposes of this research (Black's Law Dictionary, 2004). In relation to contracts, an extension is "the continuation of the same contract over specified period" (Black's Law Dictionary, 2004). The validity of addendums became an issue after extensions to contracts created addendums to the previous contract. Eight of the lawsuits dealt with coaches whose contracts included at least one extension prior to termination. Two of the cases found the addendum as a major part of driving the litigation process. Validity of the addendum was a central issue in the *Vanderbilt University v. DiNardo* (1999) case. Before Gerry DiNardo left his coaching position in 1994, Vanderbilt created an addendum earlier in the same year for Coach DiNardo that included a two-year extension of the current agreement. The addendum was presented as the contract would stay the same as it was, and DiNardo signed the addendum with the understanding acceptance would be based upon the review of his lawyer, Larry DiNardo. Two addendum related issues were addressed: whether the addendum extended specific parts of the contract, and whether there was proper acceptance of the addendum itself. First, the court found the validity of the addendum called for extension of the entire contract including all relevant sections such as the liquidated damages clause, but the issue of acceptance of the addendum was remanded (*Vanderbilt University v. DiNardo*, 1999).

Kansas State University v. Prince (2009) is a recent example of controversy surrounding an addendum. Coach Ron Prince was terminated effective December 31, 2008. The lawsuit was created based on the validity and enforceability of a Memorandum of Understanding that was signed by Coach Prince and director of intercollegiate athletics, Robert Krause. Generally, a Memorandum of Understanding (MOU) can be explained as "a document that sets out the main terms of an agreement between two or more parties and their intention to enter into a binding contract once certain details have been finalized (Law & Martin, 2009). The contractual relationship was under the new 2008 agreement that offered an extension to the contract; however a Memorandum of Understanding (MOU) was signed on the same day as the 2008 agreement (*Kansas State University v. Prince*, 2009). The issue is not the extension, but rather the university argued their knowledge and enforceability of the MOU. The MOU was drafted as for a company named "In Pursuit of Perfection" an LLC whose owner was Prince (*Kansas State University v. Prince*, 2009, p. 1292). Separate from the main employee agreement and the extension, the MOU created was an addendum to the contract that established additional damages to be paid by the athletic department if Prince was fired without cause before the terms of his contract were completed. Kansas State argued Robert Krause did not have the authority to bind the athletic department to the unknown MOU. The appeal was decided solely as a jurisdictional issue, and the validity of the MOU was remanded to the District Court (*Kansas State University v. Prince*, 2009).

Court fees.

Although not directly related to coaches' contracts, awarding of court fees was a related legal issue addressed in three cases. In *Lindsey v. University of Arizona* (1987), Ben Lindsey was hired in 1982 as the head basketball coach at the University of Arizona under an

at-will agreement. After the worse win/loss record to date in school history, Lindsey was subsequently terminated. Lindsey brought litigation for breach of implied covenant of good faith and fair dealing by not extending his contract as allegedly implied. The court awarded Coach Lindsey attorney fees of $91,312 pursuant to Arizona Revised Statutes. The figure was determined by multiplying a lodestar figure by 1.3 in calculation (*Lindsey v. University of Arizona*, 1987). Lodestar is "a reasonable amount of attorney's fees in a given case, usually calculated by a reasonable number of hours worked by the prevailing hourly rate in the community for similar work, and often considering such additional factors as the degree of skill and difficulty involved in the case, the degree of urgency, its novelty, and the like" (Black's Law Dictionary, 2004). Attorney's fees and court costs were also at issue in *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004) and *Kansas State University v. Prince* (2009), but fees were denied in both cases. In *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004), Coach Rodriguez requested the removal of the case. The University's request for award of costs, expenses, and attorney fees from the removal were properly denied by the court as Rodriguez "had a colorable basis for removal and that the removal was not done in bad faith" (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004, p. 536). *Kansas State University v. Prince* (2009) did not award the plaintiff's request under the relevant diversity statute. The court found Prince's removal objectively reasonable (*Kansas State University v. Prince*, 2009).

Parol evidence.

The parol evidence rule was an issue in *Lindsey v. University of Arizona* (1987). Parol evidence is "evidence that is not legitimately before the court" such as verbal evidence, and

the parol evidence rule is "the common-law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing" (Black's Law Dictionary, 2004). *Lindsey v. University of Arizona* (1987) found in favor of former head basketball coach Ben Lindsey after he was terminated from his position in his first year. The only written document concerning the coaching contract was a letter that gave a one year term from 1982-1983, and read that letter was not a contract but rather an academic-administrative assignment. Lindsey testified on two separate occasions he was told despite the one-year assignment that no coach would be hired for less than three to four years and there is normally a four year minimum evaluation period from the search committee and athletic director respectively. The court stated the oral representation of the University of Arizona may create a "question of fact for jury or may modify as to terms of contract" (*Lindsey v. University of Arizona*1, 1987, p. 1157). The parole evidence was allowed in making the decision even though it had originally been ruled impermissible. The case resulted in the determination that Arizona had violated an oral promise for an implied covenant of good and fair dealing to extend the coach's employment for three additional years, and thus Lindsey was due $215,000 for the deprivation of employment (*Lindsey v. University of Arizona*, 1987).

Vanderbilt University v. DiNardo (1999) provided an example of the parole-evidence rule. The *DiNardo* case was argued over terms and acceptance of the written addendum after the Coach left to coach at Louisiana State University. The court stated: "parol evidence is generally admissible to show that a condition must be satisfied before a written contract will take effect" (*Vanderbilt University v. DiNardo*, 1999, p. 759). In this case, DiNardo claimed

the addendum acceptance was contingent on the acceptance of his lawyer. The court used rationale that the written agreement would be used to govern rights and obligations of the involved parties following the parol evidence rule. The issue was remanded as the court was unable to decide under conflicting evidence whether or not proper acceptance to the addendum existed (*Vanderbilt University v. DiNardo*, 1999).

Statute of Frauds.

Statute of Frauds was raised as an issue in one of the cases. The statute of frauds is a "statute designed to prevent fraud and perjury by requiring certain contracts to be in writing by the party to be charged", and it normally applies to coaching contracts under "a contract that cannot be performed within one year of its making" (Black's Law Dictionary, 2004). In *Price v. Alabama* (2003), Coach Price argued wrongful termination of his contract after he was terminated one month after his hiring. The employee contract had not been signed and therefore did not meet the standards of the Alabama statute of frauds requiring written evidence of multi-year contracts. Price was found not to have a property interest in his employment because he not met these requirements of the state's statute of frauds. The court dismissed claims by Coach Price against Alabama University as no support for wrongful termination could be found (*Price v. Alabama*, 2003).

Discrimination.

Discrimination was an issue in the termination of employee contracts in two cases. In *Richardson v. Sugg* (2006), Coach Nolan Richardson was fired after his long career at the University of Arkansas under allegations of race discrimination. Title VII, the civil rights legislation, was a key factor in the case. Title VII of the Civil Rights Act of 1964 is a "federal law that prohibits employment discrimination and harassment on the basis of race, sex,

pregnancy, religion, and national origin, as well as prohibiting retaliation against an employee who opposes illegal harassment or discrimination in the workplace" (Black's Law Dictionary, 2004). The University argued Richardson waived his Title VII rights under the language of the guaranty money he received from termination (*Richardson v. Sugg*, 2006). Claims-release language was found in the guaranty clause of the contract, however the court ruled that neither the money accepted nor language could relieve Title VII discrimination claims. Ultimately, Richardson was not able to show evidence in support of his unlawful discrimination claims. Comments made by Athletic Director, Frank Broyles were determined as insufficient for claim as the two had made amends. The court concluded Arkansas did not fire the coach based on race, but rather for evidence of "buy me out" comments made in a press conference (*Richardson v. Sugg*, 2006, pp. 1060). The court found that the decision to fire was made on February 24, 2002, following a meeting of school officials after the comments of the coach after Kentucky basketball game (*Richardson v. Sugg*, 2006).

First Amendment Claims.

The speech of coaches can be an issue of litigation. The First Amendment "guarantee[s] the freedoms of speech, religion, press, assembly, and petition" (Black's Law Dictionary, 2004). Nolan Richardson also made First Amendment claims in addition to the discrimination claim after his termination at the University of Arkansas (*Richardson v. Sugg*, 2006). Richardson argued he had been terminated for comments made on February 11, 2002, and February 25, 2002. According to the court, the subject speech must be a matter of public concern to meet the requirements for a First Amendment termination claim. The court found

that Richardson's comments made on February 11, 2002, were not of public concern (*Richardson v. Sugg*, 2006).

Defamation.

In *Cyprien v. Board of Sup'rs ex rel. University of Louisiana System* (2009), former Head Basketball Coach, Glynn Cyprien, brought a breach of contract case after he was removed by the University of Louisiana at Lafayette (ULL) from his appointed position (p. 862). The main issue of the case dealt with defamation (p. 862). Defamation is "the act of harming the reputation of another by making a false statement to a third person" (Black's Law Dictionary, 2004). Coach Cyprien submitted a false resume in the hiring process inaccurately portraying he had received his bachelor's degree from the University of Texas at San Antonio (p. 865). Cyprien's defamation claim was based on statements made by ULL officials who accused him of resume fraud by telling reporters "that plaintiff lied on his resumé, overstated his qualifications, and otherwise failed to provide ULL with accurate information concerning his educational background" (*Cyprien v. Board of Sup'rs ex rel. University of Louisiana System*, 2009, p. 865). In order to support defamation, the court stated the need for evidence for the following:

> Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. (*Cyprien v. Board of Sup'rs ex rel. University of Louisiana System*, 2009, p. 866).

The court found the statements by ULL officials about Cyprien were not false as required for the defamation claim due to the undisputed fact the coach sent the university a false resume. ULL was valid in rescinding the employment contract with Cyprien due to misrepresentation

of his academic credentials in which the coach's failure to earn a degree from an accredited four year institution meant he did not meet the qualifications of the job, and therefore there was no breach of contract by the University (*Cyprien v. Board of Sup'rs ex rel. University of Louisiana System*, 2009).

Inducement.

Inducement was a legal issues recognized in *Northeastern University v. Brown* (2004). The inducement issue also referred to as tortious interference can be defined as "a third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties" (Black's Law Dictionary, 2004). While all of the other legal issues deal with the interactions between the institution and the coach, this issue deal adds another institution to the mix of relations. The University of Massachusetts (UMass) was named as third party in the *Northeastern* case after Coach Brown left Northeastern early to be the Head Coach at UMass (*Northeastern University v. Brown*, 2004). UMass inquired to Northeastern if they could speak to Coach Brown about prospective employment, and Northeastern denied their request. Since UMass continued to seek after Brown as their new head coach even after being denied permission to speak with him, they were named as a third party and the court found clear evidence of UMass's inducement of Coach Brown's breach of contract. The court found irreparable harm on account of the breach of contract by Brown, but the court did not place any direct punishment on UMass as they believed Brown's injunction not to work for UMass would achieve what was needed (*Northeastern University v. Brown*, 2004).

The data uncovered a number of legal issues discussed by the courts. The issues ranged from one occurrence to several recurrences over a number of different cases. All of

the issues regardless of how many times they appeared were important to the goal of this research question. The study hopes to further expand on these identified issues to reach the overall purpose of the research.

Research Question 2: Are there certain clauses that are frequently covered in contract lawsuits?

Seven different clauses were identified in the population of cases examined. The following clauses were discussed: liquidated damages (5), termination (3), reassignment (2), claims-release clause (2), perquisites clause (1), outside employment (1), and integration clause (1).

Liquidated damages clause.

A liquidated damages clause is "a contractual provision that determines in advance the measure of damages if a party breaches the agreement" (Black's Law Dictionary, 2004). This clause is usually maintained "unless the agreed-on sum is deemed a penalty" by the courts for:

> (1) the sum grossly exceeds the probable damages on breach, (2) the same sum is made payable for any variety of different breaches (some major, some minor), or (3) a mere delay in payment has been listed among the events of default. (Black's Law Dictionary, 2004)

The *Vanderbilt University v. DiNardo* (1999) case previously described included a liquidated damages clause under the condition of the coach's breach. It stated:

> an amount equal to his Base Salary, less amounts that would otherwise be deducted or withheld from his Base Salary for income and social security tax purposes, multiplied by the number of years (or portion(s) thereof) remaining on the Contract. (*Vanderbilt University v. DiNardo*, 1999, pp. 753-754)

The clause was also modified in the negotiations process to include that damages would be base on net salary (*Vanderbilt University v. DiNardo*, 1999).

Northeastern University v. Brown (2004), like the Vanderbilt case, had a liquidated damages clause in place should the coach breach his contract. This clause stated:

> "[e]xcept as otherwise noted herein," if Brown leaves Northeastern prior to the end of the contract period, then Brown "shall pay to the University as liquidated damages $25,000" and that in the event of an acceptance of such amount by Northeastern, it would be deemed to be "adequate and reasonable compensation to the University." (*Northeastern University v. Brown*, 2004, p.1)

This liquidated damages clause was a part of the institution's defenses to Coach Brown's "contract jumping" after accepting the head coaching position at the University o f Massachusetts (*Northeastern University v. Brown*, 2004).

In *O'Brien v. The Ohio State University* (2006), the contract contained two clauses for "partial liquidated damages" and "additional liquidated damages" if Coach O'Brien was fired for any reason other than *for cause* (Complaint, 2004, para. 39). The partial liquidated damages clause states:

> Under Section 5.2 of the Employment Agreement, Mr. O'Brien is entitled to be paid and provided as partial liquidated damages, for a period of 12 months, the full amount of his base salary and such normal employee benefits as OSU provides to its administrative and professional employees. (Complaint, 2004, para. 44)

Furthermore, if Ohio State should fire the coach without cause the contract also declares:

> "Under Section 5.3 of the Employment Agreement, Mr. O'Brien is entitled to be paid additional liquidated damages designed to compensate him for the loss of collateral business opportunities." (Complaint, 2004, para. 45)

The agreement also reveals the payment of entitled liquidated damages should be paid in the form of a lump sum (Complaint, 2004, para. 45).

West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez (2004) dealt with a liquidated damages clause. West Virginia University sought a ruling in the breach of contract case in favor for the employee agreement as a valid enforceable agreement to collect liquidated damages per the contract. The relevant liquidated damages clause read:

> (b) Unless Coach terminates his employment under this Agreement due to a permanent retirement from the University and all other employment with any coaching responsibility with an institution of higher education, in addition to all other forfeitures and penalties provided herein, Coach will pay University the sum of (a) Four Million Dollars ($4,000,000.00), payable in a single lump sum within thirty (30) days of termination, if termination occurs on or before August 31, 2007; or (b) Four Million Dollars ($4,000,000.00), payable, as further described below, within two years of termination if termination occurs after August 31, 2007 and on or before August 31, 2008; or (c) Two Million Dollars ($2,000,000)00), payable within two years of termination, if termination occurs after August 31, 2008 and on or before August 31, 2011; or (d) One Million Dollars ($1,000,000.00), payable in a single lump sum within thirty (30) days of termination, if termination occurs after August 31, 2011 and on or before January 15, 2014. This sum shall be deemed to be liquidated damages and extinguish all rights of University to any further payment from Coach. All sums required to be paid by Coach to the University under this Section within two years shall be payable according to the following schedule: one-third due (30) days after termination; one-third due on the one

year, anniversary of termination; and one-third due on the second anniversary of termination. (Second Amendment, 2007, para. 36)

Kansas State University v. Prince (2009) relied on a liquidated damages clause through case proceedings. At the time of the case, the parties had entered into a new employee agreement in 2008 that served as the up to date contract. The 2008 agreement laid out the liquidated damages if the institution were to breach the agreement as:

the 2008 Agreement reserved to KSU the right to terminate Prince's employment at any time without cause, in which event it agreed to pay Prince the same amounts as stated in the 2005 agreement: $1,200,000 if such termination occurred before December 31, 2009; $900,000 if before December 31, 2010; $600,000 if before December 31, 2011, or $300,000 if before December 31, 2012. (*Kansas State University v. Prince*, 2009, p. 1291)

Termination clause.

The termination clause was the second most identified clause in the population of cases examined. A termination clause acts as a contractual provision "allowing one or both parties to annul their obligations under certain conditions" (Black's Law Dictionary, 2004). The *O'Brien v The Ohio State University* (2004) case reviewed the present termination clause which read:

5.1 Terminations for Cause-Ohio State may terminate this agreement at any time for cause, which, for the purpose of this agreement, shall be limited to the occurrence of one or more of the following:

(a) a material breach of this agreement by Coach, which Coach fails to remedy to OSU's reasonable satisfaction, within a reasonable time period, not to exceed thirty (30) days,

after receipt of a written notice from Ohio State specifying the act(s), conduct or omission(s) constituting such breach;

(b) a violation by Coach (or a violation by a men's basketball program staff member about which Coach knew or should have known and did not report to appropriate Ohio State personnel) of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a 'major' infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men's basketball program or which results in Ohio State being sanctioned by the NCAA or the Big Ten Conference

(c) any criminal conduct by Coach that constitutes moral turpitude or other improper conduct that, in Ohio State's reasonable judgment, reflects adversely on Ohio State or its athletic programs. (*O'Brien v The Ohio State University*, 2004, p. 12)

According to the court's reading of the termination for cause provision, every breach of performance does not fall under the limitations of the *for cause* clause to substantiate appropriate termination. (*O'Brien v The Ohio State University*, 2004).

A termination without cause clause was also identified in the data set. In *Richardson v. Sugg* (2006), Coach Nolan Richardson was terminated under the discretion of the University of Arkansas without cause. Section 12 of the employee agreement expresses:

the Contract provides that should Richardson be terminated by the university at its "convenience" (meaning at any time, for any reason), he would "accept the guaranty of the Razorback Foundation, Inc.... as full and complete satisfaction of any obligations of the University." That [buy-out] is defined in Section 9 of the Guaranty agreement: "If Richardson is terminated for the convenience of the University of Arkansas, the

> Foundation shall pay to Richardson the sum of Five Hundred Thousand Dollars ($500,000) per year ... for the remaining period left on the Employment Agreement. (*Richardson v. Sugg*, 2006, p. 1053)

An example of a termination clause activated by the coach was provided in *Vanderbilt University v. DiNardo* (1999). The court cited the relative termination clause as:

> Mr. DiNardo recognizes that his promise to work for the University for the entire term of this 5-year Contract is of the essence of this Contract to the University. Mr. DiNardo also recognizes that the University is making a highly valuable investment in his continued employment by entering into this Contract and its investment would be lost were he to resign or otherwise terminate his employment as Head Football Coach with the University prior to the expiration of this Contract. Accordingly, Mr. DiNardo agrees that in the event he resigns or otherwise terminates his employment as Head Football Coach (as opposed to his resignation or termination from another position at the University to which he may have been reassigned), prior to the expiration of this Contract, and is employed or performing services for a person or institution other than the University, he will pay to the University as liquidated damages… (*Vanderbilt University v. DiNardo*, 1999, p. 753)

Similar to the function of to a university's option of termination without cause, the DiNardo case shows language that binds coach to pay the university if he so chooses to leave the contract early (*Vanderbilt University v. DiNardo*, 1999).

Reassignment clause.

A reassignment clause allows the university to move an employee from one position to another, usually without penalty. Through reassignment, it is generally the intention of the

school to retain the services of a coach after removing him from the head coaching position without breaching the contract. In *Monson v. State* (1995), the University of Oregon referenced the language of the contract to validate its right to reassign former Coach Monson to the position of golf coach, fundraiser, or basketball compliance officer. The reassignment clause was articulated as: "authorized by statute and by authority delegated to the Chancellor and the institution presidents, personnel may be transferred or reassigned within an institution in accordance with the staff needs of the institution or other units" (*Monson v. State*, 1995, p. 908). The clause also went on to state reassignment "should not be considered sanctions for cause unless they result from actions described in OAR 580-21-325" (*Monson v. State*, 1995, p. 908). In a similar case, Cleveland State removed former head basketball coach, Michael Garland, after the poor performance of the basketball team (*Garland v. Cleveland State University*, 2009). The institution believed the removal of Garland to be meant only as a reassignment from his current position. The applicable employee agreement contained a valid reassignment clause. Cleveland State supported the reassignment as pursuant to Section 2.6 of the employee agreement which read:

> "[t]he University has the right to reassign you without cause and at *its discretion* to another position within the University with duties different from those of Head Coach during the term of this Agreement. In no event, however, will you be assigned to any position which is not consistent with your education and experience as *determined by the University* (Emphasis added.)." (*Garland v. Cleveland State University*, 2009, p. 18)

The court stated it was the coach's duty to recognize that not every conflict with an employer has the intent to terminate the contract (*Garland v. Cleveland State University*, 2009).

Claims-Release Clause.

A release clause works as provision "by which one person discharges another from any claim with respect to a particular matter" (A Dictionary of Law, 2009). *Richardson v. Sugg* (2006) gives an example of a release clause found inside the termination without cause phrasing. The claims-release clause states:

> The Contract also provides that "[i]n consideration of such guaranty ... [Richardson] will, and does hereby, release and discharge the University, its officers, trustees and employees from and against any liability of any nature whatsoever related to or arising out of this Agreement and [Richardson's] termination for convenience of the University hereunder." (Richardson v. Sugg, 2006, p. 1053)

This clause is used in the argument of the case by the parties in reference to the Title VII discrimination and First Amendment claims brought by Coach Richardson. The court established that under a waiver clause, a prospective Title VII claim could not be waived under federal law (*Richardson v. Sugg*, 2006).

Kansas State University v. Prince (2009) also included the use of a claims-release clause in the original contract formed between Coach Prince and Kansas State University in 2005. The release clause read: "acceptance by Coach of this amount will constitute full settlement of any claim that Coach might otherwise assert against the University, or any of its representatives, agents or employees" with the amount mentioned in the clause referring to the previously specified liquidated damages of the agreement (*Kansas State University v. Prince*, 2009, p. 1291). When the parties entered into a new employee agreement in 2008, the

2008 contract found the previous claims-release clause was omitted from the new agreement (*Kansas State University v. Prince,* 2009).

Perquisites Clause.

In *Rodgers v. Georgia Tech Athletic Association* (1999), a perquisite clause was identified in the court proceedings. A perquisite is "a privilege or benefit given in addition to one's salary or regular wages" (Black's Law Dictionary, 2004). The case looks at the perquisite clause outside of the overall compensation prescribed by the contract between Coach Rodgers and Georgia Tech (*Rodgers v. Georgia Tech Athletic Association*, 1999). The court examined the contract language to determine what benefits would be retained post removal of the coach. The contract addressed the perquisites briefly in the statement, "in addition, as an employee of the Association, you will be entitled various… perquisites as you become eligible therefor" (*Rodgers v. Georgia Tech Athletic Association*, 1999, p. 471). The parties argued this clause over the 29 perquisites Coach Rodgers believed he was due although he had been removed as head coach (*Rodgers v. Georgia Tech Athletic Association*, 1999).

Outside Employment Clause.

An outside employment clause was present in the *Northeastern University v. Brown* (2004) case. An outside employment clause in this case acts as a provision restricting the coach from freely seeking out prospective employers without the properly defined notice and consent. During contract extension negotiations between the parties, the University of Massachusetts (UMass) sought permission to speak with Coach Brown about their vacant coaching position. The employee agreement articulated "outside employment" in Article VIII of the agreement as:Coach [Brown] agrees to devote full time and effort to the University

and agrees not to seek, discuss, negotiate for, or accept other employment during the term of this Agreement without first obtaining the written consent of the President of the University. Such consent shall not be unreasonably withheld. (*Northeastern University v. Brown*, 2004, p. 2).

Northeastern cited the university's contractual rights and denied UMass permission to speak with the coach about the open coaching position (*Northeastern University v. Brown*, 2004).

Integration Clause.

Contract interpretation can be shaped by an integration clause in a coach's contract. An integration clause is a "contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract" (Black's Law Dictionary, 2004). In *Kansas State University v. Prince* (2009), the case involved the identification and modification of an integration clause. The original 2005 contract agreement between Kansas State and Coach Prince contained an integration clause that stated:

> With the exception of the provisions of each annual appointment entered into by and between Coach and the University which are hereby incorporated by reference, this Agreement supersedes all prior agreements with respect to the subject matter hereof and constitutes the entire agreement between the parties hereto and may be modified only in a writing signed by the President of the University, the Athletic Director and Coach. (Kansas State University v. Prince, 2009, p. 1291)

The 2005 agreement was replaced in 2008 by a new agreement between the parties. The 2008 agreement omitted the part of the previous integration clause that read the agreement "constitutes the entire agreement between the parties hereto and may be modified only in a

writing signed by the President of the University, the Athletic Director and Coach" (*Kansas State University v. Prince*, 2009, p. 1291).

This research question identified the importance of the language of head coaching contracts during litigation. The highest frequency of contract provisions transpired in liquidated damages and termination clauses. These clauses occurred most, but the courts looked at all the case identified provisions as a part of the decision process for judgment.

Research Question 3: What contract clauses protect head coaches in contract formation?

The data set found there were five of the cases that were decided in favor of the respective former head coach by the courts. While the ruling has importance to the case, this research question focuses on the clauses and the language of the contracts that protect the coach. Instances of clauses protecting coaches are not limited to cases that coaches win. Coach protecting clauses were found throughout the case law. The research identified termination clause (2), liquidated damages clause (2), claims-release clause (1), and perquisite clause (1) were helpful to the coaches. Also, omission of an integration clause (1) was helpful to the coach as well.

In *O'Brien v The Ohio State University* (2004), Coach Jim O'Brien was terminated from his head coaching position in June 2004. Coach O'Brien brought the breach of contract case in dispute over Ohio State's claim that termination was *for cause*. The court asserted the validity of the employment agreement was never in question, and the decision surrounded the court's determination if the termination was with or without cause. As stated earlier, the termination *for cause* terms were limited to the Coach committing a "material breach", a "major violation", and/or engage in "criminal conduct" to successfully meet the conditions of the termination clause (*O'Brien v The Ohio State University*, 2004, p.12). Ohio State did not contend O'Brien's breach fell under a *major violation* or the "*criminal conduct* components of the termination *for cause*. The court decision focused on whether O'Brien's breach was found to be *material* or not. The Ohio Court of Claims ruled the plaintiff's breach of performance was not *material* because "given the contract language, that this single, isolated failure of performance was not so egregious as to frustrate the essential purpose of that contract and thus render future performance by defendant impossible" (*O'Brien v The Ohio*

State University, 2004, p. 22). As the language of the clause was limited, that limit helped protect O'Brien even through his breach. Therefore by not satisfying proper termination for cause, the termination of O'Brien was performed without cause and breached the employee agreement. Since the coach was fired without cause, he was protected also by the language of the liquidated damages clause found in the contract, and would be due the "partial liquidated damages" and "additional liquidated damages" (Complaint, 2004, para. 4). The court found in favor of O'Brien, and stated the damages would be decided at a separate trial for the former coach (*O'Brien v. The Ohio State University*, 2004).

Richardson v. Sugg (2006) was an example of a case where clauses can offer protection to a coach even when the lawsuit is not decided in his direct favor. Coach Nolan Richardson was a long-time employee of the University of Arkansas before his termination in 2002. Coach Richardson found protection under Section 9 of the agreement. First, the termination *buy-out* clause held Arkansas financially liable for the termination. As Arkansas terminated the coach at its "convenience", he was due the guaranty agreement of "Five Hundred Thousand Dollars ($500,000) per year … for the remaining period left on the Employment Agreement" (*Richardson v. Sugg*, 2006, p. 1053). There were six years remaining on his contract at the time of termination. The case was ultimately decided on the First Amendment claims (*Richardson v. Sugg*, 2006).

In *Rodgers v. Georgia Tech Athletic Association* (1983), Coach Rodgers looked to protect his alleged right to the perquisites of the contract outside of his salary, health insurance, and pension plan benefits. Rodgers listed 29 perquisites he felt entitled to under his perquisite clause after his removal as head coach. The Coach broke the perquisites into those he received directly from Georgia Tech and those he received from other sources by

"virtue of his position as head coach" (*Rodgers v. Georgia Tech Athletic Association*, 1983, p. 470). The perquisites clause stated that "in addition, as an employee of the Association, you will be entitled various… perquisites as you become eligible therefor" (*Rodgers v. Georgia Tech Athletic Association*, 1983, p. 471). The clause was found susceptible to both the construction that the Rodgers was limited to the "eligibility for perquisites to those items common to all Association employees", and that "he was also entitled to additional perquisites for which he became eligible as the head coach of football" (*Rodgers v. Georgia Tech Athletic Association*, 1983, p. 471). The clause was found to be ambiguous and therefore interpreted less favorable to the author, Georgia Tech. As a result of this ambiguity, the clause language favored the coach, and Rodgers was awarded all but nine of the twenty-nine perquisites he claimed (*Rodgers v. Georgia Tech Athletic Association*, 1983).

The case of *Kansas State University v. Prince* (2009) provided three examples where language or lack thereof in contract clauses offered protection for the coach. Upon Coach Ron Prince's termination in 2008, a case was brought over the damages due in the Memorandum of Understanding (MOU) that had been signed earlier in 2008 between the athletic director and coach. The liquidated damages clause of the employment agreement expressed that Kansas State University "agreed to pay Prince the same amounts as stated in the 2005 agreement: $1,200,000 if such termination occurred before December 31, 2009" for liquidated damages if it terminated Coach Prince without cause (*Kansas State University v. Prince*, 2009, p. 1291). The parties agreed the "termination was without cause, and that KSU paid Prince $1,200,000 as was required by the terms of the parties' 2008 employment agreement" which was maintained from earlier agreement cause (*Kansas State University v. Prince*, 2009, p. 1292). No damages were paid to the terms of the MOU, but the coach did

have some financial protection through the liquidated damages clause of the main contract cause (*Kansas State University v. Prince,* 2009).

In Coach Prince's original 2005 agreement, the contract included an integration clause that said "this Agreement supersedes all prior agreements with respect to the subject matter hereof and constitutes the entire agreement between the parties" cause (*Kansas State University v. Prince,* 2009, p. 1291). The contract also stated that any changes to the agreement must be accepted by the Kansas State President, Athletic Director, and Coach Prince. The 2008 agreement, which the lawsuit was under, omitted part of the integration clause which read: "hereto constitutes the entire agreement between the parties hereto and may be modified only in a writing signed by the President of the University, the Athletic Director and Coach" cause (*Kansas State University v. Prince*, 2009, p. 1291). This was a key factor in the MOU being a claimable issue as only Coach Prince and Athletic Director, Robert Krause, signed the agreement without the consent of the President of the University cause (*Kansas State University v. Prince,* 2009).

The third clause favoring Prince was the claims-release clause of the 2005 contract, as it had been omitted in the MOU cause. In reference to the liquidated damages clause, the claims-release clause had stated "acceptance by Coach of this amount will constitute full settlement of any claim that Coach might otherwise assert against the University, or any of its representatives, agents or employees cause" (*Kansas State University v. Prince,* 2009, p. 1291). Since Prince had accepted the liquidated damages as part of his termination without cause and was paid, a valid claims-release clause would have possibly taken away his right to another claim like the MOU. The MOU damages have yet to be decided but the omission to

the integration clause and the claims-release clause gave the coach the opportunity to stake a legitimate claim to the money (*Kansas State University v. Prince*, 2009).

Research Question 4: What contract clauses protect institutions in contract formation?

While a smaller percentage of the data was found in favor of the coach, 66. 7 percent of the cases were found in favor of the institution. To reiterate, the winner of the lawsuit does not always matter in terms of finding certain protections for the parties through clauses. An institution can lose a case even if contract clauses protect the institution. Clauses that protected the university include the liquidated damage clause (3), reassignment clause (2), termination clause (2), and outside employment clause (1).

In *Vanderbilt University v. DiNardo* (1999), the case involved Coach DiNardo leaving his contract early to enter into contract with Louisiana State University (LSU). The case looked at both the relevant contract agreement and the questionable addendum from the coach's 1994 extension. As previously noted, DiNardo's contract had a termination clause if he decided to resign from "Head Football Coach" that recognized the coach as a "highly valuable investment" for the University (*Vanderbilt University v. DiNardo*, 1999, p. 753). The without cause clause for DiNardo's departure went on to state if the coach left, and "is employed or performing services for a person or institution other than the University, he will pay to the University as liquidated damages" the amount set in the agreement (*Vanderbilt University v. DiNardo*, 1999, p. 753). Vanderbilt was protected by the language of the original contract as DiNardo clearly terminated his contract and became employed at LSU. In combination with the termination clause, the liquidated damages clause was a consequence for Coach DiNardo when he activated the termination clause. Restating the language for determination of liquidated damages:

> an amount equal to his Base Salary, less amounts that would otherwise be deducted or withheld from his Base Salary for income and social security tax purposes, multiplied by

> the number of years (or portion(s) thereof) remaining on the Contract. (Vanderbilt University v. DiNardo, 1999, pp. 753-754)

The clause was also modified in the negotiations process to include that damages would be based on net salary. The coach argued the validity of the clause and that the liquidated damages clause was an unenforceable penalty. The court stated "contracting parties may agree to the payment of liquidated damages in the event of a breach" (*Vanderbilt University v. DiNardo*, 1999, p. 755). Thus in reviewing the liquidated damages clause, the court did not consider the clause a penalty and found the calculation expressed in the clause reasonable. In answer to the claim of validity, the court refuted that permission to speak to LSU "did not relinquish Vanderbilt's right to liquidated damages. Without dispute, it was found that the original contract had an enforceable liquidated damages clause. The language laid out by the contract protected the university in the event that the coach terminated the contract (*Vanderbilt University v. DiNardo*, 1999).

Northeastern University v. Brown (2004) is another example of a head coach terminating his contract to accept employment at an institution in the same athletic conference. Before leaving for the University of Massachusetts (UMass), Coach Brown did not give any kind of early notice of his departure. The outside employment clause in the contract conveyed Coach Brown "agrees not to seek, discuss, negotiate for, or accept other employment during the term of this Agreement without first obtaining the written consent of the President of the University" (*Northeastern University v. Brown*, 2004, p. 1). Northeastern withheld permission when UMass requested to speak with Coach Brown, and Brown's departure came as a surprise because the coach had indicated he was not leaving. The court gave support to Northeastern's provision when it held "there also appears to be no

question that U. Mass. actively induced the breach when it had been told of the restrictions on Brown's talking to other potential football employers and of his existing long-term contract with Northeastern" (*Northeastern University v. Brown*, 2004, p. 2). Also in support of Northeastern, a liquidated damages clause as part of the termination clause language was identified in the contract between the parties. Section IX of the contract stated Brown "shall pay to the University as liquidated damages $25,000" resulting from the coach breaching the contract terms early (*Northeastern University v. Brown*, 2004, p. 1). Neither party debated the payment to Northeastern of the liquidated damages. The court found a clear breach of duty by Coach Brown and evidence of UMass's part in the breach through the rationale that a contract for a major university is the same "just as it is in the rest of the world" (*Northeastern University v. Brown*, 2004, p. 3). The clause served as another example of the institution receiving compensation in accordance with the contract for a coach's breach (*Northeastern University v. Brown*, 2004).

The case *Monson v. State* (1995) was found in favor for the University of Oregon based on the reassignment clause of the contract. The reassignment clause read that Oregon was "authorized by statute and by authority delegated to the Chancellor and the institution presidents, personnel may be transferred or reassigned within an institution in accordance with the staff needs of the institution or other units" (*Monson v. State*, 1995, p. 908). The University of Oregon attempted to reassign Coach Monson to golf coach or compliance officer. Through the evidence of performance and recruiting, Oregon contended it simply attempted to reassign Monson as he was no longer the best person for the job (p. 910). The court concluded that the University had the right to reassign the coach "based on its

assessment of its overall staffing needs" (*Monson v. State*, 1995, p. 909). The Court of Appeals of Oregon went on to conclude:

> Just as the institution's interest in filling a vacant position may justify reassigning as staff member, so too might the administration's determination that a staff member is no longer the most effective person for a particular position, or a determination that a department would be better served by having a different staff member in that position. (Monson v. State, 1995, p. 909)

This conclusion defeated Monson's claim that the positions for his reassignment were not vacant at the time of his reassignment. The reassignment language protected Oregon's right to remove and reassign Coach Monson for the good of the team (*Monson v. State*, 1995).

In *Garland v. Cleveland State University* (2009), a reassignment clause was identified to support Cleveland State University in its claims to their actions in the case. Coach Garland was told on March 30, 2006 that Cleveland State were going to make a change in head coaching position wherein the coach assumed this meant he was fired. As previously reported, the reassignment clause of Section 2.6 of the contract read:

> the University has the right to reassign you without cause and at its discretion to another position within the University with duties different from those of Head Coach during the term of this Agreement. In no event, however, will you be assigned to any position which is not consistent with your education and experience as determined by the University. (Garland v. Cleveland State University, 2009, p. 18)

Cleveland State gave evidence the removal was meant as reassignment by showing Garland "continued to receive salary and benefits accordingly", and presented the coach "with both a notice of reassignment and a job description" which the coach refused (*Garland v. Cleveland*

State University, 2009, p. 19). The court found no evidence of termination as the coach had been able to go about his daily duties evidenced in continual use of his office and university funded travel plans. An important factor in the favorable determination was the position in which the coach was reassigned and how it fit with the reassignment clause's condition of "consistent with your education and experience" (*Garland v. Cleveland State University*, 2009, p. 18). The court supported the clause with the reassigning of Coach Garland to Special Assistant to the Athletic Director, citing the coach's experiences of academic compliance, fundraising, and community appearances, complied with the proper experience for the position. The court held the reassignment clause protected Cleveland State as it was clear, unambiguous, and the University had not violated any terms of the contract (*Garland v. Cleveland State University*, 2009).

West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez (2004) concerned a case of where a liquidated damages clause was allegedly due by the coach. The liquidated damages clause was cited in its complete form earlier in the study to give the context of the clause in its entirety. Coach Rodriguez left for Michigan, and resigned from West Virginia effective December 19, 2007 (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004). Based on the date of his departure, the corresponding liquidated damages clause for Rodriguez, assuming he terminated the contract without cause, stated he would owe:

> Four Million Dollars ($4,000,000.00), payable, as further described below, within two years of termination if termination occurs after August 31, 2007 and on or before August 31, 2008…All sums required to be paid by Coach to the University under this Section within two years shall be payable according to the following schedule: one-third due (30)

days after termination; one-third due on the one year, anniversary of termination; and one-third due on the second anniversary of termination. (Second Amendment, para. 36, 2007)

The lawsuit was brought as a jurisdiction case, and thus there was no damages decision from the contract breach of Rodriguez (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2008). Even with no legal decision the language of the liquidated damages clause presented protection in the case that Rodriguez left the contract early (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004).

Universities were found to be protected through certain liquidated damages and termination clause similar to the way the head coaches were protected by the same types of clauses. Unlike for the head coaches, reassignment and outside employment clauses helped protect the schools in the contract review during the researched cases.

CHAPTER V

Summary

The purpose of this study was to identify the legal issues and clauses that were presented in litigation involving college football and basketball coaches. A review of literature included past legal research conducted on the topic as well as a review of secondary legal sources. Then, a search of keywords in the databases of West Law and Lexis/Nexis identified 15 cases on point. All of the cases were organized chronologically and briefed. The case briefs were then used to summarize all the data from the litigation. The review of literature and the research support the idea of the tenuous fluid job field experienced by college coaches.

This chapter will look at the significance of the case law research explained in Chapter Four. The research will be compared to the material from the review of literature and other reported secondary sources. As the research questions were answered more descriptively in chapter 4, Chapter Five functions as a way to answer the research questions by looking at the significance of the data. The study will conclude with recommendations for drafting Division I college coaching contracts and suggestions for further research.

Discussion

Research Question 1: What contract issues are being litigated in breach of contract cases involving coaches?

The data set offered issues of differing levels of occurrences with some issues recurring several times and some only appearing once. Chapter Four identified fifteen issues of litigation surrounding the case. It came as no surprise in a study over breached contracts, that termination issues and liquidated damages led the field in appearance for the issues. The literature review looked at the prevalence of termination issues in the coaching environment supported by legal research and the attention of the media.

The liquidated damages subject was the biggest issue as it as its importance was identified five times (33.3%) in the data. It was by far the most significant in terms of frequency so therefore its repeat appearances makes it an important issues that needs to be looked at by case history alone. Outside of the frequency, the financial impact of liquidated damages in today's contract makes it one of the most important issues resulting from a contract. It makes sense that liquidated damages or also referred to as the money issue would be at the forefront of concern in a college sports atmosphere that the Knight Commission characterized as "money madness" (Knight Commission on Intercollegiate Athletics, 2001, p. 14). The school determines if they can withstand paying a coach off to find a better replacement which can have a more significant financially positive impact on the overall athletic department like recruiting or increasing donor donations. Also, a coach must decide if another job is worth more in terms of money or prestige than paying to leave.

Other issues were not litigated as frequently, but it does not take away from the significant roles they may have played. The issues litigated appear to support the notion of the study that there has been a lack of education for either one or both parties or at the least a lack to attention for detail. The Statute of Frauds is a basic legal concept that appeared as an issue only once in the data. As a basic tenet of contracts, the presence of a Statute of Frauds issue illustrates that not all coaches and institutions are contract experts, and gives an example for the need for contract education and this study. Contracts have became more formal than the old oral promises referenced in a statement made by basketball coach Kevin O'Neill where he stated, "handshake deals or promises of fulfillment by the president and the athletic director are now days of the past" (Greenberg, 1992, p. 109). Also in the same law review article, Greenberg recommended coaches needed representation as an "unprotected class of employees" (p. 101). In the current landscape in the coaching contracts, it seems head coaches have taken the advice of Greenberg. In a more recent article, Richard Karcher refers to the role agents play in the marketplace representing coaches in contract negotiations (Karcher, 2009). It seems as the increasing financial implications in contracts and the presence of agents have formalized the process with the need for formal contracts as opposed to the old handshake deal.

Another issue, addendums to contracts at the time of extensions, is a key issue because many of the cases looked at involved extensions of the original employment agreements. This had the impact of being an important issue as addendums to contracts can make several changes to an original contract, or keep most of the same provisions other than a limited number of changes such as the term of employment. The environment has driven the need for addendums to original agreements mainly in the form of extensions. The

proliferation of schools trying 'to keep their coaches from being poached' in recent years has resulted in a flux of contract extensions…" (Karcher, 2009, p. 12). The extensions normally come after a winning season that gives the coach "tremendous leverage" in getting an extension or a raise. (Karcher, p. 13). The same care and effort if not more should be put into addressing the issues of the addendum as was spent in forming the original agreement. The literature review already identified extensions as an issue. Specifically, the issue recognized athletic departments handing out lengthy extensions just prior to termination such as Charlie Wise at Notre Dame (Dodd, 2008). It seems fairly easy for the coach to casually accept the terms to a contract extension like in the *DiNardo* case and continue on with day to day tasks of the job and equally easy enough for an institution to quickly draft an extension in order to appease a coach.

Another key topic was contract interpretation. Coaches and universities should minimize the amount of interpretation due to ambiguous language and lack of specificity in contracts. Interpretation means everyone can find their own meaning of the issue being interpreted. Greenberg wrote "if words are not subject to clear and simple, Webster-style definitions they should not be in the contract" (Greenberg, 2006, p. 256). The NCAA concurred and categorized ambiguity and contradictions as two problems in contracts that can cause a contract to be misinterpreted ("Drafting Resources," 2008). A simple solution is to include a section that defines all terms as part of the contract -- an internal dictionary.

In summary, the legal issues identified through the case law provide guidance for coaches and administrators in contract formation. Termination and liquidated damages are issues that will always be seen together and care should be taken expressing them with their economic connections. Reassignment is an issue that should be avoided by the parties not

making it an option or clearly identifying it. Due process is a constitutional right that should be afforded to everyone and therefore should not be an issue. Interpretation occurs a good deal in contracts disputes so parties should try and minimize the possibilities for interpretation in the beginning of the relationship. Jurisdiction and determination of court fees can be placed into a contract to avoid any confusion. Addendums should follow the same basic process as the original agreement. Parol evidence and statute of frauds are basic rules of contracts that a simple knowledge and comprehension can help avoid these issues. Parties that develop trust can help curb unknown inducement from a third party. Finally, discrimination, defamation, and First Amendments claims are non-issues if parties use common sense and courtesy as all parties should understand none of these are acceptable reasons for termination.

Research Question 2: Are there certain clauses that are frequently covered in contract lawsuits?

Analyzing the research, the recognized significant clauses were: liquidated damages (5), termination (3), reassignment (2), claims-release clause (2), perquisites clause (1), outside employment (1), and integration clause (1). Even with just fifteen cases of facts, the number of different clauses and similar clauses with different language supported that despite the occurrence of professionalism in some areas, the college coaching contract still lacks standardization like the professional sports (Greenberg, 2006). These clauses come from just a small number of contracts in perspective to the overall number of college coaches and contracts drafted, but the clauses identified should not be discredited for a lack of recurrence because all of the clauses were integral in their respective cases.

It makes sense that termination clauses and liquidated damages clauses were addressed most frequently in the litigation. These lawsuits would not exist if the contract had not ended prematurely. Although these are two distinct clauses, the type of termination will trigger whether or not liquidated damages are owed, so the two clauses must work in tandem in order to be effective. An effective termination clause must address all possible termination scenarios: termination by the university for cause or without cause and termination by the coach. The literature review describes a termination without cause clause as "if a team is not winning, complaints go to the university president's office, donations decrease, television contracts disappear" which can lead to the removal of the coach (Greenberg, 1992, p. 108). The data supported this idea in several cases like *Baldwin v. Board of Supervisors for University of Louisiana System* (2009) that cited losing seasons and significant drop in attendance for the determination for termination. As termination and

liquidated damage clauses work together, the contract must be written to support that relationship like in the *Richardson* case. Greenberg points out the main issue of termination without cause is "the universities financial liability rather than the reasons for termination" so there should be a clear definition of the damages premature termination (Greenberg, 2001, p. 226). The *Rodgers* case also made the case for the importance of strictly laying out what benefits or perquisites are due upon termination without cause outside the agreed-on damages. Reassignment has been used as a way around termination without cause such as in the *Garland* and *Monson* cases respectively. It seems contracts need to omit any kind of reassignment clause to allow the termination without cause to function as it is designed by the parties. The parties should make sure with the termination without cause there will always need to be a clause to determine the compensation that will be due commonly now referred to as the "buyout" (Karcher, 2009, p. 24) Normally the buyout should be tied to the remaining time left on the contract when it is terminated (Karcher, 2009). The negotiation for these financial consequences should be given as much concern if not more as the contract's salary (Greenberg, 2006).

Termination *for cause* takes the most consideration upon both parties. Since when *for cause* is enforced, the institution is alleviated of anymore compensation of any kind. O'Brien v. The Ohio State University (2006) was the only example of this in the data, but it offered a clear illustration of the confusion that can occur in this time of termination. Greenberg gives several examples of the language used in this clause in his explanation to the point that each meaning of each clause varies with the non-standardized college coaching contracts (Greenberg, 2006). Therefore, the language is critical to define what constitutes *for cause* termination. A simple statement like "shall include, but not be limited to" takes the

restrictions off just those listed in the agreement (Greenberg, 2006, pp. 210-211). This brings into play the always dangerous interpretation. Both parties should make the decision of what constitutes *for cause*, and clearly state the terms. Ambiguity is inevitable, but the parties should still attempt to limit it by defining what they can in the areas of uncertainty (Greenberg, 1992).

These termination clauses only cover termination by the university and do not address instances where the coach leaves for the next bigger and better job. The coach normally has a termination without cause included in the contract similar to the university to help protect the institution's economic interests. *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2008) was a great example of a head coach leaving for the bright lights of a bigger job. The University's available remedies "in theory consist of suing for damages, seeking a negative injunction to prevent the coach from working at an institution, or simply cancelling the contract and allowing the coach to leave" (Karcher, 2009, p. 47). The *Rodriguez* case like most maintained the typical model by the inclusion of its liquidated damages clause linked to the termination clause for the coach. The highly publicized case settled the issue of the liquidated damages clause for the full $4 million written into the contract (Karcher, 2009). Even thought the case was settled, the termination clause seems to have been more than adequate for West Virginia to get the full amount. According to an academic presentation made by Robert Boland, negative injunctions have not been an attainable remedy to this clause because just as coaches do not fulfill their contract commitments neither do the institutions (Boland, 2010). He suggests that if universities would honor the agreements they make then they will regain the power of injunctions (Boland, 2010). Also as a suggestion, Robert Boland proposes a different

approach to getting a coach to commit to stay with a program outside of standard liquidated damages clause. Boland believes a retention bonus should be given to a head coach if he stays for a designated amount of time in the place of messy liquidated damages clauses (Boland, 2010). He referenced Coach Bob Stoops who received a $1 million retention bonus in his tenth year with Oklahoma (Boland, 2010).

Interestingly, the data set did not include clauses in the area of two key legal issues. There were no due process or jurisdictional clauses described in the identified legal cases. Court proceedings are a lengthy and costly process. Inclusion of these clauses may have cut down the length of some the cases and maybe the need for the cases in the first place. Some clauses are so fundamental that they should be included in every contract. The NCAA suggests including a governing law provision into the contract ("Drafting Resources," 2008). As a constitutional right it seems as there should be no question in the inclusion of a due process clause that plainly lays out the available procedure after termination. Greenberg states that due process clauses are important in the need for to make sure proper termination *for cause* has taken place. Like termination *for cause* clauses, due process clauses can vary upon the contract. A contract can offer a range of variations from the same due process due to all university employees to appealing for an outside arbitration (Greenberg, 2006). The importance of clauses such as jurisdiction and due process could have saved schools and coaches' time and money spent in court deciding these fundamental issues that may have been able to have been settled by simple inclusion in the contract.

Termination and liquidated clauses were the most frequented, and should be constructed carefully as they have a large financial and legal impact when contract disputes develop. Like the liquidated damages clause, perquisites due after termination need to be

defined. The threat of outside employment can be detrimental to the relationship of a coach and institution therefore an outside employment clause should be drafted like the *Northeastern* case. Once a relationship ends, a claims-release clause helps to make sure the relationship is actually finished. Not found in the data, jurisdiction and due process clause can help limit extra unneeded litigation.

Research Question 3: What contract clauses protect head coaches in contract formation?

Clauses can protect a coach, but the challenge is to find the right mix of language and clauses in the negotiations process to ensure the protection. Negotiation theory shows planning this process begins with framing the problem of the contract negotiation (Lewicki, Barry, Saunders, & Minton, 2003). A proper frame for negotiations will help the coach grasp what is meaningful to him and important for inclusion in the contract.

For cause termination may be one of the hardest clauses to draft. *O'Brien v The Ohio State University* (2004) found the overly broad and ambiguous clause to the favor of the coach. In the negotiation process the coach necessarily does not have to restrict the determinants *for cause* termination, but it is important for a coach to understand why he can and cannot be fired, and make sure this clause meets his approval (Greenberg, 2001). The determinants need to be as clear and defined as possible when the contract is agreed upon. *for cause* is many times subject to interpretation therefore in a perfect world the coach should petition for a clause that specifically details how he can be fired and includes language that is limited to only what is listed in attempts to curb ambiguity. This is the challenge for negotiating parties, to find clear and unambiguous language that is still broad enough to cover all unforeseen circumstances. The contract can make clear distinctions for terminations for certain conditions like a NCAA violation, but some areas like moral turpitude in the *O'Brien* case are always going to be ambiguous. This issue is seen in many coaches' contracts by way of a morals clause. In the recent issue, Coach Fred Hill Jr. of Rutgers University resigned upon settlement with after the university threatened to fire him based on his "principles of conduct" clause (Carino & Sergeant, 2010a). Despite the evidence of Hill's conduct, Rutgers settled more than likely to stay away from a probable lawsuit if it had

outright fired Hill, and not knowing how a court's interpretation of the morals clause would turn out (Carino & Sergeant, 2010b).

A coach can be protected by the inclusion of a due process procedure clause. In the recurring presence of interpretation in termination provisions like the *O'Brien* case, Greenberg stated:

> Procedural and substantive rights, such as written notice of the factual basis or reasons for termination, a right to a hearing before an objective and impartial panel, the right to discovery an cross examination, and the right to be provided with the protection of counsel, are basic rights that give the coach a more level playing field when the ultimate determination is made. (Greenberg, 2006, p. 256)

Greenberg's 2006 law review laid out the due process procedure that was included in the contract for O'Brien in the instance he was fired *for cause*. Fascinating, was the procedure was found nowhere mentioned in the facts or legal rationale of the case. When coaches were terminated in the research, the due process issue was presented in *Campanelli v. Bockrath* (1996) and *Price v. Alabama University* (2003). The coach in each case claimed he was deprived of a liberty interest by denial of proper due process, but there was never a reference to a due process clause within the language of the contract. The coach can be offered different levels of protection dependent on the type of due process provision in the contract. The most protection comes from a provision that allows a coach to "appeal and adverse decision to arbitration" because the decision comes from an unbiased third-party (Greenberg, 2006).

The termination without cause provides substantial protection for the coach. The review of literature quoted Greenberg "As a result, the coach's contract may be the most important armor that the coach has in protecting his entry and exit in the job" (Greenberg, 2001, p.127). "If the coach doesn't win the organization will try to 'unload' them…" (Caughron, 2007, p. 375). Reasons like losing and unhappiness with a coach are something normally written into "without cause" clauses. If a school wants to get rid of a coach at their "convenience", they will have to pay to end the relationship as seen in the buyout of Coach Nolan Richardson (*Richardson v. Sugg*, 2006). A coach needs make sure a without cause section is included in the termination clauses to help secure himself in what will happen if the university decides to fire him for whatever reason like in the *Richardson* case.

In conjunction with a well crafted termination without cause clause, the liquidated damages clause serves as "loser's insurance" for coaches who under-perform (Osborne, personal communication, 2010). Coaches need to financially protect themselves in case of their removal. A coach should make sure the clause language identifies his exit strategy and includes compensation for loss of salary and all other perquisites and needs (such as insurance) to cover a likely period of unemployment (Greenberg, 1992). The definition of liquidated clauses identifies that the clause as result of termination without cause should be a reasonable anticipation of damages. Even thought the *DiNardo* case involved a coach's payment of liquidated damages, it was the best case to give a general picture of how the courts view liquidated damages. The case explained the determination of this clause cannot constitute as a penalty. Since liquidated damages serve as a type of severance pay for coaches, the reasonable need of a coach is determined typically based on some combination of the coach's salary and time remaining on the contract (Greenberg, 1992). A coach should

determine what he will need upon a possible premature termination to be financially secure. The money in the Division I schools for liquidated damages can be significant like Noland Richardson's buyout of $3 million or Coach Ron Prince's $1. 2 million in liquated damages per his employment agreement. A coach needs to understand the protection they receive from liquidated damages clause and make sure there is one in place. Recently, former coach Billy Gillespie of Kentucky was working under a Memorandum of Understanding (MOU) for two years with an enforcedly questionable buyout when the University of Kentucky cited "philosophical differences" to remove Coach Gillespie (Sander & Fain, 2009). Despite the outcome, this left the financial welfare of the coach up to the court's interpretation.

In conclusion, it really is up to the head coach what clauses are important to him. The coach needs to have a grasp on what he wants to protect in order to know how to properly negotiate the employment contract. Once the coach has framed the negotiation issue, he can begin to attempt to protect his investments. Termination *for cause* needs to be defined clearly especially in ambiguous areas like a morals clause, and a coach will want *for cause* to be limited to only the terms of the contract. A coach should negotiate for an included due process clause to give more courses of review for termination. Termination without cause and liquidated damages clauses should always be written together to protect the financial interests of the coach.

Research Question 4: What contract clauses protect institutions in contract formation?

A university must understand what contract clause can offer them protection so they can focus on implementing them into the contract formation process. Synthesizing the data set, the most important clauses protecting the institutions covered basically two areas, termination by the coach and reassignment. The research surrounding early contract termination offered examples of clauses to support the schools when the early termination transpired. The courts have found the coaches to be large investments with unique talents such as in *Vanderbilt v. DiNardo* (1999) where DiNardo jumped ship for Louisiana State University. Vanderbilt did a good job of using clear language for the termination by coach without cause and liquidated damages clauses. Visibly, termination by a coach can be written to protect the interests of the institution in the case they lose their investment if a coach decides to leave prematurely. The school needs to decide what the termination should entail.

Liquidated damages for an institution will vary from school to school. *Northeastern University v. Brown* (2004) and *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004) were both examples of respective contracts containing very different sized liquidated damages clauses. The *Rodriguez* case had a much more costly clause at $4 million compared to the $25,000 paid by Coach Donald Brown in the *Northeastern* case. All schools are not the same, and the amount stated in the liquidated damages should be appropriate for the school and the coach. The clause is meant economically protect an institution from the loss of services of a coach and serve as penalty (Karcher, 2009). If a coach leaves, the "stability" of the university is harmed and therefore allows the parties to predetermine amount of damages that could be attribute to the loss of stability" (Karcher, 2009, p. 53). Dependent on the school, the institution should decide what

financial harm will be done if a coach jumps ship and needs to define those terms into the liquidated damages clause.

Prospective employers can harm the relationship between contracted parties. The *Northeastern* case found protection from an outside employment clause putting restrictions on the coach's contact with prospective employers. The clause let the institution make a case for Brown's breach of contract since he did not receive permission to speak with Louisiana State University. The outside employment clause is a helpful clause because it forces the coach, or competitors, to get permission from the institution before they can talk about other employment, and this allows the school to know what is going on with the coach in perspective to job prospects.

Institutions have found ways around outright termination through the use of reassignment clauses. *Monson v. State* (1995) and *Garland v. Cleveland State University* (2009) both clearly stated an unambiguous reassignment clause that the courts ruled was acceptable under the contract. Both cases ruled in favor that the schools did not breach their contracts. The reassignment clauses help to financially protect universities by allowing them to avoid costly buyouts. The language used in the *Monson* and *Garland* cases allowed the reassignment to be at the good judgment of the university. The reassignment clauses in the data were successfully unambiguous because they clearly defined what constituted the right for reassignment, and they followed it. If an institution wants to include a reassignment clause, they can use language such as *in accordance with staff needs* and *at its discretion* that was found to be successful in the cases reviewed.

Aforementioned, jurisdiction clauses were not included in the data set, but can be recognized to be helpful to institutions by limiting unneeded litigation. Jurisdiction played a major role in some of the more recent and publicized cases. *West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez* (2004) and *Kansas State University v. Prince* (2009). The coaches looked to remove to the federal court for a more favorable case outside the state run courts in the home states of the respective universities. It seems it would be beneficial for the school to include a jurisdictional clause as to what court of law will have jurisdiction if litigation is brought over contract disputes. A clause can easily be added to the miscellaneous provisions section to establish the governing law of the contract ("Drafting Resources," 2008). The case law found for the institutions in each case of jurisdiction, but a jurisdiction clause would save the court costs and wasted time spent in litigation. The clause gives the university the security in the knowledge that state law will apply in the case of litigation ("Drafting Resources," 2008). The drafting guidelines of the NCAA gives a generic example in the John A. White model contract to include the choice of law that will "govern the validity, performance, and enforcement" of the agreement (Varady & Callision, 2008, p. 34).

Perquisites can be as important in the termination process as regular compensation. The determination has to be made on the front-end of the contract to what the coach will have right to claim in the case he is terminated. *Rodgers v. Georgia Tech Athletic Association* (1983) argued what perquisites were due after the removal of the head coach according to the perquisites clause. The *Rodgers* case involved an ambiguous perquisites clause. Ambiguity in a perquisites case favors the coach (*Rodgers v. Georgia Tech Athletic Association*, 1983). A

university needs to make a determination of what perquisites they will be held accountable for if they decide to terminate a coach without cause. At the extreme:

> the university will want a provision indicating it will not be liable for the loss of any collateral benefits, perquisites or income resulting from activities such as, but not limited to, camps, clinics, media appearances, apparel, shoe contracts, consulting relationships, or from any other sources that may ensue as a result of the university's termination of the agreement without cause or because of the coach's position as such (Greenberg, 2001, pp. 226-227).

Either way, the university must make sure no matter what they decide to distribute outside of basic compensation that the contract language clearly reflects their decision.

No different than coaches, universities must understand what and how clauses protect them in contract disputes. Liquidated damage clauses for the university should be negotiated to the needs of the specific school. An institution has a better hold on the stability of their coach with an outside employment clause. Reassignment clauses allow schools an option to avoid termination without cause. When the governing law is predetermined to the state, the university is saved any uncertainties for jurisdiction. A perquisites clause will protect a university by defining the limits to what compensation a coach is owed outside of liquidated damages.

Important Clauses to include that do not necessarily favor the coach or institution

A coach and a university both need to be careful around certain clause language such as with a claims-release clause or an integration clause. These clauses can affect both parties. *Richardson v. Sugg* (2006) contained a claims-release clause dependent on the coach's acceptance of the buyout. For overall protection, both parties need to understand all of the clauses in a contract. A claims-release clause is important for a clean break when the relationship comes to an end. Though the clause is normally meant to protect the institution, the Richardson case showed that it will not bar all claims so therefore the parties need to understand what is and is not barred by a claims-release. An integration clause does not favor a particular side in contract negotiation. It acts to establish the valid contract as the complete and final agreement until there is a formal change made.

Omission can turn clauses that are not meant to help a certain side into a favorable situation for a specific party. *Kansas State University v. Prince* (2009) had the example of a claims-release clause in the original agreement. The coach had the clause completely omitted in his new contract addendum therefore protecting his rights to claims after he received his liquidated damages like the MOU claim in the case. The case also used omission in negotiating his new contract by leaving out part of the integration clause making it possible per the contract to enter into the MOU without the written approval of the University President. The omitted integration clause led to the claim by Kansas State that the MOU was a secret agreement between the Coach Prince and the Athletic Director. All of the parties involved in a contract agreement should be informed to all agreements, and an integration clause used correctly can help suppress secret agreements.

A suggested negotiation model

Negotiation theory is intertwined across the recommendations in Chapter 5. It is not a huge revelation as the content of the chapter covers the suggestions for drafting contracts and negotiating. A big part of good negotiation is understanding "what issues are at stake". (Lewicki, Barry, Saunders, & Minton, 2003, p. 37) Planning contract negotiation involves framing the problem. Since coaches and universities are fundamentally different and have different needs they will frame contract negotiations differently so it is important the two work together.

Greenhalgh's model seems to be an easy way to implement negotiation strategy into the contract formation process to develop the most ideal contract. The seven key steps include: preparation, relationship building, information gathering, information using, bidding, closing the deal, and implementing the agreement (Lewicki et al., 2003, p. 52). A number of these steps are followed in typical negotiations but Greenhalgh's model states following these phases in order are a best practice (Lewicki et al., 2003). Preparation is important for both the coach and institution to decide what is important to them before negotiations start. The parties must understand their main objective for the contract. It is easy to see relationship building is an important part of the process with each party making a genuine commitment to the other. Information gathering and using is a key understanding of the overall study because the more information gathered on the contracts the better informed the decisions and negotiations that will be made. This goes into bidding with using the information gathered, the relationship built, and the other phases to find the ideal middle ground. Once the middle ground of the contract is found, the deal is closed and the agreement is implemented. This process is not groundbreaking, but it does provide a good model to

follow. It can allow the coach and the university to stay on task and not jump around through the negotiations process. The model makes sense in contracts with the emphasis placed early on in the stages of preparation and relationship building in the initiation phase (Lewicki et al., 2003). If these two are taken seriously, logically better negotiations would develop.

Suggestions for future research

The study was delimited to only Division I basketball and football coaches which limited the size of the data set because this is where the biggest money is exchanged in relation to coaching contracts. The study could be expanded to include all head coaches in Division I that are under contract. Sorting through the results of litigation in the legal databases, there appeared to be several cases dealing with female coaches and male coaches of other sports. The rationale for the original delimitation of this study was most of the money in the chosen schools flowed through the men's sports of football and basketball, but college athletics saw their first woman surpass the $1-million salary with Pat Summit in 2006 (Lipka, 2006). As female coaching contracts have started to become more complex, with higher salaries and more issues like summer camps and media deals, expanding the study would seem to be beneficial for both genders.

This study also had the purpose to help educate coaches and universities alike. I think in the future a more direct study could be done to survey head coaches and universities to understand about contracts. The survey could gain a better understanding of the knowledge and environment in which the contracts are drafted. The results would help determine if there need to programs or other ways to get coaches and universities informed on the contracts which they are constructing.

Also, as a growing part of the process, the study could help discover how many use the services of an agent. From the university standpoint, the survey could utilize similar questions to find out who is negotiating the coaching contracts for the institution. The survey

results of this study could be useful to see the numbers for the level of professional support the parties have for contract negotiations.

Robert Boland believed general counsel negotiating contracts for the universities were outmatched by specialized agents of coaches (Boland, 2010). Survey could be performed to focus on the role of university counsel has in the contract process and their level of familiarity with coaching contracts. The results could be helpful for institutions to identify their contract support team to make sure they are not getting an unfair or bullied deal in contract negotiations by an agent or lawyer with more specific coaching contract experience.

Recommendations

The research combined with what has been published on contracts and the understanding of the marketplace for coaching contracts provides a picture of areas to focus on for contract formation. While it does not hurt to have a legal background, it does not take a lawyer to understand some of the simple cause and effect relationships that have affected contracts. The study had a limited number of litigated cases in comparison to the amount of turnover, but this is not necessarily good news. Just because a case is settled outside of the court does not mean there was a good contract in place or the relationship ended smoothly. In conclusion, the following recommendations can be supported by common sense observations from the litigation and secondary legal sources to help improve contract formation.

1. Do your homework. Preparation is the first step in a successful negotiation process (Lewicki, Barry, Saunders, & Minton, 2003).
2. Educate. Each party should fully understand contracts or find someone who does. (Greenberg, 2001).
3. Write it down. Coach Kevin O'Neill agreed oral agreements are gone. Make sure to get the complete agreement in writing (Greenberg, 2006)
4. Negotiation theory of Greenhalgh model. Build the relationship and do not construct contracts in haste. (Lewicki, Barry, Saunders, & Minton, 2003).
5. Sign on the dotted line. Make sure contracts are legally accepted at the beginning of the relationship (Sander & Fain, 2009).
6. Do not confuse a Memorandum of Understanding for an enforceable contract (Sander & Fain, 2009).

7. Define. Define. Define. Use plain language to try and minimize the amount of interpretation in the contract so that both parties understand the terms (Greenberg, 2001).
8. Designate your jurisdiction. Save time and money by agreeing upon governing law (*West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez*, 2004).
9. Give the coach what he is due. A due process clause will help ensure a better termination process (Greenberg, 2006).
10. Transparency helps. Parties can help the relationship with clauses like an outside employment clause. (*Northeastern University v. Brown*, 2004)
11. Reassignment is a loophole around termination without cause, and therefore should not be included in the contract (Greenberg, 2001).
12. Contract termination. The environment will not change overnight, and termination will continue to occur. Both parties should put honest consideration in how they want a relationship to end in terms of reasons and liquidated damages. (Greenberg, 2001).
13. Define compensation and what else the coach gets (perquisites) in case of termination without cause (Greenberg, 2006).
14. Time for a change. Universities should attempt to honor their agreements to strengthen the opportunity for injunctive relief as a possibility for legal remedy (Boland, 2010).
15. Pay for stay. Retention bonuses can serve as a good faith alternative to liquidated damages for terminations by the coach (Boland, 2010).
16. Termination *for cause*. Clearly define what constitutes grounds for termination to limit interpretation (*O'Brien v. The Ohio State University*, 2006).

17. Be careful with your morals. Morals clauses are popular in contracts, but should be carefully defined and understood by both parties. (Carino & Sargeant, 2010b).
18. No secrets. Both parties should involve all necessary parties to keep secret agreements from forming (*Kansas State University v. Prince*, 2009).
19. Addendums. Stop! Look! And Accept! Any extensions or addendums should be given the same consideration as the original contract formation to ensure the parties clearly understand any changes and the addendum is properly accepted. (*Vanderbilt University v. DiNardo*, 1999).

Appendix A: List of Case Briefs

Rodgers v. Georgia Tech Athletic Association, 166 Ga. App. 156 (1983)

Facts:

- The contract including said benefits and perquisites supplement to the annual salary, was in the form of a letter from the Athletic Association drafted on the date April 20, 1977,
- It was accepted by Rodgers on April 25, 1977.
- A later letter extended the contract through January 1, 1982.
- Coach Rodgers was relieved of his coaching duties on December 18, 1979 at the discretion of the Association.
- The Association offered Rodgers his annual salary, health insurance, and pension plan benefits as he was not terminated for cause. Rodgers suit looked to recover the perquisites outside of his annual salary by breaking them down into 29 unique items in two different categories, items directly provided from Association and items from sources outside Association based on his position.
- Rodgers claimed breach of contract and appropriation of a "property right" as his theories of recovery.

Issue(s): Was there a breach of contract ("without cause") the Georgia Tech Athletic Association?

Did both parties intend that Rodgers would receive perquisites, as he became eligible thereof, based upon his position as head coach and not merely as employee of association?

Holding: Due to substantial fact was Summary Judgment precluded. Judgment affirmed in part; reversed in part.

Rationale:

Breach of Contract

- An employer may rightfully or wrongfully remove an employee from their position at any time therefore without a right to recover position and title of his employment.
- The breach of contract for termination without "just cause" entitled Rodgers to his annual salary through the terms of the contract as well as the clearly entitled perquisites of health insurance and pension benefits. *Southern Cotton Oil Co. v. Yarborough*, 26 Ga.App. 766, 770, 107 S.E. 366 (1921)

Ambiguous language

- Ambiguity in this case is defined by two constructions of the contract with conflicting constructions on the determination if perquisites outside those common to all employees were due to former head coach. *Bridges v. Home Guano Co.*, 33 Ga.App. 305, 309, 125 S.E. 872 (1924)

- The subject contract was found ambiguous by the courts and thus took the cited approach to take interpretation least favorable to the author, the Association.
- The court concluded that Rodgers "would receive perquisites, as he became eligible therefore, due to his specific position above that of a normal employee of the Association.
- Nine of the listed twenty-nine perquisites were ruled out as they were tied to his duty as head coach.
- As Rodgers no longer held the position of head coach, he would no longer need the services of a secretary, services of an administrative assistant, and cost of trips to football conventions, clinics and other football related activities.
- The Association was not responsible for providing the value of items relating to housing and cost of premiums on life insurance as they were found to be discontinued several years before the breach of contract.
- Financial gifts are voluntary and without consideration therefore the court found the Association not responsible to providing to coach. *Hoffman v. Louis L. Battey Post etc. Am. Legion,* 74 Ga.App. 403, 410-1, 39 S.E.2d 889 (1946).
- Also there was no evidence found to support probable result of the breach that the Association knew of the perquisites of a free membership in Terminus International Tennis Club or free lodging at certain Holiday Inns.

Property right

- The employee has no property right in the position of head coach. *Greer v. Pope,* 140 Ga. 743(1, 2), 79 S.E. 846 (1913)

Lindsey v. University of Arizona, 157 Ariz. 48 (1987)

Facts:

- The University of Arizona created a search committee in the Spring of 1982.
- Ben Lindsey was a successful NAIA national champion men's basketball coach at Grand Canyon College
- Lindsey interviewed for the University of Arizona open coaching vacancy.
- Lindsey's testimony stated officials said no one would be hired for less than three to four years as well as then-athletic director Dave Strack mentioning a minimum four year evaluation period.
- Lindsey accepted formal appointment as Adjunct Professor of Physical Education for the 1982-1983 year.
- Letter concerning request for Lindsey to serve as head coach stated effective date of July 1, 1982 up to June 30, 1983.
- Board of Regents policy allowed for termination of the contract at anytime by the President of the University in an academic-administrative assignment.
- Lindsey signed the letter on July 7, 1982.
- In that time, previous athletic director and president were replaced.
- Arizona experienced its worst season record in its history (4-24).
- Lindsey was informed around March 15, 1983 his contract would not be extended past its current term.
- Arizona cited three reasons for termination: "1) the communication relationships between Lindsey and certain players on the basketball team; 2) Lindsey's prospects for a successful recruiting effort; and 3) the technical tasks of rebuilding the University Basketball Program"

Issue(s): Did the defendants breach the contract of implied covenant of good faith and fair dealing?

Should there be any damages awarded for alleged breach or emotional stress?

Holding: Court held there was a breach of contract from Arizona on the implied covenant of good faith and fair dealing on evidence there was promise by Arizona to extend the contract three years, but was terminated in first season. Court vacated ruling to award coach damages for loss of future earnings, and also held Lindsey was not due any damages for humiliation and emotional distress.

Rationale:

- Court stated University's oral representations may create question of fact for jury or may modify as to terms of a contract. *Wagenseller v. Scottsdale Memorial Hospital,* 147 Ariz. 370, 710 P.2d 1025 (1985)
- Therefore, despite the written letter for a one year contract, evidence of oral representations of search committee and athletic director meant to hire the coach for four years.

Breach of contract

- Lindsey was not entitled maintain action for both breach of contract and breach of implied covenant of good and fair dealing. *Rawlings v. Apodaca*, 151 Ariz. 149, 158, 726 P.2d 565, 574 (1987)
- Court affirmed trial court decision to award damages for reasons of sufficient evidence for a University breach of contract on depriving Lindsey three years of employment. Rule 61 Ariz.R.Civ.P. 16 A.R.S.; *Holtz v. Holder*, 101 Ariz. 247, 251, 418 P.2d 584, 588 (1966)
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Damages

- Lindsey could not recover damages for future earning power or capacity in a breach of employment contract. *Perry v. Apache Junction Elementary School District No. 43*, 20 Ariz.App. 561, 563, 514 P.2d 514, 516 (1973)
- Computation of damages in recovery for injury to reputation is too speculative and the damages may not be presumed reasonably under the review of the parties in contract negotiations therefore not permitted. *Fogelman v. Peruvian Associates*, 127 Ariz. 504, 506, 622 P.2d 63, 65 (App.1980)
- Court vacated ruling of Lindsey being due damages totaling $480,000 for loss of future earning power.

Fees

- Court held trial court was not incorrect in awarding attorney fees of $91, 312 by applying the multiplier of 1.3 lodestar figure in determination for breach of implied covenant of good faith and fair dealing. A.R.S. § 12-341.01.

Emotional Distress

- Lindsey was not entitled to any award of damages for humiliation and emotional stress form the termination as they are also not generally awarded for a breach of contract.

Monson v. State, 136 Or. App. 225 (1995)

Facts:

- On or about March 23, 1983, Don Monson entered into contract with the University of Oregon as the head men's basketball coach through the term of January 30, 1987.
- Only compensation provision was starting annual salary of $52,000.
- Contract designated coach as a "professor, with all the rights and privileges of a faculty member, except for tenure and promotion."
- Monson signed a "Notice of Appointment and Contract" on January 27, 1986 that stated his position as an "officer of administration, non-tenure related, with the rank of professor and title of head men's basketball coach", and extended his contract from period of July 1, 1987 to June 30, 1990.
- Two years later, the Monson signed another contract extension through June 30, 1992 and was subject to Oregon Administrative Rules of the Oregon State Board of Higher Education.
- Contract extended once more to date of June 30, 1994.
- Monson earned outside income through camps and outside contracts to no mention in any of his notice of appointments and contract.
- Oregon Athletic Director, Bill Byrne, referenced the role of men's basketball team to help generate revenue for program and non-revenue sports expenses.
- On March 17, 1992, Monson was officially reassigned to head men's golf coach and fund raiser followed by offer for compliance position on April 29, but with full intentions of Oregon to honor the coach's contract.
- Monson stated acceptance of the reassignment would be "professional suicide, and on May 18, 1992, Oregon considered Monson resigned due to failure to accept the position.

Issue(s): Does reassignment of position constitute as breach of contract in the subject contract?

Is coach entitled to receiving outside income lost at action of removal of head basketball coach title?

Holding: Court held the "trial court erred in not directing a verdict in the state's favor" as reassignment did not violate coach's contract, and therefore without breach there was no need to attend to entitlement of outside income issue.

Rationale: Intention/Interpretation

Directed Verdict

- Whole record will be considered in decision of Court of Appeals for directed verdict, but the court will view evidence in favor to plaintiff. *Scholes v. Sipco Services & Marine, Inc.,* 103 Or.App. 503, 506, 798 P.2d 694 (1990); *Brown v. J.C. Penney Co.,* 297 Or. 695, 705, 688 P.2d 811 (1984)
- Reversal will only be contingent upon the finding of no evidence a jury could have found for Monson as it is only correct to rule for directed verdict when there is

complete absence of proof of an essential issue, or when there is no conflicting evidence and it is susceptible of only one construction. *Denley v. Mutual of Omaha*, 251 Or. 333, 336, 445 P.2d 505 (1968)

Reassignment

- University did not violate coach's contract by reassigning him as golf coach or basketball rules compliance coordinator because Oregon had the right to reassign under reference statute allowing Oregon to reassign personnel in accordance with staff needs. Or.Admin.R. 580-21-318
- University also had right to reassign even *for cause* based on the reason accordance to staff needs and the staff member was "no longer the most effective person for the position." OAR 580-21-325

Interpretation

- Court interprets statute or regulation by determining the intent its creators. *Perlenfein and Perlenfein*, 316 Or. 16, 20, 848 P.2d 604 (1993)
- Undefined commonly used words in statutes are given their "plain, natural, and ordinary meaning" normally. *Webster's Third New International Dictionary* 1512 (Unabridged 1976)

Campanelli v. Bockrath, 100 F.3d 1476 (1996)

Facts:

- Louis Campanelli became head men's basketball coach of University of California, Berkeley (Cal) in 1985.
- Campanelli was fired under an at-will termination clause in his employment contract on February 8, 1993.
- Pursuant to the terms of Campanelli's employment contract with the University, then-Athletic Director Robert Bockrath recommended Campanelli's termination and Vice-Chancellor Daniel Boggan, acting on Bockrath's recommendation and on behalf of the University regents, effected the termination.
- Plaintiff's complaint pointed to three success losses and displeasure from former athletic director Bockrath.
- Campanelli's career record at the University was 123-108, a winning percentage that was better than those achieved by the four head coaches who had preceded him.
- Bockrath and Boggan issued statements to San Francisco Chronicle that Campanelli was fired for psychologically and verbally abusing players.
- Plaintiff cited these circumstances had hindered him from finding a new basketball coaching job, and believed he was deprived of his liberty interest without due process because of the comments.

Issue(s): Was there a denial of liberty interest without due process violation in the termination of the plaintiff?

Holding: The court found the coach presented facts adequate to establish that university officials imposed stigma on him, and that there was the presence of allegedly defamatory statements in the course of his termination. Also the district court improperly played "fact finder" in comparison of behavior of coach and if alleged statement were substantially false. Reversed and Remanded.

Rationale:

Scope, Standards, and Extent

- Court of Appeals started anew, de novo, to review the district court's order of dismissal for failure to state. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.; *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir.1995).
- In reviewing dismissal for failure to state claim, review is limited to contents of complaint, and court would accept all of plaintiff's allegations of material fact as true and construe them in light most favorable to him. *Argabright v. United States*, 35 F.3d 472, 474 (9th Cir.1994); *National Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1340 (9th Cir.1995).
- Court reversed the dismissal due to plaintiff's ability to prove a set of facts in support of claim that would entitle him to relief. *Mountain High Knitting, Inc. v. Reno,* 51 F.3d 216, 218 (9th Cir.1995)

Termination/ Liberty Interest

- Campanelli used facts of documented statements by University officials, and thus inability to find employment as a basketball coach in order to establish an imposed stigma by university officials for purposes of his claim that he was deprived of liberty interest without due process. U.S.C.A. Const.Amends. 5, 14.
- Question of whether defendants' statements rise to level of stigmatizing employee, for purposes of employee's claim that his or her liberty interest to engage in common occupations of life has been denied without due process, is question of fact. *Stretten v. Wadsworth Veterans Hosp.,* 537 F.2d 361, 366 (9th Cir.1976):
- Being no bright-line rule that post termination statement are not made in course of termination, the coach can establish the defamatory statements that occurred after his termination are so closely related that the release from employment may become stigmatizing in the public eye as to cause a denial of liberty interest to find new employment as basketball coach. U.S.C.A. Const.Amends. 5, 14; *Hadley v. County of Du Page,* 715 F.2d 1238, 1246-47 (7th Cir.1983)
- There must be some temporal nexus between alleged defamatory statements and termination in order for claim to meet requirement that statements were made in course of termination. U.S.C.A. Const.Amends. 5, 14.
- Court found the seven to nine-day period between Campenelli's termination and publication of statements did not reduce the temporal connection of the statements and termination, and therefore establishing alleged defamatory statements were made in course of termination to claim that officials deprived him of liberty interest without due process.
- The question of truth or falsity must be decided based on the basis of evidence, and from the face of the complaint the court cannot hold at the pleading stage that the coach accepted the accuracy of the defendants' alleged charges.
  U.S.C.A. Const.Amends. 5, 14; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Board of Trustees of State Institutions of Higher Learning v. Brewer, 732 So.2d 934 (1999)

Facts:

- Billy Brewer was employed as head football coach of the University of Mississippi
- Brewer's employment contract extended until June 30, 1997.
- The University of Mississippi terminated the coach's contract on July 15, 1994.
- The university gave reason of failure to maintain control of the program and pointed to two NCAA investigation in 1986 and 1994 with findings of recruiting violations
- The decision to terminate was upheld by Athletic Director ,Warner Alford, and the University's Personnel Action Review Board.

Issue(s): Did the circuit court have jurisdiction to breach of contract hearing?

Holding: Court found the circuit court had jurisdiction of the case.

Rationale:

Jurisdiction

- Lack of jurisdiction may be raised at any time. Rules Civ.Proc., Rule 12(b); *Rodgers v. City of Hattiesburg*, 99 Miss. 639, 643, 55 So. 481, 482 (1911)
- Therefore, the claim of Board of Trustees that Brewer had failed to follow requirements of statute governing certiorari proceedings in circuit court could be raised. Rules Civ.Proc., Rule 12(b); *Mississippi State Personnel Bd. v. Armstrong*, 454 So.2d 912, 914-15 (Miss.1984).
- Brewer's action in circuit court was not an attempt to seek reinstatement through an appeal from the decision of the University or the Board's approval, but was instead a separate breach of contract action for damages. Code 1972, §§ 11-51-93, 11-51-95
- The circuit court has original jurisdiction over all breach of contract cases. Const. Art. 6, § 156; *City of Starkville v. Thompson*, 243 So.2d 54, 55 (Miss.1971).

Vanderbilt University v. DiNardo, 174 F.3d 751 (1999)

Facts:

- Gerry DiNardo was hired and entered into contract with Vanderbilt University on December 3, 1990.
- The original contract was for a full five year term including reciprocal liquidated damages clauses.
- Dinardo was offered a two-year extension on August 14, 1994, whereby DiNardo expressed interest but wanted to talk it over with his lawyer, Larry DiNardo.
- Coach DiNardo would go on to sign the addendum with the consideration Larry DiNardo would have to sign it as well before it would be finalized.
- Larry DiNardo received a copy by fax of the addendum whereas he offered no further suggestions to the document.
- Coach DiNardo went on to accept head coaching position at Louisiana State University on December 12, 1994.
- After not receiving payment from DiNardo for liquidated damages under the terms of the contract, Vanderbilt filed for a breach of contract action to recover the liquidated damages for the remaining year of the contract plus the two extended years of the addendum.

Issue(s): Was the liquidated damages clause reasonable and enforceable for an alleged breach of contract?

Holding: The Court of Appeals held that the liquidated damages clause was not unenforceable and there were no liquidated damages rights waived. Also the addendum extended the original contract's liquidated damages provision in plain terms, but the case was remanded as there was not clear evidence of acceptance on the behalf of DiNardo for the addendum.

Affirmed in part, reversed in part, and remanded.

Rationale:

Liquidated Damages

- Payment of liquidated damage, which refers to the monetary amount of just cost of damages for a breach, may be agreed upon by contracting parties under state law. *Beasley v. Horrell*, 864 S.W.2d 45, 48 (Tenn.Ct.App.1993)
- Under state law, liquidated damages provision will not be enforced if amount constitutes a penalty, which is defined as a "designation to coerce performance by punishing default."
- Court found that DiNardo was hired in a "unique and specialized position", and agreed Vanderbilt would suffer damages if DiNardo prematurely terminated his contract.
- The liquidated damages provision was found to be reasonable and not a penalty therefore the calculation of number of years left on the contract multiplied by DiNardo's annual salary was enforceable under Tennessee state law. *Smith v.*

American General Corporation, No 87-79-II, 1987 WL 15144 (Tenn.Ct.App. Aug.5, 1987)

- "Reasonableness" based on Vanderbilt's ability to present evidence of actual damages including recruiting new coach, moving cost moving staff, and salary difference in coaching staffs. *Kimbrough & Co.*, 939 S.W.2d at 108
- Vanderbilt did not waive rights to liquidated damages by granting DiNardo permission to meet with officials about the L.S.U head coaching position because the grant did not authorize DiNardo to terminate the contract. *Chattem, Inc. v. Provident Life & Accident Ins. Co.*, 676 S.W.2d 953, 955 (Tenn.1984)

Addendums/ Contract Construction

- The language of the addendum provided for a wholesale extension of the entire contract, which would include the liquidated damages clause under state law.
- The rights and obligations of contracting parties are governed by their written agreements. *Hillsboro Plaza Enterprises v. Moon*, 860 S.W.2d 45, 47 (Tenn.Ct.App.1993)
- Under Tennessee law, when agreement is unambiguous, the meaning is a question of law, and it should be enforced according to its plain terms. *Richland Country Club, Inc. v. CRC Equities, Inc.*, 832 S.W.2d 554, 557 (Tenn.Ct.App.1991).

Acceptance

- Under Tennessee law, parties may accept terms of a contract and make the contract conditional upon some other event or occurrence. *Disney v. Henry*, 656 S.W.2d 859, 861 (Tenn.Ct.App.1983).
- Court found conflicting evidence to argument to determine if the proper acceptance was in place to make the addendum an enforceable contract.

Price v. University of Alabama, 318 F.Supp. 2d. 1084 (2003)

Facts:

- Michael Price was hired as the University of Alabama's head football coach in January of 2003.
- At an event outside official University business in Pensacola Florida in April 2003, Price was reported for supposed behavior unbecoming.
- Price informed Alabama's Athletic Director and President Robert E. Witt "openly and honestly" about the events that had occurred.
- A meeting was called on May 3, 2003 to attend to the accusations of Price's conduct.
- After the meeting, President Witt announced the termination as head football coach for the reason of "conduct inconsistent with the policies of the University".

Issue(s): Was there wrongful termination through a breach of contract by University and President Robert Witt?

Is the plaintiff due compensation for his termination and a post-termination hearing and appeal of his termination?

Holding: Case dismissed. There was no breach of contract found as the contract was held as a void agreement therefore Price had no property right, and President Witt was found to have immunity. Thus, no compensation was due to Price.

Rationale:

State or Government Officers or Agencies / Immunity

- Wrongful termination damages suit against the president of state university in his official capacity was barred by court cited Eleventh Amendment U.S.C.A. Const.Amend. 11;
  Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)

- President Witt had "qualified immunity" by proving he had acted within the scope of his discretionary authority, and therefore did not owe Price compensation for alleged breach of contract.
- In the personal capacity suit by Price President, there was no knowing violation of any federal law as well as the president had "qualified immunity"
  U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Due Process / Property Rights

- Due Process rationale follows U.S.C.A. Const.Amend, 14.
- There was no support to claim violation of due process rights as Price did not have property interest because there was no valid employment contract between the parties because termination clauses of liquidated damages were still under negotiation.

Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

- There must be an established deprivation of a liberty interest without due process of law, when government employee is discharged, the employee must show:
    - False statement
    - Of stigmatizing nature
    - Attending discharge
    - Made public
    - By government employer
    - Without meaningful opportunity for an employee name clearing hearing

  U.S.C.A. Const.Amend, 14; *Warren v. Crawford*, 927 F.2d 559, 565 (11th Cir.1991)

- With no evidence of stigmatizing natured statements, the Alabama President did not violate any liberty interest of football coach therefore barring wrongful termination in the violation of a Price's due process rights.

Statue of Frauds

- Due to noncompliance with Alabama statue of frauds, the supposed wrongfully terminated contract rendered void, and as a void agreement Price did not have support for his claim of a property interest.
- The Alabama Statute of Frauds in part is cited by court:

"In the following cases, every agreement is void unless such agreement or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing:"

"(1) Every agreement which, by its terms, is not to be performed within one year from the making thereof;"
Ala.Code § 8-9-2 (1975).

Northeastern University v. Brown, 17 Mass. L. Rptr. 443, 2004 WL 616225 (2004)

Facts:

- Donald Brown Jr. began as head coach in 2000.
- On or about July 8, 2003, entered into a written contract extending end of 2007-2008 football season with considerable salary increases for the entire football staff included.
- Articles VIII and IX of the contract contained "outside employment" and "liquidated damages" clauses respectively.
- January 2004, Brown and Northeastern discuss and agreed to enter into new contract with addition of year long extension through 2009 in attempts to keep Brown satisfied and employed as head coach.
- Before formation of written contract, University of Massachusetts (UMass) seeks and is denied permission to contact Coach Brown about vacant head coaching job.
- Northeastern and UMass are both members of the
- On February 6, 2004, Brown called Northeastern AD David O'Brien that he had turned down offer of the head coaching position at UMass
- Brown formally resigned and was announced as the new head football coach at UMass on February 9, 2004
- Northeastern believed liquidated damages was insufficient remedy with UMass also being a member of same conference competing on many levels outside field of competition.
- Brown and UMass were both listed as defendants in the suit.

Issue(s): Was there a breach of contract by coach of irreparable harm to cause injunction against employment?

Can injunction be placed on UMass for alleged inducement by Brown to breach his contract?

Holding: The court ordered preliminary injunction against Donald Brown working in any capacity for the University of Massachusetts. In regards to UMass, preliminary injunction was denied without prejudice.

Rationale:

Breach of Contract/ Contract jumping

- Cited Judge in description of contract jumping cases *Detroit Football Co. v. Robinson*, 186 F.Sup. 933, 934 (E.D.La.1960),
- Contract for major universities is same as a contract exists in rest of world, and the court found a clear breach of contract by Coach Brown, and evidence of UMass inducement of Brown to breach his duty. *New England Patriots v. University of Colorado*, 592 F.2d 1196 (1st Cir.1979).
- Even in presence of liquidate damages provision, specific performance or an injunction can be granted to enforce a duty in case of a breach of duty. Restatement (Second) of Contracts, § 361

- It is upon the basis of the parties intentions deduced from the whole instrument and circumstances that how a provision for a penalty or liquidated damages will be judged as whether it is intended as security for performance or an alternative to performance. *Rigs v. Sokol*, 318 Mass. 337, 342-43 (1945)
- In the provision of Brown's liquidated damages clause stating it would be "adequate and reasonable compensation to the University[,]" the court found the statement dealt with monetary loss of the contract, and there were no intentions for the liquidated clause served as alternative to performance.
- Found there was strong evidence of irreparable harm for preliminary injunction against the Northeastern University based on Brown's program knowledge, and competition, direct and indirect, for recruits and media coverage as well as playing each other every year. *Package Indus. Group v. Cheney*; *New England Patriots*, 592 F.2d at 1199.
- Court decided against an injunction upon UMass stating an injunction placed on Coach Donald Brown would "suffice to achieve the result needed in this case."

Richardson v. Sugg, 448 F.3d 1046 (2006)

Facts:

- Nolan Richardson was hired as head coach of University of Arkansas basketball team in 1985 where he had a successful career covering seventeen seasons.
- Richardson was hired by J. Frank Broyles, athletic director, as the first black head coach in the history of the school.
- A new contract was created in October of 2000.
- In 2002 when the team went 14-15, Richardson makes comments on more than one occasion that Arkansas could replace him by buying him out.
- After several meetings between Broyles and Chancellor John White discussing Richardson's comments, they believed the comments were harmful to the University and gave the coach the option to resign or retire on February 28, 2002.
- Richardson refused to resign or retire, and Arkansas terminated him on March 1, 2002.
- The termination was reviewed and confirmed by Arkansas President Alan Sugg.

Issue(s): Was coach wrongfully terminated by the University of Arkansas for race and public comments?

Holding: The appellate court found in favor of the school affirming the decision of the district court. The court found under a mixed-motive analysis that termination was not made because of race and the comments made by Richardson were detrimental to the University.

Rationale:

Contract Conditions / Discrimination

- An employee cannot prospectively waive their right rights under Title VII, discrimination law. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)
- Defendants argued bar to waive rights was limited to collective bargaining agreements, but court review of Supreme court decision found no such limit.
- Submitting a claim to arbitration does not constitute a waiver of rights as presumably satisfied as part of a settlement agreement.
- A contract may go against public policy in attempt to settle potential discrimination claims as an employer may not pay for the authority to discriminate. Adams v. Philip Morris, Inc., 67 F.3d 580, 584 (6th Cir. 1995)
- The defendants argued that the Richardson ratified his waiver clause by accepting the guaranty money from the Arkansas, and could not bring suit unless he tendered back the guaranty.
- Court ruled the case was not barred by ratification or tender back doctrine and there could not be waiver of Title VII claims. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 118 S. Ct. 838, 139 L. Ed. 2d 849 (1998)

Mixed motive

- A mixed-motive case is one in which "it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives." Price Waterhouse v. Hopkins, 490 U.S. 228, 232, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).
- A plaintiff must show a specific link between the termination and discrimination to show merit for a mixed-motive inquiry. Philipp v. ANR Freight Sys., Inc., 61 F.3d 669, 673 (8th Cir. 1995)
- Court found time between Broyles' remarks and the termination decision relevant to determination for whether discriminatory animus was a reason for the termination. Simmons v. Oce-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999).

Termination theory

- Court found "cats-paw" theory fails in this case as per the rule the decisionmaker, Broyles, made an independent decision to terminate Richardson and was not carrying out anyone else's discriminatory motives.
- Court found defendants reason for termination legitimate and nondiscriminatory and thus presumption of "race-based animus" was gone.
- While the First Amendment protects public employees' speech of public interest, the court recognizes the balancing test between the interests of the employee and the administration of the employer. Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d
- Matters of racial discrimination are of public concern in the context of the First Amendment. Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)
- Richardson's comments were found not to be a matter of public concern and also had undermined "the effective functioning of the public employer's enterprise." Rankin v. McPherson, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)).
- Record showed support of damage on the university from Richardson's statement, and any First Amendment privilege was outweighed by the public interest.
- As there was enough evidence to support termination decision before Richardson's March 24 statement, the court did not need to reach the coach's First Amendment and retaliation claims.

O'Brien v. The Ohio State University, 2006 WL 571043 (Ohio Ct.Cl.), 2006 -Ohio- 1104 (2006)

Facts:

- The case deals with a breach of contract case in terms of the termination clause of the coach's contract.
- Jim O'Brien was the head basketball coach for The Ohio State University. O'Brien's contract was terminated "with cause" according to Ohio State.
- O'Brien's case stands on belief that Ohio State breached his contract by firing him for the NCAA violation of loaning "potential recruit" Alex Radojevic $6000.
- O'Brien holds to the idea that Ohio State breached their contract with their termination without cause, and he is seeking a ruling and damages to that point.
- The loan was kept secret until six years after the initial loan. O'Brien was first to inform Ohio State Athletic Director of the loan. One week later Coach O'Brien's contract was terminated.

Issue: Did the defendant, The Ohio State University, breach Coach O'Brien's contract by terminating him for the NCAA infraction?

Holding: Yes. The court ruled in favor of the plaintiff deciding the defendant breached the plaintiff's contract.

Rationale:

"Termination for cause"

- The plain language of the contract is clear in issues that not every failure of performance provides cause for termination.
- Court made determination if reasonable expectations of the parties were met or not by using the contract language and testimony of the parties. *Russell v. Ohio Outdoor Advertising Corp.* (1997), 122 Ohio App.3d 154, 701 N.E.2d 417
- Ohio State University did not have standing to enforce the "termination for cause" clause. To satisfy the terms of the contract for termination, at least one of the following must have occurred under Section 5.1 of the agreement: Restatement (Second) of Contracts § 241.
    1. "Material Breach"- "Under common law, "a material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract" (O'Brien v. OSU, 2006). *Kersh v. Montgomery Developmental Ctr.* (1987), 35 Ohio App.3d 61, 62-63, 519 N.E.2d 665

    2. "Major infraction"- "a violation by Coach of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a "major" infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men's basketball program or which results in Ohio

State being sanctioned by the NCAA or the Big Ten Conference (O'Brien v. OSU, 2006)."
    a. NCAA had not provided any sanctions at the time of termination.
3. "Criminal conduct"- "any criminal conduct by Coach that constitutes moral turpitude or other improper conduct that, in Ohio State's reasonable judgment, reflects adversely on Ohio State of its athletic programs (O'Brien v. OSU, 2006)."
    a. No criminal conduct was in question.

- Court found that O'Brien's breach and NCAA infraction was not a "material breach", "major infraction, or "criminal conduct" as listed in the contract.
- Therefore Ohio State terminated O'Brien without "cause", and would be held responsible for damages at a later hearing.

West Virginia University Bd. of Governors ex rel. West Virginia University v. Rodriguez, 543 F.Supp.2d 526 (2008)

Facts:

- On December 21, 2002 entered into the Employment Agreement with West Virginia as the head coach of the football team and the term running until January 15, 2007.
- First amendment to the contract occurred on June 24, 2006 to extend the term until 2013.
- The second amendment to the employee agreement on August 24, 2007 extended Rodriguez's term another year through 2014, and increased the amount to be paid by Coach if he terminated the contract term early.
- West Virginia University head football coach Richard Rodriguez resigned on December 19, 2007 to become the new head coach at the University of Michigan.
- The contract between Rodriguez and West Virginia called for liquidated damages of four million dollars if Rodriguez resigned early and took another job at an institution of higher education according to contract and First and Second Amendments to the contract.
- Rodriguez contended he was a citizen of the state of Michigan.

Issue(s): Does diversity jurisdiction apply for the action between the two parties?

May the University have permission for jurisdictional discovery?

Holding: The court held against diversity jurisdiction as the University was an arm of the state and therefore not a required citizen. Therefore it granted motion to remand to the district court for ruling, but denied the motion for costs, expenses or attorney fees. The plaintiff's motion for jurisdictional discovery was denied as moot.

Rationale:

Jurisdiction

- Court had to first to determine if it had "original jurisdiction" over the plaintiff's claims.
- Party seeking removal has burden of expressing jurisdiction.
  Maryland Stadium Authority v. Ellerbe Becket Incorporated, 407 F.3d 255, 260 (4th Cir.2005)

- Federal courts must interpret removal statutes strictly due to "federalism concerns" in removal jurisdiction as federalism lays out a balance of powers giving state courts priority before a federal court. *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941)
- The federal court remanded the case to state court as it was determined the case did not have federal jurisdiction.

Citizenship

- Rationale of court was shaped by diversity jurisdiction statue 28 U.S.C. § 1332.

- A state is not a "citizen"
  Moor v. County of Alameda, 411 U.S. 693, 717, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973)

- Diversity jurisdiction does not exist in a suit between a state and a citizen of another state.
  Maryland Stadium Authority v. Ellerbe Becket Incorporated, 407 F.3d 255, 260 (4th Cir.2005)

- A public entity is not "citizens of a state" if they are determined to be an "arm or alter ego of the state" under the requirements of the statute for diversity jurisdiction.
- All parties must be "competent to sue, or liable to be in sued " in a United States federal court as to represent all interest for a diversity jurisdiction to occur between citizens of different states. *Strawbridge v. Curtiss,* 3 Cranch 267, 7 U.S. 267, 2 L.Ed. 435 (1806)
- The court cited the Eleventh Amendment or for purposes of citizenship under statute governing diversity jurisdiction, a four-factor test applies to determine a public entity as arm of the state:
  1. "whether the judgment will have an effect on the state treasury" (potential benefit)
  2. "whether the entity exercises a significant degree of autonomy from the state"
  3. "whether the entity is involved in local versus statewide concerns"
  4. "how the entity is treated as a matter of state law."

  *Ram Ditta v. Md. National Capital Park & Planning Comm'n,*822 F.2d 456 (4th Cir.1987)

  U.S.C.A. Const.Amend. 11

- By the four factor test, the federal court found that West Virginia University and its board of governors were "arms and alter egos of the state" under diversity jurisdiction statue therefore not "citizens" because of the university since damages sought would affect state funds, numerous states ties, educating youth was statewide concern, and West Virginia law clearly defined a university as a part of the state. W.Va.Code §§ 12-2-2, 18-11-1.
  City of Morgantown v. West Virginia Board of Regents, 177 W.Va. 520, 522, 354 S.E.2d 616, 619 (1987)

  State ex rel. Board of Governors of West Virginia University v. Sims, 134 W.Va. 428, 59 S.E.2d 705 (1950)

  University of West Virginia Board of Trustees v. Graf, 205 W.Va. 118, 516 S.E.2d 741 (1998)

Baldwin v. Board of Supervisors for University of Louisiana System, 2009 WL 1879476 (La.App. 1 Cir.), 2008-2359 (La.App. 1 Cir. 6/30/09) (2009)

Facts:

- Jerry Lee Baldwin began employment as University of Louisiana at Lafayette (ULL) in December 1998.
- Formal contract was approved in April of 1999.
- Coach Baldwin was relieved of head coaching duties after three seasons on November 26, 2001with his salary being paid throughout the contracts term.
- Baldwin believed there was an alleged breach of contract, intentional and negligent infliction of emotional distress, tortious interference with a contract, and abuse of rights as well as racial discrimination.
- ULL referenced the three losing seasons and significant drop in attendance at a time pending NCAA rule that ULL must maintain a higher average of attendance to maintain its Division 1-A status

Issue(s): Were there valid breach of contract and racial discrimination claims by the plaintiff?

Holding: The court vacated previous judgment in favor of the plaintiff awarding him damages of over two million dollars due to more than one consequential error in the fact finding process, and remanded for a new trial

Rationale:

Juror selection

- Race or gender may not be sole reason for asserting a peremptory challenge. LSA-C.Cr.P. art. 795C
- Court must show three-step analysis for a *Batson* challenge to a peremptory strike:
    1. Determination if defendant exercised peremptory challenge on the basis of race.
    2. If shown, prosecutor has burden of supplying a sufficing race-neutral explanation.
    3. Court deteremines if defendant has proved purposeful discrimination.

  Alex v. Rayne Concrete Service, 2005-1457, 2005-2344, 2005-2520, p. 15 n. 11 (La.1/26/07), 951 So.2d 138, 150 n. 11

- Court found defect in jury selection as a structural error hindering the fact-finding process and created possibility of impermissible prejudice against the defendants. *Munch v. Backer,* 2004-1136, pp. 4-5 (La.App. 4 Cir. 12/5/07), 972 So.2d 1249, 1251-52,.

Expert Witness expert qualification errors

- The trial court is charged with the duty of performing a "gatekeeping" function to ensure that the expert testimony is not only relevant, but also reliable. *Kumho Tire Company, Ltd.,* 526 U.S. at 152, 119 S.Ct. at 1176;
- Unfortunately, the erroneous designation as an expert in the disputed areas placed an unwarranted level of importance on unsubstantiated and admittedly subjective opinions. Where the testimony of a key witness is deemed unreliable, the possibility of prejudice is significantly increased, and the jury's ability to fairly determine the facts is not only negatively impacted, but is interdicted. *Franklin v. Franklin,* 2005-1814, pp. 7-8 (La.App. 1 Cir. 12/22/05), 928 So.2d 90, 94,

Jury verdict

- Under Louisiana law, it is unlawful for an employer to "[i]ntentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." LSA-R.S. 23:332 A(1).
- Plaintiff has initial burden to show:
    1. He was member of a racial minority
    2. He was qualified for the position he was discharged
    3. The position was filled by a person who was not a member of a protected minority class.
    St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993);

- In a "mixed-motive" case, the University must show termination would have occurred regardless of the issue of race. *Price Waterhouse,* 490 U.S. at 239-241, 109 S.Ct. at 1785
- Trial court committed reversible error in denying motion for new trial due to actual findings of jury which were inconsistent with the judgment. LSA-C.C.P. art.1972

Jury Vote

- "If trial is by a jury of twelve, nine of the jurors must concur to render a verdict unless the parties stipulate otherwise." LSA-C .C.P. art. 1797B
- Reversible Error was found in review that trial court was "clearly and legally wrong" in finding nine affirmative votes.

Cyprien v. Board of Sup'rs ex rel. University of Louisiana System, 5 So.3d 862 (2009)

Facts:

- Glynn Cyprien interviewed for head coaching position at University of Louisiana at Lafayette (ULL) on April 25, 2004 while an assistant at Oklahoma State University .
- Resumes were faxed by a student worker from Oklahoma State to Athletic Director Nelson J. Schexnayder, Jr. and Anthony Daniel on April 28 and May 1 in 2004.
- Resume indicated Cyprien had earned a B.S. degree from the University of Texas at San Antonio (UTSA), but in reality only attended UTSA from 1987 and 1990 without earning a degree.
- Cyprien was hired by ULL with a hire date of May 19, 2004 as where he was required to fill out a Personnel Data Booklet Form.
- The form indicated facts that he had obtained online degrees from Lacrosse University and only attended UTSA in contrast to his faxed resumes
- On July 16, 2004, Cyprien was fired for lying about his academic credentials following a newspaper article in *The Times-Picayune* stating the resume falsity.
- Mr. Schexnayder and Elwood Broussard, ULL's Director of Personnel Services, allegedly made false statements about Cyprien and "resume fraud"
- Cyprien believed he was owed damages for defamation and bad faith breach of contract

Issue(s): Was there a valid defamation claim against the defendants?

Did the defendants breach Cyprien's contract on a bad faith basis?

Holding: The court held there could be no conclusion of defamation as the statements by made by ULL regarding Cyprien's resume were not false. Due to the falsely represented academic credentials, there was no breach of contract as the ULL had basis to fire Cyprien due to failure of cause.

Rationale:

Burden of Proof

- According to court, it is the burden of the mover, ULL, for producing evidence on their motion for summary judgment. LSA-C.C.P. art. 966(B).
- After the mover, ULL, satisfies the burden of proof for summary judgment, summary judgment will be granted unless the non-moving party, Cyprien, brings evidence of a material factual dispute. *Wright v. Louisiana Power & Light*, 06-1181 (La.3/9/07)
- The false resume submitted by Cyprien asserted ULL's position on establishing a lack of factual support for defamation and bad faith breach of contract claims.

Defamation

- Court defines defamation as "tort which involves the invasion of a person's interest in his reputation and good name. *Fitzgerald v. Tucker*, 98-2313, p. 10 (La.6/29/99), 737 So.2d 706, 715

- Must be four elements for establishment of defamation cause of action
    1. Statement concerning another
    2. An unprivileged publication to a third party
    3. Fault (negligence of greater) on the part of the publisher
    4. Resulting injury
    Trentecosta v. Beck, 96-2388, p. 10 (La.10/21/97), 703 So.2d 552, 559

- Plaintiff must prove ULL published false statements, "with malice or other fault", damaging Cyprien with defamatory words. *Cangelosi v. Schwegmann Bros. Giant Super Markets*, 390 So.2d 196, 198 (La.1980)
- Recovery may be barred even with presence of elements of defamation at first look if the defendant can show the statement was true. *Doe v. Grant*, 01-0175, p. 9 (La.App. 4 Cir. 1/29/03), 839 So.2d 408, 416
- Court found the statements by ULL officials about Cyprien were not false as required for the defamation claim due to the undisputed fact the coach sent the university a false resume, and therefore are entitled to summary judgment on defamation claim.

Termination / Breach of Contract

- ULL was valid in rescinding the employment contract with Cyprien due to failure of cause resulting from misrepresentation of his academic credentials in which the coach's failure to earn a degree from an accredited four year institution meant he did not meet qualifications of the job. LSA-C.C. arts. 1948-1950, 1967.
- Thus rescission did not constitute bad faith breach of contract.

Garland v. Cleveland State University, 2009 Ohio 2838 (2009)

Facts:

- Michael Garland was hired as Cleveland State (CSU) head basketball coach in April of 2003.
- Employee agreement had a defined term of three years and base salary including coaching perquisites.
- Basketball team had a tough first season under Garland with a 4 and 25 win/loss record.
- New contract and contract extension signed in April 2004 that included new term going through 2008 and a reassignment clause.
- In March 2006, meetings took place between Garland and athletic director, Lee Reed, to discuss the future plans of the team
- Reed informed Garland on March 30, 2006 the program would be making a change.
- Garland interpreted this as termination where the university only meant to reassign Garland.

Issue(s): Did Cleveland State breach the employment agreement when it removed Garland as head basketball coach?

Holding: The court did not find a breach of contract to the agreement through reassignment and found in favor of the University and assessing court fees to the plaintiff.

Rationale:

Breach of Contract

- Four element to recover for breach of contract:
    1. Contract existence
    2. Performance by the plaintiff
    3. Defendant's breach
    4. Damages or loss as result of the breach

    Samadder v. DMF of Ohio, Inc.., 154 Ohio App. 3d 770, 2003 Ohio 5340, 798 N.E.2d 1141

- Court found the 2004 contract agreement valid and containing a legitimate reassignment clause allowing CSU to act at "its discretion."
- An employee's obligation to understand that not every conflict with an employer evidences a hidden intent to terminate the employee contract. *Simpson v. Dept. of Rehab & Corr*., Franklin App. No. 02AP-588, 2003 Ohio 988, P 25
- As Garland kept his salary and benefits mixed with no other signs of termination, the court found the actions of the university pursuant to the contract and therefore was not a breach of contract on the part of CSU.

Interpretation

- It is a matter of law in the determination if a contract is ambiguous. *Ohio Historical Society v. General Maintenance & Engineering Co*. (1989), 65 Ohio App.3d 139, 146, 583 N.E.2d 340
- Common words of an employee contract will be given ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly indicated from the document. *Cochran v. Cochran* (Aug. 12, 1982), Franklin App. No. 82AP-31, 1982 Ohio App. LEXIS 13133
- Contractual terms are ambiguous if the meaning of the terms cannot be deciphered from reading an entire contract, or if the terms are reasonably susceptible to more than one interpretation. *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr*. (1998), 129 Ohio App.3d 45, 55, 716 N.E.2d 1201
- Intent of the parties will be determined from the contract in the case if the contract is clear and unambiguous. *Mattlin-Tiano v. Tiano* (Jan. 9, 2001), Franklin App. No. 99 AP-1266, 2001 Ohio App. LEXIS 32
- CSU was found not to breach the agreement through the reassignment process as the terms of the clause were clear and unambiguous in the contract.

Kansas State University v. Prince, 2009 WL 4755466 (2009)

Facts:

- Ron Prince began employment with the plaintiffs, Kansas State University (KSU) and K-State Athletics, Inc. (IAC), as head football coach on December 5, 2005.
- The agreement was signed by all parties on February, 28 2006.
- The contract gave KSU right to terminate contract at any time without cause in exchange for stated amounts for each year determinate of the date of termination.
- Prince was terminated effective December 31, 2008.
- The 2005 agreement contained an integration clause
- New employment agreement was constructed and entered into in 2008 extending employment for five more years beginning January 1, 2008.
- 2008 kept same right to termination without cause as well as same monetary amounts of 2005 agreement.
- The 2008 agreement modified 2005 integration clause to omit the agreement "constitutes the entire agreement between the parties hereto and may be modified only in a writing signed by the President of the University, the Athletic Director and Coach"
- On August 7, 2008 Kansas State Athletic Director, Robert Krause, signed a "Memorandum of Understanding" (MOU) with "In Pursuit of Perfection" (IPP) owned by Ron Prince.
- The MOU stated that IAC would pay set amounts to the IPP if the owner, Prince was terminated before the end of the employment agreement.
- Prince was notified on November 5, 2008 that he was being terminated as KSU's head football coach, effective December 31, 2008.
- KSU paid Prince $1,200,000 required by the termination without cause provision of his 2008 agreement.
- No payment was paid to the MOU as the question remained of its validity.

Issue(s): Does the court have the proper jurisdiction to hear case supported by diversity jurisdiction.

Holding: Kansas State was not ignored as "arm of the state" thus did not have citizenship of any state and not fraudulently joined so requirements for diversity jurisdiction were lacking. The improper removal of the case determined there was no award of fees and costs.

Rationale:

Diversity Jurisdiction

- As federal removal jurisdiction is statutory in nature and is to be strictly construed, "those who seek federal jurisdiction must establish its prerequisites." 28 U.S.C.A. § 1441(a); *McPhail v. Deere & Co.*, 529 F.3d 947, 953 (10th Cir.2008)
- All parties on one side of litigation must be of different citizenship from the parties on opposing side to have "complete diversity". 28 U.S.C.A. § 1332. (Diversity Jurisdiction statute)

- Diversity jurisdiction requires suit to be between citizens of different states, and Kansas State was found to be an instrumentality of the State of Kansas and thus is not a citizen of any state for purpose of diversity jurisdiction. Postal Telegraph Cable Co. v. State of Alabama
- "Arm-of-the-state" doctrine is traditionally used to bestow sovereign immunity on entities created by state governments that operate as alter egos or instrumentalities of the states. U.S.C.A. Const.Amend. 11.
- Although arm of the state test is applied most frequently in determining the applicability of Eleventh Amendment immunity, it is equally applicable in determining one's citizenship for purpose of diversity jurisdiction, where crucial question is whether State is the real party in interest. U.S.C.A. Const.Amend. 11; 28 U.S.C.A. § 1332.
- Court looked at four factors in "arm of state" determination:
    1. Character recognized under state law assessment
    2. Autonomy consideration
    3. Assessment of entity's finances (state funding)
    4. Entity's concern between local or state affairs *Mt. Healthy* [*v. Doyle*], 429 U.S. [274] at 280, 97 S.Ct. 568 [50 L.Ed.2d 471
- In addressing, as part of arm of the state analysis, character ascribed to entity under state law, state law factor favored finding that intercollegiate athletic council (IAC) at Kansas state university was an arm of the state, for purposes of determining whether there was diversity jurisdiction. West's K.S.A. 76-721.
- For purposes of determining whether there was diversity jurisdiction, lack of autonomy pointed toward arm of the state status for intercollegiate athletic council (IAC) at Kansas state university.
- Financial analysis of IAC found the lack of a drain on Kansas state funds pointed to IAC not being treated as arm of the state. K.S.A. § 76-732; *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir.2000)
- Court was convinced that functions of IAC were much more than local affairs, and leaned toward "arm of the state".

Fraudulent Joinder

- This "fraudulent joinder" doctrine "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Mayes v. Rapoport*, 198 F.3d 457, 461-62 (4th Cir.1999)
- "Fraudlent joinder" can provide exception to requirement of complete diversity, and in that context exists for the circumstances do not offer any justifiable reason for joining the defendant without regard of motives of the plaintiff. 28 U.S.C.A. §§ 1441, 1447;
  Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11 th Cir.1998)

- Court determined fraudulent joinder doctrine could be applied to show fraudulent joinder to a non-diverse plaintiff. *Grennell v. W.S. Life Ins. Co.*, 298 F.Supp.2d 390, 395-400 (S.D.W.Va.2004).

- Doctrine can be applied to the case to destroy complete diversity; especially in the case with declaratory judgment. 28 U.S.C.A. §§ 1332, 1441(a); *Miller v. Home Depot, U.S.A., Inc.,* 199 F.Supp.2d 502, 508 (W.D.La.2001)

Proper Parties

- The court modified the traditional application of the fraudulent joinder doctrine to determine if Kansas State was a proper party on the underlying cause of action since it was a declaratory judgment action. 28 U.S.C.A. § 2201; *Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods,* 915 F.2d 167, 171 (5th Cir.1990).
- KSU further contends, however, that IAC is, in fact, an alter ego or instrumentality of the State, specifically, of KSU. The alter ego theory provides yet another means for a breach of contract action to be maintained by or against a non-party to a contract, under Kansas law. *Ice Corp. v. Hamilton Sundstrand Inc.,* 444 F.Supp.2d 1165, 1169 (D.Kan.2006)
- To decide if KSU was proper party of the counter claim on this contention, the court looked in to the determination of if IAC was an instrumentality or alter ego of KSU

Breach of Contract

- Under Kansas law, "anticipatory repudiation" is breach of contract which authorizes the nonbreaching party to bring an immediate action. *Cohen v. Battaglia,* 41 Kan.App.2d 386, 393, 202 P.3d 87 (2009)

Court Costs

- Standard for awarding fees and costs as result of improper removal depends on reasonableness of the removal; absent unusual circumstances, courts may award attorney fees under remand provision of removal statute only where removing party lacked an objectively reasonable basis for seeking removal, and conversely, when an objectively reasonable basis exists, fees should be denied. 28 U.S.C.A. § 1447(c).

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