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Good Faith and Fair Dealing: The Implied Duty to Meaningfully Educate the College Athlete

Margaret E. Ciccolella, University of the Pacific; Linda A. Sharp, University of Northern Colorado; Kerry Krueger, Law Firm of Kroloff, Belcher, Smart, Perry & Christopherson, Stockton, California

ABSTRACT

Statements found in the NCAA Manual and made by the NCAA President emphasize the primacy of academic success for college athletes. However the reality of a 'meaningful education' is often elusive due to the multitude of competing interests. College athletes must balance academic success with the extensive time demands of athletic competition, practice,

travel, conditioning, watching game film, etc. Often, this balancing act proves unsuccessful insofar as it pertains to the achievement of educational goals. To date, there has been little legal recourse available for aggrieved college athletes who wish to argue that they have been unfairly deprived of the opportunity for a meaningful education. Educational malpractice lawsuits have been unsuccessful and contractual recourse for students has been limited to cases in which specific promises have been breached by a university. The authors argue, however, that college athletes should be able to rely upon a university's good faith efforts to provide a meaningful education. If a university fails to act in good faith a cause of

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action based on a breach of the duty of good faith and fair dealing should be available to the college athlete.

KEYWORDS

College Sport - Contract - Good Faith and Fair Dealing

INTRODUCTION

'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement' (Restatement of Contracts [Second] (1981) §205). It is widely accepted that the basic legal relationship between student and university is contractual in nature (*Zumbrun v. University of Southern California* (1972) 25 Cal. App. 3d 1; *Wickstrom v. Northern Idaho College* (1986) 725 P. 2d 155 (Idaho)). The exchange of tuition for an education creates a contract between student and university as does the promise to participate in the intercollegiate athletics program in exchange for a meaningful education (*Gally v. Columbia University* (1998) 22 F.Supp. 2d 199 (S.D.N.Y.); *Ross v. Creighton University* (1992) 957 F.2d 410 (7th Cir.)).

The term 'meaningful education' begs precise definition. However, one commentator described a 'meaningful education' as the 'intellectual development of students engaged in good faith in the educational process' (Widener, 1982, p. 470). While a precise definition of a 'meaningful education' may be elusive, there is no dispute as to the importance placed upon the educational process by colleges and universities. Further, the NCAA and its member institutions prioritize the importance of the educational process and academic success, and explicitly acknowledge that the academic interests of student and college athlete are indistinguishable. For example, Myles Brand, President of the NCAA, spoke to this issue recently: 'since the participants in college sports are students – individuals whose first business is acquiring an education – their academic success is of central importance.' (NCAA State of the Association Address, 2006).

The 2005-2006 NCAA Manual (§§ 2.2 and 2.4) also emphasizes educational primacy:

Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the . . . educational welfare of student-athletes . . . Intercollegiate athletics programs shall be maintained as a vital component of

the educational program and student-athletes shall be an integral part of the student body . . . The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.

A representative statement by a university in its college athlete handbook concerning this issue is as follows: 'the primary purpose of a student's attendance at a collegiate institution is to acquire an education. The college athlete's goals must be the same as those of other students, with education as the primary pursuit' (Student-Athlete Handbook and Calendar, 2005-2006, p. 7). 4

If the primary purpose for all students is to acquire an education, then the university must carefully consider its obligation to provide a meaningful education. This is especially true for the college athlete who commonly faces the competing interests of the intercollegiate athletic and academic programs, e.g., time demands, conflicting schedules between practices/games and classes. For example, a study released at the 2007 NCAA Convention reported that almost one-third of Division I football and men's basketball players stated that athletics participation has prevented them from choosing the major they wanted. This survey raises further questions about whether college athletes are given enough opportunity to be students first (Knobler, 2007). 5

When a college athlete alleges that the university has failed to provide a meaningful education, legal action may result. Such a claim, as in *Ross*, typically complains of failures related to academic offerings or performance, e.g., the type and nature of a course, the quality of an instructor, the provision of tutors, and the quality of equipment. These suits typically allege educational malpractice and/or breach of contract (*Ross; Andre v. Pace University* (1996) 655 N.Y.S.2d 777 (App. Div.)). Claims in educational malpractice are essentially negligence claims alleging that an educational institution has failed to provide a quality education. The problem with such lawsuits is two-fold: (i) a claim in educational malpractice is generally not recognized as a viable cause of action by the courts; and (ii) promises made by the university to the student are often vague and therefore difficult to enforce. As a result, universities generally are not liable (Davis, 1991). 6

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However, a recent case, in which no specific promises were alleged, has allowed a breach of contract claim (*University of Southern Mississippi v. Williams* (2004) 891 So.2d 160 (Miss.)). In this case the court employed the principle of *good faith and fair dealing* that requires the highest ethical conduct on the part of the university and may provide a broader and more effective legal strategy for aggrieved college athletes in future lawsuits against universities.

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This paper will focus on the contractual duty of a university to meaningfully educate the college athlete emphasizing the duty of good faith and fair dealing. It will briefly explain why educational malpractice is not a viable cause of action for the student seeking legal recourse for alleged academic failures of the university. Thereafter, fundamentals of the contractual relationship between a student and a university will be discussed, followed by an analysis of how courts resolve these disputes both when specific promises are involved and when they are not. The *Ross* case will be discussed at length and an argument will be made to employ a neoclassical model of contract interpretation in college athlete/university disputes. The next section addresses the theory of good faith and fair dealing through an analysis of the *Williams* case and argues for the application of good faith and fair dealing in the college athlete context and is followed by concluding remarks.

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Educational malpractice
Negligence cases in which a student alleges academic failures of the university are typically framed as *educational malpractice*. Claims in educational malpractice are essentially negligence claims alleging that an educational institution has failed to provide a quality education. However, courts are quite clear, as in *Ross*, that they are reluctant to interfere in the educational process when the general quality of an education is attacked. Professionals in other disciplines have been subject to malpractice actions but the courts, generally for policy reasons, have refused such claims against educators (Davis, 1991). There is no satisfactory way to establish duty or a standard of care by which to evaluate an educator because education is a collaborative and subjective process whose success is largely reliant upon the student. There is inherent uncertainty about causation - does ultimate responsibility for results lie with the educator or the student? - and damages are often uncertain. There is also a concern that recognizing claims in educational malpractice will result in a deluge of claims against schools, thus opening the 'floodgates' of litigation. Finally, courts have recognized that

they are not properly equipped to oversee the day-to-day operations of a school and/or resolve disputes involving academic freedom and autonomy (Ross; Andre; Beh, 2000; Melear, 2003).

In a very few situations, claims in negligence have been viable but only on the rare occasions when there has been a constitutional and/or statutory basis for such an action. For example, in 1982 the Supreme Court of Montana held that school authorities owed a duty of reasonable care to a special education student in testing her and placing her in an appropriate special education program (*B.M. v. State* (1982) 649 P. 2d 425 (Mont.)). This court stated that it had no difficulty in finding a duty of care owed to special education students citing both the state constitution and relevant sections of state statutory law. The court allowed the negligence claim but remanded the case for consideration of damages. In a subsequent proceeding, plaintiff failed to meet her burden of proof regarding damages and no recovery was therefore awarded (*B.M. v. State* (1985) 698 P. 2d 399 (Mont.)). This case highlights the difficulty for the plaintiff in proving damages even when a claim in negligence is allowed. 10

It should be noted that malpractice actions sounding in contract are also typically rejected. Such claims ostensibly attack the quality of educational experiences provided to students but actually reiterate the questions concerning the reasonableness of conduct by universities in providing educational services. For example, in the *Gally* case, a dental student sued a dental school for breach of contract, including breach of good faith, alleging that the school failed to perform on promises in its code of conduct. Specifically, the student claimed the school failed to address her allegations of rampant cheating by other students and discriminatory treatment to her personally. The court acknowledged the contractual relationship between student and university but held that not every dispute between a student and university is amenable to a breach of contract claim. 'Where the essence of the complaint is that the school breached its agreement to provide an effective education, the complaint must be dismissed as an impermissible attempt to avoid the rule that there is no claim in New York for 'educational malpractice' (*Gally v. Columbia University* (1998) 22 F. Supp. 2d 199 (S.D.N.Y.), at p. 207). 11

The essence of a claim for educational malpractice raises questions that must be answered by reference to principles of duty, standards of care, and reasonable conduct. 12

These issues are integral to tort law, not contract law, and are typically rejected by the courts for the policy reasons described above (*CenCor, Inc. v. Tolman* (1994) 868 P. 2d 396 (Colo.)).

CONTRACT THEORY

Fundamentals of the Contractual Relationship

The basic legal relationship between a student and a university is contractual in nature (*Zumbrun; Wickstrom*). The relationship's terms are generally implied and found in documents such as enrollment agreements, student manuals, registration materials, catalogs, bulletins, circulars, and university regulations made available to the student. Implicit in the contract is the understanding that if the student complies with the terms prescribed by the university, she will obtain the degree sought (*Gally; Ross; Beh, 2000*). 13

Express contracts, denoting the obligations of both student and university, do exist but are less common (*CenCor*). The following enrollment agreement signed by the student provides an example: 14

I agree to attend all classes as scheduled, to perform all duties required by the College and abide by the rules and regulations of the College in accordance with the policies as set forth in the current College catalogue . . . I further understand that upon satisfactory completion of the above titled program (including the externship) and the fulfillment of my financial obligations to the College, I will receive the College diploma (*CenCor, Inc. v. Tolman* (1993) Petitioner's Opening Brief WL 13037812, at pp. 10-11).

For the college athlete, an express contract exists when documents are signed requiring the signature of university official(s) and/or the student, i.e., the letter of intent and a financial aid agreement (*Cozzillio, 1989; Davis, 1991*). For example, the following university mandated financial aid agreement requires the signatures of the college athlete and three university officials: 15

This athletics financial aid agreement is made in accordance with the provisions of the Constitution of the National

Collegiate Athletic Association that pertain to the principles of amateurism, sound academic standards, and financial aid to student-athletes. Your acceptance of this award means that you agree with these principles and are bound by them (Financial Aid Agreement, 2005-2006).

There is a long line of precedent establishing that the relationship between the university and the college athlete is contractual, based on the financial aid agreements and the national letter of intent (NLI). Beginning with the seminal case, *Taylor v. Wake Forest University* (1972) 191 S.E.2d 379 (N.C. Ct. App.), there is substantial authority for this proposition. In *Taylor*, the court had no difficulty interpreting the scholarship agreement as a contract. Thereafter courts have consistently followed this line of analysis (*Begley v. Corporation of Mercer University* (1973) 367 F. Supp. 908 (E.D. Tenn.); *Cardamone v. University of Pittsburgh* (1978) 384 A. 2d 1228 (Pa. Super. Ct.); *Barile v. University of Virginia* (1981) 441 N.E.2d 608 (Ohio Ct. App.); *Waters v. University of South Carolina* (1984) 313 S.E.2d 346 (S.C. Ct. App.); *Hysaw v. Washburn University* (1987) 690 F. Supp. 940 (D. Kan.)).

In an oft-cited article on the issue of the contractual nature of the athletic scholarship and the college national letter of intent, Cozzillio (1989) acknowledged precedent that has found the university-student relationship to be contractual, particularly when financial aid is involved. Cozzillio, however, also attempted to explicate the parameters of each party's rights and duties under the contract. At its foundation, the NLI sets forth a university's promise to provide financial aid in exchange for the college athlete's promise to attend the university and play a sport. Additionally, the college athlete must meet the express conditions in the contract. The NLI is null and void if by the opening day of classes an athlete has not met: '(a) the institution's requirements for admissions, (b) its academic requirements for financial aid to athletes, or (c) the NCAA requirements for freshman financial aid (NCAA Bylaw 14.3) or the junior college transfer requirements' (Collegiate Commissioners Association (2005) § 7b).

The university's duty under the scholarship and letter of intent is to provide a financial aid package, an opportunity to participate in athletics and 'to provide an opportunity to secure an education' (Cozzillio, 1989, p. 1367). Consistent with the university's stated duty,

Cozzillio (1989, p. 1370) reiterated the concept of educational primacy as a part of the university's duties: 'First, the student-athlete's purpose in attending college is to obtain an education'. This concept that interpretation of bilateral promises found in the scholarship agreement and national letter of intent must be broad enough to include the opportunity to secure an education is a pivotal concern. It should be considered unconscionable to require college athletes to maintain good academic standing and yet fail to require the university to provide a meaningful educational opportunity for college athletes.

When Specific Promises are Involved

Breach of contract is a viable theory on which an aggrieved student may seek a remedy against a university. Specifically, the likelihood of plaintiff's success rises substantially when the suit alleges the breach of identifiable promises relevant to the terms of these agreements. Universities are more likely to incur liability when there is a breach of a specific rather than vague promise, arguably because it is easier to state a claim. Case law is replete, as exemplified by the cases discussed below, with favorable outcomes for a student-plaintiff when a university knowingly or recklessly makes *specific* false or misleading statements in the course of an agreement. Course catalog statements typically describe the nature and extent of academic programs and can create a reasonable expectation of what is available to the student who relies upon the catalog and decides to matriculate. When the statements are specific and either false or misleading, university liability may ensue. The following are examples of statements for which schools were liable:

1. *Misrepresenting the type and quality of equipment, facilities, and/or faculty.* Students have a cause of action when they allege that statements by school officials and the catalog misrepresented that students would train on 'up-to-date equipment and instruments' and work under 'qualified faculty' (*CenCor, Inc. v. Tolman* (1994) 868 P. 2d 396 (Colo.), at p. 399). A student received damages when a community college falsely represented in its catalog and by statements of school officials the type of equipment and training that would be available to him in welding class (*Dizick v. Umpqua Community College* (1979) 599 P. 2d 444 (Ore.)).

2. *Misrepresenting accreditation status.* The university was liable when it misrepresented in the catalog and in statements from school personnel that the respiratory therapy school was accredited. The statements were made with a reckless disregard for whether the college could perform (*Lesure v. State* (1990) Tenn. App. LEXIS 355).

3. *Breach of a catalog promise.* The court found a breach where a 'catalogue promised such things as qualified teachers, modern equipment, a low teacher to student ratio, and excellent training aids' but that the 'college actually provided one unqualified teacher in a room with seating for 42 students, all taking different level courses, with only two 10-key machines' and the 'only training aid was an unused overhead projector'. The jury found that the school knowingly made false and misleading statements (*American Commercial Colleges, Inc. v. Davis* (1991) 821 S.W.2d 450 (Tx. Ct. App.), at p. 452).

When Specific Promises are not Involved

The question remains whether there can be liability when there are breached promises that lack the specificity of the above-cited examples. In *Gally*, the court held that merely alleging a breach without the identification of a 'specific breached promise' did not state a claim upon which relief can be granted. Likewise, in *Jackson v. Drake University* (1991) 778 F. Supp. 1490 (S.D. Iowa), a court rejected the claim of a college athlete who asserted that rights to an educational opportunity and to athletic participation were implied within the express contract between him and the institution. The court declined to adopt this view as it stated that 'where the language of a contract is clear and unambiguous, the language controls' (p. 1493). In the *Hysaw* case a few years earlier, a federal district court also rejected a breach of contract claim by a college athlete who asserted that there was an implied right to play football in the scholarship agreement that he signed. According to the court, the right to play football is not a promise made in the scholarship agreement.

dealing with a college athlete's contract claims is the *Ross* case. In 1978, Creighton University, a private liberal arts school, provided Kevin Ross with a basketball scholarship to attend Creighton. Creighton sought this contract with Ross knowing he was not academically prepared for the rigors of its academic program. At the time of the offer, Ross' academic ability was far below the average Creighton student, i.e., Ross was from an academically disadvantaged background and Ross' ACT score, a test used to predict academic success at college, was in the bottom fifth percentile while the average student admitted to Creighton was in the upper 27th percentile. Based on Ross' academic disadvantages, Creighton offered tutoring and academic support and assured him he would be able to participate in a meaningful education. Ross accepted and played basketball for four years for Creighton. During this time, Ross maintained a D average, while completing only 96 units. Many of these units did not apply to the necessary 128 units needed to graduate. Ross alleged he took these courses upon advice from the athletic department personnel. At the end of these four years, Ross was no longer eligible to play college basketball and still had over a year's worth of academic work to complete in order to get a degree. It is important to note that while at Creighton, Ross' written coursework was read and typed by the athletic secretary. Although a Creighton student for four years, at the end of his college basketball career, Ross had the overall language skills of a fourth grader and the reading skills of a seventh grader.

In 1982, Creighton paid for Ross to attend one year of a private elementary school to acquire basic educational skills in reading and writing. Unlike his fellow elementary students, Kevin had already attended public schools for 12 years and Creighton University for four years. When Ross then tried to complete his college education at a local university, he was forced to withdraw due to lack of funds. Ross alleged he then fell into a deep depression. 22

In 1989 Kevin Ross filed a lawsuit alleging, among other claims, that Creighton University had breached its duty of good faith and fair dealing in his contract with the University. According to Ross, this duty imposed an obligation on Creighton to provide him with a reasonable opportunity for meaningful participation in its academic programs. Ross alleged that Creighton breached this contract when it denied him any real opportunity to participate in and benefit from the University's academic program. The basis for this claim 23

alleged numerous University failures, e.g., the University failed to provide adequate tutoring services; the University failed to require Ross to attend tutoring services; the University failed to allow Ross to red-shirt to spend more time on his academics; and the University failed to provide funds so that Ross could complete his education.

Although Ross' claims were dismissed by the federal district court, the Seventh Circuit Court of Appeals reversed and remanded on the contract claim, specifically addressing whether the plaintiff was able to point to identifiable contractual promises that the defendant failed to honor. The court held that Ross' contract claims alleged more than simply an inadequate education; rather, the student asserted that the university knew of his deficiencies, promised him specific services to assist him academically, and breached its promise by failing to provide those services. The court used precedent to point out examples of specific promises which a court could objectively use to assess whether a breach of contract had occurred, e.g., the failure to provide a set number of instructional hours (*Paladino v. Adelphi University* (1982) 454 N.Y.S.2d 868 (App. Div.)); the failure for a professor to give lectures and final exams and all students received a grade of 'B' (*Zumbrun*); the failure to provide instruction fundamental to skills necessary for a specific qualification such as journeyman (*Wickstrom*). The Seventh Circuit's decision would have allowed a trial court to determine 'whether the institution made a good faith effort to perform on its promise', whether Ross had 'any real access to its academic curriculum' and an adjudication on 'Mr. Ross' specific and narrow claim that he was barred from any participation in and benefit from the University's academic program without second-guessing the professional judgment of the University faculty on academic matters' (*Ross v. Creighton University* (1992) 957 F.2d 410 (7th Cir.), at p. 417). Creighton settled with Ross for \$30,000 (Olivas, 1997). Although the first instance court mentioned the notion of good faith, it based its holding on the failure of Kevin Ross to plead specific broken contractual promises. The court did not address the context of the situation nor look for fairness in the circumstances of Ross' situation at Creighton University (Beh, 2000).

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A critique of the *Ross* decision has been offered by Beh (2000). With regard to good faith, Beh stated that the court should have examined: whether the school provided any tutoring at all, and if so, was that program comparable to other schools; whether Ross' practice schedule left

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him adequate time for class, tutoring and studying; and whether the school engaged in ethical conduct toward Ross as required by the NCAA. With regard to bad faith, Beh stated that the *Ross* court should have examined: whether Creighton assessed Ross' academic ability during the recruiting process (or did it just focus on his athletic talents); whether Creighton knew that its program was educationally inadequate to meet Ross' needs; whether Creighton misrepresented the nature of the academic support program to Ross in written and/or oral communications; and whether Creighton followed the ethical tenets of the professional organizations to which it belonged. Beh argued that such questions 'focus on the objective reasonableness of the program in comparison to similar programs, external standards of good practice, and any evidence of bad faith and improper motives. This result is more satisfying than complete abdication of judicial oversight in that it can protect students from exploitive conduct while still according deference to academic decisions' (Beh, 2000, p. 219). Beh, therefore, proposed an analysis that looks not just at specific promises found in a document but at the larger context of the relationship between the parties.

The context of the college athlete/university relationship

Contract law has been viewed as providing a framework for the enforcement of promises (Feinman, 1990). *Classical contract theory* provided a vehicle to allow parties the 'freedom of contract', which meant that parties were essentially allowed to fashion their own contracts with whomever they chose and with terms that they jointly negotiated. So long as the parties did not violate public policy or the law, they were free to make contracts that reflected their own self-interests. This view of contracts emphasized notions of individual autonomy in which the courts limited their intrusion into the parties' ability to make contracts (Feinman). 26

However, this theory presupposes that parties are able to act in their own best interests and to operate on an even playing field. The *neoclassical model of contract interpretation* (modern contract) has been fashioned to recognize that courts sometimes need to intervene in contracts and not just apply the abstract and formal contract principles embodied in the classical model (Eisenberg, 1984). Thus, the neoclassical model allows courts to look at the context of a contract, not just the express language. It permits courts to look at the relational aspects of a contract to try and 27

reconcile the inherent tension that is at the heart of many contracts; between individual autonomy in making contracts and issues of social or individual welfare. The neoclassical model focuses on flexibility and pragmatism and allows arguments based on policy analysis, empirical inquiry and practical reason. The formalistic inquiry associated with the classical model gives way to considerations of fairness and interdependence (Eisenberg).

In Melear's article (2003) dealing with the evolution of the contractual relationship between student and institution, the author states that students, who are now characterized as consumers in some contexts, 'have specific and often precise expectations of institutional performance and actively seek judicial relief through contract theory for perceived abrogations of these expectations....In its contemporary manifestation, contract theory provides students an outlet that was previously unavailable to seek redress against their colleges and universities' (Melear, 2003, p. 175). Further, although the relationship between student and university is contractual in nature, it is not always appropriate to adhere to the rigid interpretation which is a part of the classical model. 28

Davis (1997) made a compelling argument that courts improperly ignore the relevant context of the college athlete and university relationship in adhering to a classical model of contractual interpretation, as in the *Ross* case, which focused primarily on the bargain principle, i.e., what the parties have bargained for in the contract. Davis argued that courts should interpret contracts between college athletes and universities using the neoclassical model that focuses on the relational aspects between the parties. Courts, according to Davis, need to look at the relative status of the parties and the nature of the context in this situation. Courts that continue to adhere to the formalistic rules of the classical model do not fully appreciate the relative powerlessness of the college athletes. Further, the classical model does not account for the fact that college athlete contracts with their universities are not in any way negotiated. They are a take-it-or-leave-it proposition and not the business- to-business contract typified by the classical model. 29

Hanlon (2006) has also echoed the call for a neoclassical interpretation in the context of the college athlete contract with the university due to the disparity of bargaining power that exists between the parties. For example, in the NLI 30

situation, the language of this agreement disproportionately favors the NCAA and its member universities. 'In fact, there is no bargaining power afforded to the prospective student-athlete' (Hanlon, 2006, p. 44). Hanlon (p. 46) therefore characterized the relationship between the university and the college athlete as an 'unconscionable contract of adhesion'. Using the neoclassical model would allow courts to address fairness of a contract by looking at outside social factors, public policy, and community values. 'Several doctrines have developed as a result of the neoclassical contract law evolution including promissory estoppel, unconscionability, condition precedent and good faith' (Hanlon, 2006, p. 60).

Riella (2002), in an article discussing the National Letter of Intent (NLI), also characterized it as an unconscionable contract based on the inherent disparity in position and bargaining power between the parties and noted the failing of a strict contractual interpretation that does not recognize implied obligations of contracts between universities and athletes. 'Such holdings fail to recognize that the documents that form the contract, and especially the NLI, are not bargained-for exchanges, but standard form agreements' (Riella, 2002, p. 2199). 31

Thus, the fact that some promises are not explicitly stated in the contract document should not be an impediment to arguing that some aspects of the relationship, e.g., educational primacy, should be an important component of the deal. If courts appropriately adopt the neoclassical model of interpretation in the case of the college athlete and university relationship, justice is served by adhering to the longstanding principle of 'good faith and fair dealing'. 32

Good Faith and Fair Dealing *Fundamentals of Good Faith and Fair Dealing*

This section addresses the principle of good faith and fair dealing, analyzes a recent good faith and fair dealing case in the student-university context and argues for its application in the college athlete relationship with the university. The aggrieved student suing the university for alleged breached promises that are not explicitly stated in the contract should have recourse using a neoclassical model of contract interpretation which employs the good faith and fair dealing concept as a tool to address the context of the college athlete and university relationship and the expectations of the parties. 33

It is a fundamental principle of law that in every contract there is an implied covenant of good faith and fair dealing in the interpretation and enforcement of contracts, and an implied duty of cooperation on both sides (Lord, 2005; *Logan v. Bennington College* (1995) 72 F.3d 1017 (2d Cir.); Restatement (Second) Contracts, 1981). The duty of good faith requires cooperation, fairness, and decency consistent with the 'parties' agreed-upon common purposes and justified expectations' (Beh, 2000, p. 216). 34

The obligation of good faith and fair dealing when one has induced expectation is historically rooted in a principle that imposes high ethical conduct in the performance of a contract. In 1877, the United States Supreme Court stated that the principle of good faith is 'one of sound morals as well as sound law' (*Insurance Co. v. Wolff* (1877) 95 U.S. 326). Previously, in 1868, the Supreme Court had considered the 'good faith' rule to be a well-settled principle of law, i.e., the rule that one may not defeat the just expectations of those with whom they contract: 35

Corporations as much as individuals are bound to good faith and fair dealings, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just expectations which their own conduct has superinduced (*Railroad Co. v. Howard* (1868) 74 U.S. 392, at p. 413).

In another judicial definition, the California Supreme Court has stated that the principle of good faith 'exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made' (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317 (Cal.), at p. 349). 36

The duty of good faith explicitly considers the behavior of one party to another. The Supreme Court stated that 'Courts from time immemorial have held that those who undertake to act for others are held to good faith and fair dealing and may not favor themselves at the cost of those they have assumed to represent' (*Trailmobile Co. v. Whirls* (1947) 331 U.S. 40). This sentiment has also been expressed at the state level: 'the covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of 37

another. Such power must be exercised in good faith' (*Carma Developers (Cal.) Inc. v. Marathon Development Cal. Inc.* (1992) 2 Cal.4th 342 (Cal.), at p. 372).

By extension, this has direct application to the student-university relationship. One court aptly described this notion as follows: 'The judicial inquiry should be directed toward the *bona fides* of the decisionmaking and the fairness of its implementation: whether the institution acted in good faith and dealt fairly with its student body should be the polestar of the judicial inquiry' (*Beukas v. Board of Trustees of Fairleigh Dickinson* (1992) 605 A.2d 776 (N.J. Super. Ct. App. Div.), at p. 784). 38

Beh (2000, p. 184) contends that good faith and fair dealing, 'the work horses of contract law', hold the potential to 'police' the student-university relationship, even in cases where the promises made are vague. 'Good faith and fair dealing can provide a framework to adjudicate student claims that is not unduly intrusive in that gray area where student claims are less specific but reasonable expectations seem clear' (Beh, 2000, p. 215). Courts may look at external sources such as 'custom, community standards in the academic community, literature of higher education, and codes of ethics of professional organizations' (p. 216) to provide courts with external, objective standards in order to force accountability upon the academic institution. 39

Application of Good Faith and Fair dealing in the Student-University Setting

The recent case of *Williams* is a seminal case for the application of the good faith principle in the student relationship with the university. In *Williams*, the Supreme Court of Mississippi held the university breached its duty of good faith and fair dealing with a graduate student when it consciously frustrated her attempts to prepare and defend her dissertation. The court's analysis focused on the student's expectation of pursuing her academic endeavors in an unfettered environment as well as the university's obligation to conduct itself in concert with its relevant publications. 40

Williams began her doctoral work in the summer of 1985. Upon completion of her coursework, having received grades of A's and one B, and passing her comprehensive examination and two foreign language examinations, she was admitted to candidacy for her Ph.D. in the summer of 1990. At that time, she was also hired by the department to teach undergraduate courses. She alleged her 41

chairperson engaged in sexual harassment and assault and after reporting this to the Dean of the College and the Chair of the department, she requested a new chairperson. Over the course of the next four years, Williams made repeated requests for advice and direction on her dissertation but received no reply. Finally, in 1994 she met with the new chairperson and made plans to finish within the year. In June of 1995 however, she received a letter from the chairperson, acknowledging his 'unconscionable lack of response' and stating that her dissertation topic was not viable (*University of Southern Mississippi v. Williams* (2004) 891 So.2d 160 (Miss.), at pp. 171-172). This situation effectively precluded Williams from defending a dissertation that had been approved and was followed by six years' work on the project. No option for redress was offered internally by USM.

In *Williams* the plaintiff filed suit arguing USM breached the contract created by its graduate catalog since USM failed to provide the educational opportunity for which she paid, by not giving her a fair hearing regarding her complaints about actions and inactions of the professors, and by not acting with good faith and fair dealing. USM countered that it did not violate any term of an alleged contract and that Williams was merely suing over a bad grade. Williams prevailed on her contract claim and was awarded \$800,000 in damages. 42

The Supreme Court of Mississippi had previously held that 'the student-university relationship is contractual in nature and the terms of the contract may be derived from a student handbook, catalog, or other statement of university policy' (*University of Mississippi Medical Center v. Hughes* (2000) 765 So.2d 528 (Miss.), at p. 534). The court in *Hughes* also held that 'rigid importation of the contractual doctrine has been rejected' (p. 534 noting the potential danger of judicial intervention in the academic context). The court stated in *Williams*, however, that judicial reluctance to intervene in the academic context does not mean that academic decisions are inherently unreviewable. ' [D] eference should not be construed as a license for administrators to act arbitrarily and capriciously when making decisions that affect a student's academic standing, nor to act in bad faith or deal unfairly with a student' (*University of Southern Mississippi v. Williams* (2004) 891 So.2d 528 (Miss.), at p. 169). 43

In recognizing that every contract contains an implied covenant of good faith and fair dealing in performance and enforcement, the *Williams* 44

court cited a previous iteration of good faith and bad faith:

Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness, or reasonableness (*Cenac v. Murry* (1992) 609 So.2d 1257 (Miss.), at p. 1272).

In affirming the jury's verdict for the plaintiff, the court found sufficient evidence to conclude that 45
USM breached the duty of good faith and fair dealing in its relationship with Williams. The court acknowledged evidence that USM and its employees knowingly conducted themselves in ways that violated standards of decency, fairness, and reasonableness. The court noted the uncontested academic performance of Williams and found that she 'was a mature, accomplished student on the verge of full acceptance into academia', and the inactions of USM employees 'precluded, or at least severely delayed, Williams' ability to complete the final requirement of a doctorate, the presentation and defense of an acceptable dissertation' (*University of Southern Mississippi v. Williams* (2004) 891 So.2d 160 (Miss.), at pp. 171, 173). In so doing, USM failed to fulfill its contractual obligations to Williams. The Supreme Court of Mississippi remanded on the issue of damages. Thereafter, the University of Southern Mississippi and Williams settled the claim for an undisclosed amount (Leifer, 2006).

Good Faith and Fair Dealing with College Athletes

Ross opened the door for college athletes to 46
find redress for university breach of contract claims based on the failure to perform specific promises. And, while *Ross* dealt with the college athlete, *Williams* opened the door wider for any student, including an aggrieved athlete under a general notion of good faith and fair dealing. Melear (2003) concludes that the relationship between student and university emphasizes reciprocity of good faith and reasonableness, and that courts caution against the rigid application of purely contractual principles. According to Melear (p. 179), the 'polestar' of judicial inquiry should be directed toward the fairness of decisions and whether institutions act in good faith and deal fairly with students.

Therefore, the neoclassical model of contract interpretation should be used by courts and the good faith and fair dealing concept must be employed in college athlete cases alleging a lack of meaningful opportunity for an education. With regard to the college athlete, Davis (1991, pp. 787-788) stated that schools often control the daily lives of athletes and, in so doing, 'a relationship of trust and dependence often develops that is not present in the relationship between lay students and universities'.

Many commentators have noted that the increasing commercialization of college sports has made it even more difficult for universities to reconcile the gap between college sports and the fundamental mission of higher education. Allen Sack (2001, p. B7), a well-known commentator on collegiate sport stated: 'longer seasons, significantly lower admission standards for athletes, and the growing power of coaches over all aspects of an athlete's life are just a few of the changes spawned by the unprecedented commercialism that has invaded athletics departments'. Numerous books have documented the basic incompatibility of big-time college athletics and educational primacy (Sack & Staurowsky, 1998; Sperber, 2000; Shulman & Bowen, 2001; Duderstadt, 2000; Zimbalist, 1999). Eitzen (2000, p. 30) has captured the essence of the matter:

Not only do typical athletes in big-time sports enter at an academic disadvantage, they often encounter a diluted educational experience while attending their schools. Coaches, under the intense pressure to win, tend to diminish the student side of their athletes by counseling them to take easy courses, choose easy majors, and enroll in courses given by faculty members friendly to the athletic department.

Despite the call for educational primacy by Myles Brand and the statements embodied in the NCAA Manual, the reality is far from the stated ideal. In fact, the current commercial structure of big-time college sports is essentially incompatible with education (Eitzen, 2000; Sack, 2001).

Therefore, the good faith and fair dealing principles found in *Williams* should be applicable in a college athlete context. This case evidenced the university's powerful bargaining position in dealing with the academic needs of Williams. Likewise, college athletes generally have little experience and/or expertise in understanding whether their academic course of study matches a university's academic offerings and expectations or even whether the academic experience that they are receiving is a

meaningful one. Conversely, the university is in a position to reasonably predict how a student's academic ability will match the university academic programs. It should be noted that at the time the athlete is recruited, the university controls the educational experiences offered. Given this environment and based on the disparity of power in the college athlete/university context, Davis (1997) asserted courts should adopt a neoclassical model of contract interpretation, allowing the expectation interest of college athletes to be considered. Courts should not 'reject the notion of interdependence and communal interests between college athletes and their institutions' (p. 1145).

College athlete handbooks and NCAA guiding principles which expressly state that athletes are 'students first' or that the 'academic endeavors are of primary importance' provide specific support for the proposition that the athlete has been promised a meaningful academic environment. Athletic performance expectations that significantly interfere with this promise, such as practice times that do not allow an athlete to attend required courses or obtain academic tutoring should result in a finding of breach based on the good faith and fair dealing principle. The survey results reported at the 2007 NCAA Convention which showed that almost a third of Division I football players and men's basketball players stated that athletic participation prevented them from choosing the major they desired raises more questions about the issue of educational primacy in this highly commercialized environment (Knobler, 2007). 52

Additionally, arbitrary and capricious decisions by the university and those made in bad faith, as exemplified in both *Ross* and *Williams*, place the college athlete at great academic risk and the university at risk for breach of contract under principles of good faith and fair dealing. Specifically, academic advising to meet the needs of athletics rather than academia, failure to provide assistance with academic-related concerns, failure to allow college athletes the same educational opportunities as other students, are all indicative of a failure to put the student first or to make academics a priority as promised in college athletics. 53

Good faith and fair dealing with students, as expected under *Williams*, requires an athletic department first look to the students' academic abilities and performance and only then to examine athletic abilities. The good faith doctrine provides a mechanism by which courts can 54

recognize the educational component of an institution's obligation to its college athletes (Davis, 1991).

Conclusion

Judicial deference to educational institutions and the courts' reluctance to consider educational malpractice has allowed past claims by students to be ignored and universities to proceed without accountability and oversight (*Gally; CenCor, Inc*). The *Ross* holding suggests that the courts are willing to consider an action in contract that alleges identifiable breaches that a court can objectively consider and avoid interfering with matters of academic substance. 55

Moreover, colleges should provide a critically important function in offering opportunities for college athletes to further develop their intellectual abilities. Institutional practices that result in a prioritization of athletic over academic interests and limit a student's participation in academics may represent a breach of good faith and fair dealing for which the institution may be liable as evidenced by the fact pattern in *Williams*. 56

If good faith performance of a contract deals with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party' (*University of Southern Mississippi. v. Williams* (2004) 891 So.2d 160 (Miss.), at p. 170), then it is a reasonable assertion that the agreed common purpose between student and university is education. Courts should use a neoclassical model of contract interpretation and address the contextual aspects surrounding the college athlete/university relationship. Simply put, the university should be held accountable to be faithful to its primary educational purpose and the specific expectations it creates with all students, i.e., to act in a way that exemplifies good faith and fair dealing with the college athlete. This has special importance given the increasingly commercial approach by universities investing in competitive marketing to attract and induce the matriculation of prospective students and student-athletes (Beh, 2000). 57

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