

DOES A COACH OWE PLAYERS A FIDUCIARY DUTY? EXAMINING THE RELATIONSHIP BETWEEN COACH AND TEAM

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I. INTRODUCTION

The relationships between college and university coaches and student-athletes raise a myriad of questions about duties and responsibilities that the former owes the latter. What happens when a coach harms a student-athlete's chances at a future in athletics—in college or professionally—or so damages a program as to endanger the student-athlete's ability to fulfill his role as a college or university ambassador? Does a player have recourse under the theory of fiduciary duty?

The concept of fiduciary duty can be applied to relationships touching all aspects of life. For many individuals in the United States, participating in sports is an integral part of growing up.¹ A student-athlete's success at a college or university is crucial, both in the classroom and on the court. Given the amount of time, energy, and money spent toward fostering the relationship between coaches and student-athletes, it is no wonder that many attorneys suspect this relationship may be a fiduciary one.² Classifying the relationship between coaches and student-athletes as fiduciary would impress additional duties upon college and university coaches, as well as the employing colleges and universities.

Part II of this article provides hypothetical situations questioning the implications of a fiduciary duty at the college and university coaching level. Part III outlines what it means to be a fiduciary and explores different modes of analyzing whether one is a fiduciary. These modes include the Scharffs-Welch framework and the Smith critical resource theory. Part III also provides context by reviewing the fiduciary

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1. See Thomas Rosandich, *Collegiate Sports Programs: A Comparative Analysis*, 122 EDUC. 471, 474 (2002) (explaining that approximately 400,000 individuals participated in college athletics in 2002 and devoted significant time and energy to their individual sports); see also Child Trend's DataBank, Participation in School Athletics, http://www.childtrendsdatabank.org/pdf/37_PDF.pdf (last visited Feb. 8, 2009) (providing studies that show over sixty percent of high school students participate in athletics).

2. See, e.g., Michael L. Buckner, *University Liability in Florida when Coaches Refer Student Athletes to Sports Agents: A Fiduciary Approach*, 73 FLA. B.J. 87 (1999); Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 170–72 (2002).

relationships arising in the college and university environment. Part IV discusses the role of college and university coaches generally. Part V explores case law and scholarly arguments concerning whether coaches should be viewed as fiduciaries and applies the two previously described analytical modes to the relationship between a coach and a student-athlete. Finally, Part VI revisits and reviews the hypothetical situations in light of the discussed case law and strategies.

II. HYPOTHETICAL SITUATIONS

A. The Future Professional Athlete

The student-athlete may be justified in an expectation of fiduciary protection when the school exerts significant control over the student-athlete as a result of his or her participation in school-sponsored athletic activities.³ Courts have held that there is a special relationship between a college or university and a student-athlete sufficient to impose a duty of reasonable care on the institution.⁴ In a column for the Florida Bar Journal, one attorney submitted the following hypothetical:

The star running back at State U. is the leading rusher in the nation during his sophomore year and is projected by professional scouts and sports experts to be a top 10 pick in the National Football League (NFL) draft after his senior year. The head football coach at State U. refers the star running back to a professional sports representative ("sports agent"). The coach is financially compensated by the sports agent for the referral. Because of the sports agent's shady representation, the star running back violates national intercollegiate athletic regulations, which cause his intercollegiate eligibility to be revoked. Thereafter, the star running back enters the NFL draft after his sophomore year and is picked in the second round. Consequently, the star running back loses millions of dollars in potential earnings as a result of being picked in the second round. The star running back initiates a lawsuit against State U. alleging that the university had a special duty to protect student athletes from the actions of the coach.⁵

The author, Buckner, argues that the nature of the coach-student-athlete relationship supports the protection of a student-athlete's expectations of

3. Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927-28 (N.C. Ct. App. 2001) (holding that there was a special relationship between the university and a sophomore cheerleader who suffered permanent brain damage when she fell from a pyramid while a member of the school-sponsored cheerleading squad).

4. See Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1368-69 (3d Cir. 1993).

5. Buckner, *supra* note 2, at 87.

intercollegiate play and potential future professional sport benefits.⁶

B. The Student-Athlete Who Lost Eligibility

When a coach damages a student-athlete's future in college and university athletics, the student-athlete may look to legal concepts like fiduciary duty to hold the coach accountable. In late 2008, a basketball coach at a major university told the press that he admitted responsibility for the violation of a conference rule, preventing a prized recruit from joining his team.⁷ By failing to stay adequately informed of the student-athlete's enrollment status, the coach was unable to advise the student-athlete not to enroll at the conference institution part- or full-time because he did not meet initial National Collegiate Athletics Association ("NCAA") eligibility requirements.⁸ The coach thought the athlete was *attending* class, when, in fact, he actually *enrolled* during August to remain on track academically.⁹ When the coach requested a waiver of the rule, he was denied.¹⁰ The athlete, a former junior college player, told the coach that if the NCAA Clearinghouse denied his appeal, he would go overseas to play professionally with hopes of getting to the NBA.¹¹

C. The Coach Who Ignored the University Mission, and NCAA Regulatory Rules

What happens when a coach damages the reputation of the college or university while also hindering the future of the student-athletes? Recently, a basketball coach became the subject of national media attention when accused of five major recruiting violations.¹² An NCAA report alleged that he "failed to deport himself . . . with the generally recognized high standard of honesty" and "failed to promote an atmosphere for compliance within the men's basketball program."¹³ These alleged violations eventually led to the coach's resignation.¹⁴ But more importantly to the program, violations of NCAA rules can carry additional punishments including postseason ineligibility and loss of scholarships.¹⁵

6. *Id.* at 88; see also Timothy Davis, *Student-Athlete Prospective Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585, 618–19 (1994).

7. Associated Press, *Sadler Takes Blame for Sallie's Woes*, ESPN.COM, May 29, 2008, <http://sports.espn.go.com/espn/wire?section=ncb&id=3418218>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *NCAA lists five major violations; IU AD 'profoundly disappointed'*, ESPN, Feb. 15, 2008, <http://sports.espn.go.com/ncb/news/story?id=3243793>.

13. *Id.*

14. In fact, the coach resigned during the 2007–2008 basketball season. *Id.*

15. *Id.*

III. FIDUCIARY

A. What Is a Fiduciary?

It is difficult to comprehensively define a fiduciary relationship. Justice Frankfurter wrote, “to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?”¹⁶ Fiduciary duty is rooted in concepts such as good faith, trust, and confidence, and the duties that courts place under the umbrella of “fiduciary duty” are often described in lofty terms.¹⁷ A traditional example is the trustee of a trust.¹⁸ Here, the trustee-fiduciary owes the beneficiary of the trust several duties, including good faith, honesty, and fair dealing.¹⁹

Fiduciary law applies when one places special confidence in another and the latter accepts that duty.²⁰ Fiduciary duty originated in the corporate context, describing the duty directors owe to the corporation and shareholders, and requiring a director to act with loyalty, diligence, good faith, and in the best interest of the corporation.²¹ Fiduciary duty is also used as a label, describing duties in a partnership.²² In a landmark case, *Meinhard v. Salmon*,²³ Justice Cardozo stated:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.²⁴

Resulting from this stringent attempt at application of fiduciary duties, some states allow for the contracting away of specific fiduciary duties.²⁵ Additionally, while courts often list duties in almost unreachable ideals, in practice, they are much less demanding.²⁶ This is also true in the context of applying fiduciary duty at the college and university level.²⁷

16. *SEC v. Chenery Corp.*, 318 U.S. 80, 85–86 (1943).

17. Brett G. Scharffs & John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159, 162 (2005).

18. *See, e.g., Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955).

19. *Id.*

20. Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1835 (2004).

21. 15 U.S.C. § 78j(b) (2006).

22. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

23. *Id.*

24. *Id.* at 546.

25. *E.g., DEL. CODE ANN.* tit. 8, § 102(b)(7) (2004) (allowing the contracting away of certain fiduciary rights).

26. *Id.*

27. Courts are reluctant to find fiduciary duty at the college level. *See* discussion

Some relationships are routinely found to be fiduciary in nature, as one person places trust and confidence in another, more dominant person.²⁸ These include the trustee/beneficiary relationship, lawyer/client relationship, agent/principal relationship, doctor/patient relationship, and director/corporation relationship.²⁹ Some relationships are considered fiduciary in particular situations, such as when there are additional facets to the relationship indicating a particular degree of special confidence.³⁰

The number of potential relationships classified as fiduciary is expanding and includes the relationships between educator, educational institutions, and their students.³¹ In fact, courts have already identified that colleges and universities owe fiduciary duties to their students, including duties that arise from services provided by the faculty as advisors to students.³² Courts use elements like academic advising as a critical factor in determining whether a teacher owes a fiduciary duty to a student.³³ In an advisor-advisee situation, the advisor, because of his or her position of trust and power, must exercise good faith, and avoid abusing the situation.³⁴ One of the many hats coaches wear is that of an advisor to players, placing them squarely within this definition of a fiduciary.

B. Approaches to Analysis

There are several different methods for analyzing whether an individual

infra PART IV.B.

28. *Dunham v. Dunham*, 528 A.2d 1123, 1133 (Conn. 1987) (characterizing the fiduciary relationship by “a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other”).

29. *See, e.g., Chemtool, Inc. v. Lubrication Tech., Inc.*, 148 F.3d 742, 745 (7th Cir. 1998); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987); *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982); *Moore v. Regents*, 793 P.2d 479, 483 (Cal. 1990); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Farkas v. Williams*, 125 N.E.2d 600, 603 (Ill. 1955).

30. This includes the teacher-student relationship when the teacher acts as an advisor to the student. *See Weeks & Haglund, supra* note 2, at 154 (stating that courts have found fiduciary relationships between graduate students and their advisors, as well as in the relationships of faculty and staff with undergraduates to whom they serve as advisors).

31. *Scharffs & Welch, supra* note 17, at 164.

32. *Id.*; *see also Weeks & Haglund, supra* note 2, at 154; *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 97 (D. Conn. 2000) (finding that a fiduciary relationship might be established between a graduate student and his advisors since the advisors and the university were “in a position of power and authority” over the student).

33. *See, e.g., Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362 (Fed. Cir. 2001) (involving a student with a claim of breach of fiduciary duty against an advisor/department chairman who “specifically represented to her that he would protect and give her proper credit for her research and inventions” but then “named himself as the sole inventor of Chou’s discoveries”).

34. *Id.*

is a fiduciary and to whom he or she owes duties. Some courts seem to use a traditional or historical approach, focusing on established doctrines and concepts.³⁵ Others appear to analyze the relationship and behavior between the two parties in such a way as to try to do equity.³⁶ Three law professors have developed two different theories for how courts and society should determine if someone is a fiduciary.³⁷ Because these two methods of analysis approach fiduciary duties differently, a relationship that may “qualify” as fiduciary under one method may not qualify under the other.

1. The Doctrinal Approach

[T]he doctrinal approach first asks whether someone is a fiduciary, and if so who the beneficiaries of that fiduciary’s duties are. Thus, the threshold question is whether or not a fiduciary relationship exists. In order for there to be a fiduciary relationship, there must be an element of entrustment by one person (the beneficiary) to another (the fiduciary), an element of power and control by the fiduciary over the interests and well-being of the beneficiary, and an element of proactivity and protection where under the fiduciary subordinates her own interests in order to pursue and protect the interests of the beneficiary.³⁸

Generally, courts are not aggressive in finding and identifying breaches of fiduciary duty.³⁹ Perhaps this is testimony to the fact that fiduciary concepts apply in unique ways to different situations, and courts must try to use more individualized methods in determining the fiduciary’s duties and when breaches of those duties occur.

2. The Scharffs-Welch Framework

Law Professors Scharffs and Welch proposed a framework using three inter-related inquiries to determine the likelihood of legal liability for alleged breaches of fiduciary duties.⁴⁰ They premise their analysis on the

35. *See, e.g.*, *Huffington v. Upchurch*, 532 S.W.2d 576, 579 (Tex. 1976) (holding that a managing partner owed to copartners “one of the highest fiduciary duties recognized in the law”).

36. *See, e.g.*, *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1961) (explaining that a fiduciary duty is subject to “no fixed scale”).

37. J. Reuben Clark Law School at Brigham Young University Professors, Brett Scharffs (Professor of Law) & John Welch (Robert K. Thomas University Professor of Law), have worked to develop a “framework method” for analyzing fiduciary duty. Professor D. Gordon Smith (Glen L. Farr Professor of Law) analyzes fiduciary duty using his “critical resource theory.”

38. Scharffs & Welch, *supra* note 17, at 164–65.

39. *Id.* at 165–66.

40. For a thorough explanation of the framework, see Scharffs & Welch, *supra* note 17.

recognition that not all fiduciary duties and not all breaches are equally harmful.⁴¹ The first inquiry of the Scharffs-Welch framework considers and analyzes a set of factors determining the magnitude of the duty arising within the particular fiduciary relationship and context.⁴² The second analyzes the magnitude of the breach in light of the height or degree of the fiduciary's behavior, then measures the extent to which that conduct of the fiduciary has fallen short of the required level of performance.⁴³ The last inquiry assists the court in determining the appropriate remedy by considering how difficult it would have been to fulfill the duty, trying to avoid court hindsight, and considering what available remedies are appropriate in the situation.⁴⁴

The framework stands for a general proposition that courts are most likely to find liability in cases with high magnitude duties coupled with high magnitude breaches and the ready availability of appropriate remedies.⁴⁵ Courts are less likely to find liability when a low-degree duty is paired with a low-degree breach and no real appropriate remedy exists.⁴⁶ Additionally Scharffs and Welch hypothesize that the court considers public importance, profile, and impact of the case in evaluating the possibility of a fiduciary relationship.⁴⁷

3. The Smith Critical Resource Theory

Professor Smith argues that the primary purpose of fiduciary duty law is to combat opportunism within fiduciary relationships.⁴⁸ The critical

41. ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 182 (1st ed. 1999). "While [fiduciary] duty is described in terms of [the] categories of care and loyalty, there is in fact a sliding scale of duty because some cases fall between those duties . . . [and] fiduciary duty is subject to 'no fixed scale.'" *Id.* (quoting *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1961)).

42. The factors a court may consider in identifying the magnitude of the duty owed by a fiduciary include characteristics of: the fiduciary, the beneficiary, the relationship, and the subject matter of the relationship. Within each of these four factors, the court weighs an additional myriad of considerations. This portion of the framework is clearly illustrated in Scharffs & Welch, *supra* note 17, at 167.

43. *Id.* at 218. Courts consider if a remedy is available as part of their determination of whether liability should exist at all, most likely because they are reluctant to find liability when an appropriate remedy does not exist. Potential remedies exist in a hierarchy based on the magnitude of the breach and severity of penalty. The framework developers conclude that "[i]f an appropriate remedy does not seem to exist, this will decrease the likelihood that a court will find that a fiduciary relationship exists or, if such a relationship does exist, that there has been a breach of duty." *Id.*

44. *Id.* at 167.

45. *Id.* at 218.

46. *Id.* at 167.

47. *Id.* at 190.

48. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1430 (2002).

resource theory proposes that “fiduciary relationships form when one party (“the fiduciary”) acts on behalf of another party (“the beneficiary”) while exercising discretion with respect to a critical resource belonging to the beneficiary.”⁴⁹

The “on behalf of” requirement describes relationships in which one person acts primarily for the benefit of another The “discretion” requirement implies that the fiduciary makes choices about how to perform her obligations A critical resource [can be] something valued by the beneficiary but not ordinarily considered property.⁵⁰

Smith argues that the key to the analysis is that *something* lies at the core of the relationship and binds the fiduciary to the beneficiary.⁵¹ If nothing takes this role, other than a vague expectation of loyalty, Smith argues that courts should refuse to impose fiduciary duties.⁵²

This theory “advances two primary goals: (1) It articulates the principles that distinguish fiduciary from nonfiduciary relationships, and (2) it rationalizes the content of fiduciary obligations.”⁵³ Under this analysis of fiduciary duties, a wrong is committed “when the fiduciary does or has something that is inconsistent with the beneficiary’s interest in the critical resource.”⁵⁴ However, if the beneficiary is amply protected by self-help options, external regulation, or other mechanisms, a court imposed fiduciary duty is not required.⁵⁵

The critical resource theory works not only to explain the existence of fiduciary duties, but also to identify fiduciary relationships.⁵⁶ The critical resource theory advances the principle that “fiduciaries must exercise discretion with respect to a critical resource belonging to the beneficiary, where ‘discretion’ connotes the power to use or work with the critical resource in a manner that exposes the beneficiary to harm that cannot reasonably be evaded through self-help.”⁵⁷ Thus, what distinguishes a fiduciary from a non-fiduciary is not control, but rather, discretion over the critical resource.⁵⁸ Smith argues that courts should apply fiduciary law in these relationships after considering the relative costs and benefits of fiduciary protection.⁵⁹ When a fiduciary is authorized to act on behalf of

49. *Id.* at 1402.

50. *Id.* at 1402–04.

51. *Id.* at 1404.

52. *Id.* at 1402–04.

53. *Id.* at 1401.

54. *Id.* at 1407.

55. *Id.* at 1424–25.

56. *Id.* at 1441.

57. *Id.* at 1449.

58. *Id.* at 1456.

59. *Id.* at 1458.

the beneficiary and to exercise discretion over critical resources belonging to the beneficiary, holding the fiduciary to specific duties helps to align incentives.⁶⁰

C. Fiduciary Duty in the College and University Context

As students rely on administrators for advice, services, and financial assistance in pursuing their education, colleges and universities acquire fiduciary obligations towards those students.⁶¹ In recent years, professors and institutions have been held liable to students under the vague and uncertain equitable concept of fiduciary duty.⁶² It is nothing new for colleges and universities to think about their relationship with students as infused with responsibilities and obligations; but this new trend of using fiduciary concepts is growing.⁶³

Generally, fiduciary relationships are established between a student and teacher or coach because the teacher or coach is in a place of trust, confidence, and dominance. Even though teachers assume a position of trust, confidence, and dominance, courts have been clear that students cannot pursue a fiduciary duty claim that professors failed to provide a meaningfully education because of the threat of “embroil[ing] the courts into overseeing the day-to-day operations of schools.”⁶⁴ In some cases, however, fiduciary relationships have been found to exist where a teacher serves in an advising capacity.⁶⁵ Additionally, one court has found that Plymouth State College had a fiduciary duty to protect its student from sexual harassment.⁶⁶ In the context of sexual harassment by faculty, the New Hampshire court reasoned that the relationship between the university and its students was a fiduciary one.⁶⁷ The court found that “[s]tudents are in a vulnerable situation because” of “the power differential between faculty and students.”⁶⁸

A Connecticut court denied a motion by Yale University to dismiss a breach of fiduciary duty claim brought by a graduate student when the student alleged that his dissertation advisors and the University

60. *Id.* at 1497.

61. Weeks & Haglund, *supra* note 2, at 154.

62. Scharffs & Welch, *supra* note 17, at 164.

63. *Id.*

64. *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992) (rejecting a student-athlete’s claim that his professors breached their fiduciary duty in failing to provide a meaningful education).

65. *André v. Pace Univ.*, 618 N.Y.S.2d 975, 980–81 (N.Y. City Ct. 1994).

66. *Schneider v. Plymouth St. Coll.*, 744 A.2d 101, 105 (N.H. 1999); *see also*, *e.g.*, *Williamson v. Bernstein*, 5 Mass. L. Rep. 94 (Mass. Super. Ct. 1996).

67. *Schneider*, 744 A.2d at 105.

68. *Id.* (quoting Karen Bogat & Nan Stein, *Breaking the Silence: Sexual Harassment in Education*, 64 PEABODY J. EDUC. 146, 157 (1987)).

misappropriated his dissertation ideas.⁶⁹ The student alleged, and the court agreed, that a fiduciary relationship might be established since the advisors and the University were “in a position of power and authority” over the student.⁷⁰ However in *Ho v. University of Texas at Arlington*⁷¹ a Texas court refused to find, as a matter of law, that “formal fiduciary relationships exist between teachers and students in a normal educational setting.”⁷² Additionally, college and university advisors are not required to warn applicants of obvious risks in their education program.⁷³

Courts find fiduciary relationships in the college and university context because most students are, to some degree, subservient to the will of faculty.⁷⁴ Students give tuition to the college or university to manage while they rely on subjective grading by professors to graduate and pursue future occupation. They often surrender a degree of independence to the college or university in housing and conduct codes, thereby placing trust and confidence in the administrators to protect their rights.⁷⁵ “Courts have made it clear that students and administrators cannot use charges of breached fiduciary duty instead of or before exhausting administrative remedies provided by universities.”⁷⁶

69. *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 98 (D. Conn. 2000).

70. *Id.*; *see also* *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1362 (Fed. Cir. 2001) (holding that a graduate student stated a sufficient claim for breach of fiduciary duty against a department chairman who “specifically represented to her that he would protect and give her proper credit for her research and inventions” but then “named himself as the sole inventor of Chou’s discoveries”).

71. *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672 (Tex. App. 1998).

72. *Id.* at 693 (holding that no informal fiduciary relationship existed imposing a duty upon a university to disclose information to stop a doctoral student from seeking a doctoral degree when the student was later dismissed from the program for academic reasons).

73. *See Maas v. Gonzaga Univ.*, 618 P.2d 106, 108 (Wash. App. 1980) (finding that a law school does not have a fiduciary duty to inform a student of the possibility of failure, because it is “unreasonable to require the university to warn applicants of the obvious”).

74. *Weeks & Haglund*, *supra* note 2, at 159.

75. *Id.*

76. *Id.* at 169.

IV. THE COLLEGE AND UNIVERSITY ENVIRONMENT—WHAT DOES IT MEAN TO BE A COLLEGE OR UNIVERSITY COACH?

Commentators and courts alike have suggested that the relationship between a student and teacher is a fiduciary relationship, carrying special legal obligations and along with them, potential liability.⁷⁷ But what of the relationship between the student-athlete and the coach? What special legal obligations arise in the fast-paced, big business, uncertain world of collegiate athletics?

The pressure to succeed, NCAA regulations, massive internal college and university regulations, big budgets, and other complexities of the collegiate athletics system create a special relationship between institution, coach, and student-athlete.⁷⁸ Some commentators argue that these special circumstances support the labeling of the coach-student-athlete relationship as fiduciary.⁷⁹ Extending fiduciary duty to the context of the coach-student-athlete relationship would solidify the importance of the relationship between a coach and his athletes by providing potential civil liability for breach of the duty running from the former to the latter.⁸⁰ To understand how fiduciary duty may arise, we must first examine the role of coaches in the college or university and in the lives of student-athletes, as well as the potential for fiduciary relationships in colleges and universities generally.

A. The “Basic” Duties

A coach trains intensively by instruction, demonstration, and practice. Outside of this basic role, a college or university athletics coach has to deal with the pressures of very public concerns over student eligibility, graduation rates, and program success.⁸¹ Athletics today is a highly regulated industry and “college coaching has become a game of high stakes—one where money talks.”⁸² In fact, “college athletics is big business. Whatever else they may be—master strategists, charismatic inspirers of young athletes, or national celebrities—today’s college athletic

77. See generally Johnson v. Schmitz, 119 F. Supp. 2d 90, 97–98 (D. Conn. 2000); Melissa Astala, *Wronged by a Professor? Breach of Fiduciary Duty as a Remedy in Intellectual Property Cases*, 3 HOUSTON BUS. & TAX L.J. 31 (2003); Weeks & Haglund, *supra* note 2; Robert P. Schuwerk, Comment, *The Law Professor as Fiduciary: What Duties Do We Owe To Our Students*, 45 S. TEX. L. REV. 753 (2004).

78. Buckner, *supra* note 2.

79. *Id.*

80. *Id.* at 88.

81. See Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127 (2001).

82. *Id.* at 134.

coaches are big businessmen.”⁸³ The similarities between coaches and businessmen, and athletics and big business, welcome the application of traditional fiduciary rules that apply to partners and in corporations.

A college or university coach operates in an environment monitored and controlled by voluminous and complicated rules—both the NCAA rules and conference or institution rules.⁸⁴ When a coach agrees to work at a college or university, he or she signs a contract, outlining his or her duties. Before specific duties of the coach can be listed in the contract, the coach must agree to devote his or her full-time best efforts to the performance and duties that generally come with the position of head coach, such as recruiting, teaching players the sport, and providing a vision for the program to succeed.⁸⁵ The coach must agree to abide by and comply with NCAA rules and regulations.⁸⁶ After these general responsibilities, the contract lists specific duties.⁸⁷ In accordance with case law in the business arena, some contracts specifically deny any kind of fiduciary relationship between the institution and the coach, but are silent on the issue of a fiduciary relationship between the coaches and the athletes.⁸⁸ It could be argued that NCAA rules and regulations adequately protect the student-athlete, but what happens when a coach violates those rules? The student-athlete is not compensated for his or her loss when a coach who shirks the rules has betrayed him or her, but a college or university may receive a portion of the salary returned, or coaching bonuses forfeited.

B. Furthering the Institution’s Mission

A long standing issue on many campuses has been the relationship between athletics and the academic mission of the college or university. There are growing concerns at many institutions about the disconnect between academic values and athletic pursuits. Even the NCAA has gotten involved in the disparities between the academic mission of producing educated citizens and the percentage of athletes who do not graduate.⁸⁹ Athletic programs and student-athletes are often an institution’s most visible ambassadors to the general public, so when a coach fails to conform

83. *Id.* at 149 (quoting Judson Graves, Commentary, *Coaches in the Courtroom: Recovery in Actions for Breach of Employment Contracts*, 12 J.C. & U.L. 545, 545 (1986)).

84. Greenberg, *supra* note 81, at 146.

85. *Id.* at 151–52.

86. *Id.* at 152.

87. *Id.* (including examples such as having “complete knowledge of the rules and regulations governing intercollegiate athletic competition” and maintaining “strict compliance therewith by the program”).

88. *See, e.g., id.* at 187 (quoting MARTIN J. GREENBERG & JAMES T. GRAY, *SPORTS LAW PRACTICE* 522, 596 n.534 (2d ed. 1998)).

89. Ben Feit, *Athletes Shouldn’t Drop—the Ball*, YALE DAILY NEWS, JAN. 26, 2004, at B3, available at <http://www.yaledailynews.com/articles/view/9734>.

to college or university missions, does a student-athlete have a fiduciary duty claim against the coach for breaching the institutional mission?

Vanderbilt University took a huge step in adjusting the focus of the athletic department to conform to the university mission in 2003 when it merged its athletic department and its student recreational activities department, thereby eliminating a separate athletic department.⁹⁰ The reorganization eliminated the traditional athletic department entirely and placed athletics under the central university administration.⁹¹ Then Chancellor, E. Gordon Gee, noted that this move did not diminish Vanderbilt's commitment to athletics, but rather demonstrated an intent to compete "consistent with the values of a world-class university."⁹²

Wabash College also provides another example of an institution's coaches embracing their role as individuals with a duty to further the institution's mission. In the summer of 2003, the college's football team traveled to Europe, playing only one game.⁹³ The team then toured museums and historical sites.⁹⁴ For many students it was the first time on an airplane or in Europe. For all, it was the first time viewing a concentration camp.⁹⁵ A representative of the college noted "We should be . . . willing to celebrate when our coaches and administrators value the institutional mission enough to embed those experiences within an athletic program."⁹⁶

Each college and university has a unique history and mission. Athletic programs should conform with the values the college or university intends to further. While it appears there are no cases directly addressing a coach's failure to support an institutional college or university mission, this presents an interesting question. What of the coach who praises the life of a student-athlete, but does not allow a student-athlete to take advantage of academic opportunities because the coach constantly requires more and more "voluntary" time from athletes to lift weights, review film, attend meetings, and travel?

90. Vanderbilt University's News Network, <http://www.vanderbilt.edu/news/audio/2003/09/09/vanderbilt-announces-athletics-program-restructuring.58053> (last visited Feb. 15, 2009).

91. *Id.*

92. *Id.*

93. Charles F. Blaich, Center of Inquiry in the Liberal Arts at Wabash College, *What Kind of Game Are We Playing*, http://www.wabash.edu/cila/home.cfm?news_id=1386.

94. *Id.*

95. *Id.*

96. *Id.*

V. ARE COACHES FIDUCIARIES?

While case law on the fiduciary duty of coaches in the college and university context is limited, there are potential legal obligations arising from the relationship.⁹⁷ Several scholars and commentators support finding fiduciary duties in intercollegiate athletics.⁹⁸ The relationship between student-athletes and coaches (and the college or university) is more intimate than for many students.⁹⁹ Student-athletes have a great deal riding on their success at their college or university, particularly athletes with potential for success at the professional level.¹⁰⁰ Consequently, these student-athletes are highly regulated by the college or university and by the NCAA.¹⁰¹ Additionally, student-athletes rely heavily on academic advisors and coaches for their success.¹⁰²

The relationship between a coach and a student-athlete is different from the relationship between the average teacher and student.¹⁰³ Unlike a classroom teacher, who works to guide students through discussion and debate, the “[e]xecution of the coach’s will is paramount” and what he says is seldom up for debate.¹⁰⁴ “Coaches possess vast control over the lives of athletes on the field, in class, and away from school.”¹⁰⁵ This relationship lends itself to abuse by a coach and requires that the student-athlete have some sort of protection from a coach abusing his duties. Additionally, as one commentator notes, “Coaches and student-athletes do not necessarily have the same goals. Coaches . . . retain job security by winning, not by guiding student-athletes to graduation.”¹⁰⁶

This relationship between student-athlete and coach is more similar to that between a graduate student and faculty advisor, than to that between a

97. Buckner, *supra* note 2, at 88.

98. *Id.*; see also Richard Salgado, *A Fiduciary Duty to Teach Those Who Don't Want to Learn: The Potentially Dangerous Oxymoron of "College Sports"*, 17 SETON HALL J. SPORTS & ENT. L. 135, 161–62 (2007) (“A fiduciary duty exists between universities and vulnerable student-athletes. However, the scope of the relationship is dependent upon where a student-athlete falls along a continuum. At one end are those student-athletes who genuinely want to pursue their education and earn a four-year degree At the other end of the continuum are student-athletes who attend class only because doing so is a requirement for them to play sports It makes little sense to force an education upon them or to impose a fiduciary duty upon schools to educate them.”).

99. Weeks & Haglund, *supra* note 2, at 170; see generally Buckner, *supra* note 2.

100. Weeks & Haglund, *supra* note 2, at 170.

101. *Id.* at 170–71.

102. *Id.* at 171.

103. Greenberg, *supra* note 81, at 220.

104. *Id.* (quoting *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1189 (6th Cir. 1995)).

105. Salgado, *supra* note 98, at 143.

106. *Id.* at 155.

normal student and teacher. Even in this area, the law is not clear. For example, in *Chou v. University of Chicago*,¹⁰⁷ the court held that a graduate student stated a sufficient breach of fiduciary claim against a graduate advisor who represented that he would give her proper credit for research and inventions, but then named himself the inventor of the discoveries.¹⁰⁸ This can be compared with *Ho v. University of Texas at Arlington*, where a Texas court held that no informal fiduciary duty existed to impose a duty upon a college or university employee to disclose information about a student's potential to earn a doctoral degree, even when that student was later dismissed for academic reasons.¹⁰⁹

A. The Regulation of the Coach-Athlete Relationship

Coaches are central figures in the network of relationships with student-athletes, parents, institutions, the general public, and more. Each relationship involves a bundle of legal and ethical obligations arising from laws, standards of conduct, and division/conference regulation. In the realm of college and university athletics, the NCAA is often the governing body, setting out rules and regulations by which coaches, colleges, and universities must abide.¹¹⁰ The NCAA has several division-wide legislative bodies and executive committees that govern athletic participation.¹¹¹ General committees also are in place to oversee sports rules, and other groups examine issues specific to a certain segment of the NCAA membership.¹¹² The NCAA governing bodies "strive to promote student-athlete welfare through legislation and program initiatives."¹¹³

NCAA regulations require that coaches act with honesty and sportsmanship at all times as to represent the honor and dignity of fair play and the generally recognized high standards associated with competitive sports.¹¹⁴ Bylaw 10 sets out examples of unethical conduct including receiving benefits for facilitating or arranging a meeting between a student-athlete and an agent.¹¹⁵ While these regulations outline duties, an NCAA investigation is a lengthy process, and can lead to what the public considers

107. *Chou v. Univ. of Chi.*, 254 F.3d 1347 (Fed. Cir. 2001).

108. *Id.* at 1363.

109. *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 693 (Tex. App. 1998).

110. Salgado, *supra* note 98, at 142 ("Though the NCAA directly dictates many regulations in college athletics . . . coaches enjoy a great deal of power over athletes").

111. NCAA, Legislation and Governance Overview, <http://www.ncaa.org/wps/ncaa?ContentID=18> (last visited Feb. 15, 2009).

112. NCAA, 2008-09 NCAA DIVISION I MANUAL 50 (2007), http://www.ncaapublications.com/Uploads/PDF/2007-08_d1_manual252fcd8c-6808-411c-a729-00db52d6a783.pdf.

113. NCAA, *supra* note 111.

114. *Id.* at 47.

115. *Id.* at 47.

inadequate punishment.¹¹⁶

B. The Case Law

Despite the somewhat tenuous and complicated relationship between coach and athlete, there is little case law in the area. This may be because before a fiduciary duty claim may be pursued, students must first exhaust institutional administrative remedies.¹¹⁷

Reviewing conflicts in athletics shows that even without pursuing a legal claim of breach of fiduciary duty, student-athletes are successful in getting coaches removed from a post. In 1998, the basketball coach at University of Texas left the university after a ten-year tenure due to complaints to university officials by his student-athletes about his abusive coaching style and lack of leadership.¹¹⁸ This ability for student-athletes to use “self-help” methods to solve breaches in fiduciary duty may be the reason so few cases actually appear in court.¹¹⁹

Despite the effectiveness of student-athlete complaints to institutional administrations, some student-athletes do pursue legal remedies against coaches for violations of duties. Courts have taken a stand on the issue of the academic advising of student-athletes.¹²⁰ One court found that fiduciary duties arise in a context such as this, “when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.”¹²¹

In *Hendricks v. Clemson University*,¹²² a baseball player transferred from a smaller school to Clemson University.¹²³ The player hoped to play for a year or two on the Clemson team and then return to his original college to complete his degree.¹²⁴ He met with an academic advisor in the Clemson athletic department to ensure he would be NCAA eligible and to discuss the transferring of credits.¹²⁵ Because of differences in majors between his original college and Clemson, the player had to declare a different major.¹²⁶ The advisor helped him register, but then realized that

116. See Matt Reichman, *NCAA Announces Penalties Against BYU*, BYU NEWSNET, Mar. 12, 2008, <http://newsnet.byu.edu/story.cfm/67857>.

117. Weeks & Haglund, *supra* note 2, at 169.

118. GREENBERG & GRAY, *supra* note 88, at 531.

119. *Id.* at 532.

120. See, e.g., *Hendricks v. Clemson Univ.*, 529 S.E.2d 293 (S.C. Ct. App 2000).

121. *Id.* at 298–99 (quoting *O’Shea v. Lesser*, 416 S.E.2d 629, 631 (S.C. 1992)).

122. *Id.*

123. *Id.* at 295.

124. *Id.*

125. *Id.*

126. *Id.*

he would need more hours to meet the NCAA “fifty percent rule.”¹²⁷

The advisor asked a graduate student to follow-up on the conflict, but never received any news.¹²⁸ Meanwhile, the player passed his classes, but was not eligible under the “fifty percent rule.”¹²⁹ The advisor requested a waiver from the NCAA but was denied.¹³⁰ The player was ineligible to compete, and that year, Clemson’s baseball team competed in the College World Series.¹³¹ The player sued under several theories, including breach of fiduciary duty, requesting monetary damages because he gave up his scholarship when he left his original university and had to pay tuition when he returned to graduate.¹³²

The trial court found that the claim of breach of fiduciary duty was really an “educational malpractice” claim and rejected the claim because the South Carolina legislature disallowed such suits.¹³³ However, the court emphasized the flexibility in the definition of fiduciary duty and left open the possibility that a relationship like this might otherwise fit the description.¹³⁴ The court of appeals found that the player had “alleged sufficient facts to support a claim for breach of fiduciary duty.”¹³⁵ The court further found that the advisor, as an agent and employee of Clemson University, owed the player a fiduciary duty to advise him competently of requirements necessary to remain academically eligible and that the advisor had failed that duty, injuring the player.¹³⁶

C. Fiduciary Duty Owed to Athletes Outside the College or University Context

The extent of fiduciary duties owed to athletes has been reviewed by the courts outside of the college and university athletics context. Courts have found that a doctor, testing athletes merely for drug use, does not owe a fiduciary duty to his patient-athlete.¹³⁷ Instead, the doctor owed a duty to his employers, the Athletic Congress and the U.S. Olympic Committee, not

127. *Id.* (pointing to the fifty percent rule, “which requires a student athlete to complete at least fifty percent of the course requirements for his degree to be eligible to compete during his fourth year of collegiate enrollment”).

128. *Id.*

129. *Id.* at 295–96.

130. *Id.* at 296.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 299.

135. *Id.*

136. *Id.* at 300.

137. *Powell v. Voy*, No. C. 92-4128 TEH, 1994 U.S. Dist. LEXIS 15883, at *9–12 (N.D. Cal. Nov. 1, 1994) (finding that a doctor’s administration of drug tests was not enough by itself to establish a fiduciary duty).

to the individual athlete.¹³⁸ The court found that because there was no physician-patient relationship, a fiduciary duty did not attach.¹³⁹

Fiduciary duty claims can arise out of injuries sustained by an athlete during practice or competition. A softball player sued her school and coach for a broken ankle she sustained during a game when a member of the opposing team slid into second base.¹⁴⁰ The court recognized both that the player assumed risks in participating in the sport and that the assumption of risk theory applied both to children and adults.¹⁴¹ The assumption of risk theory says that while players do not assume all risks of injury through participation in a game, they do assume “all risks incidental to the game, sport or contest which are obvious and foreseeable.”¹⁴²

An Iowa court held that high school counselors must use reasonable care when the counselor knows the specific need for information and provides specific information through a “counselor-student” relationship, the student exercises reasonable reliance on the information, and the counselor knows of the student’s reliance.¹⁴³ In this case, a counselor gave a student improper advice as to which class the student must take in order to be eligible to play basketball in college.¹⁴⁴ The state supreme court noted that “[courts] must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice” and reversed and remanded the case.¹⁴⁵

Courts are sometimes called upon to decide tragic cases in which students are injured during athletic events, making decisions on claims of breach of the fiduciary duty of care. When a fourteen-year-old student broke her neck while executing a practice dive into a shallow racing pool, a California court reasoned that:

A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is “totally outside the range of the ordinary activity” involved in teaching or coaching the sport.¹⁴⁶

138. *Id.* at *12.

139. *Id.* at *11.

140. *Kelly v. McCarrick*, 841 A.2d 869, 871–72 (Md. 2004).

141. *Id.* at 876.

142. *Id.* at 877 (quoting *Nesbitt v. Bethesda Country Club, Inc.*, 314 A.2d 738 (Md. App. 1974) (emphasis removed)).

143. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 129 (Iowa 2001).

144. *Id.* at 119.

145. *Id.* at 122, 129.

146. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 32–33 (Cal. 2003) (quoting *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992), and holding that there were triable issues of material fact existing regarding whether the coach breached a duty of care by engage in reckless conduct, therefore summary judgment was improper, reversing and remanding the case).

In a similar case, a college club cheerleader fell from a pyramid during practice, breaking her neck and rendering her a quadriplegic.¹⁴⁷ Among other claims, the cheerleader alleged a breach of fiduciary duty.¹⁴⁸ After a lengthy analysis, the court granted the defendant's motion for summary judgment on the fiduciary duty count.¹⁴⁹ However, the court recognized that this relationship was likely a fiduciary relationship because of factors like sponsorship by the school and the degree of control by the coach.¹⁵⁰

D. Application of the Scharffs-Welch Framework

The developers of the Scharffs-Welch framework intended that, among other uses, the framework be used to evaluate the complexities of alleged breaches of duties by educators.¹⁵¹ The framework helps to focus the discussion and considerations for the college or university when determining potential liability and developing standards for conduct among its staff. In examining the magnitude of the duty owed by the coach to the student-athlete, the court may find that because the coach has significant qualifications and expertise, he should be held to a higher standard of duty.¹⁵² A court may also find that this duty increases because the relative weakness of the beneficiary (the student-athlete), and the intensity of the relationship between the two.

A key analysis in the Scharffs-Welch framework is the existence of appropriate remedies. In the situation of a college or university coach breaching a fiduciary duty to a student-athlete, a court is limited in the remedies it can provide. Clearly, it is not within a court's power to require specific performance of a coach, stating that he must play an athlete. A court would also likely be unable to "fire" a coach. In the situation where a coach has acted improperly and caused a student-athlete to lose eligibility, some remedies may be available. While a court cannot require eligibility be reinstated, a decision by the court may influence the NCAA. Additionally, the court can require the coach to pay the student-athlete for lost scholarships tied to eligibility or to lost opportunities if the student-athlete is unable to travel and loses per diem money. Thus, it is possible that a court will find a breach because of the high significance this has on the student-athlete's life. If the student-athlete claims loss of future

147. *Gonzalez v. Univ. System of N.H.*, No. 451217, 2005 Conn. Super. LEXIS 288, at *1 (Conn. Super. Ct. Jan. 28, 2005).

148. *Id.*

149. *Id.* at *85–86.

150. *Id.* at *34–35.

151. Scharffs & Welch, *supra* note 17, at 168.

152. Salgado, *supra* note 98, at 144 (“There is a staggering amount of money generated and spent in compensation to coaches and other athletic administrators. College athletes are the generators of this money. In the fiduciary framework, this high level of compensation implies a correspondingly higher degree of fiduciary duty.”).

earnings because of an impaired ability to impress professional scouts, the student-athlete should show clear foreseeability of the future harm and provide a fairly accurate depiction of the monetary amount of the harm.

In the situation where damages are done to the team, again, calculating damages is difficult. A court could reach out and find that the coach is liable for a loss of potential earnings, including lower draft pick positions, loss of gifts student-athletes would receive, and loss of opportunity. Again, however, it would be difficult for the court to provide proper remedies in a situation like this, but a court could stretch to compensate the players and punish the coach.

As demonstrated above, it is difficult to find appropriate remedies when the harm is speculative. However, when the harm is significant and the duty is great, courts may stretch to find appropriate remedies to secure the finding of a breach of fiduciary duty. In light of the high magnitude of duty, and many times the high magnitude of breach, courts could adjust remedies. However, when the breach is slight, courts may not find a breach of fiduciary duty because of the unavailability of a clear and obvious appropriate remedy.

E. Application of Smith's Critical Resource Theory

The "critical resource theory" maintains that the purpose of fiduciary law is to combat opportunism by a coach acting on behalf of a student-athlete while exercising discretion with respect to a student-athlete's critical resource.¹⁵³ Application of this theory should not expose colleges or universities to unfair risk.¹⁵⁴ One commentator notes that by focusing on the "discretion" of the coach, rather than the vulnerability of the student-athlete, student-athletes would receive reasonable protection.¹⁵⁵

Does the coach actually act on behalf of the student-athlete? It is hard to argue that a coach acts "on behalf of an athlete" rather than on behalf of a program or a college or university. It would seem that in most of the coach's actions, he is acting on behalf of the entire team, not merely one member. However, in a situation where a coach is acting only in the interest of one player, there is the possibility of a recognized fiduciary relationship.

Does the coach exercise discretion—making choices about how to perform his obligations? A coach has guidelines in making decisions (e.g., NCAA rules, conference rules, job contracts). But, a coach is also afforded discretion in whom to play and how to run a team.

Even if the above elements are met, the key analysis in critical resource theory is whether something lies at the core of the relationship, binding the

153. Smith, *supra* note 48, at 1497.

154. Weeks & Haglund, *supra* note 2, at 186.

155. *Id.*

coach to the student-athlete.¹⁵⁶ Without a critical resource, there is no fiduciary duty. While arguably “playing time” is a critical resource, it is a resource that is well within the contract of the coach to regulate however he wishes. There may be a strong claim, however, that eligibility is a critical resource. Additionally, when a student-athlete exchanges playing time for the ability to study and learn at a college or university, scholarship may become a critical resource. Thus, if a coach acts in a way to impede the student-athlete’s ability to learn, the coach is using discretion with regard to a critical resource.

VI. REVISITING THE HYPOTHETICAL SITUATIONS

A. The Future Professional Athlete

The key to finding a fiduciary relationship in the situation where the student-athlete has lost future earnings would be an accurate depiction of the earnings lost. When a coach receives a kickback from an agent for referring a student-athlete and the student-athlete subsequently loses eligibility, the student-athlete may be able to allege a breach of fiduciary duty. The Scharffs-Welch framework would require that student-athlete demonstrate an accurate figure to have a remedy for the situation. In the Smith critical resource theory, the student-athlete has put the critical resource in the hands of the coach. The coach, in his discretion, has acted directly contrary to the best interests of the team and likely the student-athlete, in favor of his own personal financial interests. In this situation, a court should find a fiduciary relationship and find that the coach, in pursuing his own financial interests, breached a duty to the student-athlete.

B. The Athlete Who Lost Eligibility

Courts are reluctant to treat an individual as a fiduciary when there is no clear cut remedy to fix the wrong. When a coach behaves in a way that eventually ruins a student-athlete’s eligibility by giving inappropriate class advice or otherwise misinforming a student-athlete, it is not within the court’s jurisdiction to fix that error. Using the Scharffs-Welch framework, this failure of an appropriate remedy would likely halt any chance of the court finding the relationship fiduciary. According to the Smith critical resource theory, the coach did hold a critical resource belonging to the student, eligibility. But, given the inability of the court to require the NCAA to reinstate eligibility and the student-athlete’s own duty to remain informed of rules, it is unlikely a court would find a fiduciary duty in this situation. However, in a situation where a coach intentionally injured the student-athlete and revoked eligibility through deceit, the scenario would likely be different, and while the court cannot reinstate eligibility, a court

156. Smith, *supra* note 48, at 1404.

decision may have weight with the NCAA.

C. The Coach Who Ignored the University Mission, and NCAA Regulatory Rules

Coaches, as employees of their colleges and universities, owe some duties to the college or university. These duties likely include performing all aspects of his or her job description, including furthering the institutional mission. When a coach fails to further that mission, it is unlikely a student-athlete would have a claim for breach of fiduciary duty against the coach. Under the Scharffs-Welch framework, the characteristics of the relationship would not support finding a fiduciary duty between the student-athlete and coach, but rather between the student-athlete and the college or university for breach of duty in furthering its mission. Considering the Smith critical resource theory, the student-athlete may have placed a critical resource in the control of the coach. Under one consideration, this critical resource may be the obvious resource of eligibility, and the student-athlete may have a claim against the coach for violating a fiduciary duty in this aspect. Further, the critical resource may be the somewhat more important resource of scholarship at a particular college or university. The student-athlete, who can no longer attend a particular college or university because of a coach's violation, may then have a stronger fiduciary duty claim with regard to this critical resource.

VII. CONCLUSION

Case law in this area remains quite limited. Athletic programs, however, occupy a great deal of many college and university budgets and infiltrate many aspects of student life on campus. Given the number of the students participating in college and university athletics, and the enormous potential for liability, colleges and universities should be careful to examine, regulate, and control the relationship between coaches and players on campus.¹⁵⁷

Labeling the relationship between coach and student-athlete as fiduciary would entail important duties, including, the duty of “[n]ot honesty alone, but the punctilio of an honor the most sensitive.”¹⁵⁸ This opens the possibility of colleges and universities and athletic departments being held liable for the behavior and mistakes of their coaching staffs. Conversely, if courts find the relationship is not fiduciary in nature, the coach has no more duties than those clearly outlined in their contracts, which may include, at minimum, following university rules, NCAA rules, and acting in the

157. Buckner, *supra* note 2, at 88 (arguing that a “lack of judicial recognition should not deter academic institutions from recognizing and protecting against the potential legal obligations arising from [the coach-student-athlete] relationship”).

158. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

general best interest of the program.

Under a fiduciary analysis, colleges and universities have two duties to student-athletes. First, to limit institutional conduct that unreasonably interferes with the student-athlete's ability to develop and participate athletically, and;¹⁵⁹ second, to prohibit institutional conduct promoting the institution's interest ahead of the interest of the student-athlete.¹⁶⁰ This area is a potential minefield for colleges or universities with large athletic departments, and student-athletes who enter professional sports.

Athletes disgruntled with the behavior of the coaches and advisors who potentially owe a fiduciary duty to them tend to utilize self-help methods as demonstrated above.¹⁶¹ "By holding schools to the morals of their own marketplace, courts can protect a student's legitimate and reasonable expectations and hold institutions accountable for their abuses without diminishing the value of the university as a social institution."¹⁶² The NCAA, colleges, and universities can control the coaches with regulations and contracts. By including basic fiduciary duties between the coach and student-athlete in the contracts or regulations, colleges and universities could regulate behavior and control remedies—eliminating confusion in the courts.

While this note lands far from providing definitive legal and substantive guidance to colleges and universities, it welcomes many questions. Importantly, it provides an opportunity for more discussion at the college and university level about the impact of labeling the relationship between coaches and student-athletes as fiduciary. The fiduciary label may invite additional duties and add unnecessary levels of liability, but it also may provide a standard for enforcing the duty of coaches to further institutional missions in their work on the athletic field.

159. Davis, *supra* note 6, at 623.

160. *Id.* at 624.

161. *See supra* Part V.B. and accompanying text.

162. Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 185 (2000).

