

**OVERSIGN ON THE DOTTED LINE: THE  
NATIONAL LETTER OF INTENT AS A  
CONTRACT AND PROBLEMS  
CONCERNING THE NCAA’S 2012 OVER-  
SIGNING REGULATION**

*Wesley Ryan Shelley\**

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\* B.A., University of South Carolina, 2010; J.D., University of Mississippi School of Law, 2013. The author would like to send a special thank you to his friends and family for their patience and assistance with this article, without whom none of this would have been possible. He can be reached by email at wesleyrshelley@gmail.com.

## INTRODUCTION

The athletic department staffs of many successful college football programs anxiously await National Signing Day 2013, expecting the latest blue chip recruit's National Letter of Intent ("NLI") to come through the fax machine. Because of the twenty-five NLI limit promulgated by the National Collegiate Athletic Association ("NCAA") effective August 2012, most schools will be especially diligent in making sure that all of their recruits are not academic or athletic liabilities. One school may choose to send out only the maximum of twenty-five NLI offers, to be certain they will not exceed the NCAA's new limit, while taking the risk that some players will not sign causing the school to come up short of its recruiting goals. Another school, less confident it will sign all the players it recruited, may send out thirty NLI offers, hoping that at least five of its wavering prospects will decide to sign with another institution to get under the NCAA's twenty-five NLI limit. As the schools' football staffs sit by their respective fax machines on National Signing Day, the first school learns that of the twenty-five NLIs it sent out, only nineteen of the prospects signed with the school, leaving them six short of filling their roster. At the second school, they watch as the twenty-fifth completed NLI comes through the fax machine in an unexpectedly successful day of recruiting. The staff frantically tries to retract the five extra NLI offers they sent out, to no success, as one after another come in over the allowed twenty-five limit. In a matter of minutes, the recruiting time, effort, and finances invested by the two schools quickly left one school six recruits short of its needs for the incoming freshman class, while the other was contractually bound to five players more than it had room for, leading to a looming recruiting violation.

Signing more players to an NLI than a school has available on their roster, or over-signing, as it is commonly referred to, has become increasingly scrutinized at some major college football programs in recent years. Though the NCAA and most conference rules permitted over-signing, many pundits focused on the negative consequences of over-signing, often claiming them to be morally reprehensible. Specifically, over-signing led to the retraction of scholarships to returning players, the practice of "grayshirting" some recruits, and the general hoarding of athletes

without respect to their individual welfare. Because of such extreme criticism, the NCAA adopted a proposal to cap football signings at twenty-five beginning in August 2012. What remains to be seen, however, is whether the new legislation will be successful at curbing over-signing, and whether football programs can maximize competitive recruiting advantages while remaining in compliance with this new NCAA rule.

This article argues that the NCAA's cap on football signings is misguided and ineffective, because it fails to remedy the problems created by over-signing. Further, this article claims that the NCAA could better serve its aims by following the Big Ten Conference's model, which limits the total number of scholarships, rather than focusing on the size of individual recruiting classes.

Part I of this article gives a brief history and description of the NLI program, as well as its contractual implications to schools and student-athletes. Part II examines the phenomenon of over-signing, weighing the pros and cons of the issue, and discussing rules that conferences have enacted to curtail over-signing. Part III describes the recently adopted NCAA proposal to limit NLI signings to twenty-five student-athletes. Part IV assesses the practical problems for college athletic departments in the implementation of the NCAA's new rule, and considers whether the rule will achieve its stated goal of reducing over-signing. Finally, the article concludes in Part V by offering a set of solutions that will assist in implementing the new rule, as well as alternatives that would more successfully achieve the rule's stated aims.

## I. HISTORY OF THE NLI

J. William Davis, the former faculty athletics advisor for Texas Tech University, established the NLI program in 1964.<sup>1</sup> The program initially aimed to curb schools from continually recruiting prospective football student-athletes after they committed to another school. Although it was originally enforceable only between schools of the same conference.<sup>2</sup> The NLI

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<sup>1</sup> Michelle Brutlag Hosick, *History of the National Letter of Intent*, NCAA.COM (February 2, 2011), <http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent>.

<sup>2</sup> *Id.*

hoped to lock recruits into a commitment both the school and prospect could rely on, so neither would be able to deviate late in the recruiting process to the detriment of the other.<sup>3</sup> Attempts to nationalize the NLI program through the NCAA were futile, and instead the Collegiate Commissioners Association developed a voluntary inter-conference NLI program.<sup>4</sup> The NLI expanded to include all sports instead of just football, and the NCAA Eligibility Center took charge of administering the program in 2007, though the Collegiate Commissioners Association continues to govern the NLI program.<sup>5</sup> The NCAA has created numerous rules with regard to the NLI since its inception, concerning issues ranging from the procedure of signing and reporting the agreement to conference offices, to permissible institutional contact with a prospective student-athlete, as well as actions that void the agreement.<sup>6</sup>

The NLI is embodied by a written offer from an institution to provide athletic financial aid to a prospective student-athlete in exchange for the athlete attending the institution and participating in intercollegiate athletics for the duration of the aid, along with the signed NLI contract.<sup>7</sup> The institution's athletic director or other athletic staff authorized to extend athletic financial aid must execute the document, along with the prospective student-athlete and their parent or guardian.<sup>8</sup> Each prospect can sign only one NLI.<sup>9</sup>

The NCAA also put procedures into place for parties wishing to break the NLI agreement.<sup>10</sup> A student-athlete requesting release from the NLI must submit paperwork to the institution from which they seek release, each of which has different policies for granting or denying.<sup>11</sup> A standard penalty for a student-athlete

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<sup>3</sup> Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275 (1989).

<sup>4</sup> Hosick, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Cozzillio, *supra* note 3, at 1290.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Hosick, *supra* note 1.

<sup>11</sup> *Id.* "Of the more than 36,000 signings [in 2011], fewer than 700 signees requested releases – less than 2 percent. Of those, only 30 did not eventually obtain their release."

breaking their NLI agreement is one year in residence at their next institution, usually equating to a one-year suspension from competition as well as one year of lost eligibility for the student-athlete.<sup>12</sup> For institutions or coaches wishing to withdraw from the NLI agreement, the school is still obligated to provide the one-year athletic financial aid offer to the student-athlete that accompanies the NLI.<sup>13</sup> The possibility of voiding the NLI also exists, typically because of procedural or clerical errors, in which case there is no binding agreement between the student-athlete and institution.<sup>14</sup>

## II. CONTRACTUAL ANALYSIS AND IMPLICATIONS OF THE NLI<sup>15</sup>

### A. *Mutual Assent and Intent to be Bound*

When determining whether a contract is binding, one must first look to whether there was objective mutual assent and intent to bind the contracting parties.<sup>16</sup> Because the terms and language of the NLI agreement are clear of any negative intent to be bound, barring any reasonable outside evidence indicating such a negative intent, it is generally assumed that both parties mutually assent and intend for the NLI to bind them to its terms.<sup>17</sup> In addition, the institution's scholarship offer in exchange for the student-athlete's agreement to participate in athletics at the school reflects both parties intent to bind them to the terms of the NLI.<sup>18</sup> To be sure, there is an economic benefit to institutions with successful athletic programs, as well as to student-athletes able to demonstrate and market their skills at a high profile institution or athletic program, further giving the parties a mutual business incentive relationship typical of a contract.<sup>19</sup> By

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* If the institution releases the student-athlete from their NLI, the student-athlete may not enter into another NLI during the signing year, but may play elsewhere without an NLI.

<sup>15</sup> This analysis will be extremely simplified for purposes of briefly demonstrating the contractually binding effect of the NLI as it relates to the NCAA's twenty-five NLI limit. For a thorough, in-depth examination of the NLI's contractual implications, see Cozzillio, *supra* note 3.

<sup>16</sup> Cozzillio, *supra* note 3, at 1293-94.

<sup>17</sup> *Id.* at 1294.

<sup>18</sup> *Id.* at 1297.

<sup>19</sup> *Id.* at 1281 n. 15.

signing the written NLI document and corresponding financial aid offer, it is clear the parties have mutually assented and intended to bind themselves to the terms of the NLI.

### *B. Offer, Acceptance, and Consideration*

Additionally, an offer<sup>20</sup> and acceptance<sup>21</sup> are essential to the formation of a contract. The form and language of the NLI, as well as most standard university scholarship offers, clearly exemplify the necessary components of a proper contract offer.<sup>22</sup> An institution extending the NLI in order to elicit a response from the recruit would usually result in contract formation if affirmative. Presenting a student-athlete the chance to be bound by the terms of the NLI is enforceable as a contract offer.<sup>23</sup> The response, marked by the prospective student-athlete and his or her parents' signature, certainly qualifies as acceptance capable of finalizing the document as an enforceable contract, because the student-athlete is agreeing to the terms the university offered in the NLI.<sup>24</sup>

Consideration is another critical element of contract formation.<sup>25</sup> While benefit to the promisor or detriment to the promisee long served as evidence of consideration, the absence of both does not necessarily equate to an absence of consideration.<sup>26</sup> A bargained-for exchange more appropriately illustrates the consideration requirement.<sup>27</sup> In the case of the NLI, both the

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<sup>20</sup> RESTATEMENT (SECOND) OF CONTRACTS, §24. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."

<sup>21</sup> RESTATEMENT (SECOND) OF CONTRACTS, §50(1). "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."

<sup>22</sup> Cozzillio, *supra* note 3, at 1311.

<sup>23</sup> *Id.* at 1311. In addition, all of the parties to an NLI (Athletic Director, prospective student-athlete, and prospective student-athlete's parent) seem to have the requisite authority to contract to provide athletic financial aid and participation in intercollegiate athletics, respectively.

<sup>24</sup> *Id.* at 1317.

<sup>25</sup> RESTATEMENT (SECOND) OF CONTRACTS, §71(1)-(2). "To constitute consideration, a performance or a return promise must be bargained for; a performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."

<sup>26</sup> Cozzillio, *supra* note 3, at 1335-37.

<sup>27</sup> *Id.* at 1335-37.

school and student-athlete impose bilateral promises to each other, not for the purposes of filing suit, but rather as a triggering mechanism to enforce the opposing party to fulfill its end of the bargain.<sup>28</sup> The potential benefits to the institution for having the student's athletic services, and to the student for being promised athletic financial aid, serve as consideration. Likewise, the NLI program does not allow a student-athlete who has signed a NLI to continue recruitment with other schools, and the institution he signed with must keep a spot on the roster available for at least his or her freshman season. This act of forbearance serves as detriments to both parties, which may also constitute valid consideration. On its face, the NLI unmistakably satisfies the consideration requirement for contract formation because of the mutual promises and forbearances requiring the institution to supply athletic financial aid for the prospective student-athlete to attend the institution and participate in intercollegiate athletics.<sup>29</sup>

### *C. Voidability and Withdrawal*

In addition to the sport-specific reasons for voiding or withdrawing from an NLI, one may also void an NLI in cases of incapacity, duress, material breach or failure to comply with the terms of the agreement.<sup>30</sup> Because of the NCAA's recruiting limitations, including time constraints in recruiting and the inadmissibility for non-friend or non-family third party advisors, there are numerous opportunities for prospective student-athletes to face undue influence from parents, coaches, athletic directors, university alumni, and others with an interest in the prospect's college decision.<sup>31</sup> Should there be a case of deceit or coercion during the recruiting process that materially leads to the

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<sup>28</sup> *Id.* at 1364.

<sup>29</sup> *Id.* at 1341.

<sup>30</sup> *Id.* at 1292.

<sup>31</sup> *Id.* at 1332. Cozzillio's article discusses the story of Bear Bryant admittedly using "any trick [he] could think of" to recruit a student-athlete. One such case involved Bryant having a team manager at the University of Kentucky don a priest outfit to try to sway a religious recruit away from Notre Dame while he was coach. Recruiting ploys by college coaches have become relatively common, and could potentially jeopardize the prospect's ability to contract freely if it rises to the level of deceit and materially affects the recruit's decision.

prospect's commitment, it would possibly be grounds for voiding the NLI agreement.<sup>32</sup>

An additional possibility for stopping a contract from forming is for the institution to revoke the offer before it is accepted.<sup>33</sup> While the NLI contains express provisions that make the offer invalid fourteen days after its issuance, nothing in the NLI precludes the offeror institution from revoking the offer any time before its expiration if they give notice to the prospect offeree.<sup>34</sup> An institution may revoke an NLI offer before the prospect accepts it, and may then extend the offered financial aid and NLI to another student-athlete. Such situations are notoriously difficult for prospective student-athletes who have verbally committed to attend an institution and relied on that oral agreement with a coach.

#### *D. Relevant Cases*

In addition to hypothetical contract analysis, many cases have held that the student-university relationship outside of athletics, such as financial aid agreements, is contractual in nature.<sup>35</sup> Although financial aid agreements alone are binding contracts, the additional terms of the NLI requiring bilateral exchange of assurances and the student-athlete to participate in intercollegiate athletics further the likelihood of the agreement being a contract.<sup>36</sup> *Taylor v. Wake Forest University* held that the NLI relationship between student-athlete and institution is contractual in nature, finding that the student-athlete is obligated to participate in athletics as a condition of the University's

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<sup>32</sup> *Id.* at 1333.

<sup>33</sup> RESTATEMENT (SECOND) OF CONTRACTS, §42. "An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract."

<sup>34</sup> National Letter of Intent: NLI Provisions, *14 Day Signing Deadline*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/nli/nli/nli+provisions/fourteen+day+deadline>.

<sup>35</sup> Cozzillio, *supra* note 3, at 1296; *citing* *Hanson v. Kynast*, 24 Ohio St. 3d 171, 494 N.E.2d 1091 (1986); *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117, 191 S.E.2d 379, cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972); *Barile v. Univ. of Va.*, 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981).

<sup>36</sup> *Id.* at 1284 n. 20.



obligation to provide athletic financial aid.<sup>37</sup> Additionally, in *Barile v. University of Virginia*, the court reasoned, “it is well established in law that the relationship between a student and a college is contractual in nature,” and that “contract doctrine is particularly applicable to college athletes who contract by financial aid or scholarship agreement to attend college and participate in intercollegiate athletics.”<sup>38</sup>

Based on independent contractual analysis, as well as the cases that have examined the NLI and student-university relationship, the contractual bond between the institution and the student-athlete through the NLI is well established.<sup>39</sup> The initial reasoning for the NLI program was to bind the parties and protect their expectations and reliance upon the NLI agreement and it has been mostly successful at achieving this goal.<sup>40</sup> Despite the NLIs binding nature, coaches have gotten informal commitments from prospective student-athletes that circumvent the NLIs mutual obligations, leading to controversial methods of recruiting and roster management.

### III. OVER-SIGNING AND LEAGUE ACTION

#### *A. Over-signing*

“Over-signing” is a term used in college athletics, primarily Division I Football Bowl Subdivision (“FBS”) football, to describe a program signing more prospective student-athletes to an NLI than it has athletic scholarships available. This can occur by the school exceeding the total number of scholarship athletes allowed on the team,<sup>41</sup> or by exceeding the total number of allowable signees each

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<sup>37</sup> 191 S.E.2d 379 (N.C. App 1972). The appellate court held that Taylor failed to comply “with his contractual obligations”, and his claim that there was a conflict between academics and athletics as “a strained construction of the contract”.

<sup>38</sup> 2 Ohio App. 3d 233, 441 N.E.2d 608 (1981).

<sup>39</sup> Cozzillio, *supra* note 3, at 1375.

<sup>40</sup> *Id.*

<sup>41</sup> NCAA Manual, Bylaw 15.5.6.1 (limiting the total number of scholarships for a Division I FBS football program to eighty-five).

year.<sup>42</sup> In many instances, coaches attempt to justify over-signing by claiming that some of the school's signees will fail to initially qualify, in addition to natural player attrition, which over-signing helps offset by allowing a team to utilize its available scholarships and fill out the roster when not every signee enrolls.<sup>43</sup> In this instance, over-signing serves as insurance to replace current student-athletes that unexpectedly fail to return to the team.

When more prospective student-athletes qualify than expected, schools must find other ways to cut their roster and adhere to the eighty-five total scholarship limit. In some instances, natural attrition occurs: student-athletes may transfer to other schools, become injured, quit or become ineligible due to poor grades or rules violations.<sup>44</sup> In more highly criticized cases, however, programs must create room by not renewing current student-athletes' scholarships, or asking prospects to grayshirt or agree to be released from their NLI to play for another school.<sup>45</sup> "Grayshirting" occurs when a prospective student-athlete either takes a part-time class load their first semester of college or does not begin taking classes until the spring of their first year. The process of "grayshirting" delays the student-athlete's eligibility clock from starting, essentially granting them another year of athletic eligibility for not participating with the team their first year out of high school.<sup>46</sup> The benefit for coaches who can convince prospects to grayshirt is that they do not count toward the current recruiting class' scholarship numbers. Instead, they would count against the next year's scholarship limits when there may be more availability and time to plan around their commitment. Additionally, the institution does not have to enter into an NLI with the prospect or give them athletic financial aid in a grayshirt scenario. Obviously, there is great deal of public resentment for

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<sup>42</sup> NCAA Manual, Bylaw 13.9.2.3 (currently limiting the annual number of signees to twenty-eight; to be decreased to twenty-five effective Aug. 1, 2012 by NCAA Division I Proposal 2011-43).

<sup>43</sup> Andy Staples, *Coaches Play the Curious Game of Oversigning in College Football* (Feb. 25, 2009), [http://sportsillustrated.cnn.com/2009/writers/the\\_bonus/02/24/oversigning](http://sportsillustrated.cnn.com/2009/writers/the_bonus/02/24/oversigning).

<sup>44</sup> *Alabama's March to 85 Finished?*, OVERSIGNING.COM (July 22, 2011), <http://oversigning.com/testing/index.php/2011/07/22/alabamas-march-to-85-finished>.

<sup>45</sup> *Id.*

<sup>46</sup> *What is a Grayshirt Scholarship Offer?*, RECRUITING-101.COM (Feb. 10, 2008), <http://recruiting-101.com/what-is-a-grayshirt-scholarship-offer>.

coaches that fail to renew the scholarships of current student-athletes, or cancel commitments to recruits so they may create a place on the team for a signee at the last minute. Although publicity of these negatively viewed remedies for over-signing increased, the steps taken to avoid over-signing are legal under the NCAA and most conference rules, no matter how morally reprehensible they might seem to be. While the program escapes any official punishment,<sup>47</sup> the only retribution for over-signing comes in the form of the media's public scorn and potential harm to future recruiting.

One proposal aimed at curbing non-renewal of upper-year student-athlete's scholarships is the allowance of multiyear scholarship offers.<sup>48</sup> Before October 2011, NCAA member institutions were only allowed to award athletic aid on a year-to-year basis.<sup>49</sup> Through an emergency legislative process, the NCAA Board of Directors adopted the multiyear scholarship legislation, but it was quickly overridden by member institutions and put to a full member vote.<sup>50</sup> The membership narrowly voted in February 2012 to uphold the multiyear scholarship allowance and the proposal was adopted fully.<sup>51</sup> The new rule does not, however, require multiyear scholarships, because it allows a coach to allocate only between one and five years to a student-athlete's grant-in-aid agreement. For coaches locked into long-term aid

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<sup>47</sup> Andy Staples, *Oversigning Offenders Won't be Curbed by NCAA's Toothless Rule* (Jan. 28, 2011), [http://sportsillustrated.cnn.com/2011/writers/andy\\_staples/01/24/oversigning/index.html](http://sportsillustrated.cnn.com/2011/writers/andy_staples/01/24/oversigning/index.html). Sports Illustrated has featured numerous pieces investigating the negative aspects of over-signing, as well as ESPN through *Outside the Lines* episodes. Additionally, the website OVERSIGNING.COM was created to "track and shame the programs that sign too many players each year".

<sup>48</sup> NCAA Legislative Services Database, Division I Proposal 2011-97 (amending multiple subsections of Article 15 of the NCAA Division I Bylaws to allow awards of grant-in-aid to be extended from one year to the student-athlete's five-year period of eligibility).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* "Narrowly" does little justice to how close the vote actually was. Of the 207 votes of the 330 Division I schools and conferences (a five-eighths majority) needed to overturn the multiyear scholarship legislation, 205 voted to overturn- merely two votes shy of being successful. Steve Wieberg, *Multiyear Scholarship Rule Narrowly Survives Override Vote*, *usatoday.com* (Feb. 17, 2012), <http://www.usatoday.com/sports/college/story/2012-02-17/multiyear-scholarships-survives-close-vote/53137194/1>.

agreements, the multiyear scholarship may be somewhat successful at limiting over-signing because the coach must renew an upper year player's scholarship as the multiyear scholarship would not be subject to renewal. Therefore, coaches would have to plan their recruiting against a hard-set roster number of returning players. The allowance of multiyear scholarships does not address the issue of coaches stockpiling informal commitments from prospective student-athletes only to sign some and cut or grayshirt others. Additionally, the multiyear scholarship legislation would curb over-signing only for those coaches who utilized the multiyear scholarships, leaving those who choose to use only one-year scholarships unaffected. As indicated by the extremely narrow vote to override the multiyear scholarship legislation, many institutions are still opposed to awarding scholarships greater than one year. Where multiyear scholarships could keep an upper-year player from being cut from the team, as would be possible in a non-renewal scenario, the trend thus far has been to offer only elite prospects multiyear scholarships. As such, those elite prospects did not run a high risk of not having their scholarships renewed under the old, year-by-year system. If the NCAA adopted a system that required multiyear scholarships for student-athletes' entire terms of eligibility, then perhaps there would be a significant impact on the techniques used to circumvent over-signing.<sup>52</sup>

Over-signing and other steps taken to get rosters under the eighty-five student-athlete limit remain legal, and because of that many coaches have voiced their staunch support for the practices and the benefits they provide to their teams.<sup>53</sup> Some coaches choose to dismiss questions about their alleged over-signing, vaguely responding with lines like, "[t]he numbers work themselves out."<sup>54</sup> Others are more vocal in the ways they deal with over-signing and feel little remorse for not renewing scholarships of current student-athletes who are aware that the scholarships are year-to-year commitments.<sup>55</sup> CurrentUniversity

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<sup>52</sup> It must be mentioned that the idea of requiring grant-in-aid for the entirety of a student-athlete's eligibility is far-fetched, as evidenced by the difficulty the NCAA had convincing its members to even allow multiyear scholarships, much less require them.

<sup>53</sup> Staples, *supra* note 47.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

of Cincinnati head coach Tommy Tuberville promotes the benefits of over-signing and believes it can provide a competitive advantage for both the school and the student-athletes.<sup>56</sup> For schools, over-signing obviously allows coaches the opportunity to recruit and develop more players, lessening the impact of recruits that do not live up to their potential by broadening the talent pool from which they pick their players.<sup>57</sup> The coaches can then replace players unlikely to contribute with more promising recruits. For student-athletes, over-signing may allow them to develop a relationship with a school they otherwise would not qualify for academically, which Tuberville claims gives the school the ability to exclusively monitor and motivate the student-athletes to raise their grades in junior college.<sup>58</sup>

### *B. The Big Ten Conference's NLI Limit*

The Big Ten Conference was the first to restrict over-signing in 1956 when it put a hard cap on the eighty-five scholarship limit, meaning a school could extend NLI offers to new recruits for only the number of scholarships they had available.<sup>59</sup> In fact, the conference relaxed their over-signing ban in 2002 by allowing schools to oversign the eighty-five scholarship limit by three players, though they still could not sign more than twenty-five prospects to an NLI each year.<sup>60</sup> Additionally, if a school violates the conference's over-signing provision, it must then document how it came down to reach the eighty-five scholarship limit, forcing schools to report to the conference office to explain the means taken to come into compliance with the scholarship limit if

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* Tuberville cites Nick Fairly as an over-signing success story, a 2006 Auburn over-signee and junior college placement, who went on to transfer to Auburn in 2009 and in 2010 won the Lombardi Award and 2011 BCS National Championship Defensive Player of the Game, going on to be the thirteenth overall pick in the 2011 NFL Draft. Because Fairly did not meet NCAA initial qualifying standards, without the ability to oversign Auburn would not have been able to place him in junior college to raise his grades while retaining his commitment and not counting toward Auburn's roster limits.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* For example, if a school had twenty available scholarships, they could sign twenty-three players to an NLI; however if the school had twenty-four available scholarships, they could only sign twenty-five to an NLI.

they oversign.<sup>61</sup> On the whole, the Big Ten's over-signing restriction has been one of the most successful in the country at limiting recruiting class sizes, for Big Ten schools continually average the least signees of any BCS conference.<sup>62</sup>

### *C. The Southeastern Conference's NLI Limit*

One of the most commonly accused groups of egregious over-signing has been the Southeastern Conference ("SEC"). From 2006 to 2011, eight of the twelve SEC members averaged greater than twenty-five signings per year.<sup>63</sup> From 2007 to 2010, SEC schools collectively signed an average of 103 recruits, which is, of course, over the twenty-five NLI per year limitation.<sup>64</sup> While the practice of over-signing has been prevalent and highly criticized among SEC schools, the conference does not endorse over-signing, and University of Georgia Head Coach, Mark Richt,<sup>65</sup> and University of Florida President, Bernie Machen, have publically voiced their opposition to it.<sup>66</sup>

In 2011, the SEC adopted a rule to cap NLI signees during the football-signing period at twenty-five, with a maximum of twenty-eight, including midyear signees counting back to the previous year.<sup>67</sup> Many affectionately nicknamed the legislation the "Houston Nutt Rule" after the former Ole Miss Head Coach

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* While commentators can debate the Big Ten rule's intent and method for how it attacks over-signing, the statistical evidence proves its effectiveness.

<sup>63</sup> *Id.* The only four schools averaging less than twenty-five signings per year were the Universities of Florida, Georgia, Tennessee, and Vanderbilt University.

<sup>64</sup> *Outside the Lines: Over the Limit*, ESPN (Dec. 19, 2010), <http://espn.go.com/video/clip?id=5935634>. The SEC's 103 signees is compared to the Big Ten's 86, Atlantic Coast Conference's 89, Pac Ten's 90, Big East's 92, and Big Twelve's 97.

<sup>65</sup> Jerry Hinnen, *Richt: Over-signing 'an Awful Thing to Do'*, CBSSPORTS.COM (May 15, 2011), <http://eye-on-college-football.blogs.cbssports.com/mcc/blogs/entry/24156338/29319039>. Georgia Athletic Director Greg McGarity echoed Richt's sentiment, saying putting an end to over-signing is "the right thing to do".

<sup>66</sup> Jon Soloman, *Florida President Calls Grayshirting and Oversigning Morally Reprehensible*, AL.COM (Feb. 1, 2011), [http://www.al.com/sports/index.ssf/2011/02/florida\\_president.html](http://www.al.com/sports/index.ssf/2011/02/florida_president.html). Along with "morally reprehensible", Machen described the practice as "unfortunate" and "nefarious", adding the "schools play roulette with the lives of talented young people".

<sup>67</sup> SEC Manual, Bylaw 13.9.1 (adopted May 29, 2009).

prompted the rule by signing thirty-seven prospects to the Rebels 2009 recruiting class.<sup>68</sup> Former University of Tennessee Head Coach, Derek Dooley, was of the most vocal opponents to the new rule after it affected his 2012 signing class, saying it failed to address any of the positive aspects of over-signing.<sup>69</sup> Other SEC coaches have also defended the roster management means they implement to cure over-signing, including, among others, University of Alabama Head Coach, Nick Saban and University of South Carolina Head Coach, Steve Spurrier.<sup>70</sup>

#### *D. NCAA Adoption of Twenty-Five NLI Limit*

Effective August 1, 2012, the NCAA instituted a rule, sponsored by the SEC, that mirrors the SEC's twenty-five NLI limit to apply to all NCAA Division I FBS football programs.<sup>71</sup> The proposal specifically aims to "address concerns regarding to the practice of 'over-signing' football prospective student-athletes to National Letters of Intent or financial aid agreements."<sup>72</sup> It claimed that by limiting the number of allowable signees, the new rule would curb over-signing by forcing institutions to focus recruiting efforts on prospective student-athletes likely to qualify academically.<sup>73</sup> The Football Issues Committee and the Recruiting and Athletics Personnel Issues Cabinet issued supporting position statements for the proposal.<sup>74</sup> The Awards, Benefits, Expenses

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<sup>68</sup> Andy Staples, *New SEC Ban Means Oversigning is Nearing its End Nationwide* (May 29, 2009),

[http://sportsillustrated.cnn.com/2009/writers/andy\\_staples/05/29/oversigning/index.html](http://sportsillustrated.cnn.com/2009/writers/andy_staples/05/29/oversigning/index.html). Nutt jokingly downplayed the thirty-seven signings at his 2009 National Signing Day press conference, saying "There's no rule that says we can't sign eighty [prospects]."

<sup>69</sup> Michael Carvell, *Derek Dooley Blasts SEC's New Oversigning Rules*, Atlanta Journal Constitution (Feb. 14, 2012), <http://blogs.ajc.com/recruiting/2012/02/14/derek-dooley-blasts-secs-new-over-signing-rules>.

<sup>70</sup> *Nick Saban Joins Houston Nutt in the Fight to Keep Oversigning*, OVERSIGNING.COM (May 27, 2011), <http://oversigning.com/testing/index.php/2011/05/27/nick-saban-joins-houston-nutt-in-the-fight-to-keep-oversigning/>.

<sup>71</sup> NCAA Legislative Services Database, Division I Proposal 2011-43 (amending Bylaws 13.9.2.3 and 15.5.1.10.1 to reduce the allowable NLI's from twenty-eight to twenty-five, and to specify the signing period as being from December 1 to May 31; also creating an exception from the countable signing totals for midyear enrollees).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

and Financial Aid Cabinet also supported the proposal; however, the cabinet voiced concern that the proposal failed to address the issue of over-signing in sports outside of Division I FBS football, or the issue of institutions offering prospective student-athletes aid that the school does not expect to have available.<sup>75</sup> The proposal explicitly stated that it intended to have no additional impact on institutional budgets or the duration of student-athlete academic and athletic time once implemented.<sup>76</sup> Of the 120 institutions competing in Division I FBS football that the proposal would affect, only one requested an override vote on the proposal.<sup>77</sup>

#### IV. PROBLEMS

It has yet to be seen whether the SEC's twenty-five NLI limit, which the NCAA has adopted in its entirety, will be successful in the long-term at curbing over-signing. The average number of NLIs signed by each SEC school decreased in 2011 to comply with the twenty-five maximum allowable NLIs.<sup>78</sup> However, this statistic does not show the number of requested "grayshirts", non-renewal of upperclassman scholarships, or accepted informal offers revoked before they could materialize into an NLI on signing day.<sup>79</sup>

For one, while the twenty-five NLI limit restricts the size of individual recruiting classes, it does not do anything to keep teams from over-signing their roster limit of eighty-five players. If, for example, a team has sixty-five returning players and signs the

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 2012 SEC Team Rankings, RIVAL.COM (March 5, 2012),

<http://rivals.yahoo.com/footballrecruiting/football/recruiting/teamrank/2012/SEC/all>. Of the fourteen 2012 SEC football member institutions, all had twenty-eight or less signees, and eleven had twenty-five or less. Of the three who signed more than twenty-five signees, each had more midyear enrollees than the difference between signees and the twenty-five limit, allowing them to count back to the previous year and keep the institution under the twenty-five NLI limit for 2012.

<sup>79</sup> One of the most highly publicized and criticized grayshirt offers of the 2012 recruiting cycle involved Justin Taylor of North Atlanta, GA, who committed to the University of Alabama but had his NLI offer revoked in favor of a grayshirt offer after sustaining an ACL injury and the Alabama signing class filled up with other high profile recruits. Taylor eventually turned down the grayshirt offer at Alabama to immediately attend the University of Kentucky.



twenty-five maximum NLI, they will have ninety players, and be five over the maximum limit. In order to make room for the incoming recruits, when a team signs the maximum allowable NLI and has more than sixty returning players, the school has oversigned every time and will have to cut upperclassman to get the roster size under the eighty-five player limit. Compared to the Big Ten rule, which uses the eighty-five player limit as the measuring stick for over-signing, the NCAA and SEC rules do nothing to stop the non-renewal of upperclassman scholarships. By allowing only as many signings as the difference between returning players and the eighty-five player limit, there is mathematically no way to bring in more first year players than the eighty-five player limit. Because of this phenomenon, over-signing cannot be blamed in the Big Ten for the non-renewal of upperclassmen to make room for new players. By creating a hard cap on NLI signings, coaches under the Big Ten rule cannot replace elder players that do not pan out with prospects that are more promising. Additionally, the Big Ten's requirement to report any upperclassmen non-renewal of scholarships, as well as the reasoning behind the non-renewal, helps serve as a disincentive for schools to engage in that sort of roster management, as they will be subjected to scrutiny and sanctions from the conference office.

Another problem forced by the NCAA twenty-five NLI limit is the decision coaches must make in managing how many NLI offers to extend to incoming recruits. As Derek Dooley explained:

The reality is some of the players don't make a decision until signing day. And so it really puts stress on you [as a coach] on what to do because the odds are, in my experiences, you're going to get one out of four down the stretch. If you're recruiting eight guys, generally you're going to get two of them. Here's the problem. If I have twenty-one commitments at this point and I only sign twenty-five, that's four spots. What do I do with those eight that I'm still recruiting? That's the challenge. So you say, well you only better recruit four down the stretch. If you do that and you only get one, now you've come up short on your roster.<sup>80</sup>

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<sup>80</sup> Carvell, *supra* note 64.

Thus, there are only two realistic options for coaches. The first is to send out only twenty-five NLI offers to prospective student-athletes, some of which will almost certainly waver on their college decision until National Signing Day. As Derek Dooley said, if some of those recruits do not work out, which is more likely than not, the roster and recruiting goals come up short. The coach then must begin scavenging whatever prospects remain left over from other schools after National Signing Day with the additional struggle of explaining to the recruit why they were not part of the school's most favored twenty-five prospects to begin with.

The other option for coaches is to send out more than twenty-five NLI offers, anticipating that some will not work out and the team will be able to fill out the roster with those that do. The obvious problem with this gamble is that, should more than twenty-five prospects sign NLIs, the school will have committed a recruiting violation. On top of the potential NCAA sanctions, the contractual analysis is particularly important in this scenario, insofar as the institution will, paradoxically, be contractually obligated to provide signees a scholarship and place on the team despite the guaranteed NCAA penalties. This inconsistency occurs independent of any excess over the eighty-five-man limit that the school may commit, which could compound the issue by also forcing the school to cut current players. Under the SEC model of NLI limitation, and now the NCAA model, football and athletics compliance offices will be forced to wait by the fax machine until the twenty-fifth NLI comes through, and then scramble to call the remaining recruits to rescind their NLI offers before a twenty-sixth NLI fax comes through.

## V. SOLUTIONS

One alternative, endorsed by Derek Dooley and Troy University Head Coach, Larry Blakeney,<sup>81</sup> is to let word of mouth and the recruiting market take care of the coaches who are abusing the practice of over-signing.<sup>82</sup> By essentially keeping rules the way they were prior to NLI limits, coaches who revoke

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<sup>81</sup> *Coaches Play the Curious Game of Oversigning in College Football*, *supra* note 43. Blakeney is widely considered one of the most avid over-signers in college football, signing 162 prospects from 2005-2009, for an average of 32.4 signees per year.

<sup>82</sup> *Id.*

prospect offers at the last minute or cut upperclassman from the roster to clear room for an oversized incoming freshman class would develop a negative reputation, which would hurt the program with future recruits. Both Coach Dooley and Coach Blakeney agreed: if a coach promises a scholarship and lies by not keeping the offer available, not many players are going to give the coach an opportunity again in the future.<sup>83</sup> Such a system, however, does not put an end to the roster management practices that shed a negative light on over-signing. At best, the public scorn toward coaches engaged in questionable recruiting practices would serve as only a deterrent to over-signing. As seen by the nature of college football recruiting prior to over-signing restrictions, the negative publicity brought on coaches accused of over-signing often are not enough of a disincentive to overshadow the competitive advantage it gives them. While the former *laissez-faire* policy toward over-signing certainly provided competitive benefits to college football programs, the consequences were insufficient to curb what many consider an immoral practice.

A more ruthless side of letting the market dictate the way prospects are signed and rosters are managed is to endorse over-signing and simply let the most able players survive roster cuts. For those seeking the best quality product on the field, this would seemingly be the ideal model as it would increase competition by cutting the weaker players in favor of more promising ones. The simple way to retain a spot on the roster is to show more talent and work harder than any other player vying for the position. There is no sympathy for upperclassmen that do not make the roster under this system, because they know their scholarships are subject to annual renewal. Furthermore, coaches would not be so willing to offer scholarships and take the chance on recruits who are unlikely to contribute more than their proven veterans. While this system would almost certainly create better athletes through pure competition, it is controversial almost to the point of impracticability, insofar as it mirrors a more professional model of athletics and not the amateur, student well-being first model on which the NCAA prides itself. Thus, the universal culture change

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<sup>83</sup> *Id.*

needed to not only allow over-signing, but also promote the practice would be functionally impossible.

Another proposal that would make the NCAA twenty-five NLI rule more effective at curbing over-signing is to amend the language of the NLI to void any NLIs received after the institution has accepted their allotment of twenty-five. This would allow the school to send out as many offers as it wanted, with the prospective student-athletes being responsible for accepting the offer before it expired. Additionally, such a rule would create a disincentive for schools to make offers to high-risk prospects. The program will rely on NLI fax time stamps and coaches will not want the signing class to fill up with marginal players and non-qualifiers before better players are able to commit. While coaches may not favor this rule because it puts too much power into the hands of the recruits, such a system places a premium on the coaches' initial use of judgment in offering NLIs. The problem with this system also lies within its strength, or lack thereof, as committing would become a race between recruits to fax in their NLI before they became void. In addition, under this system, the prospective student-athletes could potentially accept an offer that no longer exists, a scenario that could arise if they are the twenty-sixth recruit to commit. Such confusion over whether an offer remains valid, and the problematic race-notice aspects, does not correspond with the intent of the NLI program, and the uncertainty of this model would likely draw the same amount of criticism as pre-regulation over-signing. By shifting the NLI burden onto the student-athlete, rather than the institution, this system does little to benefit the heralded well-being of student-athletes.

Another way of giving prospective student-athletes a greater role in the recruiting process is to switch the recruiting and contracting responsibilities, by making the prospect the offeror and the institution the offeree. Under this reverse system, football recruiting would work very similar to the traditional college admissions process. In other words, the prospective student-athletes would "apply" to play for a school in the form of an offer, and the football coach would be able to evaluate all the applicants and accept offers from the best twenty-five. By also implementing a short time frame in which coaches can evaluate and accept

offers, there is less room for institutional uncertainty as the coaches do not have to wait for prospects to accept an offer, and any student-athlete uncertainty would narrow to the window when they sent out an offer. While the system would involve a massive overhaul on the way football staffs currently conduct recruiting, as well as dispose of exciting recruiting traditions like National Signing Day, it would, in fact, increase amateurism by making the selection of a college football program mirror that of ordinary college admissions.

The Big Ten's NLI limit is likely the most effective rule enacted to combat over-signing. By limiting each class to the difference between a team's number of active returning players and the eighty-five-player roster limit, the rule assures that a school will never have to cut upperclassman to make room for incoming freshman. By design, a Big Ten school can have no more than eighty-five players at a time. The glaring problem, however, is that it does little to combat natural attrition to a team in the year it occurs, leaving no safety net for any team that experiences players transferring, suffering injury, or quitting. While a team may replace lost players the subsequent season, a significant number of transfers and injuries in one year could weigh heavily on a team's quality depth, in turn, putting them at a material competitive disadvantage. While the Big Ten rule's potential competitive disadvantages are magnified when it pits Big Ten institutions against non-conference opponents, the rule would be less influential if the NCAA adopted it to apply to every school. It would relegate any competitive advantage lost by schools that suffer extreme roster attrition to bad luck or poor program management instead of conference affiliation.<sup>84</sup> Further, a critical element of the Big Ten rule is the conference oversight for roster management decisions. The rule is more effective because member institution's coaching staffs are required to submit their reasoning for the non-renewal of upperclassmen scholarships. By engaging the conference office, the schools face the scrutiny of the conference and the risk of sanctions. Such fear of recourse forces coaching staffs to act according to the conference policy on over-

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<sup>84</sup> Tommy Tuberville's answer to Big Ten schools being at a competitive disadvantage because of their over-signing restrictions: "Nobody told [the Big Ten] they had to do that."

signing, and, in turn, conduct its roster management in a manner consistent with the conference's integrity. Though the Big Ten rule has its shortcomings, namely an inability to maximize intra-team competition at a non-NLI limit level, the rule directly leads to a decrease in the total prospective student-athlete signings each year, which subsequently decreases the need for creative roster management.

To offset the attrition problem with the Big Ten's NLI limit, the NCAA should push back the National Signing Day deadline, while putting stricter time requirements on transfers and players not returning. To do this, the NCAA should require coaches to renew current student athletes' scholarships before the signing period begins. Additionally, the current student-athletes whose scholarships are renewed would be forced to accept such scholarships before the signing period. This rule would be effective because coaches would have a concrete idea of how many players they can expect to return. This would give the coach his maximum number of allowable signees. By forcing all transferring and non-returning players into a narrow window between the end of the season and National Signing Day, coaches could more appropriately gage their recruiting needs during the offseason and avoid suffering any surprises, leaving injuries as almost the only means of unplanned roster attrition. Additionally, by making all upperclassmen scholarship non-renewals due before the beginning of the signing period, coaches would have to make renewal decisions irrespective of their first-year signings. If a coach is forced to cut upperclassmen in order to make room for new prospective student-athletes, there will be a gap in the spring where the team suffers a roster shortage. Likewise, the coach will risk that the prospective student-athletes do not end up signing with the school, making the roster shortage apply the entire season. The inherent risk of having no players by cutting upperclassmen is sufficient at least to make coaches think twice before cutting those players for a chance at a more promising recruit. While there is a risk, Coach Dooley and Coach Blakeney would be happy to know that the system allows for the signing of large classes in the event that the coach is willing to assume that risk. Still, a hard cap, like the current NCAA NLI limit for individual classes, would be in place to keep coaches from

conducting massive roster overhauls. Most importantly, the expedited roster declaration dates will give current student-athletes whose scholarships are not renewed ample time to explore other opportunities to transfer or quit the sport. Such a process puts a premium on the current student-athletes' well-being, by giving them more time to prepare, and not allowing coaches to place the burden of non-renewal on the player at the eleventh hour.

By amending the Big Ten rule to compensate for the loss of players that naturally occurs each season, and making it applicable across the NCAA, we would have the best chance to combat over-signing more effectively than the current NCAA twenty-five NLI limit. Where the current NCAA rule allows for a maximum of twenty-five signees even when there are no available roster spots, the Big Ten rule limits the number of signees to the available roster spots only. Thus, instead of limiting signing classes based on an arbitrary number, limits are based on the needs of each institution's team. By limiting signees, the source of the creative roster management problem is cut off at the root. Taking the additional measure of narrowing the roster declaration deadline and placing it before schools sign prospective student-athletes creates another safeguard to current student-athletes' well-being. Thus, with these two elements, such a rule borrows the effectiveness and positive traits from the Big Ten and NCAA NLI limits, while putting in place other methods of curbing over-signing and maximizing collegiate competition.

#### CONCLUSION

While commentators debated and documented the benefits and downfalls of over-signing in recent years, the overarching negative sentiment of the practice focuses on the anecdotes that come because of last minute roster management. As a result, conferences like the SEC have joined the Big Ten in passing legislation aimed at curbing over-signing by limiting the number of NLIs to which a school can sign new prospects. In turn, the NCAA will enact a bylaw mirroring the SEC's twenty-five NLI limitation rule. Such a rule is not without glaring weaknesses and misconstrued means that fail to fully accomplish its rationale. The NCAA could better serve its goals by modeling its rule after that

of the Big Ten rather than the SEC. Nevertheless, it would need to compensate for its downfalls to decrease creative roster management within institutions. When football staffs gather around the fax machine for National Signing Day in the future, they will not only anxiously wait for blue chip prospect's NLI's, but also an amendment such as the modified Big Ten rule that will fix the NCAA's new twenty-five NLI limit.