



## ARTICLES

**College Athletics: Testing the  
Boundaries of Contract and Tort***Timothy Davis\**

## INTRODUCTION

The preface to *Sports and the Law* notes that "[t]he conduct of sports is governed by the entire legal system."<sup>1</sup> Consequently, analyzing the myriad of legal issues that arise in sports requires an excursion into the common law of contract and torts, the statutory law of labor and antitrust, and other bodies of law.<sup>2</sup> As a subset of sports, intercollegiate athletics shares this feature. Recent court decisions in the college sports context have addressed a broad range of issues including the constitutionality of

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<sup>1</sup> PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* v (1993).

<sup>2</sup> *Id.* These other bodies of law include workers' compensation, taxation, communications, and disability law. *Id.*

mandatory drug testing programs<sup>3</sup> and NCAA enforcement procedures,<sup>4</sup> the validity of anticipatory releases signed by student-athletes,<sup>5</sup> the viability of student-athlete educational malpractice claims,<sup>6</sup> and antitrust challenges to athletic conference sanctions.<sup>7</sup>

The foregoing delineation of issues offers but a glimpse of the diverse bodies of substantive doctrine on which courts draw to resolve disputes arising in college sports. Indeed, this resort to numerous bodies of law often requires an evaluation of their interrelationship. This in turn may initiate examination of the theoretical underpinning of one or more substantive theories to determine whether it has a proper role in shaping the contours of college sports.<sup>8</sup>

This Article attempts to engage in this process. It discusses the intersection of tort and contract theories of liability in college sports. The focal point of this undertaking is *Fortay v. University of Miami*.<sup>9</sup> As will be seen, *Fortay* provides a quintessential illustration of the entanglement of disparate legal theories invoked in disputes between student-athletes and their institutions.

Part I describes the facts that underlie Fortay's lawsuit against the University of Miami. Part II examines the federal district court's opinion in *Fortay* to demonstrate how differing bodies of

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<sup>3</sup> See, e.g., *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (holding mandatory drug testing constitutional); *University of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (holding that random drug testing, without voluntary consent, violates state and federal constitutions).

<sup>4</sup> See, e.g., *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993) (holding that Nevada statute requiring due process protections in NCAA enforcement proceedings violates Commerce Clause).

<sup>5</sup> See, e.g., *Kyriazis v. University of W. Va.*, 450 S.E.2d 649 (W. Va. 1994) (holding that anticipatory release violated public policy and equal protection under state constitution).

<sup>6</sup> See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) (holding that Illinois does not recognize educational malpractice claims); *Jackson v. Drake Univ.*, 778 F. Supp. 1490 (S.D. Iowa 1991) (holding that Iowa does not recognize educational malpractice claims).

<sup>7</sup> See, e.g., *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1485 (W.D. Wash. 1994) (denying motion to dismiss players' antitrust claims).

<sup>8</sup> See WEILER & ROBERTS, *supra* note 1, at v (stating that shape of sports is influenced by law). The pervasive influence of virtually every body of law is not surprising given that sports represents a microcosm of American society. See D. STANLEY EITZEN & GEORGE H. SAGE, *SOCIOLOGY OF AMERICAN SPORT* 14 (1978) (stating that sports provides useful institution for examining complexities of larger society because it represents microcosm of society in which it is embedded).

<sup>9</sup> *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed Aug. 4, 1993).

law define the parameters of the relationship between student-athletes and their institutions. In this regard, the Article assesses the applicability of established doctrine to the student-athlete/university context. The principles explored include implying terms to fill gaps in express contracts, the economic loss doctrine, negligent hiring, and negligent supervision.

Part II continues this analysis by first examining the district court's refusal to impose on institutions implied obligations to provide their student-athletes with educational and athletic opportunities. Through discussion of the consequences of this ruling, this Article concludes that the rejection of this and other theories perpetuates judicial deference to institutional conduct. This deference limits the judiciary's role in holding institutions accountable to their student-athletes.

*Fortay* also invites consideration of the confusion that results when factual overlap tests the lines of demarcation between theoretical constructs. An issue of first impression — the applicability of the economic loss doctrine — illustrates the extent to which matters involving student-athletes blur the lines of demarcation between competing theories of liability, tort and contract. To provide a foundation for this discussion, Part III begins with an overview of the economic loss rule. It then examines use of the independent duty exception to the economic loss rule as a mechanism for avoiding dismissal of *Fortay*'s negligent hiring and supervision claims.

Part III(C) then considers the broader issue of whether the reasoning that underlies the economic loss doctrine adequately justifies its application in disputes between student-athletes and their institutions. It proposes creating a consumer exception to the economic loss rule for the benefit of student-athletes. The justification for such an exception lies in: (1) the inapplicability of assumptions, such as risk allocation and the availability of remedial schemes, that provide the underpinnings of the economic loss doctrine; and (2) the realities of the student-athlete/university relationship, including disparate bargaining power.

## I. STATEMENT OF THE CASE

A. *The Facts*

The events which cast Bryan Fortay, the "Crybaby Quarterback,"<sup>10</sup> into the national limelight are traceable to his years as a high school quarterback. Like many preparatory athletes, Fortay dreamed of attending a college with a successful football program. He believed that he could parlay the exposure gained from playing for such a program into a lucrative career as a professional football player.<sup>11</sup>

His achievement at the high school level lent an air of reality to his dream. In 1988, Fortay was awarded the Junior Heisman Trophy.<sup>12</sup> As a result of this honor and the football skills that he exhibited during high school,<sup>13</sup> Fortay was aggressively recruited by schools with successful football programs, including Notre Dame, Alabama, and Michigan.<sup>14</sup> Fortay accepted a scholarship and signed a Letter of Intent<sup>15</sup> to attend and play football at the University of Miami (UM)<sup>16</sup> which perennially fields successful football teams.<sup>17</sup> His decision was influenced by UM's reputation as "Quarterback University."<sup>18</sup>

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<sup>10</sup> An unsympathetic sports commentator assigned this pejorative label to Fortay. John D. McKinnon, *Struggling QB Sues School*, A.B.A. J., Dec. 1993, at 27.

<sup>11</sup> Coaches often exploit the professional aspirations of student-athletes in attempting to persuade high school athletes to attend their institution. MURRAY SPERBER, *COLLEGE SPORTS, INC.* 229-30 (1990).

<sup>12</sup> Second Amended Complaint, Count 1, ¶1, Fortay v. University of Miami, No. 94-385-Civ-Moreno (S.D. Fla. filed Sept. 14, 1994) [hereinafter Second Amended Complaint].

<sup>13</sup> Fortay played high school football at East Brunswick High in New Jersey. David Lyons, *Star Says U. of Miami Sacked His Pro Dream*, THE NAT'L L.J., Mar. 6, 1995, at A10.

<sup>14</sup> Joe Donnelly, *Arena*, NEWSDAY, Dec. 23, 1988, at 95; Ian O'Connor, *School Sports: Top Recruit Feels Pressure*, N.Y. TIMES, Oct. 9, 1988, § 8, at 15.

<sup>15</sup> The Letter of Intent formalized Fortay's commitment to matriculate and play football at the University of Miami in exchange for an athletic scholarship. Fortay v. University of Miami, Civ. A. No. 93-3443, 1994 WL 62319, at \*4 (D.N.J. Feb. 17, 1994).

<sup>16</sup> *Id.* at \*1.

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

<sup>18</sup> The University of Miami has a "penchant for developing NFL-quality quarterbacks." *Id.* at \*3. Former Miami quarterbacks who played at the professional level include Jim Kelly, Bernie Kosar, Vinny Testaverde, and Gino Torretta. Rick Reilly, *See You in Court*, SPORTS ILLUSTRATED, Aug. 30, 1993, at 112; Gene Wojciechowski, *Miami's Tradition of Talented Quarterbacks Has Made It Tough on Torretta to Gain Recognition*, L.A. TIMES, Dec. 31, 1991, at C6.

Fortay also alleges, however, that representations by Miami athletic officials were the principal reasons he matriculated at the institution. According to Fortay, the University promised that he would be given substantial playing time<sup>19</sup> and that the University would assist in the development of Fortay's athletic skills.<sup>20</sup> Fortay contends that UM's failure to honor these and other promises<sup>21</sup> subverted his ability to develop as an athlete. He further contends that the University's failure ultimately hurt his chances for a professional career. Fortay also alleges that he unwittingly became implicated in his academic advisor's scheme to defraud the federal government of financial aid funds.<sup>22</sup> To avoid prosecution, Fortay agreed to participate in a pre-trial diversion program and to cooperate with the government.<sup>23</sup> He subsequently transferred to Rutgers University, but lost a year of eligibility.<sup>24</sup> According to Fortay, this course of events and its accompanying emotional turmoil resulted in the impairment of his football skills and the loss of his opportunity to attain a lucrative professional career.

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<sup>19</sup> See *Fortay*, 1994 WL 62319, at \*1, \*4 (stating that Fortay had believed he would be starting quarterback and that team would be built around him).

<sup>20</sup> See *id.* at \*6 (stating that Fortay alleged University had failed to provide promised athletic training).

<sup>21</sup> During 1990 spring practice, Fortay competed for the backup quarterback position with Gino Torretta, who was eventually named Miami's starter for the 1991 season. *Id.* at \*5. Torretta went on to become the 1992 recipient of the Heisman Trophy. Michael Vega, *Game, Name at Stake Amid Controversy, Rutgers' Fortay Tries to Focus on BC*, BOSTON GLOBE, Oct. 8, 1993, at 94.

<sup>22</sup> The facts relating to this incident, which provide the basis for the negligent supervision and hiring claims, are more fully discussed *infra* in the text accompanying notes 45-52.

<sup>23</sup> *Fortay*, 1994 WL 62319, at \*5. Fortay was required under the diversion program to meet monthly with a probation officer and to make restitution of the illicitly received funds. *Id.*

<sup>24</sup> Third Amended Complaint, Count 4, ¶ 8, *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed Dec. 9, 1994) [hereinafter Third Amended Complaint]. An NCAA regulation requires transferring student-athletes to complete one full academic year of residence at their new school before they are eligible to compete. NCAA Operating Bylaw art. 15, § 14.5.1, at 158, in NATIONAL COLLEGIATE ATHLETIC ASS'N, 1995-96 NCAA MANUAL [hereinafter NCAA MANUAL].

### B. *The District Court Opinion*

In his original complaint, Fortay asserted twenty-five counts against UM and various individual defendants.<sup>25</sup> In transferring the case to the Southern District of Florida,<sup>26</sup> the New Jersey district court described Fortay's forty-two page complaint as "exasperately cumbersome and unartful."<sup>27</sup> Although unartfully articulated, distinct causes of action are discernable from Fortay's complaint.<sup>28</sup>

#### 1. Implied Contractual Obligations

Student-athletes and scholars have argued that implied duties arise from the contractual relationship between student-athletes and their institutions.<sup>29</sup> Perhaps the most significant of these

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<sup>25</sup> Fortay sued the following individual defendants: Edward T. Foote, II, President of UM; Sam Jankovich, UM Athletic Director during the 1989-90 and 1990-91 academic years; Anna Price, UM Assistant Athletic Director for Academic Support; Dave Scott, UM Assistant Director of Operations; Doug Johnson, Associate Athletic Director for Internal Operations and Compliance; Tony Russell, UM Assistant Director of the Academics Athletic Department during the 1989-90 and 1990-91 academic years; and Dennis Erickson, former UM Head Football Coach. *Fortay*, 1994 WL 62319, at \*2-3. Claims against these individual defendants were eventually dismissed. See Order Granting Motion to Dismiss at 2, *Fortay v. University of Miami*, No. 94-0385-Civ-Moreno (S.D. Fla. filed Aug. 18, 1994) [hereinafter Order No. 1].

<sup>26</sup> The New Jersey district court, pursuant to 28 U.S.C. § 1404(a), ruled that witness convenience warranted a transfer of venue. *Fortay*, 1994 WL 62319, at \*10. Specific factors supporting transfer included the Florida residence of most key party and non-party witnesses and the court's conclusion that litigating the matter in Florida would not preclude Fortay from obtaining a fair trial. *Id.* at \*10-11.

<sup>27</sup> *Id.* at \*5.

<sup>28</sup> In addition to the claims specifically enumerated below, Fortay's amended complaint asserted claims sounding in fraudulent inducement, intentional infliction of emotional distress, and conspiracy to commit fraud. See Amended Complaint, Counts 5, 7, 28, *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed May 7, 1994) [hereinafter Amended Complaint]. These claims were dismissed by the district court. See Order No. 1, *supra* note 25.

The New Jersey district court characterized the theoretical basis of each count of the original complaint. *Fortay*, 1994 WL 62319, at \*5-6. Following transfer of the case to Florida, Fortay was granted leave to file an amended complaint. Order No. 1, *supra* note 25, at 1. The Florida district court reviewed the 29 counts of the amended complaint. See *id.* In attempting to decipher them, Judge Moreno relied on responses of Fortay's counsel to questions posed by the court, as well as "the amended complaint, the motions to dismiss, responses, replies, all other pertinent portions of the record, and all counsels' arguments in open court." *Id.*

<sup>29</sup> Lawsuits in which student-athletes have asserted that institutions possess implied

duties is a college's implied obligation to provide its student-athletes with an educational opportunity. A distinct component of the educational obligation is an institutional responsibility to provide student-athletes with the guidance necessary to enable them to develop their athletic skills.

The alleged existence of these duties lies at the core of Fortay's lawsuit. In particular, Fortay maintains that UM was obligated to provide the guidance necessary to allow him to develop his football talents.<sup>30</sup> According to Fortay, Miami breached its contract<sup>31</sup> and was negligent<sup>32</sup> by engaging in a course of conduct that impeded his ability to develop athletically.

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obligations related to their welfare both as students and as athletes include: *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); *Hairston v. Pacific-10 Conference*, No. C93-1763R, 1994 WL 822458 (W.D. Wash. May 20, 1994); *Jackson v. Drake Univ.*, 778 F. Supp. 1490 (S.D. Iowa 1991); *Hysaw v. Washburn Univ.*, 690 F. Supp. 940 (D. Kan. 1987); *Colorado Seminary (Univ. of Denver) v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976); *Echols v. Board of Trustees, California State Univ. and Colleges*, No. C 266 777 (Cal. Sup. Ct. filed Oct. 22, 1979) (cited in Ron Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79, 97). These cases are discussed in greater detail *infra* in Part II.A.

Scholars also urge the judiciary to recognize implied obligations arising from the student-athlete/university relationship. These scholars and their works are identified *infra* in note 89.

<sup>30</sup> Amended Complaint, *supra* note 28, Count 6, ¶ 79.

<sup>31</sup> See *id.* at 29. The process by which the court characterized the breach of contract claim is discussed *infra* in note 34.

<sup>32</sup> The *Fortay* court ruled that language in the amended complaint suggested causes of action sounding in contract and tort. Defendants argued that Fortay's allegations claiming breach of contract were merely disguised tort claims for educational malpractice. More specifically, defendants argued that claims alleging that the University possessed a duty to develop Fortay as a student or as an athlete constituted an educational malpractice claim. Motion of Defendants to Dismiss the Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and Supporting Memorandum at 6-7, *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed May 26, 1994) [hereinafter Motion to Dismiss]. Defendants argued that:

[b]ecause a cause of action cannot be maintained for negligence in the educational process, Fortay's claims that the University and the Individual Defendants did not adequately develop his football future, did not advance him to the position of starting quarterback and did not properly guide or supervise him should be dismissed.

*Id.* at 7. In order to avoid the adverse precedent regarding educational malpractice claims, Fortay argued that certain counts merely asserted a breach of contract claim.

The *Fortay* district court ruled that the Letter of Intent<sup>33</sup> and other contract documents did not give rise to implied obligations cognizable under contract law.<sup>34</sup> Similarly, the court rejected Fortay's position that the contract documents and circumstances surrounding the contractual relationship laid the theoretical predicate for a negligence claim.<sup>35</sup> The court also held that even if a negligence claim existed, it would be barred by the economic loss rule.<sup>36</sup>

## 2. Oral Promises

Fortay was recruited to attend the University of Miami and to play intercollegiate football by then head football coach Jimmy Johnson and his staff.<sup>37</sup> According to Fortay, oral assurances induced him to sign a Letter of Intent to attend Miami.<sup>38</sup> Fol-

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<sup>33</sup> The Letter of Intent is the document which formalizes a student-athletes commitment to attend a particular university. Harold B. Hilborn, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 751 (1995). Signing the Letter of Intent prohibits a student-athlete from competing for another institution during the upcoming sports season and precludes other colleges from contacting her. *Id.* at 750. See also *Fortay v. University of Miami*, Civ. A. No. 93-3443, 1994 WL 62319, at \*14 n.9 (D.N.J. Feb. 17, 1994). NCAA rules require the institution to indicate in writing its intention to offer athletically related financial aid to the student before she can sign the Letter of Intent. Hilborn, *supra*, at 750-51; NCAA MANUAL, *supra* note 24, § 13.10.1.2, at 110.

<sup>34</sup> Characterizing Count 1 of the amended complaint as alleging breach of contract, the court originally dismissed it without prejudice, granting leave for Fortay to allege facts supporting a breach of contract. Order No. 1, *supra* note 25, at 2. In his second amended complaint, Fortay unsuccessfully attempted to allege such facts. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss at 2, *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed Nov. 22, 1994) [hereinafter Order No. 2].

<sup>35</sup> Specifically, the court held that Counts 2 and 6 amounted to claims alleging negligence which were not cognizable under Florida law. Order No. 1, *supra* note 25, at 3-5.

<sup>36</sup> *Id.* at 3-4. The legal significance of the court's extension of the economic loss doctrine to this context is discussed in depth *infra* in Part III.B.

<sup>37</sup> Miami's recruitment efforts included visits by UM staff to Fortay's home and a visit by Fortay to UM. In addition, Fortay received letters and information from UM which touted the latter's highly regarded football team, its history of developing NFL quarterbacks, its health and training facilities, and the academic and vocational resources which it offered. *Fortay*, 1994 WL 62319, at \*3.

<sup>38</sup> Unbeknownst to UM officials, Fortay and his father tape recorded the conversations during which UM officials made assurances to them. Fortay alleges that transcripts of recorded conversations between him and UM officials describe the nature of the allegations and provide support for his oral contract allegations. Third Amended Complaint, *supra* note 24, Count 4, at 6-41.



lowing Johnson's resignation as head coach,<sup>39</sup> the University allegedly made a series of promises intended to induce Fortay to forego challenging the University's refusal to release him from his commitment.<sup>40</sup>

In summary, Fortay alleges that oral promises by Johnson, his successor coach, and other UM officials support a breach of oral contract claim. These promises include alleged representations that the University would provide guidance that would enable Fortay to develop his football skills,<sup>41</sup> that UM would not recruit other quarterbacks,<sup>42</sup> and that Fortay would be UM's start-

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<sup>39</sup> Johnson resigned as UM head football coach to become head coach of the Dallas Cowboys professional football team. *Fortay*, 1994 WL 62319, at \*4.

<sup>40</sup> In reaction to Johnson's resignation, Fortay sought to be released from his commitment to play sports for UM. The University refused his request. Third Amended Complaint, *supra* note 24, Count 4, ¶ 4. Indeed, Fortay alleges that, following Johnson's resignation, UM officials and Johnson communicated with him almost daily in an effort to reassure him of the wisdom of his decision to enroll at UM. *Fortay*, 1994 WL 62319, at \*3-4. These efforts were continued by Johnson's successor, Dennis Erickson. *Id.*

Fortay alleges that transcripts of conversations recorded without the knowledge or consent of Miami officials demonstrate that such promises were in fact made. For example, he contends that transcripts document the assurances UM officials made that they would honor the commitments made by Johnson. One transcript featured Dennis Erickson assuring Fortay: "OK. Nothing's changed. . . . We'll red shirt you the first year, you'll get experience the second year, then the job will be yours. Nothing's changed. When Walsh graduates, you'll have an opportunity to back up Craig; and when Craig graduates, you'll be the quarterback." Third Amended Complaint, *supra* note 24, Count 4, at 22.

<sup>41</sup> Fortay asserts that the following and other exchanges support this contention:

[Peter Fortay]: What about getting [Bryan] involved early?

[Dennis Erickson]: He'll be involved from day one. He'll get plenty of snaps right away, don't worry about that. First year, we'll get him ready mentally and physically, second year, he'll get experience, then he'll be the next great QB here. . . .

[Peter Fortay]: What about Toretta?

[Dennis Erickson]: Bryan and Gino are not in the same league. Some day Gino may be a good backup, I hope. Bryan will be a great QB.

Third Amended Complaint, *supra* note 24, Count 4, at 19-20.

<sup>42</sup> Johnson allegedly promised that if Fortay verbally committed to Miami, Johnson would cease recruiting other quarterbacks. *Fortay*, 1994 WL 62319, at \*14 n.8; Third Amended Complaint, *supra* note 24, Count 4, at 7-8. Miami alleges that UM personnel merely promised Fortay a scholarship and the opportunities to compete for the starting quarterback position and travel with the team. *Fortay*, 1994 WL 62319, at \*14 n.8.

Transcripts of the tape recorded conversations allegedly support Fortay's version of the facts:

[Jimmy Johnson]: Bryan, you're the best QB in the country, you're gonna be a millionaire, don't blow it. Hey, we told you we won't take another QB. It's

ing quarterback by his third year.<sup>43</sup> The district court ruled that Fortay alleged facts sufficient to support a breach of oral contract claim.<sup>44</sup>

### 3. Negligent Hiring and Supervision

Fortay's claims of negligent hiring and supervision arise from what became known as the Pell Grant scandal. Fifty-seven UM student-athletes were involved in a financial aid scheme that federal officials characterized as "perhaps the largest centralized fraud upon the federal Pell Grant program ever committed."<sup>45</sup> More than \$128,000 was illicitly conveyed to these student-athletes.<sup>46</sup>

Fortay's involvement in the scandal began shortly after he matriculated at Miami. He was assigned to Tony Russell, Assistant Director of Academics, who was to provide Fortay with guidance and assistance.<sup>47</sup> Russell advised Fortay that he was eligible to receive a Pell Grant and subsequently assisted Fortay in completing the application for this financial aid.<sup>48</sup>

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gonna be Walsh, Erickson and Fortay.

[Peter Fortay]: What about the other guys you're recruiting?

[Jimmy Johnson]: When [Bryan] verbally commits, we will notify all QB prospects that we are no longer recruiting QBs. We don't want a mediocre guy and we don't want another top prospect. . . .

[Gary Stevens]: I told Torretta not to come to Miami; he'd never play. We gave him a scholarship because his brother played. After he got here, I told him to transfer to another school; somewhere where he had a shot to play.

Third Amended Complaint, *supra* note 24, Count 4, at 11-13.

<sup>43</sup> UM allegedly promised that Fortay "would be the starting quarterback and that he would absolutely receive two to three years playing time which would greatly enhance his probability of a career with the NFL." Third Amended Complaint, *supra* note 24, Count 4, ¶ 2.

<sup>44</sup> The district court ruled that Count 4, as articulated in Fortay's third amended complaint, asserted facts sufficiently detailed to permit it to rule on defenses, including the statute of frauds and lack of mutuality. Accordingly, it denied defendants' motion to dismiss the oral contract claim. Order No. 2, *supra* note 34, at 3.

<sup>45</sup> Alexander Wolff, *Broken Beyond Repair: An Open Letter to the President of Miami Urges Him to Dismantle His Vaunted Football Program to Salvage His School's Reputation*, SPORTS ILLUSTRATED, June 12, 1995, at 20, 22.

<sup>46</sup> *Id.* at 24.

<sup>47</sup> Fortay v. University of Miami, Civ. A. No. 93-3443, 1994 WL 62319, at \*5 (D.N.J. Feb. 17, 1994).

<sup>48</sup> *Id.*

The federal government undertook an investigation of Russell for illegally obtaining Pell Grant monies.<sup>49</sup> Fortay and other Miami student-athletes became implicated. Russell was eventually convicted and sentenced to serve three years in prison.<sup>50</sup>

Fortay alleges that a proper background investigation would have revealed that Russell had been involved in Pell Grant scandals at other educational institutions.<sup>51</sup> He also alleges that the University failed to supervise Russell properly. Thus he contends that the University should be held liable for its failure to become aware of Russell's illegal activities.<sup>52</sup>

## II. THE *FORTAY* COURT'S REJECTION OF IMPLIED OBLIGATIONS/SPECIAL RELATIONSHIP

### A. *Implied Contractual Duties*

With rare exception, courts and scholars recognize the contractual nature of student-athletes' relationships with their institutions.<sup>53</sup> This contractual relationship is premised on the Letter of Intent, the Statement of Financial Assistance, and

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

<sup>50</sup> Jorge Milian, *Ex-Miami Official Sentenced*, ORLANDO SENTINEL, Mar. 18, 1994, at D2.

<sup>51</sup> Third Amended Complaint, *supra* note 24, Count 9, ¶ 5.

<sup>52</sup> *Id.* Count 15. In addition to the foregoing claims on which this Article focuses, Fortay asserted numerous other causes of action. Certain claims, such as those asserting that he was an employee of UM and a third party beneficiary of the University's contract with the NCAA, are significant but beyond the scope of this Article.

<sup>53</sup> Courts adopting the contractual characterization of the student-athlete's relationship with her institution include: *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992); *Jackson v. Drake Univ.*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1991); *Colorado Seminary (Univ. of Denver) v. NCAA*, 417 F. Supp. 885, 895 (D. Colo. 1976); *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908, 909-10 (E.D. Tenn. 1973); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 381 (N.C. Ct. App. 1972), *cert. denied*, 192 S.E.2d 197 (N.C. 1972); *Barile v. University of Va.*, 441 N.E.2d 608, 615 (Ohio Ct. App. 1981). *But see* *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1174-75 (Ind. 1983) (holding that student-athlete's relationship with her university is not contractual).

Commentators describing the relationship as contractual include: 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); Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163 (1991); Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743 (1991) [hereinafter Davis, *An Absence of Good Faith*]; John S. Mairo, Comment, *The College Athletic Scholarship: A Contract that Creates a Property Interest in Eligibility*, 3 SETON HALL J. SPORT L. 149 (1993); Michael N. Widener, *Suits by Student-Athletes Against Colleges for Obstructing Educational Opportunity*, 24 ARIZ. L. REV. 467 (1982).

university bulletins and catalogues.<sup>54</sup> Nevertheless, these documents fail to expressly state a college's obligation to student-athletes apart from providing financial aid.

Given these gaps, it is not surprising that student-athletes have brought suits claiming that colleges and universities possess implied duties to provide them with opportunities to develop academically and athletically. While creating narrow exceptions, courts have rejected such challenges. *Ross v. Creighton University*<sup>55</sup> exemplifies the prevailing view.

Kevin Ross, recruited by Creighton to play intercollegiate basketball, sued his former college alleging, *inter alia*, educational malpractice and breach of contract.<sup>56</sup> The court followed nearly unanimous precedent in other contexts<sup>57</sup> in dismissing Ross's educational malpractice claim.<sup>58</sup> The Seventh Circuit also refused to imply a duty that would allow student-athletes to attack the quality of the educational instruction.<sup>59</sup>

The court did, however, recognize narrow grounds for upholding student-athlete breach of contract actions against colleges and universities. The court held that student-athletes may bring claims alleging breach of express contractual commitments

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<sup>54</sup> Daniel P. Rafferty, Note, *Technical Foul! Ross v. Creighton University Allows Courts to Penalize Universities Which Do Not Perform Specific Promises Made to Student-Athletes*, 38 S.D. L. REV. 173, 180 (1993) (stating that letter of intent, statement of financial aid, and university publications comprise express contractual agreement between university and student-athlete).

<sup>55</sup> 957 F.2d 410 (7th Cir. 1992).

<sup>56</sup> *Id.* at 412. Ross also asserted negligent admission and negligent infliction of emotional distress claims. These claims were dismissed by the court for failing to present cognizable causes of action. *Id.* at 414-15.

<sup>57</sup> The court noted that the Montana Supreme Court, in *B.M. v. State*, 649 P.2d 425 (Mont. 1982), had recognized an educational malpractice claim premised on state statutes imposing a duty of care on educators. *Id.* at 414 n.2.

<sup>58</sup> *Id.* at 415. The court's rejection of Ross's educational malpractice claims was influenced by several policy considerations including: the unavailability of a standard of care for evaluating educators; the inherent difficulties in establishing causation; the burden which educational malpractice litigation could impose on schools; and the lack of judicial expertise to oversee the day-to-day operations in schools. *Id.* at 414-15.

<sup>59</sup> *Id.* at 416. Ross's breach of contract claim asserted that Creighton had promised him the opportunity to meaningfully participate in its academic program in exchange for his promise to play basketball for the university. *Id.* at 415-16. Ross also asserted that Creighton had engaged in conduct which denied him any real opportunity to participate and benefit from the school's academic program. *Id.* at 416. The court reasoned that the same policy considerations which militate against permitting tort claims for educational malpractice are equally applicable to contract actions attacking the quality of academic instruction. *Id.*

made by their institution.<sup>60</sup> Thus, student-athletes present cognizable contract claims if they can “point to an identifiable contractual promise that the [school] failed to honor.”<sup>61</sup>

The *Ross* theme also appears in *Jackson v. Drake University*.<sup>62</sup> Terrell Jackson was recruited by Drake University to play basketball.<sup>63</sup> According to Jackson, the express contract between him and Drake implicitly “granted him the right to an educational opportunity and the right to play basketball for a Division I school.”<sup>64</sup> Drake allegedly engaged in conduct that undermined his ability to play basketball and to succeed academically.<sup>65</sup> Recognizing an express contractual relationship, the district court held that the omission of terms regarding a right to play basketball defeated Jackson’s contract claim.<sup>66</sup> The court based its refusal to imply terms on the rationale that “where the language of a contract is clear and ambiguous, the language controls.”<sup>67</sup> Given this well established rule, the court reasoned that implying a right to play basketball would be improper.<sup>68</sup>

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<sup>60</sup> *Id.* at 417.

<sup>61</sup> *Id.* In addition, the court suggested that a good faith breach could be found, but only in those instances in which the institution had failed to perform any educational service at all in contrast to poorly providing such services. *Id.* See also Timothy Davis, *Ross v. Creighton University: Seventh Circuit Recognition of Limited Judicial Regulation of Intercollegiate Athletics?*, 17 S. ILL. U. L.J. 85, 111 (1992) (urging broad interpretation of this aspect of *Ross* court’s holding).

<sup>62</sup> 778 F. Supp. 1490 (S.D. Iowa 1991).

<sup>63</sup> *Id.* at 1492.

<sup>64</sup> *Id.* at 1493.

<sup>65</sup> Jackson alleged that the following conduct by Drake improperly interfered with his right to play basketball and his right to an educational opportunity:

[F]ailing to provide independent and adequate academic counseling and tutoring; failing to provide adequate study time; requiring Jackson to turn in plagiarized term papers; disregarding Jackson’s progress toward an undergraduate degree; and urging Jackson to register for easy classes.

Jackson also contends that Drake breached its duty by scheduling practices which substantially interfered with his study time and tutoring schedule, and by requiring him to attend these practices under threats that his scholarship would be taken away if he did not comply.

*Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The court characterized Jackson’s claim that Drake “undertook a duty to Jackson to provide an atmosphere conducive to academic achievement” as sounding in educational malpractice. Based on this finding, it refused to impose a duty on Drake to provide an educational opportunity. *Id.* at 1494. The court justified its refusal to fashion a duty on

In addition to *Ross* and *Jackson*, courts in other factual and legal contexts have rejected student-athlete claims of an implied right to develop athletically and to participate in athletic competition. This alleged right is a key aspect of student-athlete due process challenges to NCAA regulations restricting their eligibility to play. In attempting to maintain their eligibility, student-athletes assert that they possess a property interest in athletic participation that cannot be taken away without procedural safeguards.<sup>69</sup> They maintain that this property interest is a product of the athletic scholarship and student-athletes' resulting contractual expectations to participate.<sup>70</sup>

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colleges to provide their student-athletes with an educational opportunity on judicial inexperience in defining a clear standard of care by which to measure the university's conduct. *Id.*

<sup>69</sup> Mairo, *supra* note 53, at 149-50. Attempting to establish a property interest is critical given that, in order for a court to conclude that a student-athlete is entitled to due process protection, it must initially find state action and a substantial right which involves "life, liberty or property." John P. Sahl, *College Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian?*, 21 ARIZ. ST. L.J. 621, 655 (1989).

<sup>70</sup> The gist of the contract rationale is that the student-athlete's contract with her institution creates a reasonable expectation and entitlement to due process to protect her eligibility interests. "Consequently, advocates of [the contract rationale] argue that what is bargained for between the student-athlete and the institution is not merely the express provisions of the scholarship agreement, but instead a much broader package of benefits." Sahl, *supra* note 69, at 657. Included within this package of benefits is a student-athlete's right to participate in intercollegiate sports. *Id.*; Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1160 (1987).

One commentator adroitly captured this rationale as follows:

Implied contracts exist where the schools and the student athletes anticipate the latter's participation in the athletic program . . . . In college athletics, intense recruiting battles among schools for the services of highly skilled athletes are commonplace. These battles indicate that the combatant universities anticipate that the scholarship athletes who enroll at each institution will represent that institution in athletic competition. The scholarship agreement is the sort of "mutually explicit understanding" . . . which supports a claim of entitlement to participate in intercollegiate athletics.

*Id.* at 1168-69 (footnotes omitted).

In addition to the contract rationale, student-athletes have asserted economic and educational rationales in attempting to establish an entitlement to eligibility. Mairo, *supra* note 53, at 152 n.14. Thorough discussions of these rationales appear in the following: Sahl, *supra* note 69, at 656-60; Porto, *supra*, at 1158-69; Felix J. Springer, Note, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions*, 10 CONN. L. REV. 318, 340-45 (1978).

Despite overwhelming scholarly support for the contract rationale,<sup>71</sup> courts conclude it is insufficient to provide the basis for establishing a property interest in participation.<sup>72</sup> For example, in *Hysaw v. Washburn University of Topeka*<sup>73</sup> several African-American student-athletes recruited to play football complained that the college's coaching staff and administration treated them in a racially discriminatory manner.<sup>74</sup> As a result of this alleged conduct and dissatisfaction with the university's response to their complaints, the players boycotted team practices and certain team meetings.<sup>75</sup> Ultimately, the university refused to allow the players to return to the team.<sup>76</sup>

The *Hysaw* court rejected the plaintiffs' contention that the university had infringed upon their contractual right to play football without affording them due process.<sup>77</sup> In disagreeing with the plaintiffs' attempt to imply a right to play football, the court stated "the only interests created by those agreements are

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<sup>71</sup> Commentators supporting the contract rationale include: Timothy Davis, *Student-Athlete Prospective Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585 (1994); Mairo, *supra* note 53; Springer, *supra* note 70. See also David K. Miller, *The Enforcement Procedures of the National Collegiate Athletic Association: An Abuse of the Student-Athlete's Right to Reasonable Discovery*, 1982 ARIZ. ST. L.J. 133, 143-44 (arguing that contracts student-athletes enter into with their institutions support legitimate entitlement to participation); G. Preston Keyes, Note, *The NCAA, Amateurism, and the Student-Athlete's Constitutional Right Upon Ineligibility*, 15 NEW ENG. L. REV. 597, 616 (1980) (asserting that circumstances surrounding student-athlete's contractual relationship with university give rise to mutually explicit understanding that former has entitlement to participation in intercollegiate athletic program); Porto, *supra* note 70, at 1153 (stating that "the Constitution recognizes a property right to continued athletic eligibility which is derived from the contractual nature of athletic scholarships").

<sup>72</sup> See Sahl, *supra* note 69, at 658 (concluding that, despite numerous theories advanced by scholars and student-athletes, majority of courts reject theory that implied understanding entitles student-athletes to right of eligibility and thus participation in intercollegiate competition).

<sup>73</sup> 690 F. Supp. 940 (D. Kan. 1987).

<sup>74</sup> *Id.* at 942.

<sup>75</sup> *Id.* at 942-43.

<sup>76</sup> *Id.* at 943. Washburn took this position after the players refused to comply with its demands which included apologies to the institution and the football team and a reaffirmation of commitment to the Washburn football program. *Id.*

<sup>77</sup> According to the plaintiffs, this infringement of their rights constituted an improper deprivation actionable under 42 U.S.C. § 1983. *Id.* at 944. The plaintiffs also alleged that the more favorable treatment afforded white football players constituted a violation of 42 U.S.C. § 1981. *Id.* The preferential treatment allegedly included the provision of better opportunities to white players to enter into favorable scholarship arrangements and to participate in Washburn's football program. *Id.*

interests in receiving scholarship funds. Any other terms plaintiffs attempt to read into those agreements are, without supporting evidence, no more than 'unilateral expectations'."<sup>78</sup>

Similar results have been reached in cases brought by student-athletes asserting contractually based property interests to eligibility and participation in intercollegiate sports. An oft-cited example is *Colorado Seminary (University of Denver) v. NCAA*,<sup>79</sup> in which the district court denied a student-athlete's claim of entitlement to participate in intercollegiate competition based on implied understandings.<sup>80</sup> The court dismissed the student-athletes' claim that they had been unconstitutionally deprived of their right to compete in intercollegiate athletics.<sup>81</sup> The court acknowledged the credibility of the plaintiffs' argument that their contractual interests included not just the entitlement to a scholarship but also an expectation that they would be allowed to participate in intercollegiate competition.<sup>82</sup> It reasoned, however, that scholarship athletes had no more of a right to play than walk-on athletes.<sup>83</sup> According to the district court, in both instances the right to participate is too speculative.<sup>84</sup>

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<sup>78</sup> *Id.* Accord *Lesser v. Neosho County Community College*, 741 F. Supp. 854, 864-65 (D. Kan. 1990) (holding that no right to position on baseball team emerged from Letter of Intent creating contract between student-athlete and college when contract was silent on issue). But see *Hunt v. NCAA*, No. G76-370 C.A. (W.D. Mich. Sept. 10, 1976) (stating that scholarship agreement entitles student-athletes to certain benefits including right to participate in intercollegiate athletics).

<sup>79</sup> 417 F. Supp. 885 (D. Colo. 1976). See also *Justice v. NCAA*, 577 F. Supp. 356, 365 (D. Ariz. 1983) (refusing to find that right to participate in post season play arises from scholarship agreement when agreement fails to expressly so provide).

<sup>80</sup> *Colorado Seminary*, 417 F. Supp. at 895 n.5. Several student-athletes at the University of Denver were declared ineligible to play ice hockey due to NCAA rules infractions. *Id.* at 889.

<sup>81</sup> *Id.* at 894-95.

<sup>82</sup> *Id.* at 895 n.5.

<sup>83</sup> *Id.* The reasoning employed by the court in *Colorado Seminary* in rejecting the contract rationale is flawed in its failure to distinguish scholarship from non-scholarship athletes with respect to their respective rights to participation. As noted by one commentator: "The non-scholarship athletes, or walk-ons, have merely a 'unilateral expectation of a benefit,' namely, the hope of participation. . . . The scholarship players, in contrast, have a contractual duty to play." Porto, *supra* note 70, at 1168. See also Keyes, *supra* note 71, at 616.

<sup>84</sup> *Colorado Seminary*, 417 F. Supp. at 895. In contrast to *Colorado Seminary*, the court in *Hunt v. NCAA*, No. G76-370 C.A. (W.D. Mich. Sept. 10, 1976), recognized student-athletes' contractually-derived right of participation. In *Hunt*, seven student-athletes, deemed ineligible to compete in intercollegiate football, asserted a constitutionally protected property interest in participating. *Id.* The court held that the student-athletes possessed a



Such reasoning was reiterated in a recent Title IX case. In *Gonyo v. Drake University*,<sup>85</sup> student-athletes on the male wrestling team sought a preliminary injunction alleging, inter alia, violation of Title IX and breach of contract after the university discontinued its intercollegiate men's wrestling program.<sup>86</sup> The district court held that, other than Drake's scholarship commitment, which the university agreed to honor, no other contractual obligations existed or were breached by Drake.<sup>87</sup>

Contrary to these decisions, many commentators concur with Fortay's position that the contract documents fail to delineate an institution's obligation to provide for or promote the educational or athletic interests of their student-athletes.<sup>88</sup> Accordingly they conclude that omissions in the contract between student-athletes and their institutions should be filled with implied terms that promote the reasonable expectations of student-athletes. These expectations include obligations to provide educational and athletic opportunities.<sup>89</sup>

Despite the urging of commentators, the *Fortay* court adhered to judicial precedent that rejects these arguments. However, in rejecting the implied obligation claims, the court refused to closely consider the nature of the student-athlete/university relationship in determining whether implication of such terms is

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"property interest arising from their contract with the University granting them certain benefits constituting a football scholarship." *Id.* The court concluded, however, that while the procedural due process afforded the student-athletes was far from ideal, it met the minimum due process required by the Constitution. *Id.*

<sup>85</sup> 837 F. Supp. 989 (S.D. Iowa 1993).

<sup>86</sup> *Id.* at 990.

<sup>87</sup> *Id.* at 994-95. The court did, however, express concern that top Drake athletic officials, who for several years had been aware the wrestling program might be eliminated, failed to inform the wrestling coach who could have informed recruits. This would have allowed the recruits to make informed decisions. *Id.* at 995 n.3.

<sup>88</sup> See, e.g., Davis, *An Absence of Good Faith*, *supra* note 53, at 772-73 (noting that express contract fails to delineate institution's obligations to its student-athletes); Alfred D. Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 ST. LOUIS U. L.J. 39, 72-73 (1990) (suggesting that express contract fails to reflect what student-athlete should reasonably expect to receive from her institution).

<sup>89</sup> See, e.g., Davis, *An Absence of Good Faith*, *supra* note 53, at 776-81 (urging use of good faith doctrine to clarify colleges' educational obligations to student-athletes); Sahl, *supra* note 69, at 657 (asserting that student-athlete gains package of benefits, including opportunity to participate, when signing scholarship agreement); Springer, *supra* note 70, at 347-48 (arguing that athletic scholarship creates contractual interest in opportunity to participate in intercollegiate athletics).

warranted. The district court's holding also perpetuates the limited availability of contract law as a means of redress for student-athletes that believe institutions have failed to abide by their obligation to provide them with an educational opportunity.

### B. Special Relationship

Fortay asserted another basis for imposing implied obligations on colleges and universities. The special relationship that allegedly exists between colleges and student-athletes justifies imposing duties on colleges to provide educational and athletic guidance to their student-athletes. In constructing this argument, Fortay relied on a recent Third Circuit case, *Kleinknecht v. Gettysburg College*.<sup>90</sup>

Drew Kleinknecht, a student-athlete recruited to play on the school's lacrosse team, died of cardiac arrest during a team practice.<sup>91</sup> His parents sued claiming that the university failed to implement safety measures designed to ensure prompt emergency medical care.<sup>92</sup> The district court ruled in the college's favor based on a finding that no such duty existed.<sup>93</sup> The Third Circuit Court of Appeals reversed, holding that colleges possess a duty of reasonable care to prevent physical injuries to student-athletes.<sup>94</sup>

The *Kleinknecht* court's fashioning of a duty of care was premised, in part, on the court's conclusion that a special relationship exists between colleges and student-athletes. According to the court, the college's active recruitment of the student-athlete to participate in intercollegiate competition gave rise to the special relationship.<sup>95</sup> Yet the court noted that recognition of a special relationship merely begins the inquiry into whether a duty exists.<sup>96</sup> In this regard, it emphasized that the special rela-

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<sup>90</sup> 989 F.2d 1360 (3d Cir. 1993).

<sup>91</sup> *Id.* at 1362.

<sup>92</sup> *Id.* at 1365.

<sup>93</sup> *Kleinknecht v. Gettysburg College*, 786 F. Supp. 449, 454 (M.D. Pa. 1992), *rev'd*, 989 F.2d 1360 (3d Cir. 1993).

<sup>94</sup> *Kleinknecht*, 989 F.2d at 1369.

<sup>95</sup> *Id.* at 1367 n.5.

<sup>96</sup> *Id.* at 1369.

tionship determination merely defines the class of persons to whom a duty can extend.<sup>97</sup>

The court next undertook a foreseeability analysis, essential to the ultimate determination of the duty issue. Applying a foreseeability analysis, the court concluded that a duty existed. However, in reaching this result, the Third Circuit carefully circumscribed the duty to extend no further than avoiding physical harm to student-athletes.<sup>98</sup>

The *Fortay* court did not expressly address the special relationship issue. It did, however, dismiss for failing to state cognizable actions the counts of the complaint alleging tort claims premised on a special relationship.<sup>99</sup> Thus, inferentially, the court rejected the special relationship characterization sought by Fortay and instead adopted UM's view.

The University of Miami urged the court to adopt a narrow interpretation of *Kleinknecht*. It argued that the duty imposed in *Kleinknecht* should be limited to the facts of that case which were patently distinguishable from those in *Fortay*.<sup>100</sup> Moreover, UM asserted that the court's finding of a special relationship should similarly be limited to the particular duty created by the

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<sup>97</sup> *Id.*

<sup>98</sup> Indeed, defendants in *Fortay* argued that this limited the holding of *Kleinknecht* to matters pertaining to physical harm to student-athletes. Reply Memorandum of Defendants in Support of Motion to Dismiss Amended Complaint at 4, *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed June 20, 1994) [hereinafter Reply Memorandum].

<sup>99</sup> Order No. 1, *supra* note 25, at 5. The court dismissed Count 6, which it characterized as asserting a negligence cause of action. *Id.* The court stated that its dismissal of Count 6 was based on the same grounds on which it had dismissed Count 2. *Id.* Earlier in the order, the court had concluded that Count 2, also characterized by the court as a negligence action, failed to allege facts which would constitute a tort. *Id.* at 3.

Counts 1, 2, and 6 of the amended complaint suggested that liability could be derived from the nature of the relationship between student-athletes and their institutions. Count 6 provided in part that the "University . . . owed a duty to comply with their obligations to the plaintiff to provide him with an education, provide guidance to him . . . and to develop his football future." Amended Complaint, *supra* note 28, Count 6, ¶ 79. The theoretical basis for such a duty was amplified and clarified in Fortay's brief opposing the defendant's motion to dismiss. Fortay argued that the circumstances attendant to a student-athlete's relationship with his institution gives rise to a special relationship. Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint at 6, *Fortay v. University of Miami*, No. 94-385-Civ-Moreno (S.D. Fla. filed June 9, 1994). He also argued that the special relationship supports the imposition of duties on the part of the University which give rise to contract and tort causes of action. *Id.* at 6-7.

<sup>100</sup> Reply Memorandum, *supra* note 98, at 4, 6, 8.

court — “to provide adequate emergency measures in the event of a medical emergency during an inter-collegiate athletic event.”<sup>101</sup>

One aspect of UM’s position is sound: the only duty recognized by the *Kleinknecht* court was that involving the provision of medical care. Yet a critical aspect of the University’s position may unduly restrict the court’s finding in *Kleinknecht*. The circumstances attendant to the student-athlete’s relationship with his institution prompted the *Kleinknecht* court to denominate the relationship as special. The critical factor was the recruitment of the student-athlete by the University to play in intercollegiate competition.

At a minimum, the *Kleinknecht* case should have prompted the *Fortay* court to closely examine and expressly address whether the circumstances surrounding Fortay’s relationship with UM gave rise to a special relationship.<sup>102</sup> An affirmative conclusion in that regard would not have automatically resulted in the creation of the duty for which Fortay argued. The existence of such a relationship only provides one factor that a court would consider in determining whether to create a duty.<sup>103</sup>

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<sup>101</sup> *Id.* at 4.

<sup>102</sup> For a discussion of the attributes of the student-athlete/university relationship which support defining it as special, see Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 91-94 (1992).

<sup>103</sup> The *Kleinknecht* court’s approach to determining the existence of a duty comports with the analysis of the majority of courts. A commentator recently summarized the analytical process in which courts must engage in determining the existence of a tort duty as follows:

In addition to the existence of a special relationship, a duty to take affirmative action requires a finding that non-action creates a foreseeable and unreasonable risk. To determine whether a risk is unreasonable, courts weigh the gravity and probability of the harm associated with such non-action against the societal burdens that correspond with imposing such responsibilities. Accordingly, duty is essentially a policy question.

Philip M. Hirshberg, *The College’s Emerging Duty to Supervise Students: In Loco Parentis in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189, 193-94 (1994).

### C. Summary

Like courts before it, the *Fortay* court rejected theories premised on rights impliedly arising from the student-athlete/university contract. In so doing it afforded considerable deference to institutional conduct. Moreover, the court marginalized the interests of student-athletes by failing to examine and acknowledge the true essence of their contractual relationship with colleges and universities. Thus the court decided to forego acting as a source of external protection of the academic and athletic interests of student-athletes. This limits the effectiveness of the judiciary as a vehicle for holding institutions accountable for protecting student-athletes' reasonable expectations which flow from the express contracts with their schools.

## III. APPLICABILITY OF THE ECONOMIC LOSS RULE

As noted above, the *Fortay* court followed existing precedent in refusing to impose on the University a negligence-based duty to provide Fortay with an education and to develop his athletic potential. Significantly, the court went further in dismissing Fortay's negligence claims, holding that "any tort claim would be barred by the economic loss rule."<sup>104</sup> Indeed, as the court explained, "the Florida economic loss rule bars any tort causes of action arising out of the facts which establish a contract cause of action."<sup>105</sup>

As the following discussion demonstrates, the economic loss doctrine represents a potentially significant obstacle to student-athlete tort claims against their colleges. This is particularly true given that the harm resulting from the failure to provide academic and athletic opportunity is likely to be economic. Nevertheless, as this Article explains, sufficient justifications exist for limiting the doctrine's application in this context.

### A. Overview of Economic Loss Doctrine

Significant consequences ensue from distinguishing the remedies available under tort and contract law. Although it can oper-

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<sup>104</sup> Order No. 1, *supra* note 25, at 3.

<sup>105</sup> *Id.* at 4.

ate more restrictively than contract law,<sup>106</sup> tort law is generally perceived as more generous to plaintiffs.<sup>107</sup> Contractually based defenses, such as notice, are unavailable to defendants in tort actions. Similarly, the utility of disclaimers and exculpatory agreements is circumscribed in tort. Contract damages, juxtaposed to tort damages, are subject to tougher foreseeability requirements. In addition, contract law severely restricts the recovery of damages for mental anguish and punitive damages.<sup>108</sup>

The foregoing underscores the significance of the economic loss doctrine as a mechanism for preserving contract risk allocation in warranty and product defect litigation.<sup>109</sup> The doctrine reflects the principle that damages resulting from a failure of the bargained for consideration to comply with expectations are recoverable in contract, but not in tort.<sup>110</sup> Consequently, the

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<sup>106</sup> The less generous aspect of tort law lies primarily in the standards used to determine liability for tort and for contract. Despite the impact of doctrines such as substantial performance and cure, contract law represents a form of strict liability. A party breaches when her performance fails to conform with what was promised. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 664 (5th ed. 1984 & Supp. 1988); Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 463 (1994). Tort law is more restrictive. Liability in tort is dependent on the unreasonable failure to conform to societally imposed standards of care. *Id.* at 502-03.

<sup>107</sup> Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 666 (1989).

<sup>108</sup> *Id.*; Galligan, *supra* note 106, at 466-73.

<sup>109</sup> The economic loss doctrine emerged in the 1960s. Prior to 1950, few decisions precluded plaintiffs suing in negligence from recovering economic loss. To the contrary, most courts permitted injured tort plaintiffs to recover for any injury, including economic loss. Michael D. Lieder, *Constructing a New Action For Negligent Infliction of Economic Loss: Building on Cardozo and Coase*, 66 WASH. L. REV. 937, 945 (1991). In product litigation, courts turned to the economic loss doctrine as privity and other theories lost their potency as defenses to negligence actions. *Id.* at 951-52.

<sup>110</sup> *Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.*, 620 N.Y.S.2d 196, 198-99 (App. Div. 1994).

economic loss rule precludes tort recovery of economic loss<sup>111</sup> in the absence of physical injury to persons or other property.<sup>112</sup>

The economic loss rule has generated substantial debate<sup>113</sup> and inconsistent judicial application.<sup>114</sup> Inconsistency is evident in the varying approaches that jurisdictions generally adopt in determining the doctrine's applicability.<sup>115</sup> The majority ap-

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<sup>111</sup> A key factor in determining the applicability of the economic loss rule is defining what constitutes economic loss. *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993). Economic loss has been described simply as "disappointed economic expectations," which contract rather than tort law protects. *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993). In *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982), the Illinois Supreme Court defined economic loss as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Id.* at 449 (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)). If the defect and the damage are one and the same, then the defect should not be considered property damage for purposes of tort.

<sup>112</sup> William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 TEX. TECH. L. REV. 477, 480 (1992). The question of what constitutes "other property" has itself been the subject of controversy. *Myrtle Beach*, 843 F. Supp. at 1056-61.

<sup>113</sup> See Timothy Davis, *The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework*, 72 NEB. L. REV. 981, 1042 nn.236 & 238 (1993) (summarizing views of proponents and opponents of economic loss doctrine); Lieder, *supra* note 109, at 939 n.3 (citing arguments raised by opponents and proponents of economic loss doctrine); Powers & Niver, *supra* note 112, at 481 (noting controversy generated by economic loss doctrine).

<sup>114</sup> See generally Lieder, *supra* note 109, at 950-54 (describing inconsistency in judicial application of economic loss doctrine).

<sup>115</sup> See *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868-69 (1986) (describing and discussing relevant merits of three approaches to economic loss rule); Lieder, *supra* note 109, at 952-54 (discussing various applications of economic loss doctrine).

Jurisdictions generally follow one of three approaches to the economic loss rule. As discussed *infra*, most courts follow the approaches at the opposite ends of the spectrum articulated in *Seely* and *Santor*, with the former representing the majority position. In addition, however, an intermediate position has developed. Under this approach, economic loss is recoverable if the loss results from a defect that created a potential danger to persons or property. *Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 329 (Alaska 1981), is illustrative of this approach. There a defect in an electric generator caused severe damage to the generator's engine. The Alaska Supreme Court held that economic loss is recoverable in tort when the manner in which the loss occurs creates a risk of harm to persons or other property. *Id.* See also William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731, 751 n.109 (1990) (citing cases which have adopted intermediary position).

In *East River* the U.S. Supreme Court rejected the intermediate position. It reasoned as follows:

proach was first articulated by the California Supreme Court in the seminal case of *Seely v. White Motor Co.*<sup>116</sup> In rejecting the plaintiff's strict liability claim,<sup>117</sup> the court emphasized that permitting the recovery of economic losses in tort would undermine the risk allocation function of contract law.<sup>118</sup>

In contrast with *Seely*, other jurisdictions align with the views expressed in *Santor v. A & M Karagheusian, Inc.*<sup>119</sup> There, the New Jersey Supreme Court permitted a consumer to sue in strict liability to recover economic loss associated with a defective carpet.<sup>120</sup> The court found it arbitrary that economic losses are recoverable if a plaintiff suffers bodily injury or property damage, but not if a defect only produces harm to, or diminution in value of, the product itself.<sup>121</sup> The court also emphasized that

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The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. . . . Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain — traditionally the core concern of contract law.

*East River*, 476 U.S. at 870. Since *East River*, the intermediate approach has lost adherents. Courts which formerly adhered to it have either abandoned it in favor of a *Seely*-like approach or have questioned it.

<sup>116</sup> 403 P.2d 145 (Cal. 1965). In *Seely*, plaintiff purchased a truck to be used for heavy hauling. Shortly after the purchase, the truck bounced violently. Repair efforts were unsuccessful. Eventually, a brake failure caused the truck to overturn while the plaintiff was driving it. The truck was damaged but the plaintiff incurred no injuries. He sued to recover in tort for economic losses consisting of repair costs, the purchase price, and lost profits. *Id.* at 147-48.

<sup>117</sup> Although it rejected plaintiff's strict liability claim, the court allowed recovery under a breach of express warranty theory. *Id.* at 152.

<sup>118</sup> *Id.* at 151. The court emphasized:

A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacture agrees that it will.

*Id.* The court also noted that permitting plaintiff to recover purely economic loss in a tort action would undermine the remedial scheme established in the Uniform Commercial Code (UCC). *Id.* at 149-50.

<sup>119</sup> 207 A.2d 305 (N.J. 1965).

<sup>120</sup> *Id.* at 312-13.

<sup>121</sup> *Id.* at 309. See also Elizabeth A. Heiner, Note, *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.: What Recovery for Economic Loss — Tort or Contract?*, 1990 WIS. L. REV. 1337, 1345-46 (noting that minority of courts reject *Seely* approach because of arbitrariness involved in restricting tort claims for economic loss absent injury to person or



"no inherent difference exists between economic loss and personal injury or property damage, because all are proximately caused by the defendant's conduct."<sup>122</sup>

Twenty years later, in *Spring Motors Distributors, Inc. v. Ford Motor Co.*,<sup>123</sup> the New Jersey Supreme Court retreated from its holding in *Santor* by circumscribing the recovery of purely economic loss in transactions involving commercial parties. The court initially emphasized its desire to maintain the competing regimes of tort and contract law to promote the differing interests that the doctrines seek to protect.<sup>124</sup> The court also focused on the Uniform Commercial Code (UCC) in justifying its desire to maintain this line of demarcation. It first noted that the UCC "constitutes a comprehensive system for determining the rights and duties of buyers and sellers. . . ." <sup>125</sup> Viewing the UCC as an agreement-based system,<sup>126</sup> the court concluded that the UCC is a more appropriate vehicle for resolving commercial business transactions because it is premised on the ability of parties to freely contract and to allocate risk.<sup>127</sup> In light of these considerations, the New Jersey Supreme Court concluded that the plaintiff was not entitled to the supplemental protection of tort doctrine.<sup>128</sup>

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other property).

<sup>122</sup> *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 869 (1986).

<sup>123</sup> 489 A.2d 660 (N.J. 1985). In *Spring Motors*, a commercial buyer alleged that defective transmissions installed in commercial trucks caused it to sustain economic loss consisting of repair costs, loss of value, and lost profits. *Id.* at 662-63.

<sup>124</sup> *Id.* at 672. The court explained:

The purpose of a tort duty of care is to protect society's interest in freedom from harm, *i.e.*, the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

*Id.*

<sup>125</sup> *Id.* at 665.

<sup>126</sup> Patricia A. Brown & Jay M. Feinman, *Economic Loss, Commercial Practices, and Legal Process*: *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 22 RUTGERS L.J. 301, 337 (1991).

<sup>127</sup> *Spring Motors*, 489 A.2d at 668.

<sup>128</sup> *Id.* at 673. Accordingly, the court held that a commercial buyer seeking damages for

As previously noted, *Seely* represents the majority approach to the economic loss rule.<sup>129</sup> Jurisdictions adopting a *Seely*-like approach express concern for maintaining a line of demarcation between tort and contract.<sup>130</sup> As illustrated by the courts' discussions in *Seely* and *Spring Motors*, the desire to maintain the boundaries between tort and contract is premised on courts' perceptions of the differing functions of the doctrines. The perception is that contract is designed to protect contractually created expectations, but that tort is designed to protect person and property by imposing a duty of reasonable care on others.<sup>131</sup>

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purely economic loss could recover under the UCC but not under negligence or strict liability. *Id.* at 663.

<sup>129</sup> Leider, *supra* note 109, at 953. See also Jones, *supra* note 115, at 799 (concluding that most jurisdictions follow *Seely* and providing comprehensive bibliography of representative cases).

Noting that the overwhelming majority of jurisdictions follow *Seely*, the Ohio Supreme Court has explained: "Some cases adopting the *Seely* view have broadly rejected 'tort' actions or 'products liability' actions, while others have more specifically discussed negligence and/or strict liability." *Chemstrol Adhesives, Inc. v. American Mfrs. Mutual Ins. Co.*, 537 N.E.2d 624, 633 n.4 (Ohio 1989). See also Jones, *supra* note 115, at 752-53 (stating that, while most courts reject both negligence and strict liability as theories for recovering economic loss, minority of courts permit recovery under negligence); Heiner, *supra* note 121, at 1347 (asserting that most jurisdictions deny recovery solely for economic loss under negligence theory).

<sup>130</sup> A recent illustration occurred when the Washington Supreme Court, in extending the *Seely* approach to professional service transactions, emphasized the desirability of keeping tort and contract distinct in the construction context. The court stated:

We . . . maintain the boundaries of tort and contract law by limiting the recovery of economic loss due to construction delays to the remedies provided by contract. We so hold to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract. We hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity.

*Berschauers/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994). The court concluded that maintaining a bright-line distinction between the remedies available under tort and contract would encourage parties to negotiate toward the desired and customary risk allocation. *Id.*

As noted above, the trend has been to adopt the *Seely* approach to economic loss. Indeed, many courts which initially followed *Santor* have either rejected that approach or raised serious questions regarding its legitimacy. See Jones, *supra* note 115, at 804-05 (identifying jurisdictions that have rejected or questioned *Santor* approach).

<sup>131</sup> Contractual duties are voluntarily undertaken by parties and become activated only as a result of the parties' private agreement. Therefore contract law provides the legal mechanism to protect the expectations arising from these voluntary exchanges. See Heiner,

The United States Supreme Court conceptualized the functions of the economic loss doctrine in adopting an approach similar to *Seely* in *East River Steamship Corp. v. Transamerica Delaval, Inc.*<sup>132</sup> The Supreme Court denied a tort action in a maritime dispute regarding a defective steam turbine when the only damage was to the product.<sup>133</sup> It held that “a manufacturer in a commercial relationship has no duty under either negligence or strict products liability theory to prevent a product from injuring itself.”<sup>134</sup>

In building a case for application of the economic loss rule, the Supreme Court initially distinguished the interests that tort and contract seek to protect. It emphasized that tort law is concerned with safety, while contract and warranty law are concerned with protecting expectations.<sup>135</sup> Noting that the safety concerns of tort are less significant when an injury results only to the product, the Supreme Court concluded that “[c]ontract law . . . is well suited to commercial controversies of the sort

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*supra* note 121, at 1340 (“Contract remedies protect society’s interest in the performance of promises.”). See generally E. ALLAN FARNSWORTH, *CONTRACTS* (2d ed. 1990).

Tort, on the other hand, is generally defined as a legal wrong committed upon the person or the property of another; it occurs independent of any contractual undertaking between the parties. KEETON, ET AL., *supra* note 106, § 92, at 655. See also Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. REV. 891, 902 (1989) (stating that tort duties are imposed by law without regard to private agreement).

Courts, like commentators, emphasize the differing functions of tort and contract. See, e.g., *Myrtle Beach Pipeline Corp. v. Emerson Elec. Corp.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993) (“The purpose of the [economic loss] doctrine is to stem not only unlimited liability by limiting parties to the terms of their agreements, but also to serve as a demarcation line between contract and tort.”); *Cooperative Power Ass’n v. Westinghouse Elec. Corp.*, 493 N.W.2d 661, 664 (N.D. 1992) (“Tort liability protects a consumer’s interest in freedom from injury regardless of the existence of an agreement between the parties.”).

<sup>132</sup> 476 U.S. 858, 869 (1986). *East River* added credence to the *Seely* approach. Leider, *supra* note 109, at 953. Most courts that have addressed the economic loss issue subsequent to *East River* have followed *Seely*. See, e.g., *Detroit Edison Co. v. Nabco, Inc.*, 35 F.3d 236, 242 (6th Cir. 1994) (interpreting Michigan law to deny tort recovery for purely economic loss); *Neibarger v. Universal Coops., Inc.*, 486 N.W.2d 612, 618 (Mich. 1992) (“[W]here a plaintiff seeks to recover for economic loss caused by a defective product purchased for commercial purposes, the exclusive remedy is provided by the UCC. . . .”); *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213, 215 (Wis. 1989) (stating that economic loss is recoverable in neither negligence nor strict liability).

<sup>133</sup> Plaintiff sought \$8 million in damages for repair costs to the ships and lost income while the ships were out of service. *East River*, 476 U.S. at 861.

<sup>134</sup> *Id.* at 871.

<sup>135</sup> *Id.* at 870-71.

involved in this case because the parties may set the terms of their own agreements.”<sup>136</sup> It added that “[s]ince a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties’ allocation of the risk.”<sup>137</sup> The Court also reasoned that the potential liability exposure that might ensue from a tort duty justified application of the economic loss doctrine.<sup>138</sup> In its view, indeterminate liability would result because tort law permits recovery for all foreseeable claims, in contrast to warranty law with its built in limitations on recoverable damages.<sup>139</sup>

### B. Analysis of Fortay Court’s Economic Loss Determination

The University of Miami argued that the economic loss rule supported dismissal of Fortay’s tort claims, including those alleging negligent malpractice, as well as negligent hiring and supervision.<sup>140</sup> UM identified two factors to justify its position: (1)

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<sup>136</sup> *Id.* at 872-73.

<sup>137</sup> *Id.* at 873 (citation omitted). The court also noted that commercial parties can always insure for a risk. *Id.* at 871-72.

<sup>138</sup> *Id.* at 874.

<sup>139</sup> *Id.*

<sup>140</sup> A federal court sitting in diversity is compelled to apply the substantive law of the state whose law governs the action. *McGeshick v. Choucair*, 9 F.3d 1229, 1235 (7th Cir. 1993). Thus, in confronting whether the economic loss doctrine would preclude a negligence claim, the *Fortay* court needed to predict how Florida courts would likely resolve the issue. The court’s holding is in accord with Florida precedent, which strictly adheres to the *Seely* approach. Florida’s perspective on the economic loss rule is exemplified by *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993).

In *Casa Clara*, a homeowner sought to recover purely economic losses under a negligence theory. The losses consisted of repair cost associated with damage to the homeowner’s condominium caused by defective concrete. In erecting the economic loss doctrine as a barrier to the plaintiff’s negligence claim, the court emphasized the differing purposes of contract and tort law. *Id.* at 1246. The rationale relied on by the Florida Supreme Court in *Casa Clara* is discussed further *infra* in notes 174-77 and accompanying text.

A similar result was reached in an earlier Florida case, *HMF Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). A commercial purchaser of telephone services sued under tort to recover economic losses due to an incorrect telephone listing. Identifying *East River* as articulating the majority position, the court denied recovery for purely economic loss pursuant to the economic loss doctrine. Noting that plaintiff had not alleged the breach of a tort duty independent of the duty created by the contract, the court concluded that the plaintiff presented no basis for tort recovery. *Id.* at 181. *Accord* *Florida Power & Light v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987) (“[C]ontract principles [are] more appropriate than tort principles for resolving economic

Fortay's tort claims arose out of the facts forming the basis for contract claims, and (2) he alleged no legally cognizable injuries to person or property.<sup>141</sup> As discussed below, the *Fortay* court agreed in part with UM's arguments. However, examination of two possible limitations on the economic loss rule raises questions about the propriety of using the doctrine to limit the ability of student-athletes to sue in tort.

### 1. Independent Duty Exception

Jurisdictions, including Florida, refuse to apply the economic loss doctrine in the presence of tort duties that arise independently of those that are contractually created.<sup>142</sup> This limitation on the breadth of the economic loss doctrine will be referred to as the independent duty exception. The district court's rejection of a special relationship between Fortay and the University illuminates the significance of this exception.

As noted above, a special relationship can provide the predicate for imposing a tort duty on institutions to exercise reason-

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loss without an accompanying physical injury or property damage."); *Monsanto Agric. Prods. Co. v. Edenfield*, 426 So. 2d 574, 576 (Fla. Dist. Ct. App. 1982) (arguing that tort law does not impose duty that products will meet purchaser's economic expectations); see also *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 7 (Fla. Dist. Ct. App. 1994) (stating that economic loss is nonrecoverable in tort unless independent duty has been breached).

In *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973), the Florida Supreme Court permitted a third-party contractor to sue an architect in tort for economic loss. *Moyer* has since been recognized as an exception to the economic loss rule that is strictly limited to its facts. *Casa Clara*, 620 So. 2d at 1248 n.9; *City of Tampa v. Thornton-Tomasetti, P.C.*, 646 So. 2d 279, 282 (Fla. App. 1994).

<sup>141</sup> Motion to Dismiss, *supra* note 32, at 12-14.

<sup>142</sup> It is a well established principle that a mere breach of contract will not provide the basis for tort liability unless a legal duty independent of the contract has been violated. *National Fire Ins. Co. v. Westgate Constr. Co.*, 227 F. Supp. 835, 837-38 (D. Del. 1964); *Morrow v. L.A. Goldschmidt Assoc.*, 492 N.E.2d 181, 185 (Ill. 1986); *Business Mens Assurance Co. of America v. Graham*, 891 S.W.2d 438, 453 (Mo. Ct. App. 1994); *Bristol-Myers Squibb v. Delta Star, Inc.*, 620 N.Y.S.2d 196, 197 (App. Div. 1994); *Flint Ridge Dev. Co. v. Benham-Blair & Affiliates, Inc.*, 775 P.2d 797, 800-01 (Okla. 1989); *Georgetown Realty, Inc. v. Home Ins. Co.*, 831 P.2d 7, 12 (Ore. 1992).

Determining whether or not a duty arises independently of the contract has created its own conceptual difficulties. *Powers & Niver*, *supra* note 112, at 477-80 (discussing confusion generated in cases assessing whether negligent breach of contract also constitutes tort); see also *Davis*, *supra* note 113, at 1022-34 (discussing inconsistent results courts reach in attempting to determine whether breach of warranty of workmanlike performance gives rise to duty independent of contractual rights).

able care in providing for the educational and athletic interests of student-athletes. Such a negligence action, premised on the special relationship and policy considerations warranting the creation of a duty, would fall within the ambit of the independent duty exception. The duty thus created would not depend on those duties arising from the contractual relationship between the parties.

The doctrinal basis for the duties imposed on UM is also relevant with respect to Fortay's negligent hiring and supervision claims. The district court held that the economic loss rule was inapplicable to these claims "because the facts giving rise to Count 9 are different than those giving rise to the contract claim."<sup>143</sup> This language suggests that the court concluded that these claims asserted breaches of duties that are independent of the duty arising from the contractual relationship between Fortay and the University. Thus, the economic loss doctrine would not circumscribe Fortay's ability to recover solely for economic losses under negligent hiring and supervision theories. As the following discussion demonstrates, however, uncertainty surrounds the viability of negligent hiring and supervision claims when the plaintiffs only seek to recover economic loss.

## 2. Negligent Hiring and Supervision

The widely adopted<sup>144</sup> negligent hiring doctrine subjects employers to liability for failing to exercise reasonable care in the selection of employees.<sup>145</sup> Derived from the fellow servant

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<sup>143</sup> Order No. 1, *supra* note 25, at 6.

<sup>144</sup> See Cindy M. Haerle, Minnesota Developments, *Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory*: Ponticas v. K.M.S. Investments, 68 MINN. L. REV. 1303, 1307 (1984) (stating that majority of jurisdictions recognize negligent hiring doctrine); Mark Minuti, Note, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 506 (1988) (asserting that significant number of jurisdictions have adopted negligent hiring doctrine). See generally Connes v. Moalla Transp. Sys., Inc., 831 P.2d 1316, 1320-21 (Colo. 1992) (identifying numerous jurisdictions which have recognized tort of negligent hiring).

<sup>145</sup> Moses v. Diocese of Colorado, 863 P.2d 310, 323-24 (Colo. 1993) ("An employer may be liable for harm to others for negligently employing an improper person for a task which may involve a risk to others."); John C. North, Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 719 (1977).

The closely related doctrine of negligent retention differs only in relation to time.

rule,<sup>146</sup> the negligent hiring doctrine was incrementally extended to protect parties that stood in a particular relationship with employers from the wrongful acts of employees.<sup>147</sup> Liability pursuant to negligent hiring is predicated on an employer's failure to exercise reasonable care in employing persons with propensities that pose a risk of injury to others.<sup>148</sup>

The related, but distinct doctrine of negligent supervision "requires an employer to exercise ordinary care in supervising the employment relationship, so as to prevent the foreseeable misconduct of an employee from causing harm to other employees or third persons."<sup>149</sup> Unlike a claim for negligent hiring,<sup>150</sup> the negligent supervision doctrine is derived directly

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Negligent hiring focuses on the employer's conduct prior to selecting an employee. *Cook v. Greyhound Lines, Inc.*, 847 F. Supp. 725, 732 (D. Minn. 1994). In contrast, negligent retention occurs when, during the course of employment, the employer becomes aware or should become aware of problems with an employee that reflect her unfitness, and yet, the employer fails to take further action such as investigation, discharge, or reassignment. *Id.*

<sup>146</sup> *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910 (Minn. 1983). The fellow servant rule absolved employers from liability to employees for injuries caused by the acts of co-employees. *Minuti*, *supra* note 144, at 502. Exceptions to the fellow servant rule were recognized as tort law expanded. The negligent hiring doctrine emerged from one of these exceptions: an employer's duty to provide a safe workplace which includes a "duty to hire safe employees." *Id.* at 502-03.

<sup>147</sup> Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 790 (1993).

<sup>148</sup> *Ponticas*, 331 N.W.2d at 911.

<sup>149</sup> *Cook*, 847 F. Supp. at 732. The doctrine of negligent supervision has been described, in pertinent part, as follows: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (c) in the supervision of the activity. . . ." RESTATEMENT (SECOND) OF AGENCY § 213 (1957). See also RESTATEMENT (SECOND) OF TORTS § 317 (1964) (describing master's duty to control intentional conduct of servants).

<sup>150</sup> Significantly, a claim for negligent hiring is not premised on vicarious liability. *Haerle*, *supra* note 144, at 1306-07. See also *Beam v. Concord Hospitality, Inc.*, 873 F. Supp. 491, 503 (D. Kan. 1994) ("Liability for negligent hiring and/or retention is not predicated on a theory of vicarious liability."); *Cook*, 847 F. Supp. at 732 (stating that theory of negligent hiring is premised on employer's negligence in failing to check into employee's background before hiring her). Accordingly, the fact that the employee's wrongful conduct falls outside the scope of the employment relationship, which is invariably the case, does not bar negligent hiring claims. *Haerle*, *supra* note 144, at 1306-07. See also *Moses v. Diocese of Colorado*, 863 P.2d 310, 324 n.16 (Colo. 1993) (explaining that scope of employment limitation on which respondeat superior is based is not implicated in negligent hiring claims).

from the doctrine of respondeat superior.<sup>151</sup> Thus, for liability to ensue, employees must have acted within the scope of their employment relationship.<sup>152</sup>

Because liability under negligent hiring and negligent supervision is predicated on negligence, the availability of either action turns initially on establishing the existence of a duty.<sup>153</sup> Commentators have noted that the concept of negligent hiring was extended to third parties standing in a special relation to employers.<sup>154</sup> Recognized as special are relationships between employers and their licensees, invitees, or customers.<sup>155</sup> Therefore, in establishing a case for negligent hiring, inquiry into the connection between the employment of the wrongdoer and the plaintiff is critical to finding the requisite duty.

As noted above, the requisite duty owed by employers to third parties exists in situations including those involving — landlords and tenants, licensees or invitees of the employers, customers, and other employees.<sup>156</sup> The special relationship between the employer and the third party in these situations supplies the connection necessary to fulfill the duty requirement.<sup>157</sup> In the absence of a special relationship, a duty arises between employers and third parties only when a sufficient connection can be

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<sup>151</sup> *Cook*, 847 F. Supp. at 732.

<sup>152</sup> *Id.*

<sup>153</sup> See *C.C. v. Roadrunner Trucking, Inc.*, 823 F. Supp. 913, 922 (D. Utah 1993) ("An essential element of any negligence claim is a duty of reasonable care owed by the defendant to the plaintiff."); *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316, 1320 (Colo. 1992) (asserting that, in negligence action, initial inquiry for court is existence of duty on part of defendant to protect plaintiff from injury); *Garcia v. Duffy*, 492 So. 2d 435, 439 (Fla. Dist. Ct. App. 1986) (providing that fundamental question in determining if case presents cognizable negligent hiring claim, is existence of duty between plaintiff and employer); *P.L. v. Aubert*, 527 N.W.2d 142, 149 (Minn. Ct. App. 1995) (stating that person must owe duty to plaintiff before negligence can be found); *Jackson v. Righter*, 891 P.2d 1387, 1392 (Utah 1995) (noting that essential element of negligent supervision claim is establishing existence of duty between employer and plaintiff); Haerle, *supra* note 144, at 1308 (stating that employer must owe plaintiff duty of care to be liable under negligent hiring cause of action).

<sup>154</sup> See, e.g., North, *supra* note 145, at 721.

<sup>155</sup> *Id.*

<sup>156</sup> Bruce D. Platt, Comment, *Negligent Retention and Hiring in Florida: Safety of Customers Versus Security of Employers*, 20 FLA. ST. U. L. REV. 697, 705 (1993).

<sup>157</sup> Camacho, *supra* note 147, at 790 n.12. In *Jackson v. Drake University*, 778 F. Supp. 1490, 1495 (S.D. Iowa 1992), the failure of a student-athlete to establish the requisite special duty between him and his institution led to the dismissal of his negligent hiring claim.



established between them.<sup>158</sup> Establishing this connection requires an in-depth analysis of the circumstances to determine whether the plaintiff is within the class of third parties to whom the doctrine should be extended.<sup>159</sup>

As previously noted, the *Fortay* court refused to recognize the existence of a special relationship between the plaintiff and UM. Thus, the court appears not to have relied on the special relationship to establish the requisite connection between the plaintiff and UM to impose a duty on the University. Given this, the court should have analyzed in-depth, and explained the basis for, its willingness to extend the negligent hiring and supervision theories to include student-athletes within the categories of third parties to whom employers owe duties.<sup>160</sup> This would

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<sup>158</sup> Camacho, *supra* note 147, at 794; Platt, *supra* note 156, at 705. See also *Connes*, 831 P.2d at 1321 (asserting that duty will be imposed on employer when job requires frequent contact between members of public and employee or special relationship exists between plaintiff and employer causing plaintiff to have close contact with employee); *Nero v. Kansas State Univ.*, 861 P.2d 768, 778 (Kan. 1993) (stating that, although university-student relationship does not automatically create duty, special relationship may exist between student and her college so as to impose duty on latter to supervise conduct of third party employee).

<sup>159</sup> Camacho, *supra* note 147, at 794; Minuti, *supra* note 144, at 510-11. The New Jersey Supreme Court has outlined the contours of the inquiry into the existence of a duty as follows:

[T]he existence of a duty to exercise reasonable care need not be determined solely by the status or legal relationship between the parties, even if otherwise relevant. That determination should be made by taking into account all of the surrounding circumstances. . . . "Ultimately . . . the imposition of a duty depends upon policy considerations such as the effect of the imposition of the risks and burdens of an activity."

*Di Cosala v. Kay*, 450 A.2d 508, 517 (N.J. 1982) (quoting *McGlynn v. Newark Parking Auth.*, 432 A.2d 99 (N.J. 1981)).

In the context of negligent supervision, the inquiry has been described as follows: "[A] duty may arise when an employer could reasonably be expected, consistent with practical realities of an employer-employee relationship, to appreciate the threat to a plaintiff of its employee's actions and to act to minimize or protect against that threat." *Jackson v. Righter*, 891 P.2d 1387, 1392 (Utah 1995).

In reviewing *Garcia v. Duffy*, 492 So. 2d 435 (Fla. Dist. Ct. App. 1986), in which the court imposed a duty on an employer for negligent hiring, a student author concluded that the court apparently considered three elements in making the relevant determination: (1) whether the employee and plaintiff were in places where each had a right to be at the time the wrongful act occurred; (2) whether the employee and the plaintiff met as a direct result of the former's employment; and (3) whether the employer would have received some potential direct or indirect benefit from the meeting of the employee and the plaintiff had the wrongful act not occurred. Platt, *supra* note 156, at 702-03.

<sup>160</sup> It should be noted that *Fortay* could not have relied solely on his status as a college

have facilitated an examination of the applicability of the independent duty exception to the economic loss rule.

The uncertainty that might arise from the court's failure to engage in such an analysis is directly related to the independent duty exception, illustrated by cases applying Wisconsin law. In *Midwest Knitting Mills, Inc. v. United States*,<sup>161</sup> the Seventh Circuit became the only court to address specifically whether the economic loss doctrine barred a negligent supervision claim seeking purely economic losses. Believing that Wisconsin courts would recognize the tort of negligent supervision, the Seventh Circuit nevertheless concluded that the district court acted properly in dismissing the claim.<sup>162</sup> Emphasizing the differences between the regimes of contract and tort, the court stated that this tort action could not be sustained when the "parties have a contractual relationship and the injury is based on that relationship."<sup>163</sup> Moreover, the court held that it believed Wisconsin courts "would decline in all circumstances to allow a negligence suit for the recovery of only economic damages, even when there is no contractual relationship between the parties."<sup>164</sup> Similarly, in *Jackson v. Drake University*,<sup>165</sup> a federal district court suggested in dictum that a negligent hiring cause of action should be limited to situations involving physical injuries to the plaintiff.<sup>166</sup>

The Seventh Circuit's expansive view on the applicability of the economic loss rule is disturbing. Expanding the economic

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student to impose a duty on the university. Overwhelming authority holds that the university-student relationship in and of itself does not impose a duty on universities to protect students from the wrongful actions of third parties. *E.g.*, *Nero*, 861 P.2d at 778; *Johnson v. State of Wash.*, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995). *But cf.*, *Delbridge v. Maricopa County Community College Dist.*, 893 P.2d 55, 58 (Ariz. Ct. App. 1995) ("The teacher-student relationship is a special one, affording the student protection from unreasonable risks of harm."). Courts have nevertheless relied on other theories to establish the special relationship necessary to hold an institution accountable to students for the institution's failure to supervise the actions of its employees. *See, e.g.*, *Nero*, 861 P.2d at 778 (stating that university might be held liable for actions of third parties under theories other than university-student relationship).

<sup>161</sup> 950 F.2d 1295 (7th Cir. 1991).

<sup>162</sup> *Id.* at 1300.

<sup>163</sup> *Id.* 1300-01.

<sup>164</sup> *Id.* at 1300.

<sup>165</sup> 778 F. Supp. 1490 (S.D. Iowa 1991).

<sup>166</sup> *Id.* at 1495 n.2.

loss rule to bar tort claims, even when the defendant's conduct violated contractual duties as well as duties imposed independent of contract, would abrogate the independent duty exception. Indeed, the Seventh Circuit's approach was subsequently criticized by the Wisconsin Court of Appeals in *Hap's Aerial Enterprises, Inc. v. General Aviation Corp.*<sup>167</sup> The court in *Hap's* concluded that the Seventh Circuit's application of the economic loss doctrine did not accord with Wisconsin precedent.<sup>168</sup> Articulating what it viewed as the proper standard, the appellate court concluded that a defendant may be liable in tort for economic loss when there is a breach of a tort duty of care regardless of whether a contractual relationship exists between the parties.<sup>169</sup>

In summary, *Midwest Knitting* provides unconvincing support for dismissing Fortay's negligent hiring and supervision claims based on the economic loss rule. Yet *Midwest Knitting*, in conjunction with *Hap's* and *Jackson*, underscores the significance of determining the sources of the duty breached when plaintiffs attempt to recover for economic damages in the absence of personal injury or property damage. Proving the elements of a tort cause of action premised on duties existing independently of those created by the contract may sanction the recovery of purely economic loss in tort. Thus, the *Fortay* court created potential confusion in failing to address specifically its basis for rejecting the defendant's arguments that asserted the economic loss rule as a barrier to the plaintiff's negligent hiring and supervision claims.

### C. A Consumer Exception

In addition to the possible limitation placed on the economic loss rule by the independent duty exception, *Fortay* also raises the question of whether characteristics of the student-athlete/university relationship justify exempting it from the economic loss doctrine. Examining the justifications on which courts have relied in applying the economic loss rule in transac-

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<sup>167</sup> 496 N.W.2d 680 (Wis. Ct. App. 1992).

<sup>168</sup> *Id.* at 682.

<sup>169</sup> *Id.* at 683-84.

tions between commercial parties assists in resolving this issue of first impression. As discussed above, these justifications include maintaining a line of demarcation between contract and tort, allowing parties to allocate risk contractually, and preserving legislatively created remedial schemes. In addition, courts have considered the wisdom of exempting transactions between consumers and commercial entities from the preclusive effect of the economic loss rule. Examining these decisions in which courts grapple with whether to carve out a consumer exception to the economic loss rule also sheds light on the applicability of the doctrine to the university/student-athlete relationship.

### 1. Jurisdictions Rejecting Consumer Exception

The majority of jurisdictions to consider the issue squarely refuse to recognize a consumer exception to the economic loss rule. In refusing to create an exception, courts often express their desire to preserve the regimes of contract and tort to promote specific policies, principles, and interests.<sup>170</sup> In other instances, refusal to recognize a consumer exception is based on a desire to simplify the law and to increase judicial efficiency. Jurisdictions that classify transactions as falling within the parameters of the economic loss rule most often do so to achieve certain "principled objectives."<sup>171</sup> These objectives are broadly stated and encompassed within what courts perceive as a key rationale underlying the economic loss rule — maintaining a line of demarcation between tort and contract. Yet as noted by one commentator, behind this generalized principled objective "lies a more general distinction between protecting personal integrity through tort and protecting personal autonomy through contract."<sup>172</sup> This distinction is evident when courts identify general as well as specific interests and policies that justify giving primacy to private ordering.<sup>173</sup>

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<sup>170</sup> Feinman, *supra* note 107, at 672-75. This form of classification defined by Professor Feinman as purposive or instrumental classifies in order to achieve particular objectives. *Id.*

<sup>171</sup> *Id.* at 681.

<sup>172</sup> *Id.* at 682.

<sup>173</sup> In applying the economic loss doctrine to consumer transactions, courts are giving primacy to contract law over tort law. Thus, application of the doctrine illustrates how the judiciary respects private ordering represented by contract law unless some overriding pub-

Thus courts will typically state the generalized policy of preserving the regimes of tort and contract. Focus next shifts to specific facts supporting decisions to maintain the line of demarcation through the economic loss rule. This approach was taken by the Florida Supreme Court in *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*<sup>174</sup> In applying the economic loss rule to preclude the plaintiff's negligence claim, the court first noted the differing purposes of contract and tort law. According to the Florida Supreme Court, the interest protected by contract law — the benefit of the bargain — falls outside the public policy interest that tort law seeks to protect.<sup>175</sup> It concluded that economic losses that constitute disappointed expectations must, if at all, be protected by contract law.<sup>176</sup>

The Florida Supreme Court next discussed specific reasons for extending the doctrine to consumer transactions. Noting that homeowners constitute a sympathetic class, the court nevertheless rejected exempting them from the economic loss rule. It found that contract law through warranties and other devices sufficiently protected the economic interests of consumers. The court also pointed to the homeowners' ability to bargain over prices as a significant means of contractual protection.<sup>177</sup> These reasons supported not upsetting the contrasting regimes of tort and contract by permitting an action in tort.

Similarly, the Delaware Supreme Court focused on the availability of adequate protective devices in refusing to permit consumers to recover economic loss in tort. In *Danforth v. Acorn Structures, Inc.*,<sup>178</sup> the available protection was the remedial scheme provided by the UCC's warranty provisions.<sup>179</sup> The

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lic purpose requires that it be disregarded. *Id.*

<sup>174</sup> 620 So. 2d 1244 (Fla. 1993).

<sup>175</sup> *Id.* at 1246.

<sup>176</sup> *Id.* *Accord* Florida Power & Light v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987) ("[C]ontract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage."); Monsanto Agric. Prods. Co. v. Edenfield, 426 So. 2d 574, 576 (Fla. Dist. Ct. App. 1982) (asserting that tort law does not impose duty that products will meet purchaser's economic expectations); *see also* Southland Constr., Inc. v. Richeson Corp., 642 So. 2d 5, 7 (Fla. Dist. Ct. App. 1994) (holding that economic loss is nonrecoverable in tort unless independent duty has been breached).

<sup>177</sup> *Casa Clara*, 620 So. 2d at 1247.

<sup>178</sup> 608 A.2d 1194 (Del. 1992).

<sup>179</sup> *Id.* at 1200-01. One commentator has described the deference to legislatively man-

*Danforth* court emphasized the interests invoked by not circumventing the UCC's remedial scheme. It stated:

[W]e are unable to accept [plaintiff's] contention that Delaware should recognize an exception to the economic loss doctrine by allowing individual consumers, as distinguished from commercial buyers, to recover for economic loss based upon the alleged inherently unequal bargaining power between individual consumers and commercial sellers. Such a rule would defeat the legislative intent of the General Assembly in enacting Article 2 of the Uniform Commercial Code . . . as the complete framework of the rights and remedies available to parties to a sale of goods contract. . . . Therefore, we see no reason to extend tort law into an area adequately governed by warranty law. Otherwise, "contract law would drown in a sea of tort."<sup>180</sup>

Thus, the existence of a remedial scheme to protect consumers' expectation interests appears to be a critical justification in decisions rejecting a consumer exception.<sup>181</sup>

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dated remedial schemes as follows:

The debate over economic loss in products liability cases involves one element missing from earlier economic loss cases, namely, the courts' concern over impinging on the legislature's power as manifested by the enactment of the UCC. This contest of wills between judicial paternalism and the legislature has taken a decisive turn in favor of the legislature. . . . Reluctance to allow tort remedies that produce results contrary to the intricate UCC warranty scheme has led many courts to reject the use of strict liability theories in the commercial context altogether.

Barrett, *supra* note 131, at 914.

<sup>180</sup> *Danforth*, 608 A.2d at 1200-01 (citations omitted). The court's conclusion was also premised on what it perceived as the broad standing under Article 2 for plaintiffs to assert warranty claims. See Heiner, *supra* note 121, at 1341 (explaining that UCC has established scheme that "safeguard[s] transactions and establish[es] protective devices for situations where transactions fail to meet some party's expectations").

<sup>181</sup> Courts impliedly rejecting a consumer exception to the economic loss rule have also relied on the availability of remedial schemes under contract. *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990), is representative. In *Waggoner*, consumer purchasers of mobile homes sued to recover economic loss under the theory of products liability. The Oklahoma Supreme Court did not specifically address the applicability of a consumer exception to the economic loss rule; its ruling, however, impliedly rejected such an exception. The court held that such an action would not lie given that the buyers' economic expectations were adequately protected by the UCC's "comprehensive and finely tuned statutory mechanism for dealing with the rights of parties to a sales transaction with respect to economic losses." *Id.* at 653 (quoting *Clark v. International Harvester Co.*, 581 P.2d 784, 792 (Idaho 1978)). See also *Dairyland Ins. Co. v. General Motors Corp.*, 549 So. 2d 44, 46 (Ala. 1989) (extending, without discussion, economic loss rule to bar consumer

In a series of admiralty cases, a consumer exception to the economic loss rule was also rejected. As in other factual contexts, the courts focused on general and specific policies in deciding whether to extend to consumer transactions the *East River* rule disallowing the recovery of economic loss in tort. For example, in *Karshan v. Mattituck Inlet Marina & Shipyard Inc.*,<sup>182</sup> a consumer owner sued under products liability to recover for fire damage to his yacht. The plaintiff argued that, under the *East River* analysis, economic loss should be recoverable by consumers given the inherent disparities in bargaining power.<sup>183</sup> In rejecting the plaintiff's attempt to limit *East River* to commercial transactions, the *Karshan* court focused on the Supreme Court's desire to keep tort and contract actions separate.<sup>184</sup> The *Karshan* court concluded that this rationale extended to consumer as well as commercial transactions.<sup>185</sup> To bolster its conclusion, however, the court emphasized that adequate protection, namely insurance, protected the plaintiff's expectancy interests.<sup>186</sup>

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purchaser's tort claim related to defective van); *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 15 (Minn. 1992) (asserting that economic loss doctrine bars recovery in tort not because of party's status but because of remedial scheme provided by UCC); *D'Huyvetter v. A.O. Smith Harvestore Prods.*, 475 N.W.2d 587, 595 (Wis. Ct. App. 1991) (holding plaintiffs' economic loss unrecoverable even though it resulted from consumer transaction).

<sup>182</sup> 785 F. Supp. 363 (E.D.N.Y. 1992).

<sup>183</sup> *Id.* at 365.

<sup>184</sup> *Id.* at 366.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* The reasoning employed in *Karshan* figured prominently in the Washington Supreme Court's decision in *Stanton v. Bayliner Marine Corp.* 866 P.2d 15 (Wash. 1993). In *Stanton*, consumer purchasers of yachts asserted, inter alia, product liability and negligence claims seeking only economic loss, namely the cost of replacing and repairing their yachts. *Id.* at 17. The defendants, pursuant to *East River*, moved to dismiss the tort claims. *Id.*

Having first determined that federal admiralty law governed the dispute, the court addressed the plaintiffs' argument that a consumer exception should preclude operation of the *East River* rule. The plaintiffs argued that the language of *East River* restricted its applicability to commercial transactions. The court was unpersuaded by the plaintiffs' argument. It first noted that the majority of maritime cases subsequent to *East River* made no distinction between commercial and noncommercial tort claims for economic loss. *Id.* at 22. Relying on what it considered the majority rule, the *Stanton* court concluded that the importance of keeping contract and tort distinct, coupled with the federal interest in protecting maritime commerce, justified applying *East River* to consumer transactions involving pleasure boats. *Id.* at 22-24.

Similarly, the court in *Somerset Marine Inc. v. Forespar Products Corp.*<sup>187</sup> concluded that the need to keep tort and contract separate and the availability of insurance outweighed any interests that might flow from permitting tort recovery for economic loss.<sup>188</sup> The court reached this conclusion despite acknowledging that factors consistent with *East River's* underlying rationale suggested a different result might be appropriate. The *Somerset* court identified the following two factors: (1) the lesser ability of consumers in contrast with commercial parties to bargain and thus adequately allocate their risk, and (2) the reduced risk of unlimited liability exposure as consumer damages would most likely be limited to the value of the product.<sup>189</sup>

## 2. Support for a Consumer Exception

Some jurisdictions have relied on the factors identified by the *Somerset* court to justify exempting consumer transactions from the economic loss doctrine. In so doing, these courts conclude that the underlying principled objectives of the doctrine will not be served by applying it. Typically these courts will focus on: (1) unequal bargaining power that circumscribes consumers' ability to allocate risk; (2) the absence of other protections such as the warranty scheme of the UCC; and (3) the decreased likelihood that permitting tort recovery will result in indeterminate liability.

The lone admiralty cases electing not to extend *East River* to consumer transactions relied on these distinctions. In *Sherman v.*

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The *Stanton* court did make note of a decision not following the trend in maritime cases to not distinguish between commercial and noncommercial tort claims for economic loss. *Id.* at 21-22. The exception identified by the court, *Sherman v. Johnson & Towers Baltimore, Inc.*, 760 F. Supp. 499 (D. Md. 1990), is discussed *infra* at notes 190-94 and accompanying text.

Other admiralty cases are in line with *Stanton*. See, e.g., *Sisson v. Hatteras Yachts, Inc.*, No. 87-C0652, 1991 WL 47543, at \*2 (N.D. Ill. Apr. 2, 1991) (justifying application of economic loss doctrine to consumer transactions by explaining risk of potential liability exposure and availability of contract remedies); *Lewinter v. Genmar Indus., Inc.*, 32 Cal. Rptr. 2d 305, 309 (Ct. App. 1994) (refusing to permit consumers to recover economic loss in tort in order to promote distinction between tort and contract and to ensure uniformity of results).

<sup>187</sup> 876 F. Supp. 1114 (C.D. Cal. 1994).

<sup>188</sup> *Id.* at 1115-16.

<sup>189</sup> *Id.* at 1115.



*Johnson & Towers Baltimore, Inc.*,<sup>190</sup> a fire destroyed a yacht purchased by the plaintiffs for personal use.<sup>191</sup> In upholding the viability of the plaintiffs' tort claim, the court narrowly interpreted *East River* as holding that "a manufacturer in a *commercial relationship* has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself."<sup>192</sup> It further construed *East River* as not eliminating all tort actions seeking economic loss.<sup>193</sup> Repeatedly emphasizing the references in *East River* to commercial transactions, the court held that "*East River* expressly limited its holding to commercial situations and, in this Court's view, the characteristics of those situations . . . demonstrate a difference between consumer (non-commercial) and commercial transactions."<sup>194</sup>

Language employed by courts in other cases suggests support for a consumer exception even though the issue is not directly addressed. For example, in *Myrtle Beach Pipeline Corp. v. Emerson Electric Co.*, the court listed the following as factors that justify applying the economic loss rule: (1) the commercial character of the relationship; (2) the relatively equal bargaining power of the parties; and (3) the existence of a contract between the parties that allocates risk.<sup>195</sup> Similar sentiments were expressed in *Consumers Power Co. v. Mississippi Valley Structural Steel Co.*,<sup>196</sup> a case that predated *East River*. There the court stated:

To summarize, the court holds that when all the parties to a transaction are commercial enterprises of relatively equal strength, have bargained for the production and treatment of specially manufactured goods, and the only damages pleaded are commercial economic losses resulting from defects in the goods themselves, then the UCC and its remedies govern the transaction. Tort remedies, such as, negligence and breach of implied warranty in tort, are unavailable to the business plaintiff.<sup>197</sup>

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<sup>190</sup> 760 F. Supp. 499 (D. Md. 1990).

<sup>191</sup> *Id.* at 500. The plaintiffs were reimbursed for the loss by their insurer to the extent of their policy. *Id.* The plaintiffs sued various defendants, including the seller of the yacht, in contract and in tort to recover economic loss. *Id.* The seller asserted the economic loss doctrine as a defense to the tort claims. *Id.* at 501.

<sup>192</sup> *Id.* at 501 (quoting *East River*, 476 U.S. at 871).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 502.

<sup>195</sup> 843 F. Supp. 1027, 1053-54 (D.S.C. 1993).

<sup>196</sup> 636 F. Supp. 1100 (E.D. Mich. 1986).

<sup>197</sup> *Id.* at 1109. Other statements of the court suggest limiting the economic loss rule to

Finally, in *Employers Insurance v. Suwannee River Spa Lines, Inc.*,<sup>198</sup> the Fifth Circuit determined the applicability of the economic loss rule to service providers. In ruling that it does indeed apply to professional service contracts, the court addressed the arguments against extending the doctrine to this context.<sup>199</sup> The plaintiff argued that, in service transactions, the economic loss rule should not apply because the UCC's protective provisions are unavailable.<sup>200</sup> In rejecting this argument, the court nevertheless intimated that it might be inappropriate to extend the rule to consumer transactions. The court suggested that the inability of purchasers in noncommercial service transactions to bargain for specific guarantees of quality militates against applying the economic loss rule.<sup>201</sup> The court emphasized that in transactions between two commercial parties applying the doctrine is appropriate given the ability of a purchaser to allocate the risk of defective performance by bargaining for express warranties.<sup>202</sup>

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commercial transactions:

The argument to limit the parties to their contractual remedies is much stronger in the *purely* commercial setting than it is when a consumer's claims are involved. . . . The law designed to define relationships among commercial persons and enacted by the legislature to create and limit liability between them, the Uniform Commercial Code, should be applied. In this situation, there is no rationale for the court to shift the loss between parties by going outside the Code.

*Id.* at 1108.

<sup>198</sup> 866 F.2d 752 (5th Cir. 1989).

<sup>199</sup> *Id.* at 762-67. Other courts have also extended the economic loss rule to bar tort claims for economic loss against service providers. *See, e.g.,* *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1273-77 (M.D. Pa. 1990) (holding that economic loss rule precluded subcontractor from recovering against general contractor in tort); *2314 Lincoln Park W. Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 348-53 (Ill. 1990) (holding that condominium association could not recover economic loss in architectural malpractice action); *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n*, 560 N.E.2d 206, 208 (Ohio 1990) (holding defendant not liable under tort to flooring installation contractor for purely economic damages); *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 992 (Wash. 1994) (limiting general contractor's recovery for economic loss to contract remedies).

<sup>200</sup> *Employers Ins.*, 866 F.2d at 764.

<sup>201</sup> *Id.* at 764-65.

<sup>202</sup> *Id.*

### 3. A Student-Athlete Exception?

Given the general and specific policies underlying the economic loss rule, courts should hesitate in applying it to preclude student-athlete tort claims against their institutions. As the following discussion reveals, features of student-athletes' relationships with their universities do not fit neatly into the contract paradigm on which the economic loss doctrine is premised. Therefore, the justifications that underlie application of the doctrine in other factual contexts lose cogency in the context of the student-athlete/university relationship.

As emphasized above, the ability of parties to allocate their risk contractually lies at the core of the economic loss doctrine. In those transactions in which one party is unable to influence contractually the allocation of risk because of unequal bargaining power, a primary premise of the doctrine is eroded. With rare exception, student-athletes are at a substantial bargaining disadvantage with their institutions.<sup>203</sup> Student-athletes enter into form agreements with no opportunity to dicker over their terms. In addition to the standardized nature of the Letter of Intent, other factors limit the ability of student-athletes to negotiate to protect their interests. These factors include the time constraints of the recruiting process, the presence of multiple persuaders, and the absence of disinterested advisors.<sup>204</sup> The end result is a process "rife with potential abuse through both blatant coercion and subtle coaxing. . . . The fawning and gentle arm-twisting by college coaches, athletic directors, alumni, and parents often creates a blurred line between friendly persuasion and cajolery that impinges upon the student-athlete's ability

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<sup>203</sup> David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669, 688. See also John R. Allison, *Rule-Making Accuracy in the NCAA and its Member Institutions: Do Their Decisional Structures and Processes Promote Educational Primacy for the Student-Athlete?*, 44 KAN. L. REV. 1, 25 (1995) (discussing impediments to designing governance structure for intercollegiate athletics that guarantees meaningful input by student-athletes at institutional or NCAA levels of decision making); Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213, 264 (1990) (arguing that absence of effective representation for student-athletes in NCAA governance contributes to lack of parity between student-athletes and their institutions).

<sup>204</sup> Cozzillio, *supra* note 53, at 1332.

to contract freely.”<sup>205</sup> In short, inequality of bargaining power neutralizes the ability of parties to allocate risks contractually. Indeed, student-athletes “have almost no means of protecting their interests by contract.”<sup>206</sup>

A related theme in cases and scholarship concerning the economic loss rule is the notion of who is the superior risk bearer.<sup>207</sup> One method of distributing risk is through insurance.<sup>208</sup> Given the economic and social realities of the student-athlete/university relationship, conceiving of student-athletes as the superior risk bearers is difficult.

Similarly, the case for judicial restraint in applying the economic loss doctrine to preclude student-athletes’ tort claims is strengthened by focusing on the complexities of the student-athlete/university relationship. In describing the characteristics of this relationship in *University of Colorado v. Derdeyn*,<sup>209</sup> the Colorado Supreme Court emphasized the considerable control that institutions exert over the lives of their student-athletes. Institutions regulate academic performance, course selection, training, practice sessions, diet, attendance at study halls, curfews, and substance abuse.<sup>210</sup> The *Derdeyn* court’s observations illustrate the interdependence that inures in the relationship.

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<sup>205</sup> *Id.*

<sup>206</sup> Skeel, *supra* note 203, at 678. *See also* Smith, *supra* note 203, at 265 (noting inequality of bargaining power between student-athletes and institutions which results in inequities such as ability of institutions to unilaterally terminate student-athletes’ contracts).

<sup>207</sup> *See, e.g.*, Brown & Feinman, *supra* note 126, at 339-42 (explaining that issue of which party is superior risk bearer may depend on whether relevant economic loss is direct or consequential).

<sup>208</sup> *Id.* at 341.

<sup>209</sup> 863 P.2d 929, 940 (Colo. 1993) (en banc).

<sup>210</sup> *Id.* In support of the University’s description of the nature of the relationship, its athletic director testified:

[T]hat the NCAA sets limits on financial aid awards, playing seasons, squad size, and years of eligibility; that the NCAA requires that CU maintain records of each athlete’s academic performance; that the “athletes that eat at training tables are football and men’s basketball and the other athletes eat in the dorms or at their off-campus residences;” that some coaches within their discretion impose curfews; that athletes are required to show up for practice; that athletes are “advised . . . on what they should take for classes;” that “we have a required study hall in the morning and in the evening;” and that it is “fair to say that the athletes are fairly well regulated.”

*Id.* at 940-41.

Indeed, the extensiveness of a college's control creates a relationship of trust and dependence. This web of interdependence also creates factual circumstances that cross the boundaries of tort and contract as illustrated in *Fortay*.

Because of these complexities, claims arising from student-athletes' relationships with their institutions involve "factual overlaps."<sup>211</sup> Consequently, the fact situations presented may be suitable for analysis in more than one doctrinal category.<sup>212</sup> As one commentator noted, "the purpose of classification is to define differences and to provide convenient means of identifying these differences."<sup>213</sup> Yet classification "requires only that degree of doctrinal integrity sufficient to render the organizing principles operative."<sup>214</sup> Thus, examining the particulars of each case should operate as a predicate to classifying conduct. Thoughtful judicial consideration of factors such as the nature of the parties' relationship and the interests affected by the conduct at issue lessens the likelihood of rigid classification. This in turn increases the odds of arriving at classifications that are consistent with the policies and aims that contract and tort seek to promote.<sup>215</sup>

Finally, the case for a consumer exception for student-athletes is strengthened by the unavailability of remedial schemes and other devices that protect expectation interests. No remedial schemes like the UCC have been developed to balance the interests of student-athletes and their institutions.<sup>216</sup> Moreover, no other protective mechanisms fill the void resulting from the

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<sup>211</sup> Professor Feinman would describe "factual overlaps" as overlaps which arise in fact patterns that are traditionally analyzed within one substantive area. Factual overlaps "are seen as also or alternatively suitable for the application of doctrines from other areas." Feinman, *supra* note 107, at 668. He also describes situations involving doctrinal and principled overlaps. *Id.* at 668-69.

<sup>212</sup> *Id.* at 668.

<sup>213</sup> *Id.* at 692.

<sup>214</sup> *Id.* at 681.

<sup>215</sup> *Id.* at 691. Such analysis will prevent courts from having to obtain detailed knowledge of the facts and from having to evaluate the extent to which the facts depart from the prototypical factual situation in which the economic loss doctrine has been applied. *Id.* at 712.

<sup>216</sup> Accordingly, allowing the right to recover under negligence for economic loss will not subvert the will of state legislatures. This is particularly true inasmuch as courts have been hesitant to permit state legislative intrusion into intercollegiate athletics.

absence of a remedial scheme to protect student-athlete expectation interests.

In summary, the foregoing suggests that the concerns and interests that underlie the use of the economic loss doctrine in the products liability context are inapplicable in the student-athlete/university relationship. As noted above, the contract paradigm relied on by courts that apply the economic loss doctrine is premised on the UCC, "which constitutes a comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods."<sup>217</sup> In contrast, the tort paradigm is premised on persons in unequal bargaining relationships and the difficulties associated with allocating the risk of harm by contract.<sup>218</sup>

Given the weak factual foundations on which these underlying premises reside in the student-athlete context, courts should not use the economic loss doctrine to preclude student-athlete negligence claims for economic loss against their institutions. As noted by commentators in discussing *Spring Motors*, the New Jersey Supreme Court gave primacy to the contract paradigm mainly because the parties were of comparable bargaining power. "Comparable bargaining power, or the parties' ability to allocate risks by negotiating over the terms of the contract at its formation, has two essential elements: equality and bargaining."<sup>219</sup> Comparable bargaining power does not exist at the core of the student-athlete/university relationship.

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<sup>217</sup> Feinman, *supra* note 107, at 704 (quoting *Spring Motors Distributions, Inc. v. Ford Motor Co.*, 489 A.2d 660, 665 (N.J. 1985)).

<sup>218</sup> *Id.* at 704-05.

<sup>219</sup> Brown & Feinman, *supra* note 126, at 337 (footnote omitted). As noted by a student author discussing the preclusive effect of the economic loss doctrine:

The U.C.C. provisions are premised on transactions between parties of comparable bargaining power because only parties with relatively equal power can negotiate their terms and allocate risks. The arguments favoring tort rather than [sic] contract remedies assume that the consumer lacks the requisite bargaining power to negotiate his terms. Strict liability recovery is inappropriate in commercial transactions where both parties have the power to negotiate their terms. In such transactions, society's interest is in the performance of the agreement.

Heiner, *supra* note 121, at 1358 (footnote omitted).

## CONCLUSION

This Article has wrestled with the theoretical difficulties that student-athletes will encounter in attempting to expand the range of tort and contract remedies available in actions against their institutions. Colleges and universities will attempt to resort to traditional defenses in response to such efforts. This is particularly true with respect to defenses often asserted to preclude tort causes of action.

As noted in this article, defenses like the economic loss doctrine superficially seem to be appropriate mechanisms for limiting institutional liability. Despite the tendency of courts to apply these defenses, however, close examination reveals that the reasoning underlying these defenses fails to provide adequate support for their application in the student-athlete/university context. Indeed, the nature of the factual circumstances giving rise to student-athletes' claims, in tandem with the nature of the student-athlete/university relationship, tests the theoretical and practical underpinning of these preclusive theories.

Nevertheless, as seen in *Fortay*, courts historically have been disinclined to engage in the type of critical and in-depth evaluation which is warranted in determining the extent to which the range of theories available to student-athletes should be expanded. One consequence of such reticence is continued deference to institutional decision-making. This in turn leads to an abrogation of the judiciary's proper role as an external mechanism for holding institutions accountable for promoting the values which underlie college athletics and the specific interests of student-athletes. Finally, such deference represents a lost opportunity to use the law responsibly to shape and influence the contours of the student-athlete/university relationship.

