



# For The Record

The Official Newsletter of the National Sports Law Institute

## INDEX

2010 Joseph E. O'Neill  
Award Winner

The Use of Clawback Clauses  
in College Coaches' Contracts  
→This article discusses the  
potential use of clawback  
clauses within college  
coaching contracts to allow  
the university to recover  
compensation when a  
coach violates NCAA  
rules.

2009-2010 Sports Law  
Survey

## NSLI CALENDAR

### SEPTEMBER 18, 2010

Annual Fall Golf Classic

→Scenic View Country Club

### OCTOBER 22, 2010

The Increasing Legal  
Regulation of Sports in a  
Declining Economic  
Environment

→Marquette University  
Alumni Memorial Union

## THE NATIONAL SPORTS LAW INSTITUTE CELEBRATES ITS 20TH ANNIVERSARY



### 2010 Joseph E. O'Neill Award Winner

**Elsa Kircher Cole,**  
Vice President of Legal Affairs/  
General Counsel,  
National Collegiate Athletic Association

On Friday, April 23, 2010, the National Sports Law Institute of Marquette University Law School presented its 2010 Joseph E. O'Neill Award to Elsa Kircher Cole. After Mr. O'Neill's untimely death in 1992, the Joseph E. O'Neill Award was established by the O'Neill family, the law firm of Davis & Kuelthau, S.C., and the National Sports Law Institute. The award is given annually to an individual in the sports industry who has made a significant contribution to the field and done so while exemplifying the highest ethical standards.

Elsa Kircher Cole is the Vice President of Legal Affairs/General Counsel for the National Collegiate Athletic Association (NCAA). Ms. Cole has been the General Counsel for the NCAA since 1997, and she is responsible for its nationwide litigation calendar and all of its legal affairs. She previously served as the general counsel for the University of Michigan for eight years and also as an assistant attorney general representing the University of Washington for 13 years. Ms. Cole is a frequent lecturer and writer in the area of higher education law, with special emphasis on athletics, sexual harassment, and due process issues. She is on the Board of Directors for the Sports Lawyers Association and has served on the Board of Directors of the National Association of College and University Attorneys, where she has been named a Fellow of the Association. Ms. Cole received her A.B. with distinction from Stanford University and her J.D. from Boston University.

Ms. Cole is an excellent and ethical attorney who has made a significant contribution to the education of the students in Marquette University Law

Volume 21, Number 2

April-June 2010

School's Sports Law program by speaking at NSLI conferences and hiring students as NCAA legal interns. In addition, Ms. Cole has been an active and valuable member of the NSLI's Board of Advisors.

NSLI Director, Professor Matt Mitten, and Attorney Charles Henderson, a member of the NSLI's Board of Advisors and Shareholder with the law firm of Davis & Kuelthau, S.C., which sponsors the award, presented the O'Neill Award to Ms. Cole.



Attorney Charles Henderson, 2010 O'Neill Award Winner Elsa Kircher Cole, and Professor Matt Mitten

During her remarks Ms. Cole presented the following points for students to consider as they begin to think about their future legal careers:

- Your first job is not your last job. The office I had right out of law school was turned into a storeroom after I left!
- You can learn something from every job you have. My first job was trying cases for the State of Washington going after folks who had refused breathalyzers. But I learned to be comfortable in a courtroom and in front of juries. Even a non-legal job can teach you people skills and effective time management.
- Extend yourself professionally. Push yourself to do something outside of your comfort zone and do the projects that are “good for you.” For me, it was writing an article about a case I had tried, even though I had little free time being a working mom with two small children. The article led to speaking engagements and eventually a reputation that brought me to the attention of a head hunter.
- Treat everyone with respect. You never know who will be helpful in doing your job or be a job lead or a reference.
- Network. This is an overused term but I think of it as just another word for being friendly and helpful. When you go to a professional or social event, don't just stay with the folks you know but try to move around and meet and greet others. Again, you never know who will be helpful someday in finding your next job or a change in your career.
- Be yourself. Don't try to be the type of lawyer that feels uncomfortable to you because you think you have to fit some stereotype. It is too wearing and others will sense it too.
- Be collaborative. Give credit to others. Be appreciative of help you receive and remember you are not the sole repository of great ideas. Having the reputation of being a team player can only help you in your career.
- Recognize you have developed great skills in being taught to think like a lawyer. You are able to take a jumbled set of ideas and thoughts and make sense out of them to guide a discussion or plan. You may be the only person in the room who can do that so use that to help the group move ahead.
- Try not to be the one saying, “No.” If the law will not allow what is being planned, be known as the lawyer who comes up with an alternative way to accomplish the same or nearly the same thing. You will more likely be included in early discussions about policy issues and develop experience that is more likely to lead to a rewarding career.



Martin Greenberg

## The Use of Clawback Clauses in College Coaches' Contracts

By **Martin J. Greenberg**, Managing Member, Law Office of Martin J. Greenberg, LLC; Member of the Board, Southeast Wisconsin Professional Baseball Park District (Miller Park); Member, NSLI Board of Advisors; and Adjunct Professor of Law.

**Definition:** A clawback clause is a contractual covenant in an employment agreement that requires an employee who has received compensation or something of value to return that compensation upon the occurrence of a specifically stated condition subsequent.

### USES OF CLAWBACK PROVISIONS

Originally, clawback clauses were used in executive employee agreements in order to recapture compensation, stock options, or bonuses if the employee breached a non-compete, non-solicitation, or confidentiality covenant.<sup>1</sup> Clawback clauses have also been used in other ways, including:

1. Within state subsidy programs when the enabling law sets out minimum recapture requirements when a recipient of a state subsidy fails to meet any investment, wage, job creation, or retention commitment.<sup>2</sup>
2. Within bankruptcy law, which permits the trustee in bankruptcy to void or undo certain types of transactions wherein the trustee can clawback or regain assets, such as when there is a fraudulent or preferential transfer.<sup>3</sup>
3. Within the Sarbanes-Oxley Act of 2002, the first federal statute to require that certain bonuses previously paid to a company's CEO or CFO could be forfeited and repaid to the company.<sup>4</sup> The repayment obligation is triggered upon a restatement of the company's financial statements due to material non-compliance or misconduct.<sup>5</sup>
4. The Emergency Economic Stabilization Act of 2008, and the American Recovery and Reinvestment Act of 2009, require repayment of bonuses due to inaccuracies in financial statements applied to a broader group of executives.<sup>6</sup>
5. Finally, on July 10, 2009, the Department of the Treasury issued an interim final rule titled TARP Standards for Compensation and Corporate Governance, which implements the bail-out program's executive compensation provisions.<sup>7</sup> The rule provides that any bonus payment with respect to certain executives of bail-out recipients must be subject to a recovery or clawback provision that is triggered in certain circumstances relating to material inaccurate financial statements or performance metric criteria.<sup>8</sup>

1. Alexis Leondis & Margaret Collins, *Spending Bonus Cash Becomes Risky as Clawback Rules Increase*, BLOOMBERG BUSINESSWEEK, Jan. 8, 2010, <http://www.businessweek.com/news/2010-01-08/spending-bonus-cash-becomes-risky-as-clawback-rules-increase.html>.

2. *See for example*, 20 ILL. COMP. STAT. 715/25 (2010).

3. *See* BankruptcyLawFirms.com, *What is the Bankruptcy Clawback Provision?*, <http://www.bankruptcylawfirms.com/resources/bankruptcy/filing-for-bankruptcy/clawback-transfers.htm> (last visited May 22, 2010).

4. Leondis & Collins, *supra* note 1.

5. Gretchen Harders & Susan Gross Sholinsky, *Bonus Compensation and Clawbacks: What Employers need to Know*, EPSTEIN BECKER & GREEN, P.C., CLIENT ALERT, June 10, 2009.

6. *Id.*

7. *Id.*

8. *Id.*

Clawback clauses encourage executives to minimize behavior that would put a company at risk. Company executives need to understand the importance of ethical misconduct and financial misstatements. Adopting clawback clauses sends a message to shareholders and investors that the company is committed to sound executive compensation packages and effective corporate governance.<sup>9</sup>

In 2008, Equilar reported that more than 64% of the Fortune 100 companies and the largest U.S. firms based on revenues had clawback clauses in place in 2008, compared with approximately 17.6% in 2006,<sup>10</sup> and rising to 73% in 2009.<sup>11</sup> According to Equilar, the rise in clawback clauses is a relatively new phenomenon: 91.7% of the Fortune 100 companies that have clawback clauses adopted them within the last three years; 60% of the Fortune 100 companies have compensation recovery clauses in the event of financial restatement, while 72.4% of the companies allow for recovery in the event of ethical misconduct.<sup>12</sup>

### CLAWBACK CLAUSES IN COLLEGE COACHING CONTRACTS

The possibility of using clawback clauses in college coaches' contracts was raised in an article by George Dohrmann<sup>13</sup> who wrote:

It is a common storyline in the annals of NCAA scandals.

A program is accused of violating the rules and the head coach is clearly culpable. Perhaps he gave money to a player or violated recruiting rules or was aware of academic fraud and did nothing to stop it. The coach either resigns or is fired, exiting in the heat of the scandal.

Months later, when the NCAA and/or the school decide on sanctions, the brunt of the punishment falls on the team and its new coach -- a ban from postseason play, scholarship reductions, recruiting restrictions -- whatever the case, they hinder players who had nothing to do with the wrongdoing and a coach who wasn't even on campus when the violations occurred.

It is a flaw in the system, one that frustrates athletes and fans.

But there is a relatively simple way to fix it.

In the wake of the economic collapse, "clawback" provisions have become more common in the contracts of Wall Street executives. These clauses enable companies to recover compensations such as bonuses for a variety of reasons, including the uncovering of a scandal or if certain performance goals are not reached. A recent editorial in The New York Times called for clear clawback provisions for board members of major banks as part of a financial reform package.<sup>14</sup>

9. Andrew Tuch, "Clawbacks" of Executive Compensation, <http://blogs.law.harvard.edu/corpgov/2008/07/30/clawbacks-of-executive-compensation/> (July 30, 2008, 12:04 EST).

10. Leondis & Collins, *supra* note 1.

11. *Id.*

12. Mary Pat McCarthy, *Clawback Provisions on the Rise*, DIRECTORSHIP BOARDROOM INTELLIGENCE, Dec. 1, 2008, <http://www.directorship.com/clawback-provisions-on-the-rise/>.

13. George Dohrmann, *Clawback Clauses in Contracts could Deter Coaches from Breaking Rules*, SPORTS ILLUSTRATED, Jan 20, 2010.

14. *Id.*

## CLAWBACK CLAUSE SURVEY

In February and March of 2010, a survey was sent by the author to universities within the Atlantic Coast Conference (ACC), Big Ten, Big 12, Big East, Pac-10 and Southeastern Conference (SEC). The survey asked each university's athletic director to answer the following question: Does the university currently use clawback clauses in its current coaches' contracts? Thirteen universities responded, including Duke, Florida State, Georgia Tech, Penn State, the University of Wisconsin-Madison, Baylor, the University of Kansas, Oklahoma State, Texas Tech, Marquette, the University of South Florida, Villanova and West Virginia. Each of the responding universities stated it does not use clawback clauses within its coaches' contracts.

Negotiating compensation packages, for cause termination, and buyout provisions, to name a few, are difficult legal challenges already; adding clawback clauses would further complicate the process.

It is not surprising that none of the responding universities included clawback clauses within their coaches' contracts. Negotiating compensation packages, for cause termination clauses, and buyout provisions, to name a few, are very difficult legal challenges already; adding clawback clauses would further complicate the process. In addition, adding clawback provisions might open the door to the university having to pay more money, especially if coaches demand bonuses in the event that they do not commit major NCAA violations.<sup>15</sup> Finally, drafting a mutually acceptable clawback clause would be very difficult as Xavier University Athletic Director Mike Bobinski observed, "[t]he legalese in drafting such a provision would be difficult."<sup>16</sup>

Recent reports demonstrated that University of Memphis football coach Larry Porter's contract contains a clause stipulating that bonuses for post-season victories will be taken back if the games are later vacated by the NCAA.<sup>17</sup> The clause states:

### Return of Bonuses:

If there is a final NCAA decision that major violations have occurred in the Program which require the vacation of records and/or return of monies received by the University and/or other penalties, any and all bonuses pursuant to this Paragraph 6 and all of its subparagraphs shall be forfeited and if already paid returned to the University.<sup>18</sup>

According to Sheri Lipman, University of Memphis attorney, this clawback provision, which is used in both coaching and administrative contracts, is being revised and further refined.<sup>19</sup>

It will be interesting to see whether the university attempts to retrieve \$360,000 in performance bonuses that former coach John Calipari earned during the 2007-2008 basketball season, even though the school was forced to vacate all of its wins and money made from the NCAA tournament that year due to violations of NCAA rules in connection with former player Derrick Rose.<sup>20</sup>

15. *Id.* at ¶ 11.

16. *Id.* at ¶ 10.

17. Dan Wolken, *University of Memphis Fine-Tuning Coaching Contracts*, MEMPHIS COMMERCIAL APPEAL, Apr. 9, 2010.

18. E-mail from Attorney Sheri Lipman, University Counsel, University of Memphis, to Martin J. Greenberg, Law Offices of Martin J. Greenberg, LLC (Apr. 21, 2010, 16:29 CST) (on file with author).

19. *Id.*

20. Wolken, *supra* note 17.

## NCAA VIOLATIONS

The principles, enforcement policies, procedures and penalties for NCAA rules' violations are defined in Bylaw Article 19, Enforcement, which states that "[i]t shall be the mission of the NCAA Enforcement Program to eliminate violations of NCAA Rules and impose appropriate penalties should violations occur."<sup>21</sup> Violations of NCAA rules are defined as secondary, i.e. "a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit,"<sup>22</sup> or major, defined as "[a]ll violations other than secondary violations, including those that provide an extensive recruiting or competitive advantage."<sup>23</sup> Multiple secondary violations by a member institution may collectively be considered as a major violation.<sup>24</sup>

While the term "major" violation is broadly defined, it includes the following:

- Providing extra benefits to student athletes or recruits;
- Falsification of recruiting records;
- Unethical conduct including academic fraud;
- Impermissible recruiting inducements;
- Lack of institutional control and failure to monitor its athletics programs;
- Provision of false and misleading information;
- Hiring irregularities;
- Fraudulent entrance examinations;
- Impermissible contact - observation of pre-season activities;
- Impermissible try-outs;
- Impermissible telephone contacts.<sup>25</sup>

Beyond the conduct that is forbidden, the NCAA also mandates specific penalties. For example, penalties for secondary violations may include:

- A two-year probationary period;
- A reduction of the number of expense-paid recruiting visits;
- A requirement that all coaching staff members be prohibited from engaging in any off-campus recruiting activities for up to one recruiting year;
- A requirement that institutional staff members determined knowingly to have engaged in or condoned a major violation be subject to termination, suspension or reassignment;
- A reduction in the number of financial aid awards;
- Sanctions precluding postseason competition in the sport;
- Institutional recertification.<sup>26</sup>

Additional disciplinary measures that may be imposed in response to major violations include:

- Public reprimand and censure;
- Probation for a least one year;

21. NCAA Division I Manual 2009-2010, § 19.01.

22. *Id.* § 19.02.2.1.

23. *Id.* § 19.02.2.2.

24. *Id.* § 19.02.2.1.

25. *Id.* § 19.02.2.2.

26. *Id.* § 19.5.1.

- Individual or team records and performance vacated or stricken;
- A financial penalty;
- Ineligibility for any television programs involving coverage of the institution's intercollegiate athletics in which the violations occurred;
- Ineligibility for invitational and postseason meets and tournaments and NCAA championship events;
- Show cause orders.<sup>27</sup>

The seriousness of major violations under NCAA rules is best portrayed in the recent case involving former University of Southern California (USC) basketball coach Tim Floyd and student athlete O.J. Mayo, now a member of the Memphis Grizzlies.<sup>28</sup> USC implemented self-imposed sanctions on its men's basketball program for NCAA rules violations related to O.J. Mayo.<sup>29</sup> Sanctions were imposed "because of Mayo's involvement with Rodney Guillory, who under NCAA Rules became a USC booster because of his role in Mayo's recruitment[.]"<sup>30</sup> It was alleged that Guillory supplied Mayo with money and gifts on behalf of a sports agent and further alleged that former USC Coach Tim Floyd provided the money to Guillory.<sup>31</sup> Floyd resigned as the head coach on June 9, 2009.<sup>32</sup> After investigating the matter and finding several violations, the university imposed the following sanctions:

a one-year ban on postseason competition following the 2009-2010 regular season, including the Pac-10 Conference [B]asketball [T]ournament, a reduction of one scholarship for the 2009-2010 and 2010-2011 academic years, a reduction by one of the number of coaches permitted to engage in off-campus recruiting activities during the summer of 2010, and a reduction in the total number of recruiting days by [twenty days] (from 130 to 110) for the 2010-2011 academic year. In addition, because of Mayo's involvement with Rodney Guillory, whom under NCAA rules became a USC booster due to his role in Mayo's recruitment, USC will vacate all wins during the 2007-2008 regular season (twenty-one), which was when [the ineligible] Mayo competed. USC will also return to the NCAA the money [\$206,200.00] it received through the Pac-10 Conference for its participation in the 2008 NCAA Division I Men's Basketball Championship Tournament.<sup>33</sup>

The self-imposed penalties, which were accepted by the NCAA, illustrate not only the economic but public exposure a university may face when a major violation occurs.

Although the NCAA accepted the self-imposed penalties related to the basketball team, it penalized the football team for "a lack of institutional control," including extra benefits given to players and unethical

27. *Id.* § 19.5.2.

28. University of Southern California News, *USC Announces Sanctions on Men's Basketball Team*, Jan. 3, 2010, [http://uscnews.usc.edu/university/usc\\_announces\\_self-imposed\\_sanctions\\_on\\_mens\\_basketball\\_team.html](http://uscnews.usc.edu/university/usc_announces_self-imposed_sanctions_on_mens_basketball_team.html) (last visited May 23, 2010).

29. *Id.*

30. *Id.*

31. Posting of Mike Heiserman to the Los Angeles Time Fabulous Forum, [http://latimesblogs.latimes.com/sports\\_blog/2010/01/usc-basketball-imposes-major-sanctions.html](http://latimesblogs.latimes.com/sports_blog/2010/01/usc-basketball-imposes-major-sanctions.html) (Jan. 3, 2010, 11:17 PST).

32. Chris Foster, *Tim Floyd resigns as USC's basketball coach*, *Los Angeles Times*, (June 10, 2009), available at <http://articles.latimes.com/2009/jun/10/sports/sp-tim-floyd-usc10> (last visited May 23, 2010).

33. University of Southern California News, *supra* note 32.

conduct by an assistant football coach.<sup>34</sup> The NCAA's investigation focused on improper benefits received by Heisman Trophy winner Reggie Bush and his family after they became partners in New Era Sports and Entertainment while Bush was still in college. In the end, additional sanctions imposed on the football program included a ban from appearing in a bowl game for two seasons, the loss of ten scholarships for three seasons, and its final two victories from the 2004 season and all 12 wins from the 2005 season.<sup>35</sup> USC plans to appeal on the grounds that the NCAA Committee on Infractions made incorrect findings and that the penalties are too severe.<sup>36</sup>

### CONTRACTUAL COMPLIANCE

NCAA Bylaw 11.2.1 requires that “[c]ontractual agreements or appointments between a coach and an institution shall include the stipulation that a coach who is found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, including suspension without pay or termination of employment for significant or repetitive violations.”<sup>37</sup> Strict compliance with NCAA rules is often an integral element of a coach's contract. In most coaches' contracts, under the heading “Duties” there will be a list of obligations in an effort to insure that the coach complies with NCAA rules. These obligations include:

1. Coach agrees to abide by and comply with NCAA rules.
2. Coach agrees to work cooperatively with the university's Faculty Athletics Representative and compliance personnel on compliance matters and NCAA rules education.
3. If the coach becomes aware, or has reasonable cause to believe, that any violations of NCAA legislation have been committed by him, a member of his coaching staff, a representative of the University's athletic interests, or any other person under his direct or indirect supervision, direction or control, he shall report the violation immediately to the Athletic Director and the Director of Compliance.
4. Coach shall supervise assistant coaches, student athletes and other individuals under his supervision so as to maintain strict compliance with the rules and regulations of the NCAA.
5. Coach shall cooperate fully in any review or investigation of possible violations of any of the NCAA rules conducted or authorized by the University.
6. Coach shall be knowledgeable of all applicable NCAA rules and regulations.

### FOR CAUSE TERMINATION

In addition to contractual duty provisions, coaches' contracts also contain “for cause termination” provisions that may result in the termination of the coach in the event the coach is found to have violated NCAA rules. The following are examples of for cause termination provisions involving non-compliance with NCAA rules:

1. Conduct by the coach that constitutes a major violation, or a pattern of conduct which may constitute or lead to a major violation, of any NCAA or other Governing Athletic

34. Gary Klein Davis Wharton, *NCAA Hits USC with Severe Penalties*, LOS ANGELES TIMES (June 10, 2010), available at <http://www.latimes.com/sports/la-sp-0611-USC-ncaa-sanctions-20100611.0.48749666.story> (last visited June 14, 2010).

35. David Wharton, *Trojans Had Their 'Heads in the Sand'*, LOS ANGELES TIMES, (June 11, 2010), available at <http://www.latimes.com/sports/la-sp-0612-usc-big-names-20100612.0.6558054.story> (last visited June 13, 2010).

36. Gary Klein, *Q&A for USC sanctions*, LOS ANGELES TIMES, (June 10, 2010), available at <http://www.latimes.com/sports/la-sp-0611-usc-qa-20100611.0.7746681.story> (last visited June 15, 2010).

37. NCAA Division I Manual, 2009-2010, § 11.2.1.



Rule which may, in the reasonable and good faith judgment of the University, negatively and significantly impact and reflect adversely upon the University, or its athletics program, including any violation which results or could result in the University being placed on probation by the NCAA; or conduct by members of coach's coaching staff or others under his supervision or subject to his control or authority, constituting a major violation, or a pattern of conduct which may constitute or lead to a major violation of any NCAA or other Governing Athletic Rule, of which coach had knowledge and failed to act reasonably to prevent, limit or mitigate, which may, in the reasonable and good faith judgment of the University, negatively and significantly impact and reflect adversely upon the University or its athletics program, including any violation which results or could result in the University being placed on probation by the NCAA.

2. Coach's failure to report immediately to the Director of Athletics and Director for Compliance any violations of NCAA or other Governing Athletic Rules or University Rules by coach or by members of coach's coaching staff, student-athletes, or other persons under coach's control or authority that become known to coach.
3. Coach's refusal or failure to furnish information relevant to an investigation of a possible program violation of an NCAA rule or regulation;
4. Coach's refusal to cooperate with the NCAA or the University staff in the investigation of possible program violations of NCAA rules or regulations;
5. Coach's knowing involvement in arranging for academic fraud by or for prospective or enrolled student-athletes;
6. Coach's knowing involvement in offering or providing prospective or enrolled student athletes improper inducement or extra benefits;
7. Coach knowingly furnishing the NCAA or the University false or misleading information concerning the coach or any staff member's or athletics' involvement in or knowledge of a violation of an NCAA rule or regulation.

### CONTRACT DRAFTING CONSIDERATIONS

If the coach's contractual duty requires strict compliance with NCAA rules and regulations and if the coach can be terminated for cause for non-compliance with NCAA rules and regulations, it would appear that the next logical step is some financial penalty for non-observance of NCAA rules in the form of a clawback provision. As one reporter explained, "[c]ollegiate athletic programs should . . . [i]nset clawback provisions into the contracts for coaches, clauses clearly written that would force a coach to pay back part of his salary should he or his program violate NCAA Rules."<sup>38</sup> Mike Bobinski, Xavier University Athletic Director, replied, "[i]t is an interesting idea. If that were to happen it would surely cause some more thought for a coach whether to go down the road [of breaking NCAA rules]. It would be another layer of deterrent for that kind of behavior."<sup>39</sup>

Bill Carr, former Athletic Director at the University of Florida and CEO of Carr Sports Associates, Inc., states,

[w]ithout question, it is appropriate for universities to begin the use of 'Clawback Clauses' in their employment contracts with highly compensated coaches and administrators. If a coach or administrator receives financial benefits from his team's

<sup>38</sup>. Dohrmann, *supra* note 13.

<sup>39</sup>. *Id.*

competitive success that is later vacated or the institution is sanctioned by the conference or NCAA for rules violations by the coach during that same period, there should be repayment of those dollars by the coach or administrator. It cannot be any other way.<sup>40</sup>

With respect to clawback provisions, Sheri Lipman, University of Memphis attorney, explained:

From the University lawyer's perspective, clawback provisions in coach contracts, specifically related to bonuses for participation in the NCAA tournament, make sense. If the NCAA money must be returned following an infractions matter, such provisions protect the institution which must re-pay the money, and eliminate uncertainty which has the possibility of leading to litigation. However, from the Athletic Department's perspective, the issue is more complicated. The Athletic Department must consider whether such provisions will prevent the institution from hiring the coach it wants, particularly when other institutions are not currently using these provisions. Moreover, when there is no finding against the coach and the coach remains at the institution, there may be a worry of a strained relationship because of the need to return the money. Finally, because infractions matters are often decided a number of years after the events at issue, the requirement to repay a large sum of money many years later creates practical questions for individuals who have not taken the repayment into account in their family budgets.<sup>41</sup>

Here are some other issues to consider in drafting a clawback provision involving NCAA violations:

1. What triggers the clawback provision, i.e. self-imposed penalties for major violations of NCAA rules, or a finding of major violations of NCAA rules by the Committee on Infractions or the Infractions Appeals Committee for which the coach knew or participated in?;
2. How far back the clawback provision reaches? This will be important in regard to the appropriate statute of limitations and in determining when the triggering event occurred;
3. What types of compensation the clawback provisions apply to (e.g. salary, outside income, perquisites, the total package, bonuses, etc.)?;
4. What the university can retrieve when it triggers the clawback provision (i.e. a stipulated amount or a percentage of coach's package to be agreed upon between the university and coach, or is it limited to bonuses paid that should not have been paid but for NCAA rules violations)?;
5. What kind of penalties for major violations of NCAA rules would trigger the clawback provision (e.g. fines, probation, reductions, financial relinquishments)?;
6. Does the clawback provision apply prospectively even if the coach is terminated or has taken another job?;
7. Is the clawback payment payable in a lump sum or on an installment basis? What are the potential tax consequences of each arrangement?;<sup>42</sup>
8. Does the clawback clause contain an offset provision (any amounts that could be clawed back by the university that can be offset by amounts the university owes the coach pursuant to the contract)?;

40. E-mail from William Carr, Carr Sports Associates, to Martin J. Greenberg, Law Offices of Martin J. Greenberg, LLC (Apr. 15, 2010, 19:39 CST) (on file with author).

41. E-mail from Lipman, *supra* note 18.

42. Allison Grace, *Compensation Clawbacks*, EVANCARMICHAEL.COM, <http://www.evancarmichael.com/Human-Resources/3395/Compensation-Clawbacks.html> (last visited May 23, 2010).

9. Should the coach be responsible for some of the costs involved in NCAA or self-evaluation enforcement proceedings, including attorney's fees?;
10. Should the coach be responsible for the acts of others who are under his supervisory control, or only for acts that he had direct knowledge of or participated in?;
11. Should any release of claims involving clawback provisions be prospective in nature after the repayment obligation has occurred?; and
12. Is the previously paid amount considered "wages?" This is important as clawback amounts may not be forfeited under some applicable state wage and hour laws.<sup>43</sup>

## CONCLUSION

In the next five years, as college coaches' contracts likely become even more lucrative and complex, it will not be surprising if clawback clauses become an important component of the negotiation process between a coach and university. Because coaches unfortunately continue to violate NCAA rules and may expose universities to serious punishments, it is important that athletic departments and college presidents seriously consider the use of these clauses to recoup money they have paid the offending coach. It will be interesting to review the breadth and scope of the next generation of clawback clauses in coaches' contracts.

*AUTHOR'S NOTE: I wish to thank Marquette University Law School third year law students Ashley Fale for her assistance with research, and Daniel Friedman for his assistance with respect to research, editing, and footnoting for this article.*

---

43. *Id.*





## 2009-2010 Sports Law Survey

In 1999, the National Sports Law Institute published its first survey to identify sports law courses and extracurricular activities currently offered at U.S. law schools, which was repeated in 2003. Results of both the 1999 and 2003 surveys can be found online at <http://law.marquette.edu/jw/surveys>.

From May of 2009 until March of 2010, the NSLI again surveyed members of the American Association of Law Schools (AALS) to determine sports law's prevalence as an area of study. Each survey focused on the following areas:

- Courses offered
- Professors teaching these courses (full time or adjunct)
- Student organizations
- Journals or law reviews
- Internship opportunities
- Other activities or opportunities available to students

In addition, recognizing the overlap in instruction between sports and entertainment law, the 2003 and 2009-2010 surveys requested information relating to both sports law and entertainment law courses.

The following executive summary provides an overview of the results obtained from the 2009-2010 survey. As appropriate, comparisons are made to the results of the 1999 and 2003 surveys as well.

### 2010 Executive Summary

The 2009-2010 survey results again show that a majority of respondents continue to offer at least one sports law course. Overall, the number of survey responses was much lower than previous surveys and has declined from 116 responses in 1999, to 80 in 2003, and 55 in 2009-2010. Regardless, the 55 responses for the recent survey out of the 198 schools surveyed for the most recent survey (including all AALS members and fee-based schools) provides a 28% response rate. Overall, 95% (52 of the 55) of the schools who responded to the survey offer at least one sports law course.

Consistent with past survey results, there are several schools that offer more than one sports law course. In 1999, 11% (13 out of 116) of the schools who responded offered more than one sports law course. In 2003, this percentage rose to 21% (17 out of 80). The current survey found similar results with 25% (14 out of 55) of the respondents offering more than one sports law course. Specifically, the following schools offer at least two sports law courses; South Texas College of Law, Tulane University Law School, University of Toledo College of Law, Western New England College School of Law, Whittier Law School, and Willamette University College of Law. Moreover, the following schools offer three or more courses; Duke University School of Law (7 courses), Indiana University School of Law -

Indianapolis (3 courses), Florida Coastal School of Law (7 courses), Marquette University Law School (11 courses), Santa Clara University School of Law (3 courses), the University of Illinois College of Law (3 courses), and the University of Tulsa College of Law (3 courses).

The data from the three surveys also shows that since 1999, there has been a significant increase in schools that are offering sports law courses taught by full-time faculty. The number of schools with full-time faculty teaching sports law courses has increased from 27% (29 of 116) in 1999, to 48% (32 of 80) in 2003, and to 71% (39 of 55) in 2010. This trend shows that schools have devoted the resources necessary to have full-time faculty members teaching these courses. This commitment of full-time faculty resources demonstrates that more law schools recognize the educational value of having sports law courses as part of their curriculum. In addition, full-time professors can be proactive in encouraging and supervising student journals, sports law societies, and other activities as they tend to be on campus more frequently and have more direct contact with students beyond the classroom than adjunct professors.

Other interesting results from the 2009-2010 survey, include:

- Three schools (6%), Florida Coastal School of Law, Marquette University Law School, and Tulane University Law School, provide students the opportunity to earn a certificate of specialization in sports law.
- Three schools (6%) publish a sports law review or journal, 4 schools (7%) publish an entertainment law review, and Florida Coastal School of Law publishes the online Journal of NCAA Compliance. While the 1999 survey did not quantify the number of schools with law reviews, or journals, the 2003 survey mirrors the 2009-2010 survey results.
- Forty-four schools (80%) reported that they have a student sports or entertainment law society. Specifically, 9 schools (20.4%) have a sports law society, 1 school (2.27%) has an entertainment law society, 2 schools (4.5%) have both sports and entertainment law societies, 30 schools (68%) have a combined sports and entertainment law society, and 2 schools (4.5%) responded affirmatively to this question without providing any specific information. Overall, the number of student organizations devoted exclusively to sports law has decreased since the 2003 survey from 29% to 20.4%.
- Of the 55 respondent schools, 28 (51%) reported details of internship or other opportunities available to students who want to work in the sports industry. This is a significant increase from the 2003 survey in which only 4 schools (5%) reported such opportunities; this question was not part of the 1999 survey.
- Twenty (36%) of the 55 schools reported they enter student teams that participate in the National Sports Law Moot Court competition. This is an increase from the 2003 survey that found that 16% (13 of 80) of the schools provided this opportunity.

The full report of survey results will be made available on the National Sports Law Institute's website. In addition, the NSLI is preparing a comparison survey of the information related to sports law's prevalence as an area of study contained on AALS school websites. That survey will also be made available online.

(Volume 21, Number 2 - Page 12)

The National Sports Law Institute of Marquette University Law School, P.O. BOX 1881, Milwaukee, Wisconsin 53201-1881, publishes **For The Record** 4 times per year. Address corrections should be sent to the NSLI at this address.

**For The Record** is a forum for sports law, business and ethical issues. It endeavors to provide current, practical information as well as public policy and scholarly viewpoints that are of professional and academic interest to NSLI members and interested parties.

Requests for permission to reproduce or republish any material from **For The Record** should be addressed to Paul M. Anderson, editor of **For The Record**. Submissions for publication should be typed, double-spaced and submitted in duplicate. If possible, any submission should be accompanied with a disc copy of the submission saved in WordPerfect or Microsoft Word of any format. Other arrangements can be made with the editor.

The opinions expressed in **For The Record** are those of the authors and do not represent the opinions, policies, or views of the NSLI, Marquette University Law School, or Marquette University.

**For The Record** editors:

*Matthew J. Mitten*, NSLI Director

*Paul M. Anderson*, Editor & Graphic Designer, NSLI Associate Director

© 2010 Marquette University. All rights reserved.



National Sports Law Institute  
Marquette University Law School  
Eckstein Hall, room 138  
1215 West Michigan Avenue  
P.O. Box 1881  
Milwaukee, WI 53201-1881