

Representations and Warranties in College Coaching Contracts

By Martin J. Greenberg¹ and Samuel Watkins²

I. INTRODUCTION

Promises made between parties to a contract often take the form of representations and warranties. These representations and warranties are often critical to the contract, enabling each party to be sure that it is receiving the consideration bargained for. College coaching contracts are one area where representations and warranties are seldom used, but when used they can have far reaching consequences.

The words "representations" and "warranties" are often used together interchangeably and in connection with each other but have different meanings, with the possibility of different damages resulting from each. Before going any further, it is important to define the terms "representation" and "warranty" because they often are incorrectly used as synonyms.³

II. DEFINITIONS

Black's Law Dictionary defines a "representation" as a "presentation of fact . . . made to induce someone . . . to enter into a contract."⁴ A representation is "a statement made by one of two contracting parties to the other... in regard to some fact, circumstance, or state of facts pertinent to the contract, which is influential in bringing

¹ Martin J. Greenberg is an experienced, award-winning attorney concentrating in the areas of real estate and sports law. Mr. Greenberg has over 40 years of experience in the law and along with his work in his own firm he teaches as an adjunct professor at Marquette University Law School.

² Samuel Watkins is a recent graduate from Marquette University Law School. He has interests in estate planning and sports law.

³ Karen Krock Et. Al., *Drafting Surviving Representations and Warranties: "A litigator's Perspective"*, HAYNESBOONE.COM (JUNE 5, 2008), [HTTP://WWW.HAYNESBOONE.COM/FILES/PUBLICATION/CF890BD9-CFB8-4DDC-B152-CFFB3801759C/PRESENTATION/PUBLICATIONATTACHMENT/201BCB7B-6B78-44B4-85B6-D65AFEE13D0E/KROCK_2008_DRAFTING%20SURVIVING%20REPRESENTATIONS%20AND%20WARRANTIES_715187_6.PDF](http://www.haynesboone.com/files/PUBLICATION/CF890BD9-CFB8-4DDC-B152-CFFB3801759C/PRESENTATION/PUBLICATIONATTACHMENT/201BCB7B-6B78-44B4-85B6-D65AFEE13D0E/KROCK_2008_DRAFTING%20SURVIVING%20REPRESENTATIONS%20AND%20WARRANTIES_715187_6.PDF).

⁴ *What is Representation?*, THE LAW DICTIONARY, <http://thelawdictionary.org/representation/>.

about the agreement."⁵ A representation, then, is a statement made before or at the time of making the contract regarding a past fact or existing circumstance related to the contract which influences each party to enter into the contract.⁶

A warranty, on the other hand is a "an assurance, promise, or guaranty by one party that a particular statement of facts is true and may be relied upon by the other party."⁷ A "warranty" is defined in terms of contracts as "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties."⁸ Courts have defined the term "warranty" as follows:

"Warranty" is said to be an express or implied agreement "by which the seller undertakes to vouch for the title, quality or condition of the thing sold." "Warranties usually go to the quality, quantity, capacity, condition (or) fitness of property for the purposes for which it is sold . . . [sic]"⁹

Black's Law Dictionary states that "[a] warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usually only a collateral inducement; (2) an express warranty is usually written on the face of the contract, while a representation may be written or oral; (3) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation was material; and (4) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation."¹⁰

⁵ *Id.*

⁶ *Id.*

⁷ *Warranty*, THEFREEDICTIONARY, <http://legal-dictionary.thefreedictionary.com/warranty>.

⁸ *Id.*

⁹ *Detroit Automatic Scale Co. v. G.B.R. Smith Milling Co.*, 217 S.W. 198, 199 (Tex. Civ. App. 1919).

¹⁰ *Black's Law Dictionary* 1618 (8th ed. 2004).

Another useful distinction between the two terms may be in the form of the nature of the remedy where a fact represented or warranted turns out to be untrue. When a representation (i.e., a statement of fact to induce a contract) is found to be untrue, it may give rise to a claim for fraud or negligent misrepresentation depending on the intent or negligence of the party making the representation.¹¹ Such a claim may permit the party receiving the representation: (a) to rescind the agreement and recover purchase money and the value of any improvements made, or (b) to enforce the agreement through specific performance and sue for damages relating to the difference between the value of the property as presented and the value of the property actually received.¹² A breach of a warranty does not require there to be intent to defraud or culpability of any kind.¹³ A breach of warranty often gives rise to a claim for damages or in some instances a requirement to cure.¹⁴ Moreover, the drafted of the contract may include a specific remedy for the breach of a warranty, allowing the parties to enforce the contract (e.g., a mathematical calculation of damages or reduction in the purchase price; a liquidated damages provision; a requirement that the seller cure; etc.), and may leave the parties to common law fraud remedies (including rescission) in the case of a breach of a representation.¹⁵

“Upon a false representation (or misrepresentation), however, the defrauded party may elect to void the entire contract, and recover any sums paid.”¹⁶ “When a

¹¹ *Vitiating Factors / Misrepresentation*, INSITELAWMAGAZINE,

¹² *Id.*

¹³ Krock, *Supra* note 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Raymond Millien, *Contracts 101: Covenants, representations and Warranties in IP License Agreements*, IPWATCHDOG.COM (April 5, 2013), <http://www.ipwatchdog.com/2013/04/05/contracts-101-covenants-representations-and-warranties-in-ip-license-agreements/id=38621/>.

breach of warranty occurs, the damages recoverable are the difference in the value as warranted (i.e., how they should have been) and the value as received.”¹⁷

Representations, “should be statements made by a party after investigation and with a belief that such statements are true, and “warranties” should be statements a party makes while willing to accept financial responsibility if the statement turns out to be untrue regardless of whether they actually (or should have) investigated.”¹⁸

In conclusion, a representation is a statement of fact including the contract while a warranty is a promise that the representation is true.

Accordingly, drafters should specify the intent to create a representation or a warranty and the remedy that will be applied in the event that the representation or warranty turns out to be untrue. Any representation or warranty so made should survive the execution of the coach's contract.

However, in no event is a representation or warranty an adequate substitute for a due diligent investigation.

III. EXAMPLES OF REPRESENTATIONS AND WARRANTIES IN COACHS' CONTRACTS

After surveying a number of college football and basketball coaches' contracts, here are some examples of contracts that contain representations or warranties by the coach:

(1) Robert Huggins - West Virginia University

VIII. Representations: Coach represents and warrants that he has not violated any of the rules and regulations of the NCAA, and he is not aware of any threatened or

¹⁷ *Id.*

¹⁸ *Id.*

pending NCAA investigation involving his conduct at any other NCAA member institution.¹⁹

(2) William O'Brien – Penn State University (resigned)

10. Representations by Coach. Coach hereby represents, which representations Coach understands are material facts upon which University has relied in reaching its decision to employ Coach, the following with respect to his background, credentials, education and past employment, to the best of his knowledge and information:

- a. that Coach has never been convicted of a misdemeanor or felony in any jurisdiction;
- b. that Coach has never been disciplined, reprimanded or sanctioned by the NCAA or any athletic conference;
- c. that Coach has never provided an improper benefit, as defined by the rules and regulations of the NCAA, to any student athlete at any time.
- d. that to the best of Coach's knowledge, while serving as the coordinator or assistant coach, he did not violate any rules or regulations of the NCAA or any athletic conference;
- e. that while serving as coordinator or assistant coach of a football program, he was not disciplined, reprimanded or sanctioned by the NCAA or any athletic conference;
- f. Misrepresentations made in Coach's bio, a copy of which is attached hereto as Exhibit "A," are true and accurate; and
- g. that Coach has never engaged in any other action or conduct that would reflect adversely on the good name and reputation of the University or that could cast the University in a negative light.

Any misrepresentation with respect to the foregoing shall constitute conduct which allows the University to terminate this Employment Contract for Cause.²⁰

(3) Paul Rhoads – Iowa State University

9. Warranty Regarding Prior Conduct. Rhoads understands that the public views coaches as representatives of the institution and its values. Rhoads is hired with the understanding that there are no events in his prior conduct, which make him unfit to represent it. Rhoads warrants and agrees as follows:

- a) Except for those events fully disclosed to University's Director of Intercollegiate Athletics prior to entry into this Agreement, that he is not aware of, nor has he in the last seven years engaged in:
 - Any prior conduct which violated the provisions of the NCAA Manual or of any recognized athletic conference;
 - Any prior conduct involving violations of rules or regulations of a prior employing academic institution regarding academic integrity;
 - Any prior conduct which would constitute a crime involving moral turpitude, violence or dishonesty;

¹⁹ Robert Huggins Employment Contract with West Virginia University, §VIII (May 1, 2008).

²⁰ William O'Brien Coaching Contract with Pennsylvania State University, §10.

- Any prior conduct which constitutes a crime in which the victim was a student-athlete or student.
- b) Rhoads agrees that if the statements made above are not true, University, in its discretion may terminate this Agreement pursuant to this Article V, unless the circumstances of such conduct have been disclosed to the University and University has retained Rhoads' services after full disclosure of the prior conduct.²¹

(4) Craig Robinson – Oregon State University

22. Coach's Certification of NCAA/PAC-10 COMPLIANCE

Coach certifies that he has not knowingly been involved in violations of NCAA or PAC-10 Conference rules or regulations at this or any other institution in the two years immediately preceding the execution of this Agreement, and that he has not been the recipient of any disciplinary action including, but not limited to, termination or suspension from duties, by any other institution for violation of NCAA or PAC-10 Conference rules and regulations during the two years immediately preceding the execution of this Agreement.²²

(5) Kevin Wilson – Indiana University

VII. Unique Services. 7.02, Representations and Warranties of the Employee.

As a material inducement to the University to execute and perform this Agreement, the Employee represents and warrants to the University that (i) he has not violated any of the NCAA Rules prior to the date of this Agreement and (ii) he knows of no violation of any of the NCAA Rules by any assistant coach or staff member who was under his supervision, direction or control at any prior member institution of the NCAA and for which he could be held responsible or be subject to sanctions or other discipline from the NCAA.²³

(6) Randy Douglas Edsall – University of Maryland

21. COACH'S REPRESENTATIONS. In executing this 2011 Agreement, the Coach represents to the University that he has not been reprimanded by the NCAA or any previous employer on account of an NCAA major violation or a series of secondary violations; that he is not being investigated as a party involved in a pending major or secondary NCAA violations review; and that he has not been arrested, pleaded guilty to, or convicted of any crime (excluding minor traffic offenses) not heretofore fully disclosed by him to the Athletic Director. The Coach's representation regarding these matters is a material condition of this 2011 Agreement.²⁴

(7) James Whitford – Ball State University

17. Coach's Representation and Warranty of Employability. As of the start of the Term, the Coach represents and warrants that the Coach is contractually available for

²¹ Paul Rhoads Coaching Contract with Iowa State University, §9 (Dec. 20, 2008).

²² Craig Robinson Coaching Contract with Oregon State University, §22 (Apr. 6, 2008).

²³ Kevin Wilson Coaching Contract with Indiana University, §VII (Jun. 10, 2011).

²⁴ Randy Edsall Coaching Contract with University of Maryland, §21 (Jun. 24, 2011).

employment throughout the Term. To the greatest extent permitted by law, the Coach shall hold harmless and indemnify the University for all claims against the university, and its employees or agents, brought by a former employer of the Coach and arising out of the Coach's appointment and employment by the University and all attorneys' fees and legal expenses incurred by the University defending such claims. The Coach also represents and warrants that the Coach reasonably believes that the Coach has not committed violations of the Governing Athletics Rules not already reported to the University. These representations and warranties are of material importance to the University.²⁵

(8) Greg C. Kampe – Oakland University

23. Acknowledgment and Warranty.

The Head Basketball Coach acknowledges that before signing this Agreement the Head Basketball Coach read this Agreement completely and fully understands the terms of the Agreement and the effect of this Agreement. The Head Basketball Coach also warrants to the University intending the University to rely thereon, that the Head Basketball Coach's academic and professional credentials that the Head Basketball Coach provided to the University were complete, accurate and true in all material respects.²⁶

(9) Fred Hoiberg – Iowa State University

5. Warranty Regarding Prior University Conduct. The University understands that Hoiberg accepted the position as head men's basketball coach with the understanding that there are no events in the University's prior conduct (including but not limited to the prior conduct of current and former University employees), which may adversely affect the Team. The University represents and warrants that it is not aware of nor has in the three years prior to the date of this Agreement engaged in (i) any conduct which constitutes a serious violation of the provisions of the NCAA Manual or of any recognized athletic conference; or (ii) any conduct involving serious violations of rules or regulations of the University regarding academic integrity in the conduct of its athletic program. The University agrees that if the statements made above are not true, it shall be deemed a material and serious breach of this Agreement and Hoiberg in his discretion may terminate this Agreement pursuant to Paragraph VI(4) without any further obligation to University, including any obligation to pay liquidated damages.²⁷

(10) Michael Todd Graham -- Arizona State University

12(b). Representation Concerning NCAA and Conference Legislation. Coach represents and warrants to the University that Coach has not been sanctioned for any violation of Legislation of the NCAA, the Conference or any other conference with which Coach has been affiliated.²⁸

²⁵ James Whitford Coaching Contract with Ball State University, §17 (Apr. 5, 2013).

²⁶ Greg Kampe Coaching Contract with Oakland University, §23 (Jun. 15, 2011).

²⁷ Fred Hoiberg Coaching Contract with Iowa State University, §5 (May 1, 2013).

²⁸ Michael Todd Graham Coaching Contract with Arizona State University, §12(b) (Mar. 5, 2012).

(11) Gus Malzahn -- Auburn University

25. Previous Contracts. Coach hereby warrants and represents that there are no binding contracts between Coach and any third party that would entitle the third party to approve any provision or all of this Agreement prior to its execution or to participate in or receive any proceeds to be paid to Coach pursuant to this Agreement. Coach further agrees and acknowledges that in the event any claim or legal action or administrative action is instituted against University by any third party wherein it is alleged, among other things, that Coach, in fact, is bound by such contract, Coach will indemnify and hold harmless University from any award, judgment, or settlement received by the party asserting the claim or bringing the administrative action or legal action. As part of this Agreement to indemnify and hold harmless, Coach acknowledges and agrees that he will be responsible for payment of any legal fees and related expenses incurred by University as a result of any such claim, administrative action, or legal action.²⁹

(12) Dana Holgorsen - West Virginia University

X. Representations: Holgorsen represents and warrants that he has not violated any of the rules and regulations of the NCAA, and he is not aware of any threatened or pending NCAA investigation involving his conduct at any other NCAA member institution.³⁰

(13) Charlie Partridge - Florida Atlantic University

2. Coach's Representations: Coach warrants and represents to the University the following:

A. He has the necessary knowledge, skills, qualifications, and experience to serve as the head coach of the Program and to manage its football operations.

B. He is legally competent and able to enter into this Agreement and there exists no conflicting obligations or agreements with another college, university, or other individual or entity that prevents him from entering into and performing the duties required by this Agreement.

C. He is familiar with and shall comply with all Athletic Requirements regarding the University and his coaching responsibilities. Coach further acknowledges and agrees that he is familiar with and shall comply with all the University's regulations and policies regarding his employment and the University regulations and policies applicable to the student athletes under his direction.

D. He has fully disclosed to the Athletics Director and the University's NCAA Compliance Officer: 1) any and all past investigations of alleged violations of Athletic Requirements in which he has been involved directly, indirectly, as a witness or in some other capacity; 2) any lawsuits filed against him in his official or personal capacity arising out of any of his prior employment relationships; or 3) any and all instances in which he was investigated for misconduct involving former co-workers or the student athletes under his direction.³¹

²⁹ Gus Malzahn Coaching Contract with Auburn University, §25 (Dec. 4, 2012).

³⁰ Dana Holgorsen Coaching Contract with West Virginia University, §X (Aug. 7, 2012).

³¹ Charlie Partridge Coaching Contract with Florida Atlantic University, §2 (Dec. 16, 2013).

(14) Stan Heath - University of South Florida

3. Coach's Representations. Coach warrants and represents to the University that:
- a. He has the necessary knowledge, skills, qualifications, and experience to serve as the head coach of the Basketball Program.
 - b. He is familiar with the Athletic Rules and University Rules, he will abide by these rules and he will remain familiar with these rules in the future.
 - c. There are no conflicting obligations or agreements with another college, university, or other individual or entity that prevents him from entering into this Agreement and fully executing the duties required by this Agreement.
 - d. He has not been found to have violated any Athletic Rules after investigation by the NCAA or other agency, and that he has fully disclosed to the Athletic Director and the University any and all past investigations of alleged violations of Athletic Rules in which he has been involved.³²

(15) Lyle "Butch" Jones - University of Tennessee

10. Background: Coach represents that he has disclosed to the University all information concerning previous NCAA, conference, or institutional rules violations or potential violations committed by him or any staff member under his direct or indirect control at any other NCAA member institution prior to the date on which he executed this Agreement; similarly, the University represents that it has disclosed to Coach all information it has regarding any pending and/or ongoing NCAA investigations or inquiries of any University sports program (including, without limitation, the football program). The MOU is subject to a satisfactory criminal background check and NCAA compliance check, to be completed within 5 business days of the date hereof.³³

(16) Michael R. Gundy - Oklahoma State University

13. Right to Contract. Coach hereby warrants that he is free and has full rights to enter into this Contract and to perform all of his obligations hereunder and to grant all rights hereunder without violating the legal or equitable rights of anyone. Coach agrees to indemnify and hold harmless the University of, from, and against any cost, liability, and expense (including, without limitation, reasonable attorneys' fees) incurred by either or both of them as a result of breach of this warranty by Coach.³⁴

(17) Mark Thomas Stoops - University of Kentucky

18. Authority. Each party warrants and represents that it has the full right, power and authority to enter into and perform this Agreement and to make the covenants set forth herein.³⁵

³² Stan Heath Coaching Contract With University of South Florida, §3 (May 24, 2007).

³³ Lyle "Butch" Jones Coaching Contract with University of Tennessee, §10 (Dec. 7, 2012).

³⁴ Michael Gundy Coaching Contract with Oklahoma State University, §13 (Jan. 1, 2009).

³⁵ Mark Stoops Coaching Contract with University of Kentucky, §18.

(18) John Groce - University of Illinois

2.4.b. ...With regard to the Head Coach's prior employment at another NCAA member institution, Head Coach represents and warrants that he did not commit, nor was he aware of and did not report, a major violation of the NCAA Rules relating to such institution's basketball program. In the event that any of the Head Coach's representations and warranties in this section are incorrect and the NCAA imposes sanctions, which result in probation, ineligibility for post-season tournaments and/or the loss of scholarships at such former institution, then the University shall have the right to terminate this Agreement for "Cause," as provided in Sections 4.2 and/or 4.3 of this Agreement.³⁶

IV. NCAA RULES, RESUMES, AND MORALS

There are three major areas in which a university may require a form of representation and warranty by a coach. First, a representation that the coach has not previously violated any rules or regulations of the NCAA, nor is the coach subject to being reprimanded, sanctioned, or disciplined as a result of previous possible violations of NCAA, conference, or university rules. If the coach has been a violator of such rules and regulations in the past, or has been subject to some reprimand, sanction, or discipline, it is then best for the coach to fully disclose any past known violations of NCAA rules or any reprimand, sanctions, or disciplinary proceedings as a result therefore in the contract being executed. One example of this was Lane Kiffin, former University of Tennessee Head Football Coach. His employment agreement dated October 16, 2009, Article 1, Paragraph C makes specific disclosures of previous violations:

"As a material inducement to the University to execute and perform this Agreement, Coach Kiffin represents and warrants to the University that (1) he has not violated any of the NCAA, SEC, or University rules or regulations prior to the date of this Agreement other than those NCAA violations previously reported to the Athletics Department's Compliance Office, specifically violations of NCAA Bylaw 13.6.7.9 ("Activities"), reported on January 26, 2009; violations of NCAA Bylaw 13.1.2

³⁶ John Groce Coaching Contract with University of Illinois, §2.4.b.

("Permissible Recruiters"), reported on February 13, 2009; violation of NCAA Bylaw 13.10.2 ("Comments Before Signing"), reported on February 19, 2009; violations of NCAA Bylaw 13.1.3.4 ("Permissible Callers"), reported on March 18, 2009; violations of NCAA Bylaw 13.10.2 ("Comments Before Signing"), reported on June 5, 2009; and violations of NCAA Bylaw 13.10.4 ("Prospect's Visit"), reported on June 25, 2009; and (2) he knows of no violation of any of the NCAA, SEC, or University rules or regulations by any assistant coach or staff member who was under his supervision, direction, or control prior to the date of this Agreement and for which he could be held responsible or be subject to sanctions or other discipline by the NCAA, SEC, or University.³⁷

A second form of representation or warranty is the accuracy of the coach's academic and profession credentials as presented to the university during the hiring process in the form of a resume, biography, or website posting.

Examples of coaches that have not given an accurate presentation of their academic and professional credentials follows:

(1) George O'Leary – Notre Dame/University of Central Florida

Perhaps the most notable case of a coach lying, is that of George O'Leary ("O'Leary"), the current head football coach of the University of Central Florida, in his successful, but short lived, attempt to win the head football coaching job at Notre Dame.³⁸ O'Leary had a successful run of things at Georgia Tech, coaching the men's football team since 1994 until being enticed away by Notre Dame in 2001.³⁹ He lead his Yellow Jackets team to multiple bowl games and won the Bobby Dodd Coach of the Year Award in 2000.⁴⁰

O'Leary was hired away from Georgia Tech by college football goliath Notre Dame in 2001, in what turned out to be a very short lived coaching stint and an event

³⁷ Lane Kiffin Coaching Contract with University of Tennessee, §1(c) (Oct. 16, 2009).

³⁸ Gary Smith, *Lying in Wait*, SI.COM (Apr. 8, 2002), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1025474/1/index.htm>.

³⁹ *Id.*

⁴⁰ *Id.*

that has left a dark cloud on his otherwise impressive career.⁴¹ A few days after being hired to take over Bob Davie's job with the Fighting Irish, news started to emerge that O'Leary had not been truthful in his resume nor contract negotiations.⁴²

O'Leary apparently fabricated essential pieces of his resume such as the school he attended and supposedly graduated from to the fact that he played college football at all. In his resume, O'Leary claimed to have graduated from NYU-Stony Brook, a school that does not exist, and to have played college football at the University of New Hampshire, a school that has no record of his participation.⁴³

In response to the discovery of his fabrications, and upon resigning from his new post at Notre Dame, O'Leary said, "[d]ue to a selfish and thoughtless act many years ago, I have personally embarrassed Notre Dame, its alumni and fans."⁴⁴

(2) Doug Martin – Villanova

In 2012, news began to emerge of another controversy surrounding the representations and warranties made by a college coach regarding his past education and experiences. Doug Martin ("Martin") was briefly an assistant men's basketball coach at Villanova, before his lies were discovered and he resigned in August of 2012.⁴⁵

On his resume, Martin listed that he had played Division I basketball for four years (1991-1995) at the University of Wisconsin-Green Bay under Coach Dick Bennett. Soon after being hired, it was revealed that no record exists showing that Martin had

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ John W. Fountain & Edward Wong, *Notre Dame Coach Resigns After 5 Days and a Few Lies*, NYTIMES.COM (Dec. 15, 2001), <http://www.nytimes.com/2001/12/15/sports/notre-dame-coach-resigns-after-5-days-and-a-few-lies.html>.

⁴⁵ ESPN.com news services, *Villanova's Doug Martin Resigns*, ESPN.COM (Aug. 14, 2012), http://espn.go.com/mens-college-basketball/story/_/id/8259849/villanova-wildcats-assistant-men-basketball-coach-doug-martin-resigns-due-resume-inaccuracies.

played for the school.⁴⁶ He does not appear in any of the statistics on Green Bay's website, former players do not recall playing with Martin, and his supposed coach at the time denies ever having a player of that name.⁴⁷ It turns out Martin instead played his college basketball at a small NAIA college, Viterbo University.⁴⁸

(3) Glynn Cyprien – UL-Lafayette

In 2004, after receiving an anonymous tip, the Louisiana-Lafayette Athletic Director discovered that the school had fallen victim to yet another coach lying on his resume and promptly fired basketball Coach Glynn Cyprien ("Cyprien").⁴⁹ In the resume, Cyprien claimed to have received a bachelor's degree from Texas-San Antonio, a claim found to be untrue.⁵⁰ Cyprien was hired in May of 2004 before being fired on July 16, 2004.⁵¹ According to Athletic Director Schexnayder, "[a]ll nonclassified employees must have a bachelor's degree to work at the university... trainers, coaches, everyone."⁵² The Athletic Director went on to explain the mistake made by the university in not discovering this fabrication sooner, saying, "[h]e had been at a number of universities in the system so long I assumed his resume was correct,"⁵³ a mistake that has haunted multiple schools in recent years. The Athletic Director summed things up and provided simple advice to other schools searching to fill coaching vacancies,

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Associated Press, *Louisiana-Lafayette Fires Coach Because he Doesn't Have Degree*, LUBBOCKONLINE.COM (Jul. 17, 2004), http://lubbockonline.com/stories/071704/col_0717040010.shtml.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

saying, "it's bad to assume anything these days."⁵⁴ Cyprien brought a lawsuit against the University of Louisiana-Lafayette for breach of contract and defamation.⁵⁵ The Louisiana Supreme Court, in January, 2009, held that the university had a valid reason to fire Cyprien and did not defame him when they accused him of resume fraud.⁵⁶

(4) Tom Williams – Yale

Tom Williams ("Williams") took over as coach of the Yale University football team in 2009.⁵⁷ Williams was Yale's first African American head football coach. In his resume, the coach claimed to have been a Rhodes Scholarship candidate and to have played on the practice squad for the San Francisco 49ers in 1993.⁵⁸ Both of these claims were later found to be fictitious. In actuality, the coach never did apply for the scholarship, and while he did attend a tryout camp with the 49ers, he was never signed to the team, and did not participate with the practice squad.⁵⁹ This whole situation came to light after a student athlete sought Williams' advice on whether to play in a game against Harvard, or go for his Rhodes interview.⁶⁰ Williams' resigned effective on December 31, 2011.⁶¹

(5) Steve Masiello – University of South Florida

The most recent story in the string of coaches that have been discovered padding their resumes, is that of Manhattan College basketball coach Steve Masiello

⁵⁴ *Id.*

⁵⁵ Janet McConnaughey, *La Supreme Court Dismisses Coach Suit vs. ULL*, USATODAY (Jan. 22, 2009), http://usatoday30.usatoday.com/sports/college/mensbasketball/2009-01-21-882568419_x.htm.

⁵⁶ *Id.*

⁵⁷ Associated Press, *Yale Coach Tom Williams Resigns*, ESPN.COM (Dec. 21, 2011), http://espn.go.com/college-football/story/_/id/7375538/yale-bulldogs-coach-tom-williams-resigns-due-rhodes-scholarship-fib.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

("Masiello") in his attempt to procure the head basketball coach job at the University of South Florida.⁶² In a background check done by the university, the school discovered that the coach never did graduate from the University of Kentucky as it says on his resume.⁶³ The coach did attend Kentucky and played basketball there under head coach Rick Pitino, but never did earn his degree.⁶⁴

In the aftermath of the discovery of the misrepresentation made on his resume, the University of South Florida rescinded their term sheet offer dated March 24, 2014.⁶⁵ The deal was reportedly worth over \$1 million per season for five years.⁶⁶ The term sheet contained a clause entitled Representation and Warranty which stated as follows:

"With respect to his current coaching position, Coach represents and warrants that neither he nor his current basketball program (including assistant coaches) are the subject of a current NCAA investigation, and/or to the best of his knowledge neither he nor his assistant coaches have violated any NCAA rules or bylaws. In the event the University discovers in a forthcoming check that coach breached the foregoing warrant then University may terminate this Agreement upon discovery with no further financial obligation or penalty to Coach whatsoever.

Coach also represents and warrants that he is not subject to any undisclosed criminal conviction or pending investigation. Coach further represents that the resume and education credentials described in his official "gojaspers.com" bio:

<http://www.gojaspers.com/ViewArticle.dbml?ATCLID=205134241>

are true and accurate. In the event that either of the foregoing warrants are proved to be untrue within 30 days of the date of this Agreement, then University may terminate this Agreement upon discovery with no further financial obligation or penalty to Coach whatsoever."⁶⁷

⁶² Roger Rubin, *Steve Masiello Will Return to Manhattan, Coach Must Complete Degree at Kentucky First*, NYDAILYNEWS.COM (Apr. 8, 2014), <http://www.nydailynews.com/sports/college/masiello-manhattan-job-compelte-degree-article-1.1748718>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Steve Masiello Coaching Contract with Manhattan, §10 (Mar.24, 2014).

"Manhattan has decided the potential for future success under Masiello outweighs the discrepancy on his resume."⁶⁸ Manhattan announced "it will reinstate Masiello once he completes the requisite work to earn his degree from Kentucky this summer."⁶⁹ Manhattan President Brennan O'Donnell said in a statement released by Manhattan "...that Mr. Masiello executed poor judgment, but did not intentionally misrepresent himself in applying to the College."⁷⁰ Masiello responded thusly:

"I am extremely grateful and humbled by the opportunity to continue as the head men's basketball coach at Manhattan College. I made a mistake that could have cost me my job at an institution I love. Details matter. Manhattan College has shown me a great deal of compassion and trust during this process, and I will do everything in my power to uphold that trust."⁷¹

Not every padded resume results in the coach either resigning or being terminated by the university. Less than a month after being introduced as the new head basketball coach for Rutgers University and the leader chosen to rescue a scandal ridden program under Mike Rice, Eddie Jordan ("Jordan") and Rutgers were put on the defensive when it was revealed that Jordan had never actually received a degree from the University.⁷² Rutgers shortly thereafter issued a statement indicating that while there was an error in claiming Jordan was a graduate of Rutgers University, he would remain the head men's basketball coach for the school, and that neither the NCAA nor

⁶⁸ Jeff Eisenberg, *Manhattan Retains Steve Masiello, Framing his Error as 'Poor Judgment' Rather Than a Lie*, YAHOO SPORTS (Apr. 7, 2014), <http://sports.yahoo.com/blogs/the-dagger/manhattan-retains-steve-masiello--framing-his-mistake-as--poor-judgment--rather-than-a-lie-210421506.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Steve Eder, *Rutgers Coach Never Completed Degree*, NYTIMES.COM (May 10, 2013), <http://www.nytimes.com/2013/05/11/sports/ncaabasketball/rutgers-says-new-basketball-coach-eddie-jordan-is-not-a-graduate.html>.

the university requires the head coach to hold a bachelor's degree.⁷³ "Rutgers sought Eddie Jordan for the head coach position as a target of opportunity hire based on his remarkable public career."⁷⁴ Jordan was inducted into the Rutgers Hall of Distinguished Alumni in 2004 and has been part of the Rutgers' family since before 1997.⁷⁵ Jordan never submitted a resume but his university produced biography indicated that he "earned Honorable Mention, All-American Honors, as a senior, 1977 before earning a degree in Health and Physical Education."⁷⁶ Whether Jordan was not fully candid, or the university erred, was of no consequence as Jordan was "Rutgers' man."⁷⁷ Jordan is taking courses to complete his degree.⁷⁸

College coaches, while not the only professionals padding their resumes in the country, are big names, at big schools, with big money in the balance, so they are in the spotlight and their actions can have very real consequences for their employers. Scandals like those seen in recent decades involving dishonesty in securing a job by means of padding one's resume bring doubt and unwanted attention upon universities, and can cause backlash against the hiring practice that were employed.

John Challenger, CEO of consulting firm Challegner, Gray & Chirstmas, described the how and why coaches are lying on their resumes, explaining that coaches are no different than executives that pad their resumes:

"Not getting a degree in today's era can be perceived as so embarrassing," says Challenger. "People feel that you can't get to first base if you don't have a degree. It leads them to do this. They decide to

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

forge their résumés and then say, 'Once I'm in the job, I can show them what I can do—but I just need the lie to get through these horrendous screens.' We've seen it with CEOs, too."⁷⁹

The executive and consultant went on to say, "the question is: How far do you go to find out if a college degree is valid or not? For most organizations, they just don't do this, it's a question of cost."⁸⁰

While some schools might not currently think that their money is well spent by undertaking a background check, the more and more cases that come out in this area will certainly make them question that line of thinking.

Though it is difficult to find a case where a university dismissed a coach for prior conduct involving dishonesty or moral turpitude, in recent years a number of universities have added moral clauses, public image clauses, good conduct clauses, and moral turpitude clauses to college coaching contracts. Rick Pitino's ("Pitino") Contract with the University of Louisville Athletic Association ("Louisville") states that the university could terminate Pitino's contract for the following actions:

Sections 6.1.2. Disparaging media publicity of a material nature that damages the good name and reputation of Employer or University, if such publicity is caused by the Employee's willful misconduct that could objectively be anticipated to bring Employee into public disrepute or scandal, or which tends to greatly offend the public, or any class thereof on the basis of invidious distinction.⁸¹

Section 6.1.4. Employee's dishonesty with Employer or University; or acts of moral depravity; or conviction of a felony or employment or drug related misdemeanor; or intoxication or being under the influence of a psychoactive substance when performing duties under this contract, when

⁷⁹ Keenan Mayo, *The Lesson of Rutgers's New Basketball Coach: Resume-Padding Can Be Hard to Resist*, BUSINESSWEEK.COM May 15, 2013), <http://www.businessweek.com/articles/2013-05-15/the-lesson-of-rutgers-new-basketball-coach-resume-padding-can-be-hard-to-resist>.

⁸⁰ *Id.*

⁸¹ Rick Pitino Coaching Contract with Louisville, COURIER-JOURNAL (Aug. 12, 2009), <http://www.courier-journal.com/article/20090812/SPORTS02/90812007/Rick-Pitino-s-employment-contract>.

students athletes are present, when attending scheduled public events or appearances, or during media contact.⁸²

Rick Pitino is the head coach of the Louisville Cardinals men's basketball team and has been in that role for thirteen years.⁸³ He has brought the team to multiple NCAA Final Four appearances as well as a trip to the national championship game in 2013 that ended with the Cardinals cutting down the nets as the newest champion of the NCAA tournament.⁸⁴ However, despite his success at three previous schools and a brief stint in the NBA, there was some worry about his hiring--in particular his relations with the media from his time in the NBA--that led to the addition of a morals clause into his contract.⁸⁵

Louisville, in negotiations with the storied coach, insisted upon Pitino entering into two separate morals clauses.⁸⁶ The two clauses focused on relations and interactions with the media and acts of moral turpitude.⁸⁷ Both clauses gave the school protection if any incident were to occur in the future that would paint the athletic program and the school in a bad light.⁸⁸ The school it turns out was rightfully concerned, as just a few years later, the coach was back in the spotlight, not for his accomplishments on the court, but his actions off of it.⁸⁹

⁸² *Id.*

⁸³ Cari Stern, *Rick Pitino and the "Cardinal" Morals Clause*, FORDHAM SPORTS LAW FORUM, <http://fordhamsportslawforum.com/wp-content/uploads/2013/05/Rick-Pitino-and-the-%E2%80%9CCardinal%E2%80%9D-Morals-Clause-.pdf>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

Pitino, a married man with children, was out celebrating a recent hire when he had an extramarital affair with Karen Sypher, a model, in the back of a restaurant.⁹⁰ Sypher later informed Pitino that she was pregnant, and looking to deal with the problem, Pitino gave her money, which she then used to get an abortion.⁹¹ Years later Pitino found himself being extorted for money due to the incident, and decided it was best to go to the authorities with the whole situation.⁹²

Pitino later won a lawsuit against the extortionists, but not before his reputation had once again taken a hit, and the Louisville had to deal with all of the fallout from the mess its highly touted head coach created.⁹³ Colleges and universities do not enjoy seeing their names tied to a situation like the one Louisville had to deal with, it can seriously damage the reputation of an athletic program and the educational institution as a whole. There was speculation after all of this occurred that Louisville would use one or both of the morals clauses as a means to sever the relationship between the university and Pitino.⁹⁴ However, the firing that many were expecting never occurred. In a statement about why Pitino would be staying with the team, university Athletic Director Tom Jurich said:

Regardless of the truth or falsehood of specific actions that have been attributed to the coach, he's clearly made errors in judgment that have come under intense public scrutiny. We can't ignore these errors in judgment, and they have saddened and disappointed me. As we try to teach our students, when you make a mistake, you admit it and right it as best you can. Coach has done that today.⁹⁵

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Statements From Head Coach Rick Pitino, President Dr. James Ramsey and Vice President and Director of Athletics Tom Jurich*, GOCARDS.COM (Aug. 12, 2009), <http://www.gocards.com/sports/m-baskbl/spec-rel/081209aab.html>.

While many were upset with the decision of Louisville not to terminate Pitino, even though it had the opportunity to fire the coach for cause, it shows that sometimes things will be overlooked in certain situations. Pitino brought a lot of fame and success to the Louisville program and even more money. In the 2012-2013 season, Louisville brought in the most revenue (\$42.4 million) and the most profit (\$26.9 million) out of any college basketball team in the nation.⁹⁶ The University was forced to think long and hard about terminating their relationship with coach Pitino, and in the end it seems that money may have been one of the major deciding factors. If Pitino had been a different coach at a different school, it is easy to imagine this situation ending differently, with the coach out of a job, and the school happy to have made sure to add a morals clause into its contract.

V. REVERSE REPRESENTATIONS AND WARRANTIES

While the emphasis has been on representations and warranties required of coaches in employment agreements, the University should also be required to make certain representations and warranties as well. For instance, the Memorandum of Understanding between Chris Peterson and the University of Washington states:

"In connection with making this offer, the University represents to you that there is no pending or threatened investigation by the NCAA or PAC 12 Conference of major violations alleged to have arisen out of the conduct of its Football Program, nor does it have knowledge or reasonable belief of conduct involving the Football Program that violate such legislation. We acknowledge that your acceptance of this offer is in reliance on this representation."⁹⁷

⁹⁶ Chris Isidore, *Louisville tops NCAA Dollar Rankings Too*, CNNMONEY (Mar. 21, 2013), <http://money.cnn.com/2013/03/21/news/ncaa-basketball-dollars/>.

⁹⁷ Chris Peterson Coaching Contract with University of Washington, (Dec. 5, 2013).

The contract between Mark Helfrich and the University of Oregon also requires representations from the university as follows:

8.11(b) The Director of Athletics acknowledges and represents as follows: (1) Coach has been advised of the nature and scope of all ongoing NCAA investigation of violations of NCAA rules, regulations, bylaws, interpretations or decisions by any current and former University employees in the University's football program; and (2) Coach has been advised of the material facts constituting the violations alleged by the NCAA.⁹⁸

Allegedly during the hiring process involving head football coach, Al Golden ("Golden"), the University of Miami was aware of former booster Nevin Shapiro's ("Shapiro") transgressions involving providing millions of dollars in impermissible benefits to at least 72 athletes from 2002 through 2010.⁹⁹ The University never informed Golden of Shapiro's violation of NCAA rules and the potential for a scandal or NCAA sanctions.¹⁰⁰ The university probably had a legal obligation to inform Golden of the potential NCAA violations, scandal or NCAA sanctions. They may have had a duty to inform him based upon the implied contractual covenant of good faith and fair dealing. Golden addressed the topic saying that "Miami had a responsibility to inform him of a potential scandal when they knew it was percolating."¹⁰¹

"Shapiro gained access to the athletic department first as a booster then made inroads with assistant coaches and student athletes."¹⁰² "He hosted parties for student athletes and recruits at his home, on his yacht, at local bowling alleys, and in strip clubs.

⁹⁸ Mark Helfrich Coaching Contract with University of Oregon, §8.11(b) (Jan. 20, 2013).

⁹⁹ Andrea Adelson, *No Bowl Ban for Miami Hurricanes*, ESPN.COM (Oct. 23, 2013), <http://m.espn.go.com/wireless/story?storyId=9861775&wjb=>.

¹⁰⁰ Dan Fitzgerald, *Miami's Dealings with Al Golden Provide Lessons for Negotiating Coaching Contracts*, SPORTS LITIGATION ALERT Vol. 8, Issue 18 (Sep. 9, 2011), <http://ctsportslawblog.files.wordpress.com/2011/09/miamis-dealings-with-al-golden-provide-lessons-for-negotiating-coaching-contracts.pdf>.

¹⁰¹ *Id.*

¹⁰² *No Bowl Ban*, *Supra* note 99.

He provided improper benefits to student athletes by paying for meals, hotels, for girlfriends, meals for family members, and buying clothes and Christmas gifts for children of some student athletes."¹⁰³ Shapiro is a convicted felon now serving a twenty year sentence for masterminding a multi-million dollar Ponzi scheme.¹⁰⁴

Miami's self imposed post season bans in 2011 & 2012 avoided more serious sanctions.¹⁰⁵ The NCAA Infractions Committee placed the athletic program on three years of probation.¹⁰⁶ Miami would loose out on nine scholarships over the next three years and some of the assistant coaches were punished for their involvement with Shapiro.¹⁰⁷

Attorney Dan Fitzgerald in his article "Miami's Dealing with Al Golden Provide Lessons for Negotiating Coaching Contracts"¹⁰⁸ indicates that:

1. A coach should inquire as to whether the university is aware of any potential or existing NCAA violations or ongoing investigations before accepting a job.
2. A coach should attempt to negotiate escape clauses that are triggered by certain levels of NCAA sanctions resulting from violations that occurred before the coach was hired.
3. A coach should attempt to negotiate "reverse morals clauses" in his or her contracts which would permit the coach to terminate

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Rachel Axon, *NCAA on Shapiro Case: Miami Losing Football, Hoops Scholarships*, USATODAY SPORTS (Oct. 22, 2013), <http://www.usatoday.com/story/sports/ncaaf/acc/2013/10/22/ncaa-announces-sanctions-miami-hurricanes-infractions-case-nevin-shapiro-loss-of-scholarships/3146343/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Fitzgerald, *Supra* note 100.

the contract if the university's actions cause the coach embarrassment, damage the coach's reputation, or diminish the value of the job.¹⁰⁹

Fitzgerald also indicates that "for coaches who are under contract when a scandal involving a previous regime is exposed, they should seek contractual concessions from the university, including the following:"¹¹⁰

1. A contract extension, long enough to allow the coach to clean up the program, endure any sanctions against the program and the accompanying adverse effects on recruiting, and recruit and develop the coach's own players.

2. The elimination of any buyout provision that may be included in the original contract, allowing the coach to leave the university without financial penalty.

3. The addition of an escape clause, if such a clause was not included in the original contract, allowing the coach to leave the university if it is found to have committed major NCAA violations and is sanctioned accordingly.¹¹¹

VI. LESSONS TO BE LEARNED

1. Representation and warranties in coaches' contracts are seldom used.
2. Universities need to understand the difference between a representation and warranty and their remedial effect.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

3. Representation and warranties, similar to the ones used by Penn State, seems to be apropos, which requires the coach to warrant:

- a. that Coach has never been convicted of a misdemeanor or felony in any jurisdiction;
- b. that Coach has never been disciplined, reprimanded or sanctioned by the NCAA or any athletic conference;
- c. that Coach has never provided an improper benefit, as defined by the rules and regulations of the NCAA, to any student athlete at any time.
- d. that to the best of Coach's knowledge, while serving as the coordinator or assistant coach, he did not violate any rules or regulations of the NCAA or any athletic conference;
- e. that while serving as coordinator or assistant coach of a football program, he was not disciplined, reprimanded or sanctioned by the NCAA or any athletic conference;
- f. Misrepresentations made in Coach's bio, a copy of which is attached hereto as Exhibit "A," are true and accurate; and
- g. that Coach has never engaged in any other action or conduct that would reflect adversely on the good name and reputation of the University or that could cast the University in a negative light.

4. The head coaches' of basketball and football programs are large hires that have large dollars attached. Any and all due diligence with respect to the applicants' background is an absolute must for the university.

5. The university should not be off the hook, a reverse representation and warranty clause should be required by the coach's counsel.

6. Representations and warranties should be a part of every coach's contract and should be a basis, under the heading of termination for cause, for immediate termination if the representations and warranties are not true.