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Redress for a No-Win Situation: Using Liquidated Damages in Comparable Coaches' Contracts to Assess a School's Economic Damage from the Loss of a Successful Coach

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REDRESS FOR A NO-WIN SITUATION: USING LIQUIDATED DAMAGES IN COMPARABLE COACHES' CONTRACTS TO ASSESS A SCHOOL'S ECONOMIC DAMAGE FROM THE LOSS OF A SUCCESSFUL COACH

Richard T. Karcher*

This Essay addresses the difficulty of proving the financial harm that results when a head coach departs a college or university during the contract term and the institution thereby abruptly loses a valuable asset—a successful and stable athletic program. Due to the unique and specialized nature of head coaches' services and the industry in which they work, ordinary measures for assessing damages based on substitute performance and transaction costs are insufficient. This Essay offers a theory of measuring a university's damages within the construct of a lost-income-producing-asset valuation, using a methodology based on liquidated damages amounts in comparable coaches' contracts.

I. INTRODUCTION 429

II. HOW THE SCHOOL IS DAMAGED 431
 A. *Head Coaches Are "Unique"* 431
 B. *A Loss of Continuity in Its Coaching and a Loss of Stability Results in "Foreseeable" Economic Damage* 433

III. HOW TO REASONABLY APPROXIMATE A SCHOOL'S DAMAGES 439
 A. *Using Comparable Coaches' Contracts as Evidence to Assess the Amount of Damages* 439
 B. *Assessing Damages in the* Marist *Case* 442

IV. CONCLUSION 450

APPENDIX: COMPARABLE CONTRACTS 452

I. INTRODUCTION

Three years ago, I wrote an article on the topic of the "coaching carousel" in big-time college sports that laid the groundwork for establishing claims of breach of contract and tortious interference when a successful head coach leaves for another institution during the contract term and, in particular, for satisfying

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the elements for obtaining injunctive relief due to the difficulty of ascertaining the school's damages.[1] While the school can seek a negative injunction to prevent the coach from working for a competitor,[2] the unanswered question from my prior work, and the narrow issue presented in this Essay, is: How does the school prove its financial loss if it elects to sue for damages instead of equitable relief? I will concede the difficulty of ascertaining with a reasonable degree of certainty the amount of financial harm that results when a school abruptly loses a successful athletic program. However, because "liquidated damages" are an accepted industry norm and are frequently used to remedy this particular type of harm,[3] it is difficult to fathom the notion that *no* financial harm actually results or that the damages are merely "speculative."

Sport does not function and operate like a typical industry.[4] It is a highly specialized industry with its own set of unique rules, procedures, and well-established legal precedents.[5] As such, it is often difficult to assess damages in cases involving athletes, teams, and sports organizations using traditional economic models and formulas based on substitute transactions, lost revenues, and direct expenditures.[6] Damage calculations in sports cases require an understanding of how the industry operates and assigns value to various contractual rights and duties and income-producing intangible assets, as well as an application of the industry's unique rules and legal framework to the underlying facts and issues in each case.

This Essay offers a theory for measuring a school's damages for the loss of a successful head coach during the contract term based on a model that uses comparables to value the loss of an income-producing asset. Part II addresses how the school is damaged due to the loss of the "unique" services provided by head coaches—the primary difference between the university–coach relationship and the typical employment relationship—as well as the loss of a successful and stable athletic program. Part III proposes that a school's consequential damages can reasonably be approximated with evidence of liquidated damage amounts in comparable coaches' contracts and includes the author's damage calculation using this methodology in the case of *Marist College v. Brady*.[7]

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1. *See* Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2009).
2. *See id.* at 58.
3. *See id.* at 48 (citing MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 372 (2d ed. 2009)).
4. *See generally* Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995) (discussing the uniqueness of the sport industry while addressing whether provisions of the National Basketball Association's collective bargaining agreement would violate antitrust laws).
5. *See id.*
6. *See* Karcher, *supra* note 1, at 55–56.
7. Marist Coll. v. Brady, Index No. 5006/2009 (N.Y. Sup. Ct. 2010) (decision and order requiring parties to appear). As explained further herein, at the start of the trial, the judge granted the coach's motion in limine to preclude Marist from presenting my damage calculation at trial. *See infra* Part III.B.

II. HOW THE SCHOOL IS DAMAGED

A. Head Coaches Are "Unique"

Head coaches are uniquely employed individuals. Head coaches are not fungible and, therefore, are not easily replaceable,[8] which makes them unlike the vast majority of employees in the workforce. The head coach is also the "face" of the athletic program;[9] he receives much of the credit when the program is successful and, conversely, significant blame when it is unsuccessful.[10] Head coaches are unique because of their high-profile status and the local and national media coverage they receive on a daily basis. Courts have even recognized college head coaches in the sport of football as being unique.[11]

Thus, universities view head coaches as the principal ingredient to having and maintaining a successful athletic program.[12] These coaches impact the recruiting and signing of the most talented student athletes—the key to winning.[13] The head coach plays a critical role in this recruitment process, and recruits often seek assurances that the coach will remain at the school for the next few years.[14] These "schools obtain a competitive advantage in recruiting by hiring and keeping the coaches who are the best recruiters,"[15] which in turn serves not only to increase a coach's market value but also to give the coach leverage in negotiating a compensation package.[16] Once an athletic program has achieved success, as measured by the "win–loss" column, it puts the college or university in a better position to continue to maintain that success because winning has a positive effect on recruiting.[17] When a head coach leaves for another university, such a departure raises questions in the minds of recruits about the continuity of the program, as well as the university's commitment to

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8. *See* Karcher, *supra* note 1, at 55.

9. *See id.* at 66.

10. *See, e.g.*, *id.* at 24–27 (citations omitted) (discussing the termination and hiring of Division I coaches).

11. *See, e.g.*, Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999) (noting that head coach was hired for a "unique and specialized position" and holding that liquidated damages provision was not an unenforceable penalty and university did not waive its right to liquidated damages); New England Patriots Football Club, Inc. v. Univ. of Colo., 592 F.2d 1196, 1199 (1st Cir. 1979) (noting that coach's services were considered "unique" in affirming preliminary injunction enjoining university from hiring Patriots head coach who had five years remaining on his contract).

12. *See* Karcher, *supra* note 1, at 33.

13. *Id.* at 46.

14. *Id.* at 72.

15. *Id.* at 46.

16. *Id.* at 47.

17. *See id.* at 33–34 (citing Steve Wieberg & Steve Berkowitz, *NCAA Report: College Sports Spending Keeps Skyrocketing*, USA TODAY (Apr. 29, 2009, 10:53 PM), http://usatoday30.usatoday.com/sports/college/2009-04-29-college-athletic-spending-report_N.htm).

that program.[18] It can take two to three years, sometimes longer, for a university's athletic program to achieve that success again.[19]

Because of their "uniqueness," when a head coach under contract abruptly leaves the program, the university loses continuity in its coaching and stability in its athletic program.[20] The university's need for continuity and stability, as well as the need to retain the coach's services for multiple years, reflects the coach's uniqueness. The university maintains continuity in its coaching and stability in its athletic program by making a large financial investment in the coach for a multiyear term, and the university remains on the hook for that entire investment, even if it terminates the coach because the program is unsuccessful.[21] However, due to the nature of the recruiting process—in addition to the necessity of maintaining continuity and stability—it is neither practical nor feasible for the industry to employ coaches at will.[22] Instead, coaches are typically employed for multiyear contract terms during which they are obligated to perform *exclusively* for their respective universities in exchange for substantial guaranteed salaries and a variety of performance bonuses and perks.[23]

Exclusivity provisions are standard clauses in coaches' contracts that provide that (1) the coach breaches the exclusivity provision if he unilaterally terminates the contract and becomes employed as a head coach for another university prior to the expiration of the contract term and (2) the other institution tortiously interferes with the contract by instigating the breach.[24] Unlike the various professional sports leagues, the National Collegiate Athletic Association (NCAA) and its affiliated conferences have failed to adopt a "no tampering" policy that would prohibit a coach under contract from seeking or accepting other employment unless and until he has either been terminated or granted permission to explore other employment opportunities.[25] In the absence of

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18. *See id.* at 11–12 (citing Blair Kerkhoff, *College Coaches Get Richer as Programs Try to Trim Other Costs*, KAN. CITY STAR (June 1, 2009), http://www.kansascity.com/sports/story/1228663.html (quoting former Big 12 Conference Commissioner Dan Beebe) (accessed by searching for Kerkhoff article in newspaper Archives database to purchase)).

19. *See generally id.* at 53 (discussing the loss of stability that results from a coach's departure).

20. *See id.* at 53, 66 (citing Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755–56 (6th Cir. 1999)).

21. *See id.* at 33.

22. *See id.* at 71.

23. *See id.* at 3.

24. *See id.* at 68 (citing MITTEN ET AL., *supra* note 3, at 372).

25. *See id.* at 72 (citing Robert H. Lattinville & Robert A. Boland, *Coaching in the National Football League: A Market Survey and Legal Review*, 17 MARQ. SPORTS L. REV. 109, 132 (2006)). For a discussion of the National Football League's (NFL's) no tampering policy and its effectiveness in preventing and deterring coaches from breaching their contracts, see *id.* at 73–77 (citations omitted). In 2011, the NFL extended its no tampering policy to college coaches by requiring NFL clubs to seek permission from a school's athletic director prior to discussing employment opportunities with, or hiring, any college coach. *See* Memorandum from NFL Comm'r Goodell on Hiring of Coaches and Other College Personnel to Chief Execs., Club Presidents, Gen. Managers, and Head Coaches (Jan. 20, 2011) (on file with author).

internal league rules that deter and prevent breach and tortious interference, a university must file suit against the coach and the interfering institution to recover its damages.[26]

B. *A Loss of Continuity in Its Coaching and a Loss of Stability Results in "Foreseeable" Economic Damage*

Schools justify making substantial financial commitments to a coach "on the basis that [the] coach's compensation is an investment that yields a monetary return" in the form of, among other things, "increased ticket sales, marketing and sponsorship revenue, donations," apparel sales, and an increase in the quantity and quality of admissions applications.[27] The high-profile nature of college head coaching and the revenue that the sports generate through ticket sales, licensing, merchandising, and donations form the basis for a university's decision both to guarantee a coach's annual compensation for a multiyear term and to pay the coach substantial bonuses as a reward for the team's achievements each season.[28] Athletic programs are typically viewed as the "front door" of the college or university, and they play a major role in higher education in the United States.[29] More specifically, universities justify the compensation paid to their head football and men's basketball coaches with the revenue these two sports generate in comparison to all other sports.[30]

As stated above, the economic damage to the university due to the departure of a head coach before the expiration of his contract term can be characterized as a loss of continuity in its coaching and loss of stability in its athletic program, which results in a lost opportunity for the university to benefit from a successful

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26. *See, e.g.*, Karcher, *supra* note 1, at 51–52 (discussing the settlement between the University of West Virginia and Rich Rodriguez and the University of Michigan).

27. *Id.* at 27; *see also* Devin G. Pope & Jaren C. Pope, *Understanding College Application Decisions: Why College Sports Success Matters*, J. SPORTS ECON. (forthcoming) (manuscript at 1, 18), *available at* http://jse.sagepub.com/content/early/2012/05/08/1527002512445569 (finding that success in college sports has a large impact on student application decisions such that certain demographic groups—e.g., males, Blacks, out-of-state students, and students who played sports in high school—are more likely to be influenced by sports success than their counterparts); *see also* Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 S. ECON. J. 750, 776 (2009) (findings include: (1) football and basketball success significantly increases the quantity of applications to a school; (2) private schools see increases in application rates after sports success that are two-to-four times higher than public schools; (3) the extra applications received are composed of both low and high SAT scoring students, thus providing potential for schools to improve their admission outcomes; and (4) schools appear to exploit these increases in applications by improving both the number and the quality of incoming students).

28. *See* Karcher, *supra* note 1, at 27–31 (citations omitted) (discussing the hires of Nick Saban at the University of Alabama and John Calipari at the University of Kentucky).

29. *See id.* at 27.

30. *See id.*

and stable program.[31] The damage, then, consists of the *value* of the loss of the coach for the remainder of the contract term, including the loss of a successful and stable program, which is, itself, akin to an income-producing asset.[32] Due to the specialized services head coaches provide and the fact that they are not fungible, a substitute transaction is neither feasible nor practical as a damages calculation.[33] Thus, the formula normally used to measure damages when an employee breaches an employment agreement—the employer's cost to procure substitute services[34]—is inadequate because the "market value" of the coach's lost services cannot be measured against that of the substitute services.[35]

Moreover, the substitute-transaction measure of damages does not account for the economic damage to the university in the form of a lost income-producing asset and a lost opportunity—known in contract law as consequential damages—which were reasonably foreseeable to the coach when he contracted with the university. The rule for recovery of consequential damages, laid down in the seminal case of *Hadley v. Baxendale*,[36] is that damages are recoverable for only a loss that was known to, or reasonably foreseeable by, the party in breach at the time the contract was made.[37] The foreseeability doctrine operates to give the contracting parties an incentive to allocate risk *before* the breach occurs, namely, at the time of contract formation.[38] Contract principles operate as

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31. *See id.* at 56. For a study on the coaching carousel's impact on a college football player's NFL draft prospects, see Philip L. Hersch, *Does the NCAA Coaching Carousel Hamper the Professional Prospects of College Football Recruits?*, 13 J. SPORTS ECON. 20, 28 (2012) (noting that regression results indicate that, for players drafted, a coaching change drops the average draftee's position nearly two thirds of a round, potentially costing the player hundreds of thousands of dollars in guaranteed money).

32. *See* Karcher, *supra* note 1, at 56.

33. *See id.* at 55.

34. *See id.* (quoting Judson Graves, Commentary, *Coaches in the Courtroom: Recovery in Actions for Breach of Employment Contracts*, 12 J.C. & U.L. 545, 548–49 (1986)).

35. *See id.* at 56; *see also* Dinicu v. Groff Studios Corp., 690 N.Y.S.2d 220, 224 (N.Y. App. Div. 1999) (In cases presenting "some special, if not unique, features which [make] the ascertainment of damages a difficult task," the plaintiff "is not restricted to the ordinary rules for measuring damages or obliged to prove its losses with mathematical certainty or accuracy." (quoting Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc., 56 N.Y.S.2d 173, 179 (N.Y. App. Div. 1999))).

36. (1854) 156 Eng. Rep. 145; 9 Ex. 341.

37. *See id.* at 151; 9 Ex. at 355–56 (holding that damages based on lost profits were not foreseeable to the defendant common carrier who entered into a contract with plaintiff grain miller to deliver a broken crankshaft to another party for repairs by a certain date where delivery failed to occur on time, which resulted in lost business for the plaintiff and a resulting breach of contract claim against the carrier for the recovery of lost profits); *see also* Susi v. Simonds, 85 A.2d 178, 179 (Me. 1951) ("[F]or the plaintiff to recover the special damages which he here claims to have suffered beyond what would naturally flow from the breach claimed of such contract, it must affirmatively appear that the special circumstances under which the contract was actually made which gave rise to such damages were communicated by the plaintiff to the defendant and were thus in the contemplation of both parties at the time of making the contract." (citing *Hadley*, 156 Eng. Rep. at 145, 9 Ex. at 341; Griffin v. Colver, 16 N.Y. 489 (1858))).

38. *See Hadley*, 156 Eng. Rep. at 151, 9 Ex. at 354.

default rules in the absence of express provisions, and contracting parties are, therefore, generally free to contract around damage rules under certain conditions.[39]

To avoid incurring the inconvenience and expense of litigation upon a coach's breach of the exclusivity provision, the prevailing industry trend is for universities and coaches to contract around the default consequential damages rules by quantifying, or "liquidating," their damages at the time the contract is made.[40] A "buyout"—the term the industry often uses to describe the transaction that results when a coach leaves one institution for another—is, in actuality, nothing more than a triggered liquidated damages clause; it is an amount of money owed to a nonbreaching party for damages caused by the breaching party.[41] Liquidated damages clauses commonly provide that the coach acknowledges that his services are unique, that his promise to work for the entire contract term is the essence of the agreement, and that the university's substantial investment would be lost if the coach were to terminate his employment before the end of the term.[42] In essence, the liquidated damages are covering the university's consequential damages resulting from the coach's breach.

However, contract law provides that any amount of liquidated damages cannot exceed a figure "that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss."[43] Thus, two requirements for the enforceability of a liquidated damages clause are that (1) actual damages be difficult to prove and (2) the liquidated damages be reasonable at the time of drafting the contract.[44] Some courts have imposed an additional requirement that there not be a "wide disparity" between the liquidated damages and the actual loss, measured post-breach.[45] If the court

39. *See* 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 65:1 (4th ed. 2002) ("Under the fundamental principle of freedom of contract, the parties to a contract have a broad right to stipulate in their agreement the amount of damages recoverable in the event of a breach, and the courts will generally enforce such an agreement, so long as the amount agreed upon is not unconscionable, is not determined to be an illegal penalty, and is not otherwise violative of public policy." (footnotes omitted)).

40. *See* discussion *infra* Part III.B and app. (detailing research showing that thirty-six out of the fifty-five coaching contracts analyzed contained liquidated damages provisions).

41. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (1981).

42. *See* Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127, 247–48 (2001).

43. RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

44. *See id.*

45. *See, e.g.*, Kimbrough & Co. v. Schmitt, 939 S.W.2d 105, 109 (Tenn. Ct. App. 1996) ("[A] wide disparity between the stipulated damage amount and actual damages may indicate that a damage forecast was unreasonable . . . ."), *overruled on other grounds by* Guiliano v. Cleo, Inc., 995 S.W.2d 88, 99–100 (Tenn. 1999).

finds the damages amount excessive, it may deem the liquidated damages clause unenforceable as a "penalty" and strike it down accordingly.[46]

The damages amounts pursuant to liquidated damages clauses in coaches' contracts are typically either (1) a stipulated dollar amount or (2) based upon a formula tied to the coach's base salary, multiplied by the number of years remaining on the contract term as of the time of the breach.[47] Therefore, by agreeing to a payment formula in advance, the parties are negotiating a buyout price for the coach, up front, in the event he breaches the exclusivity provision of the contract. Additionally, because the liquidated damages amount owed to the university when a coach leaves before the expiration of the term is often paid by the new institution,[48] the recovered amount may be viewed as payment for damages caused by its tortious interference with contractual relations.

What if a coach breaches the exclusivity provision in his contract and the parties have not contracted around the default damages rules by agreeing to a liquidated damages amount? While liquidated damages clauses are viewed as a reasonable attempt to measure the anticipated economic loss to the university in the event of a coach's breach, the law certainly does not require parties to include such a provision in the contract, nor does it preclude nonbreaching parties from recovering their actual losses in the absence of a liquidated damages clause.[49] A sentiment seems to exist that if the school and coach do not include a liquidated damages clause, then the coach is "free to leave" without having to compensate the school for the breach.[50] However, a contract that omits a liquidated damages clause cannot be construed as the parties' intent or agreement to contract around the default damages rules;[51] construing the intent of the parties in such a manner would render the exclusivity clause superfluous. If the parties intend to allow the coach to leave without compensation, the proper way to contract around the default damages rules is to omit the exclusivity provision

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46. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356(1) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

47. *See* Greenberg, *supra* note 42, at 248–51 (providing specific examples of liquidated damages provisions in coaching contracts); *see also* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999) ("[U]sing the number of years left on the contract multiplied by the salary per year was a reasonable way to calculate damages considering the difficulty of ascertaining damages with certainty.").

48. Karcher, *supra* note 1, at 48 (citing MITTEN ET AL., *supra* note 3, at 372).

49. *See, e.g.*, My Bread Baking Co. v. Jesi, 214 N.E.2d 53, 55 (Mass. 1966) (allowing a nonbreaching party to recover their actual loss despite the absence of a liquidated damages clause); Frank D. Wayne Assocs., Inc. v. Lussier, 454 N.E.2d 109, 111 (Mass. App. Ct. 1983) (noting that in the absence of a liquidated damages clause, appropriate damages for breach of a noncompete contract may be the value of lost profits to the plaintiff employer).

50. *See* Greenberg, *supra* note 42, at 248.

51. *See* Karcher, *supra* note 1, at 89; *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 115 (1989) ("Parties who dislike a given default rule will contract around it."). By omitting a liquidated damages clause, the parties have not contracted around the default damages rules. Therefore, the "[d]efault rules [will] fill the gaps in [the] incomplete contract[]." *Id.* at 87.

that obligates the coach to perform services solely for the university for the length of the contract term.[52]

In the absence of a liquidated damages clause, the university must prove its damages, which requires it to overcome two hurdles. The first hurdle is the foreseeability rule for recovery of consequential damages.[53] Its application suggests that when the multiyear guaranteed contract is executed, the head coach is well aware that his breach during the contract term, at a time when the athletic program is typically successful, would cause some economic loss beyond those direct and indirect costs incurred in finding a replacement. It is reasonably foreseeable to the coach that his breach would cause an immediate loss of recruits and a lasting difficulty on the program's ability to attract talented student athletes.[54] In addition, it would have a detrimental impact on tickets, broadcasting, donations, and other sources of revenues.[55] Moreover, it is reasonably foreseeable to the coach that his breach will force the university and its newly-hired replacement coach to do everything possible to turn the program around and return it to the level of success that had been attained by the previous coach before his departure. The extent or magnitude of the economic loss that is reasonably foreseeable varies, however, depending upon the particular school, sport, level of competition, and conference.[56] For instance, the University of South Carolina and Clemson University football programs are likely to incur a greater economic loss than the basketball programs at Marist College and James Madison University.

The second hurdle is a general rule of limitation; damages—including consequential damages for breach of contract—must be determined with "reasonable certainty."[57] This rule presents a challenge for plaintiffs in any case involving lost opportunity and lost profits because such determinations necessarily entail projections and predictions about future business prospects.[58] Nevertheless, reasonable certainty does not equate to absolute or complete

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52. If the parties omit the exclusivity provision, the coach cannot be found to have breached the contract for leaving before the expiration of the contract term. Thus, the university would not be entitled to compensation for damages caused by the coach's departure.

53. *See* Hadley v. Baxendale, (1854) 156 Eng. Rep. 145, 151; 9 Ex. 341, 354.

54. *See* Ne. Univ. v. Brown, 17 Mass. L. Rptr. No. 19, 443, 444 (Mass. Super. Ct. Mar. 11, 2004). The court granted an interim injunction preventing Northeastern University's head football coach, who was in the first year of a six-year contract, from accepting an offer to coach at the University of Massachusetts (U. Mass.). *Id.* at 445. The court focused on the competitive disadvantage to Northeastern and found that Northeastern and U. Mass. compete with each other for recruits. *Id.* at 444.

55. *See* Karcher, *supra* note 1, at 27.

56. *Compare infra* app. (listing different liquidated damages provisions for various men's college basketball coaches) *with* Karcher, *supra* note 1, at 51–52 (detailing the liquidated damages provisions in college football coach Rich Rodriguez's contracts at West Virginia and Michigan).

57. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981); *see also* RESTATEMENT (SECOND) OF TORTS § 912 (1979) (noting that to recover, a tort victim must establish damages "with as much certainty as the nature of the tort and the circumstances permit").

58. RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. b.

certainty,[59] and mathematical precision is not required in cases where such exactitude is not attainable.[60] A reasonable approximation of the value of the lost income-producing asset or lost opportunity can be determined even if lost profits cannot be quantified with certainty.[61] The Restatement (Second) of Torts describes a situation in which the defendant has tortiously interfered with the plaintiff's entering into or continuing a business enterprise or business transaction, which entails "not only the likelihood of profit but also a chance for loss."[62] To recover lost profits, the plaintiff must prove that the enterprise or transaction "was or was likely to be profitable and that the chance for profits has been interfered with."[63] As an illustration, the Restatement provides the following example of a business transaction involving tortious interference with a contract to promote a boxing match:

> A has a contract with B by the terms of which A is to arrange for a boxing match between B and C. D tortiously causes B to break his contract before A has incurred any expenses with reference to it. A is entitled to compensatory damages from D only if he proves that it is more probable than not that the match would have been made by him

59. *See* Felder v. Physiotherapy Assocs., 158 P.3d 877, 886 (Ariz. Ct. App. 2007) ("As the comment to the Restatement recognized . . . it is desirable that 'an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.'") (quoting RESTATEMENT (SECOND) OF TORTS § 912 cmt. a); RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a ("Damages need not be calculable with mathematical accuracy and are often at best approximate.").

60. Dinicu v. Groff Studios Corp., 690 N.Y.S.2d 220, 224 (N.Y. App. Div. 1999) (quoting Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc., 56 N.Y.S.2d 173, 179 (N.Y. App. Div. 1945)); *see also* Frank D. Wayne Assocs., Inc. v. Lussier, 454 N.E.2d 109, 111 (Mass. App. Ct. 1983) (quoting Kroeger v. Stop & Shop Cos., 432 N.E.2d 566 (1982)) (citing Smith v. Brown, 42 N.E. 101 (Mass. 1895)) (noting that "quantifying the consequences of violating a non-competition clause is a particularly difficult and elusive one," and therefore "mathematical accuracy of proof is not required, and estimates are in order"); Fera v. Vill. Plaza, Inc., 242 N.W.2d 372, 376 (Mich. 1976) (quoting Godwin v. Ace Iron & Metal Co., 137 N.W.2d 151, 156 (Mich. 1965)) (in reinstating jury award for lost profits involving a new business with no past earning history on which to base an estimate of future earnings, court noted that mathematical precision is not required where precision is unattainable particularly when "it is [the] defendant's own act or neglect" that has created the problem).

61. *See, e.g.*, Air Tech. Corp. v. Gen. Elec. Co., 199 N.E.2d 538, 548 (Mass. 1964) ("The problem is to determine the value of that opportunity to which AT was entitled as a contract right, even if AT's lost profits cannot be ascertained. A reasonable approximation will suffice."); *see also* Snow v. Villacci, 2000 ME 127, 754 A.2d 360, 365 (2000) (acknowledging that recovery of prospective, hypothetical earnings presented special evidentiary challenges and holding that a plaintiff may recover damages based on lost earning opportunity if supported by an adequate evidentiary foundation).

62. RESTATEMENT (SECOND) OF TORTS § 912 cmt. d.

63. *Id.*

and would have been a financial success, and if his proof offers a reasonable basis for estimating the profits.[64]

In the example above, *A* must first prove that *D*'s wrongful conduct did *in fact* cause *A* a loss of the opportunity to earn money.[65] Second, *A* must prove the *amount* of that loss to a reasonable degree of certainty.[66] In other words, there must be a reasonable probability, as opposed to a mere possibility, that the plaintiff suffered damage from the defendant's actions, and there must be evidence, not just speculation, that provides a reasonable estimate of the amount of such damage. However, when consequential damages for breach involve a lost income-producing asset that was in the plaintiff's possession prior to the breach—such as the loss of a successful and stable athletic program—determining the value of the asset is inherently *less* speculative than proving the amount of lost profits because such a determination represents a value calculated at a single point in time and not contingent on the realization of profits that have not yet materialized.[67]

III. HOW TO REASONABLY APPROXIMATE A SCHOOL'S DAMAGES

A. *Using Comparable Coaches' Contracts as Evidence to Assess the Amount of Damages*

In cases involving unique businesses and individuals, it is especially difficult to quantify economic damages resulting from breaches.[68] When assessing the value of a lost income-producing asset or a lost business opportunity pertaining to a unique business, courts often allow evidence and expert testimony concerning values, profit histories, and sales of comparable assets, businesses, agreements, and transactions.[69] As one court noted, values of intangible assets,

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64. *Id.* § 912 cmt. d, illus. 8.

65. *Id.* § 912 cmt. a ("When one seeks to recover damages . . . he has the burden of proving . . . that the act of the other was a legal cause of the harm.").

66. *Id.* ("It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible.").

67. *See* Schonfeld v. Hilliard, 218 F.3d 164, 177 (2d Cir. 2000) (holding that loss of supply agreements "was clearly within the contemplation of all the parties" when the defendants entered into the agreement to provide funding, which was subsequently breached, because the funding agreement that was breached was entered into for the purpose of securing the supply agreements).

68. Karcher, *supra* note 1, at 50 (quoting Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999)).

69. *See, e.g.*, *Schonfeld*, 218 F.3d at 178 (noting that "market value of unique or intangible assets" may be determined based on an expert's "opinion of the asset's value" and "evidence of sales of comparable assets" when no sales history is available); Sarrouf v. New England Patriots Football Club, Inc., 492 N.E.2d 1122, 1127, 1128 (Mass. 1986) (noting the uniqueness of sports teams from other business ventures, court held that the trial judge was entitled to use evidence of

such as music licenses, television show formats, mineral rights, and literary characters, may be established by experts based upon references to values established by other agreements and comparable assets.[70]

Comparable coaches' contracts can be used to assess a university's lost opportunity to benefit from a successful athletic program as a result of a head coach's breach of an exclusivity provision, as well as a concurring tortious interference with his contract by the institution seeking to hire the coach. A reasonable approximation of a university's damages can be established by reference to, and analysis of, the liquidated damages amounts that (1) are contained in the contracts of head coaches (a) in the *same sport*, (b) at *comparable schools*, and (c) with *comparable salaries*, and (2) would have been paid to the school had the comparable coach left *in the same year of the contract term* in which the breaching coach left. I base the relevance and reliability of such evidence on three assumptions.

First, it can be assumed that this evidence is the best available under industry standards. The college coaching industry frequently uses and relies upon liquidated damages clauses to assess a university's damages to a reasonable degree of certainty for the loss of a head coach for the remainder of the contract term; the damages include the lost opportunity to profit from a successful program that would result both directly and indirectly from a head coach's services.[71] A substantial number of head coaches' contracts in Division I men's basketball programs and Football Bowl Subdivision programs contain liquidated damages clauses, the purpose and function of which is to protect the university from the coach's departure.[72]

Second, it can be assumed that universities and coaches will be rational economic actors when measuring the foreseeable damage to the school pursuant

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"prices paid for new franchises as a starting point in his valuation of the net assets of the [New England Patriots Football Club]" for purposes of ascertaining the fair value of its stock in an appraisal proceeding); *see also* Felder v. Physiotherapy Assocs., 158 P.3d 877, 887–88 (Ariz. Ct. App. 2007) (In addressing what constitutes "reasonable certainty" in the determination of damages for the lost opportunity in a sports career, the court stated that the amount may be "supported by the best evidence available and the essential consideration is that 'the jury must be guided by some rational standard,'" which included evidence concerning the economics of baseball compensation, the length of a career, "and what similar players were being paid." (quoting Short v. Riley, 724 P.2d 1252, 1255 (Ariz. Ct. App. 1986))); Doe v. McFarlane, 207 S.W.3d 52, 69–70 (Mo. Ct. App. 2006) ("[T]he Restatement (Third) of Unfair Competition recognizes that expert testimony concerning the licensing fees paid to similarly situated persons for comparable uses is relevant to determine the fair market value of a defendant's unauthorized use of a plaintiff's name in a right of publicity case.").

70. *Schonfeld*, 218 F.3d at 178; *see also* Cent. Dover Dev. Corp. v. Town of Dover, 680 N.Y.S.2d 668, 669 (N.Y. App. Div. 1998) (assessing market value of sand and gravel deposits based upon a separate lease for the right to remove such deposits).

71. *See* Karcher, *supra* note 1, at 49–50 (quoting *DiNardo*, 174 F.3d at 755–57).

72. For example, in my review of comparable contracts for the *Marist* case, a majority (thirty-six out of fifty-five) of the head men's basketball coaches' contracts at mid-major, Division I colleges and universities contained a liquidated damages clause. *See* discussion *infra* Part III.B and app.

to an agreed upon liquidated damages amount or formula.[73] According to the economic theory of contracts, parties to a contract will behave as rational economic actors when negotiating and agreeing upon terms and conditions of a transaction.[74] Both the university and the coach are very knowledgeable about the market for coaches' services, and they rely on the advice and counsel of retained search consultants, agents, and lawyers.[75] Because the market for coaches' services is highly competitive, when a university and coach agree to stipulate the school's damages, it can be assumed that the parties will lack the incentive to agree to an amount that is unreasonable, inefficient, or both.[76] When determining liquidated damage amounts and formulas, universities and coaches take into account such factors as (1) the number of years in the contract term, (2) the coach's total guaranteed compensation for the entire contract term, (3) the athletic department's budget and the level of competition at which the particular athletic program participates, and (4) the extent and scope of foreseeable damage to the university depending upon when the coach commits a breach during the contract term.[77] If one assumes that compensation amounts are determined by market forces based upon comparable coaches' contracts, then it can also be

73. *See* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 636 (2010) ("When parties stipulate damages, they clarify the respective expectations of the parties, permitting efficient breach without repudiation of the mutual understanding.").

74. *See* Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 687 (1986) ("The [economic] claim posits that since people respond to legal rules in an 'economic' fashion, one may use economic theory to predict the behavior of people in response to particular legal rules.").

75. *See* Karcher, *supra* note 1, at 41–42 (quoting Libby Sander & Paul Fain, *Coaches' Contracts Are Fertile Ground for Conflict*, CHRON. HIGHER EDUC. (June 4, 2009), http://chronicle.com/article/coaches-contracts-are-fertile/44424/) (citing Brian Curtis, *The Kingmakers: Part II: Agents Playing an Ever Greater Role in the Hiring of College Coaches*, CSTV.COM (Jan. 30, 2008), http://www.cstv.com/sports/m-footbl/stories/013008aag.html).

76. *See* Wilkinson-Ryan, *supra* note 73, at 645 ("[W]hen a competitive market exists, parties have no incentive to sign a socially inefficient contract (like a contract with a penalty clause)." (citing Kathryn E. Spier & Michael D. Whinston, *On the Efficiency of Privately Stipulated Damages for Breach of Contract: Entry Barriers, Reliance, and Renegotiation*, 26 RAND J. ECON. 180, 198 (1995) ("[W]ith a competitive entrant, the buyer and seller not only have an incentive to sign a socially efficient contract, but can also achieve the first best using a relatively simple stipulated damage contract that sets damages equal to the efficient expectation damage."))).

77. *Cf. id.* at 646–47 ("When parties specify the amount of damages in the event of breach as part of a contract, they may be forced to do some cost-benefit calculations that they would have otherwise neglected. . . . [I]t asks parties to think about fair compensation for breach at a time when they are not inclined toward punishment for the moral outrage of breaking a promise."); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 415–17 (2009) (finding that study subjects were inclined to set the penalty for breach at a lower amount when they were asked to draft a liquidated damages clause than when they were asked, ex post, to determine the appropriate level of damages for breach and arguing that the difference between negotiating for the penalty in the event of breach and deciding on a penalty after the fact has to do with the salience of the moral harm and assigning blame).

assumed that stipulated damage amounts reflect the going "market rate" for liquidated damages.[78]

Lastly, no court has struck down a liquidated damages provision in a coach's contract. To the contrary, one court that addressed the legality of a liquidated damages provision in the contract of a head football coach found it to be reasonable and enforceable.[79] Therefore, a third assumption can be made that the liquidated damages clauses contained in comparable coaches' contracts are valid, binding, and legally enforceable obligations that would be construed as reasonable in relation to the anticipated damages and not as an unenforceable penalty. It would be illogical for an entire industry, as well as courts of law, to recognize liquidated damages provisions as a reasonable method of assessing what is acknowledged to be difficult-to-ascertain economic harm, but to then suggest that such evidence is not reliable or relevant in assessing damages incurred by a comparable university resulting from a comparable breach committed by a comparable coach. The next section demonstrates the methodology.

B. Assessing Damages in the Marist *Case*

I was retained as an expert by Marist College after its head men's basketball coach, Matthew Brady, left for James Madison University (JMU) during the first year of a nearly four-year contract term.[80] Marist requested that I assess the range of damages resulting from Brady's breach of contract and JMU's tortious interference with Brady's contract.[81] Brady's contract with Marist contained a standard exclusivity clause providing that Brady "shall devote all of his time,

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78. Universities and coaches reach market rates for compensation according to what comparable institutions pay comparable coaches. *See, e.g.*, Terms of Employment, dated November 28, 2011, between The Ohio State University and Urban Meyer, CSTV.COM, http://grfx.cstv.com/photos/schools/osu/sports/m-footbl/auto_pdf/2011-12/misc_non_event/112811-fb-contract.pdf (last visited Nov. 12, 2012) ("In concluding this agreement, the university undertook certain benchmarking of comparable contracts.").

79. *See* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999) ("[U]sing the number of years left on the contract multiplied by the salary per year was a reasonable way to calculate damages considering the difficulty of ascertaining damages with certainty."). In affirming the district court's judgment against the coach for $281,886.43, an amount based upon the coach's base salary that was initially set at $100,000, the Sixth Circuit Court of Appeals noted that the coach was hired for "a unique and specialized position" and that the potential damage to the university from his resignation extended "beyond the cost of hiring a replacement coach." *Id.* at 756, 757.

80. *E.g.*, Affirmation in Opposition to Brady's Motion in Limine Regarding Expert Testimony ¶¶ 3, 43, 45, Marist Coll. v. Brady, Index No. 5006/2009 (N.Y. Sup. Ct. Apr. 26, 2012) [hereinafter Opposition to Motion in Limine] (on file with *South Carolina Law Review*).

81. RICHARD T. KARCHER, ANALYSIS OF DAMAGES INCURRED BY MARIST COLLEGE BY REASON OF THE LOSS OF MATTHEW BRADY FOR THE REMAINDER OF HIS CONTRACT TERM 1 (2011) [hereinafter ANALYSIS OF DAMAGES] (on file with *South Carolina Law Review*); *see also* Verified Complaint, Marist Coll. v. Brady, Index No. 5006/2009 (N.Y. Sup. Ct. July 7, 2009) [hereinafter Marist's Verified Complaint] (on file with *South Carolina Law Review*) (outlining Plaintiff's causes of action and version of the facts).

attention, knowledge and skill solely and exclusively to the position for which the College has hired [him]."[82] The contract further provided that Brady "may not enter into discussions with another college, university or professional basketball organization regarding a coaching position unless he receives prior written permission of the Marist College Athletic Director"[83] and "may not accept another basketball coaching position unless it is mutually agreeable to the College and [Brady]."[84]

In his four seasons at Marist, Brady had an overall record of 73–50 (45–27 conference record), including a first-place finish in the Metro Atlantic Athletic Conference (MAAC) in the 2006–2007 season.[85] Marist also advanced to the National Invitation Tournament (NIT) in 2007, where it defeated Oklahoma State in the first round.[86] This win during Brady's tenure was the first-ever postseason victory for Marist.[87] That year (2007), Marist extended Brady's contract for a three-year, nine-month term "providing a guaranteed annual salary of $200,000 plus numerous performance incentives."[88]

Following the 2007–2008 season, with three years remaining on his new contract term,[89] Brady left Marist for JMU,[90] thereby breaching the exclusivity provision in his contract.[91] JMU announced the hiring of Brady as its new head men's basketball coach on March 25, 2008.[92] The basketball program at Marist experienced consecutive losing seasons subsequent to Brady's breach. The team's overall record in 2008–2009 was 10–23 (4–14 conference record, second-to-last-place finish);[93] in 2009–2010 was 1–29 (1–17 conference record, last-

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82. Contract of Employment Between Marist College and Matthew Brady 8 (July 1, 2007) [hereinafter Brady Marist Contract Extension] (on file with *South Carolina Law Review*).

83. *Id.* at 9.

84. *Id.*

85. *Matt Brady Biography*, JMUSPORTS.COM, http://www.jmusports.com/ViewArticle.dbml?DB_OEM_ID=14400&ATCLID=1420099 (last visited Oct. 16, 2012) [hereinafter *Matt Brady Bio*].

86. *Id.*

87. Mike Ferraro, *Red Fox Basketball Puts Marist on the Map*, MARIST MAGAZINE, Summer 2007, at 8, *available at* http://www.marist.edu/alumni/magazine/pdfs/magazine07.pdf.

88. ANALYSIS OF DAMAGES, *supra* note 81, at 6–7 (citing Brady Marist Contract Extension, *supra* note 82).

89. Opposition to Motion in Limine, *supra* note 80, ¶ 8.

90. *See Matt Brady Bio*, *supra* note 85.

91. *See* Special Verdict Form, Marist Coll. v. Brady, Index No. 5006/2009 (N.Y. Sup. Ct. May 5, 2012) [hereinafter Special Verdict Form] (on file with *South Carolina Law Review*).

92. Marist's Verified Complaint, *supra* note 81, ¶ 18; *see also JMU Selects Matt Brady as New Men's Basketball Coach*, COLONIAL ATHLETIC ASS'N (Mar. 25, 2008), http://www.caasports.com/ViewArticle.dbml?DB_OEM_ID=8500&ATCLID=1418992 (reporting that Matt Brady selected as new JMU coach).

93. *See Men's Basketball 2008–2009*, MAACSPORTS.COM, http://www.maacsports.com/standings/Standings.dbml?SPID=10446&DB_OEM_ID=17400&DEF_FY=2008 (last visited Oct. 16, 2012) [hereinafter MAAC Standings *2008–2009*].

place finish);[94] and in 2010–2011 was 6–27 (3–15 conference record, last-place finish).[95]

Marist's basketball program lost both stability and coaching continuity immediately after Brady's departure, having lost its head coach and assistant coaches, as well as its incoming recruiting class.[96] Further, as I explained in my damages report:

> Marist lost the value and goodwill associated with program stability and success that was created by Marist's substantial economic investment in Brady. In addition, Marist lost the opportunity to capitalize on the favorable publicity, reputation and goodwill that comes with having a successful basketball program. It was [reasonably] foreseeable to [Brady when he entered into the contract with Marist] that Marist would be damaged by the loss of that opportunity if [he] unilaterally terminated his contract [and left for another institution during the contract term]. The damages would be greatly enhanced if [he left] during the first year of the contract term. The determination of Marist's damages required an assessment, to a reasonable degree of certainty, of the value of the loss of Brady for the remainder of the contract term, utilizing a reliable methodology supported by the best evidence available according to industry standards.[97]

Applying the theory discussed above,[98] I based my opinion on evidence of liquidated damages amounts (1) contained in the contracts of head coaches (a) in the *same sport*, (b) at *comparable schools*, and (c) with *comparable coaches' salaries*, and (2) that would have been paid to the comparable school had the comparable coach left *in the same year of the contract term* that Brady left Marist.[99] To assist in my analysis, I obtained and reviewed the contracts of head men's basketball coaches in NCAA "mid-major" Division I conferences with a 2010–2011 conference Rating Percentage Index (RPI)[100] comparable to that of

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94. *See Men's Basketball 2009–2010*, MAACSPORTS.COM, http://www.maacsports.com/standings/Standings.dbml?SPID=10446&DB_OEM_ID=17400&DEF_FY=2009 (last visited Oct. 16, 2012) [hereinafter MAAC Standings *2009–2010*].

95. *See Men's Basketball 2010–2011*, MAACSPORTS.COM, http://www.maacsports.com/standings/Standings.dbml?SPID=10446&DB_OEM_ID=17400&DEF_FY=2010 (last visited Oct. 16, 2012) [hereinafter MAAC Standings *2010–2011*].

96. ANALYSIS OF DAMAGES, *supra* note 81, at 7.

97. *Id.* at 7–8 (citing Ne. Univ. v. Brown, 17 Mass. L. Rptr. No. 19, 443 (Mass. Super. Ct. Mar. 11, 2004)).

98. *See supra* Part III.A.

99. *See* ANALYSIS OF DAMAGES, *supra* note 81, at 9.

100. *See id.* at 10; *NCAA BB Overall Power Rtg Conference Ratings 2010–2011*, NCAA BASKETBALL POWER RATINGS (Apr. 5, 2011), http://www.teamrankings.com/ncaa-basketball/ranking/overall-power-ranking-by-conf [hereinafter *NCAA BB Conference Ratings*]. The RPI is a system by which NCAA basketball teams are ranked based upon a team's wins, losses, and strength of schedule. *See Rating Percentage Index (RPI)*, NCAA, http://www.ncaa.org/wps/wcm/connect/

the MAAC, which had a 99.2 conference rating.[101] Those mid-major conferences included the Colonial Athletic Association (CAA) (103.1 rating), Conference USA (CUSA) (103.1 rating), Horizon League (102.5 rating), Missouri Valley Conference (MVC) (102.3 rating), Western Athletic Conference (WAC) (101.1 rating), Mid-American Conference (MAC) (97.8 rating), Atlantic Sun Conference (97.5 rating), Big West Conference (97 rating), Summit League (96.3 rating), Ohio Valley Conference (95.7 rating), and Sun Belt Conference (95.7 rating).[102] Thirty-six of the approximately fifty-five contracts I reviewed contained liquidated damages clauses.[103]

Because Brady left during the first year of what was nearly a four-year contract term, for each comparable contract, I determined and charted the damages that would have been paid to the college or university had the coach left during the first year of the contract term. This data, for all thirty-six contracts, is contained in the chart in Appendix A.

Next, I "calculated the mean [liquidated] damages for all [thirty-six] comparable contracts if the coach had left in the first year of the contract term, which [was] $286,166."[104] I found that:

> The damages owed pursuant to many of the liquidated damages clauses [in comparable contracts] is greatest when the coach leaves early during the contract term and the damages decline if the coach leaves later during the contract term. As an example, the liquidated damages clause in Article VIII of Brady's contract with JMU provides for damages in the amount of $500,000 if Brady leaves in the first or second year and $250,000 if he leaves in the third year. This reflects the parties' understanding of the importance of the substantial investment being made by the school and the long term commitment from both parties, as

public/NCAA/Championships/NCAA+Rating+Percentage+Index/ (last updated Oct. 3, 2012). The NCAA has used this system since the early 1980s "to aid in the selecting and seeding of the teams [for] the 65-team men's [tournament] . . . [and] for the 64-team women's tournament since its inception in 1982." *See Ratings Percentage Index*, CHN COLLEGE BASKETBALL, http://www.collegehoopsnet.com/history/ratingspercentageindex.htm (last updated May 2005). In its current formulation, the index comprises a team's winning percentage (25%), its opponents' strength of schedule (50%), and the strength of schedule of those opponents' opponents (25%). *Id.* A team's strength of schedule accounts for 75% of the RPI calculation and is "2/3 [its] opponents' winning percentage and 1/3 times its opponents' opponents' winning percentage." *See RPI FAQ*, COLLEGERPI.COM, http://www.collegerpi.com/rpifaq.html (last updated Dec. 11, 2007).

101. *NCAA BB Conference Ratings*, *supra* note 100.

102. *Id.*

103. *See infra* app. I was unable to obtain and review the head coaches' contracts of schools in the MAAC because the schools refused to comply with my FOIA request; as private institutions, they are not required to make their coaches' contracts available to the public.

104. ANALYSIS OF DAMAGES, *supra* note 81, at 11.

> well as an understanding that the school tends to be harmed to a greater extent the earlier the coach leaves during the term of the contract.[105]

The earlier a departure occurs in the contract term, the more disruptive it is on the athletic program because of the detrimental effect the coaching transition can have on continuity within a program from a coaching, management, and recruiting standpoint.[106]

The thirty-six comparable contracts also evidence a relationship between the amount of the coach's base salary and the amount of liquidated damages; the greater the coach's base, the greater the liquidated damages. The scatterplot graph in Figure 1 shows a positive relationship between the coach's base salary and the liquidated damages amount that would be owed to the school if the coach left in the first year of the contract term.[107]

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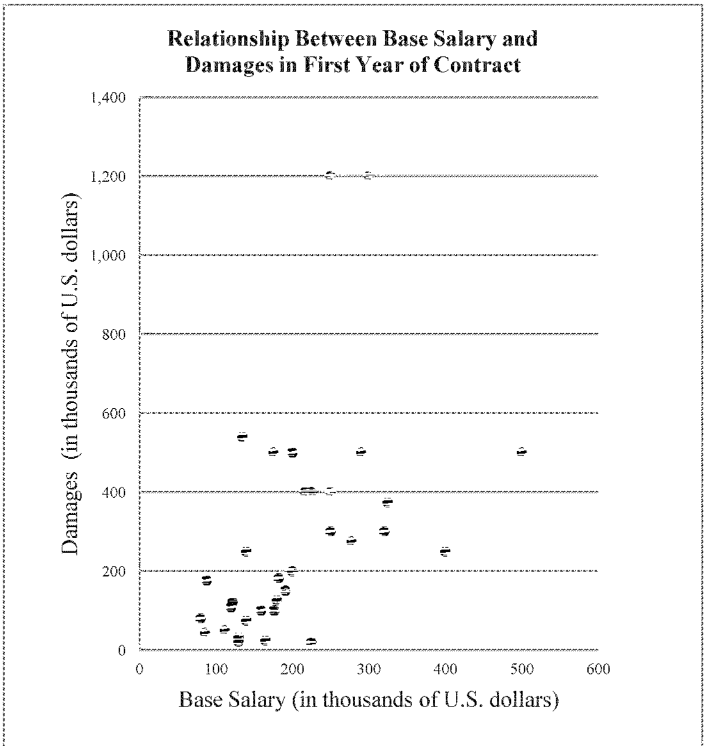
105. *Id.* (citing Head Coach Employment Contract Between James Madison University and Matt Brady (Mar. 26, 2008) [hereinafter Brady JMU Contract] (on file with *South Carolina Law Review*)).

106. *See* Karcher, *supra* note 1, at 53.

107. *See infra* Figure 1.

FIGURE 1: RELATIONSHIP BETWEEN BASE SALARY AND DAMAGES IN FIRST YEAR



Additionally, I calculated the mean liquidated damages of those contracts in which the coach's included base salary was similar to that of Brady's. This calculation was made using a salary range of $150,000 to $250,000—$50,000 above and below Brady's included base salary at the time he departed Marist for JMU[108]—which reduced the number of comparable contracts from thirty-six to eighteen.[109] The mean liquidated damages amount for these eighteen contracts, assuming the coach had left in the first contract year, was $300,218.[110] This figure is fairly consistent with the mean for all thirty-six of the contracts, representing an approximate $14,000 variance.[111] Therefore, I concluded that a reasonable approximation of Marist's damages was likely to be within the range of $286,166 to $300,218.[112]

108. Brady Marist Contract Extension, *supra* note 82, at 5.
109. ANALYSIS OF DAMAGES, *supra* note 81, at 11.
110. *See id.* at 11–12.
111. *Id.* at 12.
112. *Id.*

Marist settled its tortious interference claim against JMU a few days before the trial started, which left only the breach of contract claim against Brady.[113] Brady filed a pre-trial motion in limine with the court to preclude my proffered testimony at trial on two grounds.[114]

First, Brady argued that Marist was not claiming a breach of the contract's exclusivity provision.[115] Brady asserted that my analysis assessed the damages incurred by reason of the loss of his services for the remainder of the contract term—which included the lost opportunity to benefit from a successful basketball program—but that Marist "never alleged or claimed in [the] case that the mere fact of Coach Brady's departure constituted a breach of his contract" (i.e., a breach of the exclusivity provision).[116] The motion proclaimed that "Marist *permitted* Coach Brady to depart his employment at Marist and engage in his employment at James Madison University," and that the only breach alleged by Marist was breach of a provision in the contract whereby Brady agreed that, in the event of such a permitted departure, he would end all contact with Marist recruits and would not offer a scholarship to a current Marist player or a player being recruited to play at Marist.[117] Brady thus argued that "[d]amages, if any, must be somehow linked to the actionable conduct: the alleged recruitment of so-called 'Marist recruits.'"[118] Marist countered, stating that the contract expressly provided that "in the event Brady seeks permission to leave his position with Marist to accept another coaching position prior to the end of his contract term, any permission granted by Marist is *conditional* upon Brady's agreement 'to end any further contact with program recruits'[—a] condition that Brady unquestionably breached."[119]

Second, Brady argued in his motion that my proffered testimony was "based upon a liquidated damages clause which does not exist in the operative contract between Marist College and Coach Brady" and, therefore, liquidated damages "ought not to be permitted to be considered by the jury to have been 'fairly within the contemplation of the parties at the time that [the contract] was

113. *See* Peter Vieth, *JMU Settles Lawsuit over Basketball Coach Hire*, THE VLW BLOG (Apr. 27, 2012), http://valawyersweekly.com/vlwblog/2012/04/27/jmu-settles-lawsuit-over-basketball-coach-hire/.

114. Affirmation ¶ 6, Marist Coll. v. Brady, Index No. 5006/2009 (N.Y. Sup. Ct. Apr. 27, 2012) [hereinafter Brady's Motion in Limine].

115. *See id.* ¶ 7 (quoting Marist's Verified Complaint, *supra* note 81, ¶ 20).

116. *Id.* ¶¶ 5, 8 (citing ANALYSIS OF DAMAGES, *supra* note 81, at 8–9).

117. *See id.* ¶¶ 8–9.

118. *Id.* ¶ 10.

119. *See* Opposition to Motion in Limine, *supra* note 80, ¶¶ 11–12 (emphasis added) (quoting Brady Marist Contract Extension, *supra* note 82). Thus, Marist argued that it specifically pled in the complaint that when Brady left for JMU, Marist had advised JMU that "[it] would grant Brady permission to terminate his position as head basketball coach at Marist *only if and so long as* Brady and [JMU] abided by all provisions of the Contract relating to Brady's obligations to have no contact with or solicitation of current Marist men's basketball players and all Marist men's basketball team recruits." *Id.* ¶ 15 (quoting Marist's Verified Complaint, *supra* note 81, ¶ 17).

made.'"[120] Under the rule of *Hadley v. Baxendale*,[121] however, it is not a liquidated damages provision that must have been fairly within the contemplation of the parties, but rather it is the economic loss.[122] Brady's argument here (1) disregarded the fact that liquidated damages clauses in coaches' contracts compensate the school for consequential damages and (2) implicitly asserted that Marist was not entitled to consequential damages because he and Marist had not agreed to a liquidated damages clause. Marist argued in its opposition to the motion in limine that courts have acknowledged "it is reasonable to establish the value of an asset by expert opinion based upon the value of comparable assets" and that "[t]here is no New York case law forbidding such comparisons when establishing the value of a collegiate athletic program."[123] Marist further argued that "[t]hese comparable liquidated damages clauses represent the value comparable schools assign to their comparable collegiate basketball programs and provide an accurate measure of the loss these schools expect to incur as the result of the early departure of a coach in violation of the contract."[124]

At the start of trial, the judge granted Brady's motion in limine to preclude my testimony. Unfortunately, we do not have the benefit of the judge's reasoning, because no explanation was provided and no written opinion was

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120. *See* Brady's Motion in Limine, *supra* note 114, ¶¶ 11, 13, 15 (quoting Goodstein Constr. Corp. v. City of New York, 80 N.Y.2d 366, 373 (1992) (citations omitted)). Brady further argued that "Professor Karcher should not be permitted to testify that liquidated damages clauses in *other* contracts, which are neither in evidence nor relevant to these parties' agreement, can form any basis for analysis of Marist's purported damages in this case." *Id.* ¶ 15.

121. (1854) 156 Eng. Rep. 145; 9 Ex. 341. Brady acknowledged that the *Hadley v. Baxendale* rule for consequential damages was applicable in this case. Brady's Motion in Limine, *supra* note 114, ¶ 13 ("Under the accepted rule of *Hadley v. Baxendale*, it must be shown that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made." (citations omitted) (quoting *Goodstein Constr. Corp.*, 80 N.Y.2d at 373) (internal quotation marks omitted)).

122. *See id.* at 151; 9 Ex. at 355. Interestingly, Brady's original contract with Marist (before the extension was entered into) had a liquidated damages clause which stated: "The parties acknowledge that the College will incur administrative, recruiting, resettlement and other costs in obtaining a replacement coach in addition to potentially increased compensation costs and *loss of ticket, broadcast or other revenues*, which damages are impossible to determine with certainty and accordingly agree to this liquidated damages provision. The parties further agree that the liquidated damages provided for herein are reasonable in amount and not a penalty." Contract of Employment Between Marist College and Matthew Brady 4 (Apr. 27, 2004) (emphasis added) (on file with *South Carolina Law Review*). The foregoing demonstrates that it was, in fact, foreseeable to Brady that Marist would be damaged if he breached—by "loss of ticket, broadcast or other revenues." *Id.* Moreover, in the original contract, Brady agreed that the amount of damages that would be reasonable to cover Marist's economic loss if he left in the first year of the contract term was two times his annual base salary (Base of $115,000; Liquidated Damages of $230,000). *Id.* at 4, 5.

123. Opposition to Motion in Limine, *supra* note 80, ¶ 57.

124. Opposition to Motion in Limine, *supra* note 80, ¶ 57; *see also* Stewart I. Edelstein, Daubert *and Lost-Profits Testimony*, TRIAL, Sept. 2005, at 31 ("[E]xpert testimony is admissible if the expert is qualified to testify on the topic at issue, the testimony will assist the trier of fact, and the expert's methodology is sufficiently reliable.").

rendered. Marist proffered the testimony of two accountants, James Markham and Chad Staller, "who issued a joint report analyzing Marist's damages on behalf of The Center for Forensic Economic Studies."[125] Their study contained three categories of economic damage: (1) "Marist's loss of the costs of recruiting the 2008 recruits," which was "based upon a determination of the amount of time Brady and each [assistant coach] spent on recruitment efforts for that year as a percentage of their respective salaries for that year";[126] (2) "Marist's increased cost for replacing assistant coaches . . . whom Brady convinced to follow him to JMU";[127] and (3) "Marist's decreased ticket revenue from the men's basketball games" by comparing ticket revenue "for the season immediately prior to Brady's departure to the [ticket] revenue . . . for the three seasons remaining on Brady's contract term subsequent to [the] breach."[128]

IV. CONCLUSION

The jury returned a verdict that Brady had breached his contract with Marist, but that Marist was not damaged financially.[129] Because jury verdicts have no legal precedential value and cannot be cited as legal authority,[130] it is not necessary to speculate as to how or why this particular jury concluded that Marist was not damaged at all when its basketball team's win–loss record went from 62–33 (during the three seasons prior to the coach's breach)[131] to 17–79 (during the three seasons subsequent to the breach).[132] When a majority of schools and their coaches are in agreement, pre-breach, that the school is financially damaged when the coach breaches the exclusivity provision, and a

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125. Opposition to Motion in Limine, *supra* note 80, ¶ 21.

126. *Id.* ¶¶ 22–23.

127. *Id.* ¶¶ 22, 31.

128. *Id.* ¶¶ 22, 33. Marist explained that I was retained to provide an alternative basis for Marist's calculation of its consequential damages for consideration by the jury:

> Karcher's method of calculating Marist's consequential damages from Brady's breach is intended to provide the trier of fact with an alternative basis for calculating Marist's consequential damages in place of the increased costs of assistant coaches and loss of ticket revenue calculated by Markham and Staller. Karcher's calculation of damages is not intended to replace Marist's general damages of the costs of recruiting in 2008, which Marist is entitled to regardless of which method is utilized to calculate Marist's consequential damages.

Id. ¶ 44 n.1.

129. Special Verdict Form, *supra* note 91; Associated Press, *Jury: JMU Coach Brady Breached Marist Contract*, NCAA MEN'S BASKETBALL (May 9, 2012, 1:11 PM), http://collegebasketball.ap.org/article/jury-jmu-coach-brady-breached-marist-contract.

130. *See, e.g.*, Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 878 (1999) ("Jury verdicts usually do not produce judicial opinions and therefore do not become part of the persuasive or binding judicial authority . . . .").

131. *Matt Brady Bio*, *supra* note 85.

132. *See* MAAC Standings *2008–2009*, *supra* note 93; MAAC Standings *2009–2010*, *supra* note 94; MAAC Standings *2010–2011*, *supra* note 95.

particular school experiences the loss of a successful and stable athletic program after such breach actually occurs, we can be fairly confident from a causation standpoint in saying it is *more likely than not* that the breach, in fact, causes some amount of economic damage. That amount can be assessed with "reasonable certainty" by determining what a reasonable (or average) liquidated damages amount would be if the school and breaching coach had included it in the contract pre-breach. The methodology proposed in this Essay is a malleable formula for assessing a school's "difficult to ascertain" damages post-breach, and its reliability is substantiated by the formula's universal acceptance by similarly-situated contracting parties pre-breach.

APPENDIX: COMPARABLE CONTRACTS

Coach (Date of Contract)	School	Conference	Base Salary	Liquidated Damages	Damages in First Year of Contract
Mike Davis (Apr. 7, 2006)[133]	University of Alabama at Birmingham (UAB)	Conference USA	$500,000; 5-yr. term	$500,000	$500,000
Mark Fox (July 1, 2006)[134]	University of Nevada, Reno	Western Athletic Conference	$400,000; 5-yr. term	$250,000	$250,000
Shaka Smart (May 1, 2009)[135]	Virginia Common-wealth University (VCU)	Colonial Athletic Association	$325,000; 5-yr. term	$375,000 in first yr., reduced by $75,000 per yr. for remainder of term; *plus* coach shall cause new school to contract with VCU for a 2-yr. home/home series with $250,000 buyout	$375,000; *plus* 2-yr. home/home series contract with $250,000 buyout
Keith Dambrot (May 4, 2010) *See below for Dambrot's previous contract[136]	University of Akron	Mid-American Conference	$320,000; 7-yr. term	$320,000 in any yr. if coach accepts employment at another institution following first Friday after NCAA tournament and prior to first regular season game. If coach accepts employment between first regular season game and first Friday after NCAA tournament, then $300,000 in first yr.; $250,000 in second yr.; $200,000 in third yr.;	$320,000; *plus* additional $300,000 if coach accepts other employment at any time between the first regular season game and the first Friday after

133. Employment Agreement Between the University of Alabama at Birmingham and Mike Davis (Apr. 7 2006) (on file with *South Carolina Law Review*).

134. Employment Agreement Between the University of Nevada, Reno and Mark L. Fox (July 1, 2006) (on file with *South Carolina Law Review*).

135. Employment Agreement Between Virginia Commonwealth University and Shaka D. Smart (May 1, 2009) (on file with *South Carolina Law Review*).

136. Employment Contract Between the University of Akron and Keith Dambrot (May 4, 2010) (on file with *South Carolina Law Review*).

				$150,000 in fourth yr.; $100,000 in fifth yr.; $50,000 in sixth yr.; and $50,000 in final yr.	the NCAA Nat'l Championship game
Ricardo Patton (Mar. 19, 2007)[137]	Northern Illinois University	Mid-American Conference	$300,000; 5-yr. term	An amount equal to base multiplied by number of yrs. remaining *plus* any base remaining for current yr.	$1,200,000 *plus* any remaining base in first yr.
Matt Brady (Mar. 26, 2008)[138]	James Madison University (JMU)	Colonial Athletic Association	$290,000; 5-yr. term	$500,000 in first or second yr.; $250,000 in third yr.	$500,000
Gregg Marshall (June 20, 2007, as amended May 19, 2010)[139]	Wichita State University	Missouri Valley Conference	$277,500; 5-yr. term	$275,000	$275,000
Kenneth McDonald (Jan. 13, 2009)[140]	Western Kentucky University (WKU)	Sun Belt Conference	$250,000; 4-yr. rolling term	$300,000 in any yr.; *plus* coach agrees to a 4-yr. home/home series between WKU and new school	$300,000 *plus* 4-yr. home/home series
Gene Ford (Apr. 1, 2010)[141]	Kent State University	Mid-American Conference	$250,000; 5-yr. term	An amount equal to base *and* supplemental, multiplied by the number of yrs. remaining	$1,200,000
John Groce (Apr. 1,	Ohio University	Mid-American Conference	$250,000; 5-yr. term	$400,000 in first yr.; $300,000 in second yr.;	$400,000

137. Employment Agreement Between Northern Illinois University and Ricardo Patton (Mar. 18, 2007) (on file with *South Carolina Law Review*).

138. Brady JMU Contract, *supra* note 105.

139. Second Amendment to Contract for Employment of Men's Head Basketball Coach Between Wichita State University and Gregg Marshall (May 19, 2010) (on file with *South Carolina Law Review*) (citing First Amendment to Contract for Employment of Men's Head Basketball Coach Between Wichita State University and Gregg Marshall (Apr. 23, 2009) (on file with *South Carolina Law Review*); Contract for Employment of Men's Head Basketball Coach Between Wichita State University and Gregg Marshall (June 20, 2007) (on file with *South Carolina Law Review*)).

140. Western Kentucky University Athletic Employment Contract Between Western Kentucky University and Kenneth M. McDonald (Jan. 13, 2009) (on file with *South Carolina Law Review*).

141. Employment Contract Between Gene A. Ford and Kent State University (Apr. 1, 2010) (on file with *South Carolina Law Review*).

2010)[142]				$250,000 in third yr.; $200,000 in fourth yr.; and $150,000 in fifth yr.	
Gary Waters (Sept. 12, 2006)[143]	Cleveland State University	Horizon League	$225,000; 5-yr. rolling term	$400,000 with more than 4 yrs. remaining; $300,000 with less than 4 yrs. but more than 2 yrs. remaining; $225,000 with less than 2 yrs. remaining	$400,000
William Kennedy (July 1, 2010)[144]	Murray State University	Ohio Valley Conference	$225,000; 4-yr. term	$50,000 if coach leaves for school in Big 12, Big Ten, SEC, ACC, Big East, Pac-10 or OVC; $20,000 if he leaves for school in any other conference	$20,000
Christopher Lowery (July 1, 2007)[145]	Southern Illinois University Carbondale (SIUC)	Missouri Valley Conference	$216,300; 7-yr. term	$400,000 before June 30, 2010; $250,000 between July 1, 2010 and June 30, 2012; $50,000 between July 1, 2012 and June 30, 2014	$400,000
Robert "Buzz" Peterson (Apr. 16, 2010)[146]	UNC Wilmington (UNCW)	Colonial Athletic Association	$200,000; 5-yr. term with $10,000 annual increases.	$500,000 in first yr.; $400,000 in second yr.; $300,000 in third yr.; $200,000 in fourth yr; and $0 fifth yr.	$500,000
Rodrick Barnes (July 1, 2007)[147]	Georgia State University	Colonial Athletic Association	$200,000; 5-yr. term	$500,000 in first yr.; $331,500 in second yr.; and $166,500 in final three yrs.	$500,000
Joseph Kennedy (July 1, 2006)[148]	Towson University	Colonial Athletic Association	$200,000; 5-yr. term	Amount equal to Annual Base Salary	$200,000
Keith	University	Mid-American	$200,000;	If, during any contract yr.,	$200,000

142. Head Coach Employment Agreement Between Ohio University and John Groce (Mar. 3, 2009) (on file with *South Carolina Law Review*).
143. Employment Agreement Between Gary Waters and Cleveland State University (Sept. 12, 2006) (on file with *South Carolina Law Review*).
144. Offer of Employment Between Murray State University and William Kennedy (Mar. 30, 2010) (on file with *South Carolina Law Review*).
145. Employment Agreement Between Southern Illinois University Carbondale and Christopher M. Lowery (Apr. 4, 2007) (on file with *South Carolina Law Review*).
146. Employment Agreement Between the University of North Carolina at Wilmington and Robert "Buzz" Peterson (Apr. 16, 2010) (on file with *South Carolina Law Review*).
147. Employment Agreement Between Georgia State University Athletic Association and Rodrick K. Barnes (July 1, 2007) (on file with *South Carolina Law Review*).
148. Contract Extension Agreement Between Towson University and Joseph P. Kennedy (July 1, 2006) (on file with *South Carolina Law Review*).

Dambrot (July 1, 2007)[149]	of Akron	Conference	7-yr. term	coach accepts employment at another school after April 7 and before the first regular season game, then $200,000. If coach accepts other employment between first regular season game and April 7: $200,000 in first yr.; $175,000 in second yr.; $150,000 in third yr.; $125,000 in fourth yr.; $100,000 in fifth yr.; $75,000 in sixth yr.; $50,000 in seventh yr.	
Stephen Hawkins (May 1, 2008)[150]	Western Michigan University	Mid-American Conference	$191,000; 5-yr. term	$150,000 in first two yrs.; $100,000 in final three yrs.	$150,000
Billy Taylor (Aug. 8, 2007)[151]	Ball State University	Mid-American Conference	$182,000; 5-yr. term; with min. $5,000 ann. increases	Annual base for the yr. in which the termination occurs	$182,000
Robert Williams (Apr. 1, 2008)[152]	UC Santa Barbara	Big West Conference	$180,270; 4-yr. term	An amount equal to 65% of annual salary	$126,925 (65% of Base *plus* $15,000 stipend for public relations duties)
Phillip R.	University	Mid-American	$176,685;	$100,000 prior to April 30,	$100,000

149. Employment Contract Between the University of Akron and Keith Dambrot (July 1, 2007) (on file with *South Carolina Law Review*).

150. Western Michigan University Full-Time Head Coach Employment Agreement with Stephen Hawkins (May 1, 2008) (on file with *South Carolina Law Review*).

151. Letter and Terms of Employment Between Ball State University and William Taylor (Aug. 16, 2007) (on file with *South Carolina Law Review*).

152. Employment Agreement for a Contract Appointment Between the Regents of the University of California and Robert A. Williams (Apr. 1, 2008) (on file with *South Carolina Law Review*).

Witherspoon (May 1, 2009)[153]	of Buffalo	Conference	5-yr. term	2012; $75,000 after April 30, 2012	
Brad Greenberg (Apr. 1, 2009)[154]	Radford University	Big South Conference	$176,000; 6-yr. term	$100,000 in first four yrs.	$100,000
Ernie Zeigler (July 1, 2010)[155]	Central Michigan University	Mid-American Conference	$175,446; 4-yr. term	$500,000 in first yr.; $250,000 in second yr.; $125,000 in third yr.; $75,000 in final yr.	$500,000
Ron Hunter (June 22, 1999, as amended May 1, 2008)[156]	Indiana University Purdue University Indianapolis (IUPUI)	Summit League	$165,000; 7-yr. term	$25,000	$25,000
Ben Jacobson (July 1, 2009)[157]	University of Northern Iowa	Missouri Valley Conference	$159,306; 7-yr. term with $20,000 annual increases	$100,000	$100,000

153. Employment Agreement Between the University at Buffalo and Phillip R. Witherspoon (May 1, 2011) (on file with *South Carolina Law Review*).

154. Employment Contract Between Radford University and Brad Greenberg (Apr. 1, 2009) (on file with *South Carolina Law Review*).

155. Contract Between Central Michigan University and Ernie Zeigler (Apr. 13, 2010) (on file with *South Carolina Law Review*).

156. Employment Agreement Between Indiana University–Purdue University Indianapolis and Ronald E. Hunter, Jr. (June 22, 1999) (on file with *South Carolina Law Review*), *amended by* Second Addendum Between Indiana University–Purdue University Indianapolis and Ronald E. Hunter, Jr. (Aug. 31, 2007) (on file with *South Carolina Law Review*) and Third Addendum to Employment Agreement Between Indiana University–Purdue University Indianapolis and Ronald E. Hunter, Jr. (Apr. 25, 2008) (on file with *South Carolina Law Review*).

157. University of Northern Iowa Contract of Employment with Ben Jacobson (June 26, 2009) (on file with *South Carolina Law Review*).

Cuonzo Martin (Apr. 1, 2008, as amended June 18, 2010)[158]	Missouri State University	Missouri Valley Conference	$140,000; 7-yr. term	$250,000 on or before April 1, 2011; decreases by $50,000 every April 1 thereafter	$250,000
Murray Bartow (July 1, 2009)[159]	East Tennessee State University (ETSU)	Atlantic Sun Conference	$140,000; 5-yr. term	If coach leaves for mid-major program, coach shall require hiring institution to pay $75,000; if coach goes to a big six conference or a Conference USA school, coach shall require hiring institution to pay $150,000	$75,000
Matthew Driscoll (Apr. 9, 2009)[160]	University of North Florida (UNF)	Atlantic Sun Conference	$135,000; 5-yr. term	Base salary for number of yrs. remaining in term	$540,000
Charles Ramsey (Apr. 1, 2005)[161]	Eastern Michigan University	Mid-American Conference	$130,000; rolling 4-yr. term	An amount equal to two months of annual salary	$21,667
Matthew Brown (May 1, 2009)[162]	University of Missouri–Kansas City	Summit League	$130,000; 4-yr. term	In first yr., 1/4 of then-current base; in second yr., 1/8 of then-current base; in third yr., 1/16 of then-current base; and in final yr., $0	$32,500

158. Employment Contract Between Missouri State University and Cuonzo Martin (June 20, 2008) (on file with *South Carolina Law Review*), *amended by* First Addendum to Employment Contract Between Missouri State University and Cuonzo Martin (June 18, 2010) (on file with *South Carolina Law Review*).

159. Head Men's Basketball Coaching Contract Between East Tennessee State University and Murray Bartow (July 10, 2009) (on file with *South Carolina Law Review*).

160. Employment Agreement Between the University of North Florida and Matthew Driscoll (Apr. 9, 2009) (on file with *South Carolina Law Review*).

161. Eastern Michigan University Athletic Coach Employment Agreement with Charles Ramsey (Aug. 2, 2005) (on file with *South Carolina Law Review*).

162. Contract For Employment Between the University of Missouri–Kansas City and Matthew Brown (Aug. 21, 2009) (on file with *South Carolina Law Review*).

Saul Phillips (July 1, 2008)[163]	North Dakota State University	Summit League	$121,900; 5-yr. term with 4% ann. increase	One yr. of then-current base salary	$121,900
Donnie Tyndall (Apr. 10, 2006)[164]	Morehead State University	Ohio Valley Conference	$120,000; 4-yr. term	$100,000; *plus* a reasonable fee to reclaim institutional funds spent on recruited players who leave (not to exceed $2,000 per player); *plus* coach agrees to a 2-yr. home/home series	$108,000; *plus* 2-yr. home/home series
Tyler Geving (Apr. 15, 2009)[165]	Portland State University	Big Sky Conference	$112,008; 4-yr. term with $5,000 approx. ann. increase	$50,000	$50,000
Edward Payne (Aug. 4, 2006)[166]	University of South Carolina Upstate	Atlantic Sun Conference	$88,000; 5-yr. term	50% of annual base salary for the remaining term	$176,000
Roger Reid (Mar. 28, 2007)[167]	Southern Utah University	Summit League	$86,000; 5-yr. term	In first 2 yrs., 50% of then-current annual base salary; in third yr., 45% of then-current base; in fourth yr., 35% of then-current base; in fifth yr., $0	$43,000
Dane Fife (Apr. 1, 2007)[168]	Indiana University–Purdue University Fort Wayne	Summit League	$80,000; 6-yr. term	Number of months remaining on term multiplied by then-current base monthly salary ($80,000 max.)	$80,000

163. Employment Agreement Between North Dakota State University and Saul Phillips (July 1, 2008) (on file with *South Carolina Law Review*).

164. Memorandum of Agreement Between Morehead State University and Donnie Tyndall (Apr. 10, 2006) (on file with *South Carolina Law Review*).

165. Employment Agreement Between Portland State University and Tyler Geving (Aug. 19, 2009) (on file with *South Carolina Law Review*).

166. Employment Agreement Between the University of South Carolina Upstate and Edward G. Payne (Aug. 4, 2006) (on file with *South Carolina Law Review*).

167. Contract for Employment Between Southern Utah University and Roger Reid (Mar. 28, 2007) (on file with *South Carolina Law Review*).

168. Employment Agreement Between Indiana University–Purdue University Fort Wayne and Dane Fife (Apr. 1, 2005) (on file with *South Carolina Law Review*), *amended by* Addendum to Agreement Between Indiana University–Purdue University Fort Wayne and Dane Fife (Mar. 23, 2007) (on file with *South Carolina Law Review*).

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