An Examination of the Non-Recruit Clause in Intercollegiate Coaching Contracts

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Abstract

Contracts of coaches in intercollegiate athletics, that were once simple and straightforward, have morphed into an ever more intricate combination of the demands from an institution. As these specific expectations of coaches increase, both parties may intensify their efforts to protect themselves in the event of litigation. In recent years there have been several high profile cases dealing with breach of contract claims by either the coach or institution. This paper takes an extensive look at the legality of a non-recruit clause within the *Marist College v. Matthew Brady* case. After reviewing the facts of the case, the paper will put attention on the non-recruit provision and whether it's inclusion in the contract constitutes a valid non-compete clause or is a violation of public policy since it could potentially interfere with educational opportunities. The last segment will conclude with a recommendation for athletic administrators on how to structure such clauses in future coaching contracts.

It is no secret that intercollegiate athletics has become a big business in the United States. In 2010-11, athletic programs at Division I colleges and universities generated over $6 billion in revenue (Berkowitz & Upton, 2011). The most extreme example of the money involved in college athletics is the University of Texas. In 2010-11, the University's Athletic Department generated over $150 million in revenue (Dosh, 2011). Of that amount, $95.7 million was generated by the football program, while $17.3 million was generated by the men's and women's basketball teams (Dosh, 2011). While several schools such as the Ohio State University, University of Alabama, University of Florida, and the University of Tennessee have realized extensive revenue production

from sports, it is important to note that not all university athletic departments have been as successful (Dosh, 2011). Yet, many continue to pay significant coaching salaries in the hopes that it will generate revenue for the athletic department and institution (Berkowitz & Upton, 2011). With so much money involved in college sports, there is an increased pressure on colleges and universities to win immediately in order to increase revenue and ensure the economic viability of the athletic department.

The pressure for players' success on and off the field is often placed upon a coach. A perfect illustration of the tenuous nature of today's college coaching is the turnover in jobs that occurs at the end of each college basketball and football season. For example, in the fall of 2011, out of the 66 schools that currently play in the automatic BCS bid college football conferences (ACC, Big 10, Big 12, Big East, Pac 12, and the SEC), 12 coaches were fired or resigned to accept other jobs at the end of the regular season (Coaching Changes, 2011). The continuous coaching carousel in collegiate athletics has required both the school and coach to develop specific contractual language to protect themselves and their interest if the contract is eventually breached. The more precise a contract can be crafted, reducing ambiguity and specifically defining the terms, the more both parties will benefit (Greenberg & Smith, 2007; Yasser, McCurdy, Goplerud, & Weston, 2000). No matter how well the contract is drafted, however, when one party fails to meet its obligation or one side wishes to breach the contract, legal issues or a conflict of settlement is sure to arise over the proper damages.

Representative of the legal issues that arise when a coach decides to terminate a contract is the lawsuit filed by Marist College against their former basketball coach, Matt Brady. In 2004, Matt Brady signed a four year contract to be the head basketball coach at Marist College. After successfully leading the basketball team for three years, in July 2007, Matt Brady and Marist College signed a contract extension that was to run through the 2010-11 basketball season (*Marist College Complaint*, 2009). In 2008, Brady left Marist College to accept the head coaching position at James Madison University (JMU). Brady, however, ignored the non-recruit clause in his Marist contract and offered scholarships to four players he was recruiting for Marist, one of whom had already signed a National Letter of Intent (NLI) to attend Marist. Since Brady's actions clearly violated the contract language, Marist sued Brady and James Madison for damages as a result of the contract breach.

Due to the potential far reaching public policy implications of the non-recruit language included in Brady's contract, this paper explores the legal issues surrounding the inclusion of such non-recruit clauses in intercollegiate athletics coaching contracts. The first part of the paper provides a brief historical review of prior litigation involving the breach of coaching contracts. In particular, this section will include some of the legal reasons and remedies awarded by the courts relevant to intercollegiate athletics. The second part of the paper examines the background and underlying facts surrounding Marist College's lawsuit against Matt Brady. After reviewing the facts, the paper will put attention on the non-recruit provision and whether such a provision in the contract constitutes a valid non-compete clause or is a violation of public policy, since it could potentially interfere with educational opportunities for student athletes. The last segment of the paper concludes with recommendations for athletic administrators structuring of non-competition clauses in future coaching contracts.

Prior Litigation

Today's coaching contracts are complex and need to include clauses covering everything including the coach's salary, institutional fringe benefits, and additional compensation opportunities (i.e., shoe apparel and equipment endorsements, television, radio, speaking engagements) (Greenberg, 2006). Furthermore, contracts must contain the schools expectation that the coach will comply with NCAA and conference rules. However, no matter how well the contract is drafted, due to the nature of the business of coaching, one day either the university or the coach may eventually try to break the contract. As the following cases illustrate, a coach can be fired either with or without cause. For example when Ohio State University (OSU) terminated the contract of their football coach Jim Tressel, it could claim that it had "just cause" based on the language of his contract. The contract stated that OSU had the right to terminate the contract "at any time for cause" due to the "fraud or dishonesty of Coach in the performance of his duties or responsibilities" (Football Bowl Subdivision, 2010). While Tressel's contract listed 13 other reasons OSU could terminate the coach's contract, most contracts define "just cause" to include:

(1) a violation of any law; (2) a violation of any rule regulation; (3) constitutional provision; (4) bylaw or official interpretation of

> the school; (5) a violation of a conference rule; (6) a violation of NCAA legislation by the coach; (7) a violation by a member of the coaching staff or any other person under the coach's supervision; (8) direction, which the coach is aware of and takes no steps to address or correct within a reasonable period of time; (9) gross negligence in performance; (10) an immoral act; (11) habitual intoxication; and (12) dishonesty (Greenberg, 2006, p. 225).

On the other side of the coaching carousel are the successful coaches who decide to leave their current position prior to the contract expiration for a more high profile job or more lucrative deal (Karcher, 2009). In *West Virginia University v. Rodriguez* (2008), West Virginia University (WVU) brought suit against former football coach Rich Rodriguez when he left to accept the head football coaching position at the University of Michigan. The departure of the coach was significant because he sought to void the $4 million dollar buyout clause contained in the contract. In challenging the buyout clause, Rodriguez claimed that WVU and its president, Mike Garrison, had committed fraud and breach of contract by verbally agreeing to eliminate the buyout clause from the contract when he signed his new contract at WVU and then failing to do so (*West Virginia University v. Rodriguez*, 2008a). Rodriguez also claimed that the buyout clause itself was improper for two reasons. First, Rodriguez claimed that the $4 million buyout provision far exceeded the actual damages WVU suffered and was therefore an unreasonable and unenforceable penalty (*West Virginia University v. Rodriguez*, 2008a). Second, Rodriguez claimed that he was pressured by the president of WVU into signing it (*West Virginia University v. Rodriguez*, 2008a). After Rodriguez' attempt to have the case removed to Federal Court was rejected (*West Virginia University v. Rodriguez*, 2008b), the parties eventually settled the case. In the settlement, Rodriguez and the University of Michigan agreed to pay the $4 million buyout, of which Michigan paid $2.5 million and Rodriguez the other $1.5 million of the buyout. While the case never made it to court, the settlement may provide us with some guidance in our review of *Marist College v. Matthew Brady* (2009) and for future lawsuits between coaches and their former schools. The fact that WVU received the entire $4 million buyout, even though it may have exceeded the real damages suffered by the school, recruiting, and hiring a new football coach, suggests that both

Rodriguez and the University of Michigan believed that the buyout clause would have eventually been upheld and was not a penalty clause.

Another example occurred in January 2010 when former University of Connecticut head football coach Randy Edsall breached his contract with two years remaining to take the head coaching job at the University of Maryland (Clarke, Yanda, & Prisbell, 2011). In Edsall's instance, since he accepted the Maryland job on January 3, 2011, his contract required him to pay the University of Connecticut $400,000 (Football Bowl Subdivision, 2010). In this type of situation, the schools generally allow the coach to breach his contract after paying an agreed on liquidated damage.

Liquidated Damages

In order to compensate the school for any damages that they may incur as a result of the coach's breach, liquidated damage clauses are increasingly being utilized. Liquidated damages are a pre-determined sum that is included into a contract that is payable to the non-breaching party (Farnsworth, 1982). The benefit of including a liquidated damage clause in a coach's contract is that by stipulating the damages in advance of the breach, both parties know with certainly the cost of breaching the contract (Farnsworth, 1982). It is important to note, however, that a liquidated damage clause cannot be so large or onerous that it is characterized as a penalty. If the court characterizes the clause as a penalty, it will void the clause (Farnsworth, 1982).

Not satisfied solely with liquidated damages, some institutions have taken a more proactive approach against their former coach's breach of contract (Karcher, 2009). While these cases may be limited, due to the negative publicity and financial expense involved, they are still important in the examination of the issues raised in the *Marist College v. Matthew Brady* (2009) case. Two cases, *Vanderbilt v. Di Nardo* (1999) and *Northeastern University v. Brown* (2004), are applicable to the discussion of the case of interest.

Vanderbilt v. DiNardo (1999)

In 1990, Gerry DiNardo signed a five year contract to coach the Vanderbilt football team. In 1994, one year before the original contract was to expire, DiNardo and Vanderbilt Athletic Director Paul Hoolahan

began negotiating an extension. The two sides eventually reached an agreement on a two-year extension. However, before DiNardo signed the extension, he told Hoolahan that his attorney would need to review the agreement before it would be finalized (*Vanderbilt v. DiNardo,* 1997). Hoolahan agreed and DiNardo signed the extension (*Vanderbilt v. DiNardo,* 1999). Before DiNardo's attorney could read and finalize the contract extension, DiNardo was contacted, and eventually accepted, the head coaching job at Louisiana State University (LSU). Upon notification, Vanderbilt demanded that DiNardo pay three years in liquidated damages, representing the one year remaining on the original five year contract signed in 1990, and the two year extension (*Vanderbilt v. DiNardo*, 1999). In rejecting Vanderbilt's argument, the court determined that the liquidated damages provision was only enforceable for the one year remaining on the original five year contract and awarded the school $281,886.43 pursuant to a damage provision in DiNardo's employment contract. Since DiNardo breached his contract before his attorney signed off on the extension, the court held that the extension was not in force at the time of the breach (*Vanderbilt v. Dinardo*, 1999). Unlike the Rodriguez case, which was settled out of court, the district court in DiNardo held that the liquidated damages provision in the contract was enforceable and that the damages provided were reasonable (*Vanderbilt University v. DiNardo*, 1997). This is important for the review of *Marist College v. Matthew Brady*, since it establishes that liquidated damages clauses are a reasonable way for schools to protect their financial interests.

Northeastern University v. Brown (2004)

Whereas the previously discussed cases all provide precedence for similar scenarios when a coach leaves an institution, there are also instances whereby coaches leave to go to a school that are either part of the same conference or considered a competitor for other reasons. In doing so, quite often a school is not as concerned about just the financial damages but also, the impact on their program. More specifically, in a case closely related to *Marist College v. Matthew Brady* (2011), Northeastern University brought suit against football coach, Don Brown, when he breached his contract to accept a position at the University of Massachusetts (*Northeastern University v. Brown*, 2004). Following three successful years as head football coach, Don Brown in July 2003,

secured a five-year extension to his contract which included substantial raises for himself and his staff. Article IX of Brown's contract included a liquidated damages clause that required Brown to pay the University $25,000 if he left before the end of his contract (*Northeastern University v. Brown*, 2004). In January 2004, Brown told Northeastern's Athletic Director David O'Brien that he wished to speak with another school about their coaching job. Not wanting to lose Brown, O'Brien asked Brown what it would take to keep him from interviewing for the job. As a result, the two parties negotiated a contract extension, which included a substantial salary increase for Brown and his staff as well as improvements in the football program (*Northeastern University v. Brown*, 2004). Before the new contract could be drafted and signed, however, Brown resigned from Northeastern to take the job of head football coach at the University of Massachusetts (*Northeastern University v. Brown*, 2004). In seeking to prevent Brown from going to the University of Massachusetts, Northeastern argued that it would suffer economic harm if Brown were able to leave because the two schools played in the same conference, played each other every year, and that Brown knew Northeastern University's playbook and recruiting practices (*Northeastern University v. Brown*, 2004). Therefore, Northeastern argued the liquidated damages clause in Brown's contract was an insufficient remedy (*Northeastern University v. Brown*, 2004). Brown on the other hand argued that the contracts' liquidated damage clause provided the only remedy available to Northeastern in the event that Brown breached the contract before it was completed (*Northeastern University v. Brown*, 2004).

In rejecting Brown's position, the court held "that specific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty" (*Northeastern University v. Brown*, 2004, p.8). This result, the court held, was reached on "the assumption that the parties ordinarily contemplate that the contract be performed and that the provision for a penalty or liquidated damages in the event of a breach was intended as security for performance and not as a price for the privilege of nonperformance" *(Northeastern University v. Brown*, 2004, p. 9). In granting Northeastern an injunction, the Massachusetts Court ruled that the irreparable harm suffered by Northeastern far outweighed the irreparable harm, if any, to Brown or the University of Massachusetts (*Northeastern v. Brown*, 2004). The court seemed to be particularly

offended by the behavior of Brown and the University of Massachusetts. There was no question, the court held, that "Brown willfully and intentionally breached his contract with Northeastern. He signed his contract and straight-out violated it" (*Northeastern University v. Brown*, 2004, p. 5). As for the University of Massachusetts, the court ruled that there "appears to be no question that U. Mass actively induced the breach when it had been told of the restrictions on Brown's talking to other potential football employers and of his existing, long-term contract with Northeastern" (*Northeastern v. Brown*, 2004, p. 6).

Having won the battle, Northeastern nevertheless lost the war, and reached an out of court settlement that allowed Brown to coach at the University of Massachusetts. The settlement required the University of Massachusetts to pay Northeastern $150,000 in exchange for being allowed to hire Brown as its coach. In addition, the parties agreed that Brown would be precluded from contacting members of the Northeastern football team or coaching during the first three games of the Massachusetts football season (Wolohan, 2004). *Northeastern v. Brown* (2004) is important for the review of *Marist College v. Brady* (2011) since it demonstrates that courts are willing to award schools injunctive relief against their coaches, especially when the coach breaching the contract does so willfully and intentionally. Besides the behavior of the coach, to obtain such a negative injunction, the school also must demonstrate that it will suffer an irreparable harm, which outweighs the harm the coach will suffer through the breach of contract (*Northeastern University v. Brown*, 2004). In *Northeastern*, the court focused on the fact that the schools played in the same conference, played each other annually, and generally recruited the same geographic area.

Marist College v. Matthew Brady (2009)

As *Northeastern v. Brown,* 2004; *Vanderbilt University v. DiNardo*, 1999; *West Virginia University v. Rodriguez*, 2008 illustrate it is essential that colleges and universities include clear contract provisions to protect their financial interests should a breach occur. In an effort to protect their institutions, however, there is a chance that athletic administrators may draft contract language that is overly broad and, therefore, void. One such example, and the focus of this article, is Marist College v. Matthew Brady, the Commonwealth of Virginia, and James Madison University (*Marist College Complaint*, 2009). In July 2007,

Matt Brady, the head basketball coach at Marist College, entered into a new contract that would run through the 2010-11 season (*Marist College Complaint*, 2009). Included in the contract was a provision that precluded Brady from entering into any employment discussions with any other basketball program or accepting a head coaching position without the prior written consent of Marist College. Furthermore, the contract stated that if it were terminated for any reason, including accepting another job, Brady agreed to:

> turn over all basketball program records and files; (2) end any and all contact with all Marist basketball program recruits; and (3) not offer a scholarship to current Marist basketball players or to any persons that he or his staff recruited to play basketball at Marist *(Marist College Complaint*, 2009, p. 4).

On March 17, 2008 Brady advised Marist Athletic Director, Tim Murray that he wanted to be considered for the head coaching job at James Madison University (JMU). Three days later Jeff Bourne, Athletic Director at JMU spoke to Murray regarding the specific terms of Brady's contract at Marist College. Murray told Bourne that there was no "buyout" provision within Brady's existing contract, but that Brady was required to obtain Marist College's prior written consent to leave (*Marist College Complaint,* 2009). Murray noted that Marist College would grant Brady permission to terminate his position only if 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 (*Marist College Complaint,* 2009).

On March 25, 2008, JMU announced the hiring of Brady as the men's basketball head coach. Upon Brady accepting the position at JMU, Murray again informed Bourne, by a letter dated April 10, 2008, of the obligations under the contract and supplied Bourne with the identity of 19 basketball players who had been actively recruited by Brady and his assistant coaches and who Marist believed should not be able to follow Brady to JMU (Katz, 2010). Despite the terms of the contract, Brady contacted and offered scholarships to four Marist's basketball recruits (*Marist College Complaint,* 2009). The four recruits (Julius Wells, Devon Moore, Andrey Semenov, and Trevon Flores) all accepted the scholarships and became members of the 2008-09 men's basketball team

at JMU (*Marist College Complaint,* 2009). Of the four recruits, Wells had already signed a NLI with Marist (of which Marist released him from this agreement); Semenov and Flores had orally committed to the school but did not sign a NLI; and Moore was being recruited but had not announced his decision. Three of the recruits (Wells, Moore, and Semenov) all played for James Madison University in during the 2008-2009 season, which was Brady's first, and were key contributors to the 20-win season. The fourth recruit, Flores, deferred his enrollment and joined the program for the 2009-10 season.

As a result of Brady's actions, Marist College filed suit against not only Brady, but also the Commonwealth of Virginia and JMU (*Marist College v. Brady, the Commonwealth of Virginia and James Madison University*, 2011). In the lawsuit, Marist officials claim that not only did Brady fail to follow the clauses in his contract, but that Brady and JMU failed to respond in any way to talks over the course of the year between the hiring of Matt Brady and the filing of the lawsuit that could have potentially prevented the need for litigation (Lobdell, 2009). Since the clause prohibiting Brady from talking to or recruiting any player he tried to recruit is an extension of the standard liquidated damage clause and covenant not to compete clause found in most coaching contracts, the next section examines the validity of such a non-recruit clause.

Validity of the Non-Recruit Clause

In exploring the validity of the non-recruit clause as presented in the *Marist College v. Brady* (2009) case, there are several specific issues to address. First, is to explore whether the non-recruit clause prohibiting Brady from contacting and offering scholarships to any of the players he was recruiting while at Marist constitutes a valid legally enforceable clause or should be considered a penalty clause. In order for the clause to be enforceable, it must have some relationship to the actual damages suffered by Marist College. If the non-recruit clause is not related to the actually damages suffered by Marist, but is merely a penalty clause designed to punish Brady, the court will not enforce such a clause. The second area of discussion is by applying the New York court rules to Brady's contract, whether or not the two prong test is fulfilled. The next area of discussion is whether the non-recruit clause violates public policy. In particular, the clause's negative impact on the freedom to contract and on the third party athletes who are not a party to Brady's

contract with Marist College, nor receive any benefits from the contract will be examined. Beyond the legality of the clause itself, it is also important to look at the impact on the student athlete in this case. Finally, upon discussing the aforementioned areas, this section will conclude with a discussion of how to calculate monetary damages in cases such as this one.

Liquidated Damage Clause

In drafting Brady's contract, Marist College tried to protect its interests by recognizing the cost of recruiting athletes and the negative impact any disruption in the basketball program, especially during recruiting would have on the athletic department and college. By inserting the non-recruit provision into Brady's contract, a clause the school included in every coach's contract (Satterfield, Croft, Franklin, Godfrey, & Flint, 2010), Marist College was trying to protect those interests by forcing the coach to leave his athletes and recruits behind. In determining whether such the clause is valid, there must first be an examination of the difference between a valid liquidated damage clause and an unenforceable termination penalty. Generally, when used in coaching contracts, a liquidated damage clause or a covenant not to compete is intended to protect the competitive advantage of the school, while at the same time not overly restricting the coach's future earning possibilities (Caughron, 2007). As seen in the cases discussed in the previous section, the courts will enforce a liquidated clause or a restrictive covenant clause as long as there are found to be reasonable. In determining a liquidated damage clause or a restrictive covenant is reasonable, the Restatement (Second) of Contracts states:

> [a] promise to refrain from competition that imposes a restraint . . . is unreasonably ... if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. (American Law Institute §188(1)).

In addition, a post-employment restraint may impose a hardship on the employee if it "inhibits his personal freedom by preventing him from earning his livelihood if he quits" (American Law Institute, §188(1)). In elaborating on this basic rule, the state of New York courts

have stated that two prongs must be met: (a) the restrictive covenant must be reasonably limited in terms of time and geographic scope, and (b) that the restrictive covenant is necessary to protect its legitimate business interests (*Reed Roberts Associates, Inc. v. Strauman,* 1976). These two prongs will be addressed in the next section.

Meeting the Two Prong Test

By applying the New York court rules to Brady's contract, it could be argued that the first prong is satisfied: that the restrictive covenant is reasonably limited in terms of time and geographic scope. For example, for a restrictive covenant to be reasonable with regard to the durational requirement, the courts have held that the restriction should be no longer than is necessary to protect the interest of the employer (*Liautaud v. Liautaud*, 2000). Therefore, even though there is no clearly defined time frame in the contract, since the contract only prevents Brady from offering scholarships to current Marist basketball players or to any persons that he or his staff recruited to play basketball at Marist the scope of the covenant should reasonably only be limited to a period of four years or less. As for the reasonableness of the geographical restrictions, the courts will look at the nature of the competition in a particular geographical area drawing a distinction between direct and indirect competition (Perillo, 2003). Therefore, while the Massachusetts courts in *Northeastern University v. Brown* (2004) found direct competition by the schools on the field and in recruiting players, Marist College and JMU do not compete against one another, and are not in the same athletic conference; Marist College is a member of the Metro Atlantic Athletic Conference, while JMU is a member of the Colonial Athletic Conference. In addition, the two schools are not within reasonably close proximity to one another. Unlike Northeastern and the University of Massachusetts which are in the same state and recruit within the same regions, Marist College and JMU are in different states 420 miles away from one another.

If Marist was able to show that it meets the first prong of New York's two part test, it would have a harder time proving the second prong: that the restriction is necessary to protect its legitimate business interests. For example, it would be difficult for Marist to support the second prong and show that the restrictive covenant was necessary to protect its trade secrets or other confidential information essential to its

business since the players being recruited would probably be known to most college basketball coaches and were probably profiled in one or more national recruiting services. In addition, while Brady may be a good coach and recruiter, and there may be a special relationship between Brady and the current and prospective basketball players, since the schools do not directly compete against each other, the direct harm may be difficult to establish. Finally, with over 340 Division I men's basketball coaches in the country it may be difficult to argue that what Brady does is special or unique. Next, even if Marist was able to show that it met both elements for a restrictive covenant, it must still show that the clause is not an unenforceable termination penalty. This argument was used with no success in the *DiNardo* case, where DiNardo argued that the liquidated damages provision was a "thinly disguised overly broad non-compete provision and constituted an unenforceable penalty under Tennessee law" (*Vanderbilt v. DiNardo*, 1999, p.755). In rejecting DiNardo's argument, the district court ruled that both parties understood and agreed that the coach's resignation would result in damage to the university beyond the cost of hiring a replacement (*Vanderbilt v. DiNardo*, 1999).

Generally "... a contract clause is unreasonable and is hence a penalty when the amount required to be paid by the clause is invariant to the gravity of the breach" (*Mau v. L.A. Fitness International*, 2010, p. 850). The reasoning behind this rule is that "...if the amount of damages is invariant to the gravity of the breach, the clause is probably not a reasonable attempt to estimate actual damages and thus is likely a penalty" (*Checkers Eight v. Hawkins*, 2001, p. 562). Therefore, if the sole purpose of the clause is to secure performance of the contract, the provision will be deemed an unenforceable penalty. In applying the above rule to Brady's contract, it could be argued that since Marist College inserted the non-recruit clause in every coach's contract, regardless of the sport, the revenue generated by the sport or success of the coach and team, the non-recruit clause has no relationship to the actual damages suffered by Marist due to Brady's breach of contact. As such, the clause is merely a penalty intended to secure performance, and not compensate Marist for any actual damages to the school.

Violation of Public Policy

Generally a restrictive covenant may not be broad enough to violate the public policy such that it limits the employee's skill, labor, and talent (Williston & Lord, 2004). While this is a very broad definition, the courts have established a sliding scale such that the more narrowly the restrictions on activities are defined, the broader the limitations may be in terms of time and space (Blake, 1960). One such factor examined is whether the particular activity the employer wishes to restrict is based upon an employee's natural talent and ability. For example, one court may appear more willing to restrict the activities of an employee when these skills and abilities were conveyed to the employee through the former employer's expense and effort (*New River Media Group, Inc. v. Knighton*, 1993). In addition, the courts are unwilling to enforce restrictions against activities of an employee where the talents and abilities of the employee are considered ordinary or less than ordinary and thus easily replaced (*Cullman Broad Co. v. Bosley*, 1979).

In the *Brady* case, since Marist College was attempting to restrict an activity, (i.e., his recruiting), the question was whether Brady's talent as a recruiter was based primarily upon his natural talent and ability or developed over his time as employment as coach at Marist College. The restrictive covenant (non- recruit clause) also raises the issue of whether prohibiting him to contact the recruits was too broad of a restriction as it limits his skill, talent, and livelihood as a collegiate coach. This is especially important when it is considered that coaches have a limited time in which to win before the school starts looking for a new coach, and they win by recruiting the best players they can. In addition, when examining the enforceability of the non-recruit provision, the courts can also look at the hardship that both the employee and employer would suffer if the restrictions were or were not enforced. For example in *Northeastern University v. Brown* (2004), the court concluded that Northeastern would suffer the greater hardship if Brown left to coach at the University of Massachusetts. In weighing the hardship or economic harm the two parties would suffer as a result of the clauses enforcement, it is clear that the non-recruit clause did not have any immediate effect on Brady's ability to get another job, as evidenced by his new job at JMU paying him a greater salary. That is not to say that the non-recruit clause has no impact, however. The restrictions set forth in the contract

would restrain Brady from not only using his natural skills and talents to his best advantage (recruiting), but may also threaten Brady's ability to move on to higher profile job by hindering his success at James Madison. In prohibiting Brady to utilize his skills in recruiting, it harms the quality of product put on the court by the schools. As for the injury suffered by the employer, Marist College, since they are not challenging Brady's move, the only real damages they suffered would be limited to the cost of recruiting. Also, the hardship caused to the men's basketball program from Brady's actions, particularly, the recruiting of four prospective student athletes.

Impact on the Student-Athlete

In regards to the impact on the student, throughout the recruiting process an athlete usually bases a large part of their decision to attend a given institution on who holds the current head coaching position (Satterfield et al., 2010). While acknowledging that it understands that it is a student athlete's right to choose an educational institution, Marist College claims that the purpose of the non-recruit clause is to limit the impact that Brady leaving would have on their basketball program. The problem with this argument is that while Brady signed the contract, none of the four recruits signed the contract or even had knowledge of the contract. Therefore, Marist College is trying to enforce a contract clause against a group of individuals who are not parties to the contract between Marist and Brady and can be seen as negatively impacting the athlete's educational opportunities.

Under contract law, the courts have long recognized that certain contracts, though properly entered into in all other respects, will not be enforced, or at least not enforced fully, if found to be contrary to public policy (Giesel, 2003). This raises the question of what is public policy? While public policy may be difficult to define as a general rule, it is based upon judicial notions of sound social policy and human welfare so what violates public policy in one jurisdiction, may not violate public policy in another (Giesel, 2003). While public policy may be difficult to define, what is clear is that the courts have found "... a strong public policy favoring freedom to contract" (*Computrol, Inc. v. Newtrend,* 2000, p. 3). Therefore, any restrictive covenant, such as non- recruit clause, that restricts the freedom of non-parties, the four recruited

players, to enter into contracts accepting scholarships to JMU would generally be deemed void as against public policy.

Estimation of Potential Damages

Even if Marist College were to win the lawsuit against Brady, there still exists the issue of how to calculate monetary damages. Generally, the court would award the injured party, in this case Marist College, expectation interests. In awarding expectation interests, the court tries to award damages to the injured party equivalent to what they expected from the contract had it not been breached. The goal therefore is to put the non-breaching party in the same position they would have been had the contract not been breached (Hillman, 2004). Under this theory, since Marist College gave Brady permission to accept another job, the only damages they would have suffered are those related to recruiting costs and the money equivalent or value of the four recruits who joined Brady at JMU.

This poses the difficult question of how to calculate those damages? In looking at the four recruits who came to JMU, only two are starters on the basketball team, Julius Wells and Devon Moore. Wells, whom Marist released after he had already signed a NLI with Marist, was the CAA Rookie of the year in 2008/09 and is a 2011/12 Pre-Season All-CAA player, who has averaged 12.9 points and 4.9 rebounds per game over his career. Moore, who was only being recruited and had not announced his decision on which school to attend, made the second team 2011/12 All-CAA, and has averaged 11 points and 3.4 rebounds per game over his career. The other two, Andrey Semenov, who along with Trevon Flores had orally committed to the Marist but had not sign a NLI, have had limited roles on the James Madison basketball team. Semenov has only started 6 games in three years at James Madison and is averaging 7.7 points and 3.5 rebounds per game. While Flores, who averaged 2.8 points and 2.4 rebounds per game with 13.7 minutes per game, is no longer part of the team ("Junior forward", 2011).

The problem with calculating the actual damages suffered by Marist by Brady's breach of the non-recruit clause is the uncertainty surrounding all the factors that go into a successful basketball team. For example, how do you value or calculate the number of minutes the four players played or the type of impact the four would have had of the Marist basketball team? In addition, would the four players have had the

same success at Marist without Brady or did Brady's coaching and the talent of the other players on the team contribute to their success? Since none of these questions can be answered with certainty, it would be impossible for the court to award Marist College expectation interests.

Conclusion

Four years later, while the case is still tied up with the lawyers and the issue is still unclear, what can researchers and future athletic administrators learn from the case? First, it is clear that as long as a liquidated damage clause is reasonably related to the actual damages a party can suffer, the courts will allow their use in employment contracts. The same is true for restrictive covenants, which are reasonably limited in terms of time and geographic scope and are necessary to protect a legitimate business interests. Second, because the non-recruit clause used by Marist College, not only restricted Brady's opportunity to use his natural talent and ability in recruiting, but also the right of the athletes' to choose an educational institution, the use of such a clause will have a difficult time being upheld based on public policy concerns. Finally, because of the impossibility of determining exact damages, it would have been wise for Marist College, and future schools interested in using such language, to spell out the value it placed on the recruitment of prospective athletes and provided a specific damage figure Brady was to pay for his breach of the no-recruit provision. If Marist had included such a clause, it would have been easy for the courts to determine the appropriate remedy and the case would probably have been settled before the students left JMU. Therefore, if Marist College or any other school would like to include such a clause in future coaching contracts, it should spell out the damages the coach must pay for taking each recruit in very specific and implicit language to avoid circumstances like this in the future.

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