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"MAGIC" OR MISERY?: HBCUS, GUARANTEE CONTRACTS, AND PUBLIC POLICY

John Lillig*

I hate it. I wish we didn’t have to play those games... I think somewhere down the line, our conference, our institutions have to come up with some type of way so we don’t have to play those games and take that money... I don’t care what you say, I don’t think you get better getting beat by 30 points.

Larry Wright, Head Men’s Basketball Coach, Grambling State University, 2007.1

I. INTRODUCTION

On January 3, 2009, the University of Arkansas-Pine Bluff (UAPB) men’s basketball team began its Southwestern Athletic Conference (SWAC)2 season with a 74-52 home victory over Mississippi Valley State University (MVSU).3 While UAPB still had eighteen games remaining in a campaign that would last another three months, that first win of 2009 signaled a new beginning for the Golden Lions. Prior to its triumph over the Delta Devils, UAPB was 1-10.4 It had played all of its games on the road. Furthermore, many of its losses were lopsided, including fifty-point losses at the hands of Purdue University (90-40) and the University of Missouri (95-41).5

Despite suffering defeat at the hands of the Golden Lions on that early January night in Pine Bluff, the Delta Devils might have been

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2. SWAC member schools include Alabama A & M, Alabama State, Alcorn State, Grambling State, Jackson State, Mississippi Valley State, Prairie View A & M, Southern University, Texas Southern and Arkansas-Pine Bluff. See SWAC, http://www.swac.org/ (last visited January 21, 2009). All are HBCUs (see infra Section II).


able to commiserate. Before the game with UAPB, MVSU was 0-13. It had played all but one game on the road. And its losses included a forty-point loss to Georgia and a fifty-one-point loss to Washington State. In fact, the entire SWAC needed a breather. On January 3 the ten conference teams’ combined record stood at 15-101.

This conference-wide ineptitude resulted from the systematic scheduling of so-called “guarantee games,” in which lower-tier NCAA Division I conference schools contract with high-ranking Division I schools from “major” or BCS conferences for large payouts. Many basketball teams from mid- and lower-tier Division I conferences rely on guarantee games to finance their programs, and sometimes their school’s entire athletic programs. Most affected, however are the historic and significant HBCUs, or Historically Black Colleges and Universities, which currently make up two of the most disadvantaged Division I athletic conferences.

7. Id.
8. Id., supra note 4.
10. The Bowl Championship Series (“BCS”) is an arrangement between major Division I football schools whereby the champions of six conferences (“BCS conferences”) and two other teams are selected to play in four major “Bowl” games at the end of the season. NCAA, Bowl Championship Series, http://www.ncaa.org/wps/ncaac?ContentID=40459 (last visited January 22, 2009). The BCS ranks teams and selects the top two for a so-called “national championship” game. The BCS has drawn criticism because it is often unclear if the “champion” is truly the best team in the country, and drawn allegations of antitrust violations because teams from non-BCS conferences rarely get selected for its games. For example, after the 2009 season, Utah (13-0), of the Mountain West, a non-BCS conference, was the only undefeated Division I team, but was not selected for the “national championship” game. Both Utah attorney general Mark Shurtleff and then-President-elect Barack Obama questioned that result. BCS coordinator: system in compliance, ESPN, Jan. 8, 2009, http://sports.espn.go.com/ncf/bowls08/news/story?id=3818921. BCS conference identification is relevant when discussing sports other than football because of the large streams of money available to BCS conference schools through their football teams’ participation in the BCS. (See Bowl Championship Series, supra). The six BCS conferences are the Southeastern, Big Ten, Big 12, Big East, Pac-10 and Atlantic Coast. BCS Coordinator, supra.
11. “Basketball” in this article will refer to Men’s College Basketball unless otherwise specified.
12. In addition to the SWAC (See supra note 2), the other HBCU Division I conference is the Mid-Eastern Athletic Conference (“MEAC”) whose member schools include Bethune-Cookman, Coppin State, Delaware State, Florida A & M, Hampton, Howard, Maryland-Eastern Shore, Morgan State, Norfolk State, North Carolina A & T, South Carolina State, and Winston-
Guarantee contracts provide valuable funds for cash-strapped athletic departments, but they result in repeated, demoralizing blowout losses for teams and arduous road trips away from classes for players and coaches. Most insidiously, reliance on guarantee contracts assures both continued funding for athletic programs and the unlikelihood that those programs will succeed. As a result, some guarantee contract terms may be unconscionable or void as against public policy. Even if guarantee contracts are legally enforceable, alternate strategies of contracting, based on HBCU football games and some basketball tournaments, may help HBCUs break away from the cycle of adversity that currently afflicts them on and off the basketball court—an adversity profoundly at odds with their prestige and historic pasts. A remedy, whatever its nature, is sorely needed. According to SWAC Commissioner Duer Sharp, "We cannot continue to have this situation."\(^\text{13}\)

II. Background

Identification as an HBCU is an official United States government designation. According to the Higher Education Act of 1965, an HBCU is

any historically black college or university that was established prior to 1964, whose principal mission was, and is, the education of black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education] to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation.\(^\text{14}\)

The White House Initiative on Historically Black Colleges and Universities lists ninety four-year HBCUs currently in existence.\(^\text{15}\) Four-

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\(^\text{Salem State. Meacsports.com, Member Institutions, http://www.meacsports.com/ (last visited on January 21, 2009). One measure of the two conferences’ relative competitive weakness is that a MEAC or SWAC school has played in the NCAA Division I Men’s Basketball tournament opening-round game (the so-called “play-in game”), featuring the two lowest-ranked tournament qualifiers, each year from 2002-08. See Marc Carig, Battling Against ‘Stigma’ of Play-In, WASH. POST, March 11, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/10/AR2007031000825_pf.html; see also Mount St. Mary’s pulls away from Coppin State, ESPN, Mar. 18, 2008, http://sports.espn.go.com/ncb/recap?gameId=280782154. The NCAA Division I Men’s Basketball tournament is discussed further at note 28 infra.}\(^\text{13}\)

\(^\text{Crise, supra note 4.}\(^\text{14}\)

\(^\text{20 U.S.C. § 1061(2)(as amended 2008).}\(^\text{15}\)

teen percent of all African American students in higher education are enrolled in HBCUs.\footnote{16}

\section*{A. The Cultural and Athletic Tradition of HBCUs}

On March 16, 2008, ESPN\footnote{17} debuted \textit{Black Magic}, a four-hour, two-part film that "tells the story of the injustice that characterized the civil rights movement in America as told through the lives of basketball players and coaches who attended historically black colleges and universities."\footnote{18} In conjunction with the film, ESPN.com published a list of the Top 10 All-Time HBCU players; the list included such NBA\footnote{19} stars as Earl Monroe and Willis Reed.\footnote{20}

\textit{Black Magic} documents the key role that HBCU teams played in the development of modern basketball. Black players, who were systematically excluded from the all-white campuses of mid-20th century universities, instead brought their talents to HBCUs.\footnote{21} The film "persuasively argues that basketball in the 1940s and 1950s at what we now call historically black colleges and universities—programs like Tennessee State, Winston-Salem and Bethune-Cookman—was faster-paced on offense and more determined on defense."\footnote{22} Strategic innovations by coaches such as John McLendon and players such as Monroe, Reed and Elgin Baylor helped push the game into the modern era, creating the fast-paced, entertaining style that characterizes modern basketball.\footnote{23}

The unique identity and pride forged in these troubling times can still be glimpsed at some HBCU athletic events. ESPN annually televises the conference tournament of the Division II Central Intercollegiate Athletic Association (CIAA),\footnote{24} the nation's oldest league of

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\begin{itemize}
\item \footnote{17} ESPN (Entertainment and Sports Programming Network, Inc.), is a television network founded in 1979 that broadcasts more than 65 sports. Encyclopaedia Britannica, \textit{ESPN, Inc.} http://www.britannica.com/EBchecked/topic/192762/ESPN-Inc (last visited February 6, 2009). ESPN.com is ESPN's official web site.
\item \footnote{19} National Basketball Association.
\item \footnote{20} \textit{HBCU All-Time Top-10}, supra note 18.
\item \footnote{21} Aaron Barnhart, 'Black Magic': Only the lines were white, TVBARN.COM, http://blogs.kansascity.com/tvbarn/2008/03/black-magic-only.html (last visited February 6, 2009).
\item \footnote{22} Id.
\item Id.
\item \footnote{24} CIAA members include Bowie State, Chowan (A football-only member and the only non-HBCU,) Elizabeth City State, Fayetteville State, Johnson C. Smith, Livingstone, Saint August-
historically black schools. The CIAA tournament symbolizes the unique combination of school pride, cultural celebration and athletic tradition often alive at HBCU athletic events. The tournament serves "as a giant reunion for alumni and friends of historically black colleges and universities." Held in Charlotte, North Carolina in 2008, the CIAA tournament was expected to be more lucrative to the local economy than the ACC tournament or the NCAA Tournament East Regional.

B. The Modern Financial Plight of HBCUs

Despite their storied history and governmental recognition, HBCUs' athletic departments are struggling. "Frustration is palpable among HBCU athletic administrators, exhausted from trying to stretch a dollar and keep flailing programs alive with little to no help from the university, graduates, or even the state." While former HBCU athletes and administrators at the January, 2008 NCAA convention spoke of pride and resourcefulness, "pluck and moxie only gets you so far, particularly in a world ruled by dollars and cents." According to ESPN.com writer Dana O'Neil, "There is a genuine and legitimate fear that. . .[HBCUs] . . . are in a battle they are no longer equipped to fight and that the proud programs of the past could disappear altogether."

A sign of HBCU economic woes is the disparity in athletic budgets between HBCUs and other Division I schools. Delaware State University, of the MEAC, had the biggest annual athletic budget of all

26. Id.
28. Associated Press, CIAA Tournament, supra note 25. The NCAA Division I tournament is held each March to conclude the basketball season. 65 teams are invited to the tournament, including a representative from each of the 31 Division I conferences (usually the postseason conference tournament champion) and 34 at-large teams selected by a committee. The 16 second-round winners qualify for "Regional" competition. NCAA, NCAA Division I Men's Basketball Championship Information: Championship Structure, http://www.ncaa.org/wps/wcm/connect/resources/file/ebf4d445242e708/09ChampStructure.pdf?MOD=AJPERES&attachment=true (last visited January 21, 2009).
30. Id.
31. Id.
HBCUs at $17.2 million. This figure pales in comparison with those at most NCAA Division I schools, ranking 124th out of 339.

One reason for the decline in the fortunes of HBCU athletics is that integration of all schools, especially in the south, opened up opportunities to black athletes that were not there before. As more black athletes (and students) went to formerly all-white schools, HBCU enrollment (and athletic success) declined. HBCUs are still "a source of accomplishment and great pride for the African American community as well as the entire nation," but they must continue to adapt to a changing national landscape.

C. Guarantee Games

As noted above, guarantee games are nonconference matches, usually between high-profile, high-ranking Division I schools from BCS conferences and low-profile, low-ranking schools from non-BCS conferences. The agreements (or "guarantee contracts") that govern these games typically stipulate that they are played on the home court of the "major" school, and stipulate a large payment, or "guarantee" that the host school contracts to pay the low-ranking visitor. The on-court result is usually a resounding victory for the hosts: "They call them guarantee games for a reason. Little school X takes a five-figure paycheck from Big School Y, travels across the country and loses by 40. The guarantee is for the home squad." Mike Gillespie, former coach of HBCU Florida A & M (FAMU) has said of the benefits of guarantee games, "I'm guaranteed a paycheck. [The BCS conference school is] guaranteed a win." Guarantee games have proliferated in number and increased in prominence over the past several years, as the guarantee payments associated with them have risen.

The proliferation of guarantee games has been a concern to some who follow college basketball. Kyle Whelliston, a college basketball writer and blogger, has analogized guarantee games to fixed boxing

32. Id.
33. Id.
34. Id.
35. White House Initiative, Home Page, supra note 16.
matches, distinguishing the two solely because “[i]n college basketball, paying an opponent a large sum of money to take a loss is completely legal and acceptable behavior. In fact, athletic departments openly include these payments in their publicly-published budgets!”

While guarantee games (and guarantee contracts) are an issue of concern within all of college basketball, they are a more pressing issue to HBCUs. In February, 2008, all but four members of the MEAC and all members of the SWAC had RPI rankings in the 200s. Such teams are attractive opponents to BCS-conference teams looking for easy non-conference home games. Conversely, the prospect of a large guarantee payment may be difficult to pass up for HBCUs pressed for cash to fund their athletic budgets: “That’s the way of the world in the MEAC. You bring your overmatched team into a high-powered program’s arena for a five-figure check that helps keep an entire athletic department afloat.”

Said Coppin State coach and athletic director Ron “Fang” Mitchell: “That buys a lot of baseballs, golf balls and uniforms.”

While providing needed funds for HBCU athletic departments, guarantee contracting also produces significant non-financial consequences. Continually playing (and losing) by wide margins lowers the RPI of HBCUs. Since half of the RPI is derived from opponents’ winning percentages, the guarantee game blowouts can have a sort

38. Id. Despite his concern, Whelliston concludes that “things work out on balance” because a BCS-conference school that were to schedule too many guarantee games would suffer in the RPI rankings (see infra note 40) and risk not being selected for the NCAA tournament. This conclusion is unconvincing due to the sheer number of BCS-conference schools continuing to schedule guarantee games. As noted infra note 77, BCS-conference schools scheduled 69 games with HBCUs alone over approximately seven weeks in late 2008 and early 2009, or an average of almost 10 such games a week.


40. O’Neil, supra note 29. The Ratings Percentage Index, or RPI, is a ranking system employed by the NCAA to aid the selection committee (see supra note 28) for the NCAA tournament in selecting teams: “Several independent elements are combined to produce the RPI. These elements are a part of the statistical information that may or may not be utilized by each [committee] member in any manner they choose.” NCAA, NCAA Division I Men’s Basketball Championship Information: Principles and Procedures, http://www.ncaa.org/wps/wcm/connect/resources/file/eb23c44cbf0c0f09PrinciplesandProcedures.pdf?MOD=AJPERES&attachment=true (last visited January 21, 2009). While the NCAA’s description is short on specifics, college basketball observers, including Jerry Palm, have ascertained the formula and publish RPI rankings during the season. The RPI has become important to schools because it helps determine whether they make the tournament or not. CollegeRPI, FAQ, http://collegerpi.com/ (last visited January 21, 2009).


42. Id.

43. CollegeRPI, supra note 40.
of geometric effect: HBCUs with already-low RPIs might lower them further simply by playing their conference opponents who have also suffered guarantee game blowouts: "The annual series of unwinnable nonconference games have made the SWAC the nation’s lowest-rated conference in each of the past three seasons."44

Other effects of guarantee games are harder to quantify but may be just as significant from a policy standpoint. "The losses chip away not only at the league’s RPI but also at its collective psyche."45 Players and coaches both feel the effects. Howard University head coach Butch Beard said: "Those kids suffer tremendously. . .It can take us 2-3 weeks to get them back to believing they can compete."46 Grambling head coach Larry Wright stated, "I hate it. I wish we didn’t have to play those games."47 And Alcorn State player Troy Jackson said, "You just get beat up mentally. . .You start believing, ‘Man, we can’t win. We’re never going to win a game.’ and it carries over into the conference season. The losing, it just eats at you."48

Beyond the perhaps-immeasurable psychological harm of systematic guarantee contracting, the financial ramifications of a guarantee game schedule may be more complicated than they initially seem. "The irony at Alcorn is the basketball team sees hardly any of the money it brings in. The guaranteed money is put into a general fund—not a general athletics fund but a general university fund."49

D. Recent Guarantee Game Contracts

The terms of four guarantee game contracts signed in 2007 by HBCUs with BCS-conference schools or third-party promoters illustrate the large payouts available to HBCUs for such games. The contracts signed with BCS-conference host schools generally provide those schools with significantly greater opportunities for revenue generation, victories, and developing fan and public goodwill than they afford the HBCUs. Contracts signed with third-party promoters may increase the opportunities for victory and goodwill for the HBCUs, but in exchange for reduced guarantees. Furthermore, these third-party contracts are even more lucrative for the BCS-conference schools than for HBCUs.

44. Glockner, supra note 1.
45. Id.
46. Forde, supra note 41.
47. Glockner, supra, note 1.
49. Id.
1. HBCU Guarantee Contracts: “Traditional” Guarantees

Three guarantee contracts entered into by HBCUs in 2007 illustrate the guaranteed payouts, travel and ticket arrangements typical of guarantee games. These contracts arranged games played in late 2007 or early 2008, during the “nonconference” phase of the 2007-08 season. All three contracts committed an HBCU (Florida A & M and Norfolk State of the MEAC and Jackson State (JSU) of the SWAC) to play on the home court of a BCS-conference school (The University of Connecticut (UConn) of the Big East, the University of Nebraska of the Big 12, and the University of California (Cal) of the Pacific 10). UConn guaranteed FAMU $77,000 for coming to the northeast to play a game on November 26, 2007.50 The contract did not require that FAMU’s expenses be taken out of the guarantee. The one-page contract contains a term specifying ticket arrangements and a force majeure term.51 (Curiously, for reasons that are unclear, the contract also prohibited Florida A & M from bringing its band, cheerleaders or mascot to the game.)52

Cal guaranteed JSU $65,000 to fly from Mississippi to the Bay Area to play on December 5, 2007. The contract stipulates that Cal would pay JSU’s “airfare, ground transportation, hotel, and meals” out of the guarantee.53

Nebraska guaranteed Norfolk State $60,000, “minus ground transportation” and 12 hotel rooms for two nights to play the Cornhuskers in Lincoln on November 20, 2007.54 However, the contract specified

51. Id.
52. Perhaps this was a prudent term for UConn to include. FAMU’s marching band, known as the “Marching 100,” is known for its vibrant and theatrical performances at football games, and is often as much of an attraction as the game itself. Their presence in an indoor basketball arena might be impressive and intimidating to FAMU’s opponent. See FAMU, Marching 100, http://www.famu.edu/index.cfm?a=marching100&p=welcome (last visited January 21, 2009. It is not clear whether the Marching 100 ever travels to non-conference road basketball games.
that $40,000 of the guarantee be paid to "C.I. Travel" and $12,000 to "Fleet Management" with the rest going to Norfolk State University.\(^5\) This may suggest that under some "guarantee" contracts, the amount of money actually reaching the university may be a relatively small percentage of the contractual guarantee. Alternatively, it could suggest that Norfolk State may have negotiated the contract in such a way as to satisfy obligations to third parties or creditors. Both possibilities would be consistent with HBCU athletic departments' financial difficulties.

2. **HBCU Guarantee Contracts: Tournaments**

A slightly different model of guarantee contracting exists where universities contract with third-party promoters who set up and run tournaments. The contract terms for the same event may vary widely depending on the school. One such third-party promoter is Basketball Promotions, Inc. (BPI) who ran the Las Vegas Holiday Invitational tournament from November 18 to November 24, 2007.\(^5\)\(^6\) One of the schools BPI contracted with to play in the tournament was the University of North Carolina at Chapel Hill (UNC), a BCS-conference school and perennial basketball powerhouse.\(^5\)\(^7\) Another school BPI contracted with was South Carolina State University (SCSU), an HBCU and MEAC member. The two schools' contracts with BPI display widely divergent terms.

In contrast to the "traditional" guarantee contracts discussed above, SCSU was guaranteed only $30,000 by BPI to participate in the tournament.\(^5\)\(^9\) However, the round-robin tournament format provided that SCSU would play four games. Two games were on the road, including one at UNC, and two "final round" games were on a neutral floor in Las Vegas.\(^5\)\(^0\) Terms in the contract stipulate that BPI would pay all of SCSU's "hotel, bus transportation, and airfare accommodations" to and from Las Vegas,\(^5\)\(^1\) and provide 50 free tickets to the Las Vegas games.\(^5\)\(^2\)

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55. Id.
57. Id.
59. Id. at para. 5.
60. Id.
61. Id. at para. 4.
62. Id. at para. 10.
While the guarantee may be less than half of the $77,000 Connecticut paid FAMU for a guarantee game, or the $65,000 California paid JSU, SCSU’s travel expenses are not deducted from the guarantee, as they were for JSU. In addition, because of the inclusion of some other non-BCS schools in the tournament, there was a greater chance that they might win a game.63

UNC’s terms, however, are even more attractive than SCSU’s. UNC’s contract stipulates that it must pay a guarantee to BPI of $120,000, and that it must pay its own expenses to Las Vegas.64 However, the contract also stipulates that UNC would be selected to host two early-round games in the tournament and would be able to keep all revenues from those games. In addition, UNC was to receive 200 free tickets to the Las Vegas rounds of the tournament.65

It is somewhat difficult to determine the precise benefit to UNC from these contract terms without knowing the amount of revenue it can generate from home basketball games. However, it is a reasonable inference that that revenue, for one of the top teams in the country, located in a basketball-mad state, would be substantial. The terms of this contract allow UNC to effectively pay a guarantee of $120,000 for two home games, roughly comparable to the 2007 going price for two guarantee games, based on the Nebraska and California contracts discussed above. However, UNC gains a total of four games for that price instead of two. It is also possible that the excitement of a “tournament” would marginally increase gate revenue for the two home games.

Contracts with third-party promoters for tournaments may allow for more attractive terms for both HBCUs and BCS conference schools than traditional guarantee games. However, the contract terms available to the two groups of schools remain disparate from each other.

III. Analysis

The terms of the guarantee contracts provide generous compensation to HBCUs and may appear to justify HBCUs’ systematic regimen of guarantee contracting. However, players and coaches suggest that guarantee contracts also engender mental and emotional hardships for

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63. SCSU did in fact defeat Iona 81-76 in Las Vegas. In their other tournament games, they were blown out at UNC 110-64 and lost at Old Dominion 64-54 and to Hartford 80-72 in overtime in Las Vegas. Scsuathletics.com, 2007-2008 SC State MBB Final Statistics, http://www.scsuathletics.com/ (last visited January 23, 2009).
64. North Carolina Men’s Basketball Agreement, supra note 58, at para. 4.
65. Id. at para. 14.
HBCU personnel. They force student-athletes to spend even more time away from school than other Division I athletes. Furthermore, the practice of guarantee game contracting seems to contribute to and perhaps perpetuate financial difficulties for some HBCU athletic departments. In this context it is reasonable to question whether guarantee game contracts may violate contract law by being unconscionable or void as against public policy in certain situations.

A. Unconscionability

1. Procedural and Substantive Unconscionability

The doctrine of unconscionability has two elements: procedural and substantive. Modern views of procedural unconscionability often involve contracts between, on the one hand, a sophisticated, often corporate party, and on the other hand, an unsophisticated entity or individual.66 For example, evidence that would constitute procedural unconscionability has been said to consist of a lack of understanding of contract terms arising from fine print, complex legalistic or "boilerplate" language, disparity in sophistication or bargaining power of the parties. Another example of a court's formulation of procedural unconscionability is that it addresses whether a party had a reasonable opportunity to read and understand the terms of the contract.67

Modern discussions of substantive unconscionability have found it where the terms of the contract are one-sided or overly harsh, which occurs where the terms are "shocking to the conscience," "monstrously harsh," or "exceedingly calloused."68

In 2002, a federal district court held that a health club chain's employee arbitration agreement was unconscionable, and therefore unenforceable.69 The court held the agreement was procedurally unconscionable where the chain's regional human resources director, an attorney, had given employees insufficient time to review the complicated agreement and threatened employees that if they did not sign the agreement, they would not be promoted.70 As a result of these "high-pressure" tactics, and the disparity in bargaining power between the parties, the plaintiff employee "reasonably felt she had no choice" but to sign the agreement.71

70. Id. at 383.
71. Id.
The court also held the agreement was substantively unconscionable, where the agreement unreasonably favored the health club chain.\textsuperscript{72} The agreement allowed the chain to unilaterally modify the employee contract at any time, potentially binding employees to a contract they would have never seen. The agreement denied the plaintiff employee the right to proceed in court with a pending sexual harassment claim against the chain.\textsuperscript{73}

2. Are Guarantee Contracts Unconscionable?

It may appear that guarantee contracts inherently involve one "more powerful party" and one "imposed-upon party;" certainly the BCS schools are "more powerful" than non-BCS or HBCUs in terms of financial resources and facilities. These advantages are generally quantified in the RPI and top 25 rankings\textsuperscript{74} and reflected in the score of many guarantee games. Nonetheless, this disparity in power does not alone appear to constitute unconscionability under the law. In the context of the modern court discussions of unconscionability, guarantee contracts are likely not unconscionable.

This is because, unlike "imposed-upon" parties to procedurally unconscionable contracts, it seems that HBCUs do have "meaningful choice" as to whether to enter into guarantee contracts. HBCUs appear to have wide choice with regard to where and when they can play guarantee games,\textsuperscript{75} as shown from the large number of different BCS schools entering into guarantee games with HBCUs in 2008.\textsuperscript{76} HBCUs also likely have some freedom to negotiate the amount of the

\textsuperscript{72} Id. at 384.

\textsuperscript{73} Id.

\textsuperscript{74} During the basketball season, the Associated Press and ESPN.com/USA Today publish rankings (based on writers' (AP) or coaches' (ESPN/USA Today) votes) of the Top 25 basketball teams in the nation on a weekly basis. See ESPN, Men's Basketball Rankings, http://sports.espn.go.com/ncb/rankings (last visited January 22, 2009).

\textsuperscript{75} Provided, of course, that the game is a road game for the HBCU. Among the 69 games played between HBCUs and BCS conference members between November 14, 2008 and January 7, 2009, only one was played on the home court of the HBCU. Perhaps not coincidently, the game resulted in a win for the HBCU: Howard University defeated Oregon State 47-45 in Washington, D.C. on November 14. Howard-bison.com, Myatt, White Combine To Lead Howard To Big Win Over Oregon State, Nov. 14, 2008, http://www.howard-bison.com/sports/mbkb/2008-09/news/Myatt-__White_Combine_To_Lead_Howard_To_Big_Win_Over_Oregon_State (last visited January 22, 2009).

guarantee and perhaps some other terms.\textsuperscript{77} In addition, none of the contracts examined above appear to contain fine print or boilerplate or legalistic language. Furthermore, it cannot reasonably be said that an HBCU or other non-BCS school is "unsophisticated," where the institution enters into numerous game contracts in numerous sports each year and employs a general counsel among many other athletic and university administrators.

With regard to substantive unconscionability, it may first appear that terms of guarantee contracts are "unreasonably favorable to the more powerful party," where the non-BCS school must go on the road to play, often multiple times in short succession and often suffers blowout losses. However, it is doubtful that the requirement of a road game alone would rise to the level of a term that would "impair the integrity of the bargaining process."

Furthermore, non-BCS and HBCUs receive generous payouts in exchange for going on the road for a blowout loss. Neither the road requirement nor the size of the payout would suggest a contract that is "shocking to the conscience," "monstrously harsh," and "exceedingly calloused." Thus guarantee contracts in their present form are likely not unconscionable.

\textbf{B. Possible Unconsciousness of Cancellation Terms}

Some other common NCAA athletic contracts, such as scholarships and the national letters of intent (NLI)\textsuperscript{78}, may be unconscionable. While such contracts are distinguishable from guarantee game contracts, they help to explain which specific terms of guarantee contracts are legally problematic.

\begin{footnotesize}
\textsuperscript{77} According to Whelliston, "The little guys are getting good at the game, too - they know that big schools need to fill up their early-season schedules . . . and this drives the scheduling process into the summer and the prices into the stratosphere. 'I'm just amazed at how it goes into September because guys hold out for something more,' says Notre Dame associate head coach Sean Kearney." Whelliston, \textit{supra} note 37. Neither Kearney nor Whelliston was discussing HBCUs in particular, however.

\textsuperscript{78} "The NLI is a voluntary program with regard to both institutions and student-athletes . . . By signing a National Letter of Intent, a prospective student-athlete agrees to attend the designated college or university for one academic year. Pursuant to the terms of the National Letter of Intent program, participating institutions agree to provide athletics financial aid for one academic year to the student-athlete, provided he/she is admitted to the institution and is eligible for financial aid under NCAA rules. An important provision of the National Letter of Intent program is a recruiting prohibition applied after a prospective student-athlete signs a Letter of Intent. This prohibition requires participating institutions to cease recruitment of a prospective student-athlete once a National Letter of Intent is signed with another institution." NCAA, \textit{About the National Letter of Intent}, http://www.ncaa.org/wps/portal/nli (last visited January 23, 2009).
\end{footnotesize}
NCAA student-athletes preparing to receive NCAA athletic scholarships must execute the NLI and their university's statement of financial aid. These agreements may be unconscionable.\textsuperscript{79} Both the NLI and financial aid statements are "standardized-form adhesion contracts"\textsuperscript{80} that may be "viewed as oppressive by the courts because of the gross inequality of bargaining power between the two parties."\textsuperscript{81} There also is the element of surprise present in both documents due to their incorporation by reference of NCAA legislation, essentially concealing the terms of the contract to the young student-athlete.\textsuperscript{82}

While guarantee contracts may be standardized to a certain extent (a reasonable expectation for schools that enter into numerous athletic contracts each year), and are prepared by the BCS-conference host or the third-party promoter, none of the guarantee contracts discussed above contains fine print or would be difficult to read for the reasonably educated person. In addition, the contracting schools cannot reasonably be viewed as disproportionately unsophisticated in the same way as the young athletes signing the NLI and financial aid statement.

However, some guarantee contracts are analogous to athletic scholarships in terms of the lack of freedom to cancel the contract and find alternative opportunities. The NLI and financial aid statements may be substantively unconscionable due to NCAA rules that allow schools to revoke scholarships without cause but prohibit an athlete from receiving a scholarship elsewhere unless he\textsuperscript{83} obtains permission from the current institution.\textsuperscript{84}

Guarantee contracts' cancellation terms widely vary. For example, Connecticut's contract with FAMU provides that in the event of a breach, the breaching party is required to pay the non-breaching party $77,000, the amount of the guarantee.\textsuperscript{85} California's contract with JSU contains a more detailed term, stipulating that in the event of a breach the breaching party pay the non-breaching party $50,000, less

\textsuperscript{79} "[T]he combination of oppression and unfair surprise directed towards student-athletes leaves no doubt that athletic scholarship contracts are procedurally unconscionable. . . . the terms and provisions . . . are unreasonably favorable to the NCAA and its member institutions, [constituting] substantive unconscionability. Therefore, athletic scholarship contracts are unconscionable contracts of adhesion Sean M. Hanlon, Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?, 13 SPORTS LAW. J. 41, 74 (2006).

\textsuperscript{80} Id. at 70.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 71.

\textsuperscript{83} The prohibition applies to all NCAA athletes of both genders.

\textsuperscript{84} Id. at 72.

\textsuperscript{85} Article of Agreement, supra note 50.
than the guarantee of $65,000. The term defines this amount as "a reasonable estimate of the actual damages that would be suffered" and that it represents "liquidated damages and not a penalty." By contrast, however, Nebraska's contract with Norfolk State contains two terms related to cancellation. The first provides that Norfolk State pay the amount of the guarantee ($60,000) to Nebraska "for cancellation of this scheduled event." Such a term apparently contemplates a unilateral cancellation by Norfolk State, and the contract contains no similar term providing for damages in the event that Nebraska were to cancel the game. The inclusion of a harsh cancellation term for the non-BCS school, combined with the lack of a cancellation term for the BCS school, would appear to be analogous to Hanlon's description of the substantive unconscionability of NCAA scholarship contracts. It would appear to constrain the non-BCS school to playing the game, once the contract is executed, while the BCS school remained free to "shop around" for other opponents (perhaps those that would accept a lower guarantee). However, immediately following the cancellation term in the Nebraska-Norfolk State contract is a term stipulating that "[t]he contest can only be cancelled or rescheduled by mutual agreement of both institutions." This term would appear to be in conflict with the previous term to the extent that Nebraska would not be able to unilaterally cancel the game without agreeing with Norfolk State to do so. While the contract does not provide for a remedy for Norfolk State in that event, presumably Norfolk State would be free to sue for the amount of the contract or for specific performance (forcing Nebraska to honor the contract and play the game).

Such varying cancellation terms suggest that some guarantee contracts may contain substantive terms that may be unfair in the manner of scholarship contracts. As noted above, however, guarantee contracts are not procedurally unconscionable in a way analogous to scholarship contracts, which would likely leave any finding of substantive accountability alone insufficient for a final finding of unconscionability.

C. Contracts Void as Against Public Policy

While the harsh terms of guarantee game contracts likely do not rise to the level of unconscionability, some of those terms may be

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86. Athletic Agreement, supra note 53, at para. 6.
87. Id.
88. Athletic Contract, supra note 54, at para. 3.
89. Id. at para. 4.
contrary to public policy. The Restatement (Second) of Contracts declares that a contract is unenforceable on grounds of public policy if legislation so provides or if "the interest in its enforcement is clearly outweighed in the circumstance by a public policy against the enforcement of such terms."90 Thus, a determination as to whether a contact is unenforceable due to public policy is a case-by-case determination that requires an examination of the facts of the particular situation and public policy interests relevant to that situation.

The Restatement lists a number of factors that should be taken into account in "weighing the interest in the enforcement of a term . . . ;" these include:

(a) the parties' justified expectations,
(b) any forfeiture that would result if enforcement were denied, and
(c) any special public interest in the enforcement of the particular term.91

In addition, "in weighing a public policy against enforcement of a term, account is taken of:

(a) the strength of that policy as manifested by legislation or judicial decisions,
(b) the likelihood that a refusal to enforce the term will further that policy,
(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
(d) the directness of the connection between that misconduct and the term."92

In attempting to apply this balancing test in the context of guarantee contracts, it is important to first note that there are strong interests in favor of enforcement of a contract bargained for between two universities. Both parties would likely have justified expectations that the contract would be enforced, and if enforcement were denied, each party would forfeit something of significant value: a guaranteed payment or a home game with significant revenue.

D. Public Policies Against Enforcement of Guarantee Contracts

Relevant public policies that might weigh against enforcement of a HBCU guarantee contract term include the federal government's recognition of HBCUs, students' contractual relationship with universities and students' standing as third-party beneficiaries to contracts between the NCAA and universities. Also weighing against the en-

91. Id.
92. Id.
forcement of such contracts are universities’ possible duties to educate their students and deal with them in good faith.

However, courts have been hostile to student claims brought against the NCAA and member universities. Even if relevant public policies weigh against enforcement of guarantee contracts, they might not be overcome by judicial recognition of the universities’ interests in and expectation of the contracts’ enforcement.

1. White House Recognition of HBCUs

The official policy of the executive branch is that HBCUs’ educational mission, institutional stability and financial health should be supported and sustained. Each President since Jimmy Carter has signed an executive order establishing or furthering programs specifically charged with supporting HBCUs. On September 15, 1981, President Ronald Reagan signed an executive order establishing the White House Initiative on Historically Black Colleges and Universities. The most recent Executive Order relating to HBCUs was signed by President George W. Bush on February 12, 2002. The order was issued, in part, to “. . .strengthen the capacity of historically black colleges and universities to provide the highest quality education. . .” The order created an advisory committee in the Office of the Secretary of Education and charged it with creating an annual report. Guidelines for the report include the stipulation that, “Particular emphasis should also be given. . .to enhancing institutional planning and development, strengthening fiscal stability and financial management, and improving institutional infrastructure. . .to ensure the long-term viability and enhancement of these institutions.”

The actions of Presidents Carter, Reagan, George H.W. Bush, Bill Clinton and George W. Bush have established a strong public policy in favor of sound financial management, institutional health and ultimately, the preservation of HBCUs. This articulated public policy would seem to favor avoidance of arrangements such as guarantee contracts that might create unhealthy financial dependencies, limit the quality of education for student-athletes, and engender emotional or psychological hardship for staff and student-athletes.

93. List, supra note 15. As of September 3, 2009, President Obama had not yet signed such an order.
96. Id.
97. Id.
98. Id.
2. A University’s Contractual Relationship With a Student

A university’s system of guarantee contracting could violate public policy if it caused the university to breach its contractual relationship with its student-athletes. The student-university relationship is essentially contractual in nature, and the terms of the contract may include statements in publications disseminated by the university or provided to the student. Students may sue universities for a breach of this contract. However, courts have generally held that students must allege the breach of very specific and objectively verifiable promises to state a cause of action.

One of the only cases to allow a suit to go forward alleging less specific promises made by a university involved a college basketball player. In Ross v. Creighton University, the Seventh Circuit allowed a former Creighton University basketball player’s breach of contract lawsuit to go forward despite the fact that the promises the player alleged the university made to him “were neither particularly specific or capable of objective measurement.” The court read the complaint to allege that the university had made the promise “. . . that he would be able to participate in a meaningful way in that [basketball] program because it would provide certain specific services to him.”

Guarantee contracts could be challenged by a student-athlete who alleges that a university’s guarantee contracting practices violate the university’s contractual relationship with the athlete. Under the usual standard, the athlete would have to allege the breach of specific promises, which might only happen if the coach or athletic representative had explicitly said, “We won’t play any guarantee games while you’re here,” or something substantially similar. This is unlikely because schools with a policy of scheduling guarantee games often warn players of exactly what they’re getting into. Alcorn State assistant coach Jason Cable has said, “We tell guys when they sign [a letter of intent] ‘Sign at your own risk.’”

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99. While the eleventh amendment to the Constitution may bar some contract suits against state universities due to state immunity, in other situations private and public universities may be similarly situated. 46 A.L.R. 5th 581 (1997).

100. 15A Am. Jur. 2d Colleges and Universities § 25

101. 15A Am. Jur. 2d Colleges and Universities § 45

102. Hazel Glenn Beh, Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing, 59 Md. L. Rev. 183, 204 (2000), (citing Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992)).

103. Id. at 211.

104. Id. (quoting Ross, 957 F.2d at 417).

Under a more relaxed Ross standard, a student-athlete might be able to bring a suit for breach of a vaguer promise. For instance, an athlete could allege that he had been led to believe that he would have adequate time and conditions to study, a promise breached by numerous road guarantee games with substandard travel and accommodations. Or an athlete could allege that he was promised an environment in which his basketball skills would improve, a promise breached by numerous games against far-superior opponents that provide little opportunity for execution and skill practice. Such suits might be foreclosed by the disclaimers HBCU coaches offer recruits: “You need to recruit kids that are capable of playing that kind of a [guarantee game] schedule and kids that want to play that kind of schedule,” said UAPB coach George Ivory. Nonetheless, the contractual nature of the student-university relationship is important in understanding the limits public policy interests might place on HBCUs’ contracting policies.

3. A University’s Duty to Educate and the Student as Third-Party Beneficiary

Courts have recognized the existence of a special relationship between athletes and universities. In Kleinknecht v. Gettysburg College, the Third Circuit found that the school’s active recruitment of a student-athlete created a special relationship between the parties, that the relationship in turn required that the university provide a special standard of care to student-athletes, and that such a duty’s financial and administrative costs did not outweigh the public policy of protecting athletes. In addition, the Colorado court of Appeals’ decision in Bloom v. NCAA recognized that student-athletes have standing to sue the NCAA as third-party beneficiaries to the contract between the NCAA and its member institutions. In Bloom, a Colorado football player and world-class skier sued the NCAA to enjoin it from prohibiting him from playing football while receiving endorsement money related to his professional skiing.

106. Crise, supra note 4.
108. Id. at 768.
110. Id.
"MAGIC" OR MISERY

Courts’ recognition of this duty and standing may make it easier for athletes to sue the NCAA itself for institutions’ (or institutional personnel’s) violation of NCAA regulations or bylaws.\textsuperscript{111}

Congress has also recognized the special relationship between athletes and universities by the requirement that universities disclose certain information about student athletes to the Department of Education.\textsuperscript{112}

Guarantee contracts that demand significant time away from study without a compelling educational purpose could perhaps rise to the level of violating a university's duty to educate a student. Even if one individual guarantee contract might not constitute such a violation, perhaps a policy of numerous guarantee contracts may. If the purpose of such contracts is fundamentally pecuniary gain, this also may call into question whether a university is adequately “protecting” a student and instead prioritizing financial concerns. Athletes could also allege that a systematic policy of scheduling guarantee contracts, with its repeated blowouts, long trips, and substandard accommodations breaches a university’s duty to “protect” athletes’ physical and psychological health. Such student arguments at HBCUs might likely be foreclosed by universities’ insistence that they prepared the student-athletes for what they were getting into. Furthermore, \textit{Kleinknecht} is distinguishable from a guarantee game scheduling situation because it concerned a fatality. The athlete in \textit{Kleinknecht} was a lacrosse player who died after suffering cardiac arrest at a practice where no trainers were present, supervised by two coaches who had never discussed emergency procedures. Furthermore, the nearest telephone was 300 yards away behind an eight-foot cyclone fence.\textsuperscript{113}

4. Judicial Responses and Standard of Review

These public policies may not call into question the enforceability or prudence of guarantee contracts in any case. However, judicial responses to litigation against the NCAA and member institutions suggest that any claims based on such duties or policies may be unlikely to succeed in the courts.

Courts have historically deferred to the NCAA and universities in cases involving student athletes.\textsuperscript{114} Courts have historically been reluctant to interfere in NCAA dealings because the NCAA is a voluntary association, and have generally intervened only when the

\begin{itemize}
  \item \textsuperscript{111} Id. at 928-9.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1363 (3rd Circuit 1993).
  \item \textsuperscript{114} Eckert, \textit{supra} note 109, at 913.
\end{itemize}
NCAA's actions have been found to be arbitrary and capricious. Some courts have applied the even more lenient standard of bad faith.\textsuperscript{115}

This deferential standard of review applied to individual colleges and universities is analogous to the Business Judgment Rule that courts apply to corporate boards of directors. The Business Judgment Rule presumes that directors act in good faith and in the best interests of the company.\textsuperscript{116} However, "university officials who make decisions regarding the welfare of these athletes (coaches, athletic directors, faculty members, or high level officials) face inherent conflicts of interest."\textsuperscript{117} "[T]he staggering sums of money at stake in Division I basketball and football may shift the priorities of university officials from acting in the best interests of their respective schools."\textsuperscript{118}

However, this deferential standard could be disregarded in favor of a stricter one that would be more appropriate to the circumstances of student athletes.\textsuperscript{119} Under the stricter formulation, basketball and football players at Division I schools pursuing breach of contract claims against the university or the NCAA could argue that their performances generate revenues that create these conflicts of interest.\textsuperscript{120} Athletes would likely need to show that the alleged harmful actions of the university "sprang directly from the conflict between the university's financial welfare and the welfare of the athlete."\textsuperscript{121}

HBCU athletic departments enter into guarantee contracts precisely because of the critical state of department finances. In this way, the "harmful action" of engaging in a guarantee contract policy does "spring directly" from the conflict between the university's financial welfare and the welfare of the athlete. A basketball player on a team playing guarantee games, especially those requiring long flights, missed class and spartan conditions, endures these trials precisely because of an institution's stressed financial posture. The only tangible benefit is financial, and the benefit may not be enough to justify the cost. Such an athlete may have an opportunity for a remedy, but the appropriate one may be monetary damages, not the cancellation of game contracts, guarantee or otherwise.\textsuperscript{122} In the absence of the adoption of the stricter standard, however, courts may continue to

\textsuperscript{115.} \textit{ld.} at 913-4.
\textsuperscript{116.} \textit{ld.} at 915.
\textsuperscript{117.} \textit{ld.}
\textsuperscript{118.} \textit{ld.} at 916.
\textsuperscript{119.} \textit{ld.} at 917.
\textsuperscript{120.} \textit{ld.}
\textsuperscript{121.} \textit{ld.}
\textsuperscript{122.} \textit{ld.} at 933-4
show reluctance to invalidate student-athlete contract claims against universities.

5. The "Public Service" Exception

At least one other area of contract law may provide persuasive authority for the proposition that a system of guarantee contracting violates public policy, at least at state universities. The West Virginia Supreme Court has held that a university owes a duty of care to athletes on university athletic teams when it encourages them to participate in any sport. The court held that a contract (a release form) signed by the plaintiff, a club rugby player, was void as a matter of public policy.

The underlying law and the court's application of it, while currently narrowly applicable to anticipatory releases, provides persuasive authority that could be applied to protect student-athlete rights under a system of guarantee contracting at a state university. The court declared the release in question invalid under a contract law doctrine that declares unenforceable any contract clause that exempts from tort liability a party "charged with a duty of public service." The court concluded that this "public service" exception applied to West Virginia University. The court reasoned that

When a university provides recreational activities to its students, it fulfills its educational mission, and performs a public service. As an enterprise charged with a duty of public service . . . the University owes a duty of care to its students when it encourages them to participate in any sport.

Application of this contract law doctrine to invalidate a system of guarantee contracting would require an expansion of the law and is probably beyond what courts are currently willing to do, even in situations involving a state university. Nonetheless, the court's analysis of the "public service" exception is noteworthy in that it (1) recognizes a state university's duty to perform its public service of educating its students; (2) recognizes that student athletics are an aspect of that public service; (3) recognizes that universities that encourage student

123. 40 of the 90 4-year HBCUs are public institutions. List, supra note 15.
124. Kyriazis v. University of West Virginia, 450 S.E.2d 649, 655 (W.V. 1994). (While the name of the institution involved is officially West Virginia University (See West Virginia University, The History of WVU, http://wvuniversity.wvu.edu/historyofwvu (last visited September 17, 2009)), the caption of the case lists the defendant as "University of West Virginia").
125. Id.
126. Id. at 653-4 (quoting the Restatement (Second) of Contracts § 195(2)(b)-(c) (1979).
127. Id. at 655. See note 124, supra.
128. Id.
participation assume responsibilities toward the students; and (4) recognizes students' right not to be bound by contracts that purport to absolve universities from fulfilling those responsibilities. While unlikely in the near future, courts may eventually apply such analysis to invalidate institutionalized practices, like guarantee contracting, that compromise a state university's mission of education to the student-athlete in conflict with public policy.

E. Alternate Forms of Contracting: Examination of HBCU Football Contracts and the Big Apple Classic

In the absence of widespread recognition of university duties or public policies that would cancel or discourage basketball guarantee contracts, universities and especially HBCUs, may need to consider alternate models of contracting to ameliorate the financial, emotional and psychological strain caused by the current system. Two possible models of contracting already exist: the “Classic” model utilized by HBCU football programs, and a modest but innovative attempt to expand the “Classic” model to basketball through the “Big Apple Classic.”

1. Football Contracts: The Circle City Classic

A unique element of HBCU athletic culture is the “Classic,” an annual matchup between two HBCU football squads, often held in a neutral, sometimes northern city and featuring musical and black cultural programming in addition to the game. In 2006 there were 41 such classics, headlined by the most famous one, the Bayou Classic featuring Grambling State University and Southern University, played in New Orleans’ Superdome. 129

Some classics have evolved into four- and five-day events featuring golf tournaments, parades, concerts and job fairs. 130 Classics have become, along with guarantee games, the major funding sources for many HBCU athletic departments. 131 According to Southern athletic director Greg LaFleur, “It’s a huge asset to our department...There’s no other way you can generate that kind of revenue.” 132 The Bayou Classic alone provides a third of Southern’s athletic budget. 133

130. Id.
131. Id.
132. Id.
133. Id.
Classics provide several advantages over guarantee games, including that they are played every year, in large cities, and against traditional rivals. Furthermore, Grambling athletic director Troy Mathieu noted, Classics serve other purposes besides revenue generation: "[They] take[ ] our universities into other parts of the country and serves as a recruiting tool for not only athletics, but our universities as a whole."

In October, 2007 FAMU’s football team took on fellow HBCU Winston-Salem State University (WSSU) in the Circle City Classic in Indianapolis, Indiana. The contract FAMU executed for the Classic could be adapted to serve as a model for HBCUs in developing a whole new mode of contracting for Men’s basketball.

FAMU’s Circle City Classic contract contrasts with the typical Men’s basketball contract in that it is sixteen pages long rather than one or two pages. The other party to the contract is not WSSU, but a third party, an established Indiana not-for-profit corporation, Indiana Black Expo, Inc. (Expo). As its name suggests, Expo’s contract with FAMU concerned not merely the football game but also various related black-cultural themed events held in conjunction with the game that celebrated HBCU and black culture, likely helping attract attendance and enhancing attendees attachment and goodwill to the participating universities.
The feeling inspired by such a positive and wide-ranging cultural celebration contrasts with the sentiments likely engendered by a sparsely attended weeknight blowout basketball loss suffered in a road venue. If alumni even know about such an event, their reaction may likely be shame, or at least disappointment.

The “Circle City” contract provides for a guarantee fee of $150,000 to FAMU, plus “reasonable and necessary” expenses.\textsuperscript{138} This guarantee is significantly larger than even the largest guarantees HBCU Men’s basketball teams can command from BCS-conference foes. As noted above, Men’s basketball contracts also typically provide that the team’s expenses be paid out of the guarantee, both lowering the take-home amount and incentivizing HBCUs to scrimp on expenses to the discomfort and inconvenience of the student-athletes.

The contract also provides for a $25,000 bonus to FAMU if attendance at the game exceeds 57,000.\textsuperscript{139} This not only provides an opportunity for the school to make more money, but it incentivizes the school to market the game and encourage student, fan and alumni attendance. In addition, it provides the kind of opportunity that is absent from most Men’s basketball guarantee contracts: a measure of investment in the event that the school can utilize to its advantage.

\section*{2. A Basketball Application: The Big Apple Classic}

Since 2006, the Big Apple Classic (BAC) has attempted to apply some of the principles of HBCU “Classic” football contracting model to basketball. The 2008 BAC, held on December 6 in New York’s Madison Square Garden, featured a basketball doubleheader with games between CIAA members Virginia Union and Bowie State and MEAC members Howard and Hampton.\textsuperscript{140} Prior to the doubleheader were a college fair, a drumline competition, exhibitions, a D.J., food and bands.\textsuperscript{141}

While the programming of the BAC echoes the all-encompassing cultural focus of the Classics, the contract terms for the event reveal a

\begin{footnotes}
\footnotetext[138]{Game and Parade Contract, \textit{supra} note 136, at para. 2.01.}
\footnotetext[139]{Id. at para. 2.06.}
\footnotetext[141]{Big Apple Classic, \textit{Schedule}, http://www.thebigappleclassic.com/ (last visited January 24, 2009).}
\end{footnotes}
contrast to both the Classics and guarantee games. First of all, Bowie State's contract with the third-party promoter, Johnson, Inc., (Johnson) executed in 2006, committed the school for six years of annual games.142 This is an unusually long duration for a basketball contract, which is usually for one year, and occasionally for two or three. Second, the contract provides for only a modest annual guarantee, starting at $5000 and gradually increasing to $12,500 by the sixth year of the contract.143 While Bowie State is a Division II school, and may not be able to command the guarantee amounts that Division I schools could, this amount is far below the guarantee amounts provided for in the other HBCU guarantee contracts examined. Third, the contract stipulates that this amount be earmarked specifically for a Men's basketball scholarship at Bowie State,144 so it may not be put toward funding other expenses in the athletic department like the funds harvested from guarantee games and the Classics. The contract further provides that Johnson pay for Bowie's transportation from Maryland to New York (albeit by bus), its lodging and a team meal.145

These terms may reveal more than anything else that the market is untested as to this type of event. The gradually increasing amounts of the scholarship payment perhaps suggest that the parties contemplated that the event would increase in popularity and therefore economic benefit. Furthermore, the funding of a basketball scholarship is an important expense for any athletic department, and for a Division II school may be even more important. It is also in keeping with the holistic spirit of the Classics in that it emphasizes the providing of an education rather than merely moneymaking. If the BAC proves to be a success, this model of contracting may be more attractive to HBCU basketball programs in the future.

IV. Proposal

Whether their current guarantee contracts violate contract law, HBCUs (and perhaps other NCAA institutions) would be better served by adopting Men's basketball contracting strategies similar to those of HBCU football games. HBCU basketball teams could highlight destination events celebrating African-American traditions and

143. Id. at para. 4.
144. Id.
145. Id. at paras. 6, 7, and 8.
culture, rather than playing guarantee games away to major Division I foes and losing by wide margins.

The new model of contracting could not only follow the football Classic example, but could also incorporate features of the third-party tournament promoter contracts some HBCUs already utilize. Such arrangements, like those of the Las Vegas Invitational discussed above, provide for the host school to pay a large fee, usually about the same or larger than it would otherwise pay as a guarantee fee, to the promoter in exchange for the promoter inviting all the other teams, paying their guarantees, and paying the expenses. The host school then gets to keep whatever revenue it earns from the games, less the fee to the promoter. (See discussion above at II(D)(3)). Currently many of these tournament games are hosted by BCS-conference schools—those with whom the HBCUs might otherwise sign guarantee contracts—rather than HBCUs themselves.

HBCUs could instead set up their own tournament. Ideally, such a tournament could be known as the HBCU Invitational, but informally known as “The Black National Championship.” It could involve all HBCUs playing college basketball, from Divisions I, II and III. The tournament could replace some or all of the guarantee games HBCUs currently play during November and December. Scheduling during this period would avoid conflicts with conference games. Also, November and December are traditionally the nonconference portion of the season when many “holiday” tournaments, such as the Las Vegas Invitational are scheduled. The tournament format could be modeled on that of the NCAA tournament, with “pods” of four or eight teams each playing an elimination mini-tournament over a weekend at a neutral site, with the winners moving on to a Regional tournament at another site. These sites could be located across the South, in the states where HBCUs predominate,146 with the occasional site in a northern city with a large HBCU alumni base or black fan base. This aspect of the plan follows directly from the “Classics.” Black National Championship games could even be held on the same weekend (but not the same dates) as some of the “Classic” games; the basketball games could be held on the Friday and Sunday while the football game would remain the centerpiece of the weekend on the Saturday. Tournament games could incorporate the type of cultural celebration that the football games currently include, such as performances by the HBCUs’ famous bands. Ideally, schools could generate more revenue

146. Seventy-six of the 90 4-year HBCUs are located in Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Texas, or Virginia. See List, supra note 15.
and more goodwill from this plan than they do from even the large guarantee contracts they currently sign. However, perhaps the biggest benefit to HBCUs would be the elimination of the long roadtrips, blowout losses, inconvenience to athletes and demoralization that characterize the current guarantee game situation.

Schools' contracts for the tournament would be structured as hybrids of the “Classic” model, the Las Vegas Invitational model and the Big Apple Classic model, with some new terms. Like the “Classics,” the contracts would stipulate musical and cultural programming and obligations for the participating schools. This would be necessary to establish the tournament as a black cultural destination and engender investment by the schools in the event. Like the Las Vegas Invitational, the contracts could identify certain HBCUs as host schools and stipulate different ticket, fee and transportation arrangements depending on whether the contracting school was a host. Like the Big Apple Classic, the contracts could specify that some or all of the guarantee money could be earmarked for scholarships, and the contracts could commit the schools to multiple-year participation in the tournament.

The tournament contracts would need to include new terms in order to make the event viable. Most importantly, in order to make participation worthwhile for all schools, the guarantee money would have to be shared in some way, so that a school losing in the first round would not receive so little money to make a guarantee game with a BCS-conference school more attractive. A certain percentage of all proceeds could be pooled for the benefit of all participating schools, with the remainder awarded to the individual schools based on how far they proceeded through the tournament. Alternatively, the tournament could include a “loser’s bracket” that would guarantee each team at least two games.

The “HBCU Invitational” tournament plan is not a panacea, of course. Football is king in the fall at many HBCUs, and the Black National Championship might not draw large crowds if fans’ attention remained on football. Alternatively, if its games are well-attended, the basketball tournament could detract from attendance at the Classics. Furthermore, the schools may be perceived by some observers as improperly segregating themselves from the college basketball mainstream by spurning college basketball’s best to play only other black schools in an exclusive tournament. With regard to the financial arrangements, the distribution of funds could prove to be unworkable, with winning schools balking at sharing money with losers, or “loser’s bracket” games drawing few fans and dragging down prestige.
These are real arguments which must be weighed against the current scheme of large financial guarantees accompanied by blowouts, long trips and demoralization. However, the tournament proposal has the potential to develop into a new event that can stand on its own, neither impacting nor being impacted by the football games. First of all, the tournament model would employ the exciting elimination format of the NCAA tournament. This could be enhanced by the inclusion of Division II and III schools, which along with their fans will be excited for the chance to knock off a Division I school. Second, it will crown a single champion, something the Classics — for all their cultural value, pomp, and celebration — do not do. It will bring a new and unique prestige to the schools who win, or even those who make “The Black Final Four.” Third, there may be a group of fans who would not attend the Classics who would attend the tournament. Basketball games are shorter than football games, and basketball is played indoors, out of the elements. Basketball is also arguably more popular among young people than football, especially as a spectator sport. Fourth, the games could be scheduled to least conflict with football—at night, for instance—and in cities with large HBCU alumni or Black populations that do not currently host a Classic. The tournament might have initial difficulties attracting attendance, but after it gets off the ground it has the potential to truly grow into an eagerly-anticipated annual highlight of the collegiate sports calendar.

It certainly is possible that the tournament model would not make as much money for the HBCUs as the current guarantee games do. However, a tournament based on this proposal has potential to be much more of a destination “event” than guarantee games ever could be. HBCU fans’ attendance at dozens of football “Classics” each year shows there is a lucrative market for HBCU athletics when paired with cultural programming at a neutral location and marketed by a knowledgeable and culturally aware promoter. Entrepreneurs with a sense of community awareness and appreciation for Black history and HBCU sports could be recruited to set up third-party entities that could contract with the schools to host tournament games. Such entrepreneurs could demonstrate their commitment to the local community and to African American culture by promoting a weekend of tournament games. Teams would play before enthusiastic crowds of alumni and local supporters. Schools could gain scholarships and

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147. An example of a competition that generates this type of excitement is English Soccer’s FA Cup, whose annual matches between lower- and upper-division teams annually engender excitement often described as “magic.” See SoccerNews, FA Cup magic this weekend, Dec. 28, 2008, http://www.soccernews.com/fa-cup-magic-this-weekend/10996/.
some money for operating costs. There would be no more discouraging road blowouts, no games with only hostile fans, and no long road-trips away from school.

Careful economic studies would have to be done to gauge pricing and potential attendance. However, the current situation may be about as worse as it can get for HBCUs. The systematically scheduled slates of guarantee-game blowout losses far from home do little good for the schools' images or the players' confidence, and not much better for the athletic departments' bottom lines. They arguably threaten schools' responsibility to their students. If a tournament only breaks even, the benefit to HBCUs would be tremendous based on the gain to HBCUs image, educational mission, and goodwill.

V. Conclusion

Men's basketball guarantee contracts create repeated, demoralizing blowout losses for teams and arduous road trips away from classes for players and coaches. Reliance on guarantee contracts assurs funding for athletic programs, but makes on-court success and financial health unlikely. Some guarantee-contract terms may violate contract law principles against unconscionability. More likely, some guarantee contracts violate public policy. This may especially be true for HBCUs due to the articulated governmental interest in their preservation. HBCUs may be better served by adopting contracting strategies for Men's basketball similar to those they already use for football, combined with some used by the Las Vegas Invitational and the Big Apple Classic. If committed and culturally aware promoters can be found, such contracting strategies could be used in the creation of the HBCU Invitational, an early-season HBCU tournament that would supplant guarantee games, celebrate African-American culture and HBCU traditions, and bring a measure of financial stability to HBCU athletic programs.