Contracts are “indispensable tools” in our free enterprise society, which includes intercollegiate sports (Murray, 1990, p. 481). Courts have consistently recognized the existence of a contractual relationship between universities and student-athletes (Taylor v. Wake Forest University, 1972; Ross v. Creighton University, 1992). The National Letter of Intent (NLI) and the Statement of Financial Aid (SFA) represent the two main documents that form a contract between the parties (Hanlon & Yasser, 2008). The essence of any contract is volition (i.e. free exercise of will), which is undermined when one party enjoys an enormous bargaining advantage permitting the stronger party to dictate the terms of the contract to the weaker party (Murray, 1990). Universities enjoy an enormous bargaining advantage in dealing with student-athletes because the terms of the NLI and SFA are non-negotiable. This begs the question: do student-athletes lack volition in their contractual relationships with universities?

This study tackles that research question by analyzing the doctrine of unconscionability and its possible application to contracts between student-athletes and universities. In doing so, the history and development of unconscionability are explored. Specifically, the study analyzes the doctrine’s origins as a covert tool in courts of equity, the codification of the doctrine in U.C.C. § 2-203, and the extension of § 2-203 by analogy to include contracts that do not involve the sale of consumer goods. The study also includes analysis on the bifurcation of the doctrine into substantive and procedural unconscionability and the elements used by courts to find both types of unconscionability.

Substantive unconscionability involves unreasonable contractual obligations and procedural unconscionability involves defects in the bargaining process (Murray, 1990). The literature revealed that courts are more willing to find that a contract or contractual term is unconscionable when elements of both substantive and procedural unconscionability are found to exist (DiMatteo & Rich, 2006). Procedural unconscionability examines whether there was an absence of meaningful choice for one of the parties, while substantive unconscionability focuses on the actual contract terms and whether those terms are unreasonably favorable to the drafting party, shocking the conscience of the court (Morrison v. Circuit City Stores, Inc., 2003).

Standardized contracts can contain both substantive and procedural elements of unconscionability if found to be contracts of adhesion. Contracts of adhesion are defined as “a standard-form contract prepared by one party, to be signed by the party in a weaker position ... who adheres to the contract with little choice about the terms” (Black’s Law Dictionary, 2009, p. 366). Farnsworth (2004) identified three factors which suggest a finding that the contract is a contract of adhesion: the party offering the contract has had the advantage of time and expert advice in preparing it, the other party is relatively unfamiliar with the form contract and has little opportunity to read it, and bargaining over contract terms may not be between equals or there may be no possibility of bargaining at all. Contracts of adhesion may also be found in a “take-it-or-leave-it” contract where the party’s “only alternative to complete adherence is outright rejection” (Farnsworth, 2004, p. 558). It can be persuasively argued that each of these factors is present in the contracts between student-athletes and their universities. In addition, NCAA bylaws prohibit modification of these standard-form agreements so they are, in fact, take-it-or-leave-it contracts where a prospective student-athlete’s only alternative is to not compete.

Application of the related concepts of unconscionability and contracts of adhesion in the context of student athlete contract is a rather straightforward case on the elements. Yet, resolution of this issue remains a challenge because of the complexity of the various contractual relationships between the NCAA, the member institutions, and the student-athletes. “[T]he NCAA asserts that when a student-athlete signs his or her scholarship agreement, that contract incorporates all of the NCAA rules and regulations by reference, which provides the requisite consent” (Hanlon & Yasser, 2008, p. 243). However, Hanlon and Yasser (2008) have argued that “this consent is not legally viable” (p. 243). In particular, the elements of oppression, unfair surprise, and terms unreasonably favoring the NCAA member institution support the finding that these agreements are, in fact, unconscionable contracts of adhesion (Hanlon & Yasser, 2008).
Student-athletes have yet to challenge the validity of NLI and SFA agreements based on an argument that those documents are unconscionable contracts of adhesion. However, student-athletes could use unconscionability as a basis for challenging the application of NCAA rules and regulations by invalidating the agreements that impose NCAA rules and regulations on student-athletes. The recent and highly-publicized cases of Keller v. NCAA (2009), O’Bannon v. NCAA (2009), and Oliver v. NCAA (2009) all raise challenges to NCAA policies and procedures that could have included unconscionability as an alternate means and viable option for asking the court to refuse to enforce NCAA rules and regulations.

In Keller v. NCAA (2009), former Arizona State University and University of Nebraska starting quarterback Sam Keller claims that the NCAA, EA Sports, and the Collegiate Licensing Company have infringed the right of publicity of student-athletes and committed breach of contract by including their likenesses in EA Sports video games (Keller v. NCAA complaint, 2009). The doctrine of unconscionability could provide Keller with a way to invalidate the contractual application of NCAA regulations that prevent the compensation of student-athletes for the use of their likeness in sport video games. In O’Bannon v. NCAA (2009), Ed O’Bannon, former basketball player for UCLA, challenged contractual provisions that allow the use of student-athlete likeness in perpetuity. An argument could be made that permission to use student-athlete likeness in perpetuity without just compensation is substantively unconscionable because the provision is unreasonably unfavorable to the non-drafting party. Lastly, in Oliver v. NCAA (2009), Andrew Oliver, a collegiate baseball player from Oklahoma State University, challenged an NCAA regulation that prohibited the use of attorney advisers. The doctrine of unconscionability could have provided Oliver with an alternate way to invalidate the contractual application of NCAA regulations that restricted Oliver’s right to legal counsel.

This presentation will analyze the application of the doctrine of unconscionability and the requirements for contracts of adhesion to the contractual relationship between a student-athlete and his/her university. Through a review of the relevant sport law literature and case law, this analysis will highlight the inequities present in the contractual provisions. The policy implications of recent cases involving the contractual rights of student-athletes will be discussed and opportunities for future research will be forwarded.