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## COMMENT

# OUT OF BOUNDS: TIME TO REVAMP TEXAS SPORTS AGENT LEGISLATION

by T. Andrew Dow

**L**AST month, the Indianapolis Colts signed their number one draft choice, University of Illinois quarterback Jeff George, to a record six-year, \$15 million contract.<sup>1</sup> As the recently concluded 1990 amateur sports drafts approached, talented high school and college athletes undoubtedly pondered those numbers with amazement. Unassumingly thrust into the reality of professional sports, many questions must come to a young athlete's mind. How does he ensure that he receives his fair market value? What does he do with all that money once he receives it? In addition, because a young athlete probably lacks business sophistication, other questions likely do not come to mind. How does he structure a contract in a manner that will minimize tax liability? Where does he find commercial endorsements that will supplement his salary?

Enter the sports agent, a phenomenon of the late twentieth century. On one hand, sports agents have been called the "most destructive force in sports."<sup>2</sup> On the other hand, sports agents have been characterized as serving the necessary function of equalizing the relationship between the athletes they represent and the management of the teams with whom they negotiate.<sup>3</sup>

Where lies the balance between these countervailing views? The National Collegiate Athletic Association (NCAA)<sup>4</sup> and various professional players' associations<sup>5</sup> have attempted to strike it. They have found, however, that

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1. The Dallas Morning News, April 21, 1990, at 11B, col. 1.

2. INQUIRY INTO PROFESSIONAL SPORTS: FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. REP. NO. 1786, 94th Cong., 2d Sess. 70 (1977) [hereinafter REPORT] (statement of Harrison Vickers, Owner of the Houston Aeros).

3. *Inquiry into Professional Sports, 1976: Hearings Before the House Select Committee on Professional Sports, Part One*, 94th Cong., 2d Sess. 282 (1976) [hereinafter *Hearings*] (testimony of Martin Blackman, agent); *id.* at 285 (testimony of Jerry Kapstein, agent).

4. Memorandum from Richard J. Evrard, Director of NCAA Legislative Services, to Player Agents (Sept. 1, 1987) [hereinafter NCAA Letter] (discussing 1987-88 Player Agent Registration Program), *noted in* Kohn, *Sports Agents Representing Athletes: Being Certified Means Never Having to Say You're Qualified*, 6 ENT. & SPORTS L. 1, 18 n.58 (1988).

5. For a discussion and analysis of the certification and registration of agents by the National Football League Player's Association (NFLPA), the National Basketball Player's Association (NBPA), and the Major League Baseball Player's Association (MLBPA), see Kohn, *supra* note 4, at 7-9.

their limited jurisdictional reach impairs their attempts to curb the broad range of misdealings of unscrupulous agents.<sup>6</sup> As a result, as many as seventeen states have enacted legislation aimed at the regulation of sports agent activity.<sup>7</sup> This Comment first discusses the historical developments that prompted the need for such representation and then examines the metamorphosis of the agent's role over the past twenty years. The Comment also focuses on the various attempts to regulate the industry, with a particular emphasis on Texas legislation. In analyzing the Texas law the Comment makes recommendations to increase the scope and effectiveness of the statute as well as remove any constitutional concerns that may exist. Finally, the Comment examines the federal regulation alternative.

## I. BACKGROUND

The prominence of the sports agent is a relatively recent development in the world of sports. As recently as twenty years ago most players negotiated their own contracts.<sup>8</sup> Two primary reasons explain the late arrival of the agent into professional sports: first, until the past couple of decades the athlete had no bargaining power to use as leverage with the team with whom he was dealing; and second, even if he did, professional sports were not as popular nor as profitable as they are today.<sup>9</sup> From a strict market analysis, therefore, the industry until recently could not have survived today's multi-million dollar contracts or the factors that led to them.

### A. *Factors Increasing the Bargaining Power of Athletes*

Several events took place in the 1960s and 1970s that shifted the strength in contract negotiations to the players. First, the creation of new professional leagues gave players a workable alternative to the previous sole option of simply refusing to play.<sup>10</sup> By choosing to jump leagues a player could, in effect, hold out for as long as needed and still be paid a handsome salary while doing so.<sup>11</sup> At the same time he was able to continue playing the sport, even if in an inferior league.<sup>12</sup>

The expanded competition for the players' services and the resulting bargaining leverage paid off in areas other than increased compensation. This

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6. See *infra* notes 48-56 and accompanying text.

7. See *infra* notes 57-58 and accompanying text.

8. G. SCHUBERT, R. SMITH & J. TRENTADUE, *SPORTS LAW* 123 (1986) [hereinafter *SPORTS LAW*].

9. *Id.*

10. Since the 1960's the National Football League (NFL) has been the most challenged professional league with competition from the American (AFL), World (WFL), and United States (USFL) Football Leagues. In other sports, competition for players also arose among the National (NBA) and American (ABA) Basketball Associations, as well as the National Hockey League (NHL) and the World Hockey Association (WHA). While none of the upstart leagues ever survived as a viable alternative to the more established alliances, they did succeed in increasing the bargaining power of the players and driving up salaries. For a discussion of competition among professional sports leagues, see L. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* 331-419 (1977) & Supp. 61-68 (1981).

11. *SPORTS LAW*, *supra* note 8, at 124.

12. *Id.*

shift in negotiating power, for instance, helped transform the players' associations from meaningless organizations into powerful labor unions<sup>13</sup> that were able to dilute or abolish the option and reserve clauses present in practically every contract.<sup>14</sup> Perhaps more significantly, the players' unions began to realize the objectives that could be accomplished through the collective bargaining process. Through collective bargaining, for example, the experienced players obtained the right of free agency,<sup>15</sup> and the younger players obtained the benefits of increased minimum salaries and arbitration.<sup>16</sup> Furthermore, the average yearly salaries in each of the major sports skyrocketed.<sup>17</sup>

### *B. Factors Leading to the Increased Popularity and Profitability of Sports*

Expanded media exposure, enhanced by the increased availability of radios and televisions in the home, significantly contributed to the rise in popularity of spectator sports in America.<sup>18</sup> With the popularity of these events came high television ratings, which led to increased revenues from network, pay, and cable television contracts.<sup>19</sup> These contracts, along with the advertising and commercial activities they foster, have transformed the sports industry into a multi-billion dollar a year trade.<sup>20</sup> As a result, franchise owners are financially capable of meeting the increasing salary demands of the players and their unions, and they have demonstrated an acquiescence, albeit grudgingly, to pay the inflated salaries.<sup>21</sup>

These factors increased the bargaining power of the athlete, as well as the

13. Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701, 704 (1987).

14. *Id.* These clauses precluded athletes from negotiating with any other team in the same professional league. For a discussion of the effect of these clauses on the bargaining position of the individual athlete, see SPORTS LAW, *supra* note 8, at 124.

15. Free agency allows a veteran player without a current contract to declare himself a free agent and enter the marketplace by making his services available to other teams in the league. The result is usually a bidding war between various teams and a higher salary for the player. SPORTS LAW, *supra* note 8, at 125.

16. *Id.* For example, the MLBPA has bargained successfully for the current minimum salary of \$68,000 and mandatory arbitration after three years in the league. Fichtenbaum, Rosenblatt & Sandomir, *How Golden the Goose*, SPORTS, INC., Jan. 2, 1989, at 29 [hereinafter *How Golden*].

17. *Id.* The average salary in Major League Baseball, for example, has risen from \$19,000 in 1967 to \$438,000 in 1988. *How Golden*, *supra* note 16, at 29. Furthermore, no end to this pattern appears imminent. Just last year, the average player salary in the NFL rose to \$302,000, a 27.6% increase over 1988. King, *Inside the NFL*, SPORTS ILLUSTRATED, Dec. 18, 1989, at 68.

18. SPORTS LAW, *supra* note 8, at 126.

19. *Id.*

20. *Id.*

21. Considerable debate has arisen over whether the owners will be able to continue to meet the increasing salaries. To this point, the owners have passed some of this expense on to the fans, who are willing to pay higher prices for tickets. It is unclear, however, whether the fans will continue to acquiesce. The NBA, in addressing this concern, established a complicated salary cap system by which each team is given a maximum amount to spend on players' salaries. For a general discussion of this salary cap and the antitrust issues it raises, see Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985).

popularity and profitability of the sports world, and contributed to the creation of an environment in which an individual athlete could no longer afford to negotiate his own contract.<sup>22</sup> The stakes of the game having been raised, most athletes realized the need to hire a professional in order to reap the benefits of this increased leverage.<sup>23</sup>

### C. *Services Performed by the Agent*

Like the sports industry itself, the services performed by sports agents have undergone considerable change from the early days of mere contract negotiation. As the contracts of the athletes grow more sophisticated, so do the services agents provide. Thus, agents have become contract advisors and negotiators, financial advisors and managers, marketing consultants, and even legal and tax counselors.<sup>24</sup> This transformation into the concept of full service representation has broadened the agents' role and increased the areas of expertise they must possess. Not all agents perform all of these services, but the concept of the sports agent necessarily has been expanded to include each of them.<sup>25</sup> Broadly defined, sports agents provide three distinct services.

#### 1. *Contract Negotiation*

The oldest and perhaps the most significant service of an agent involves the negotiation of a player's employment agreement.<sup>26</sup> While the past twenty years have shown a dramatic shift in bargaining power from the ownership and management of teams to the players, most players personally lack the business sophistication to take advantage of this power.<sup>27</sup> The agent, therefore, serves as "the great equalizer" in the process of negotiation.<sup>28</sup> Inequity inherently exists in a negotiation between an experienced team official and a young man directly out of high school or college. In theory, therefore, an agent representing the athlete serves to turn a potentially one-sided negotiation into an arms-length dealing.<sup>29</sup>

The agent's representation in the contractual relationship requires not only expertise in the art of negotiation but also an understanding of complex legal and tax matters.<sup>30</sup> A working knowledge of these matters is essential for quality representation and the maximization of benefits to the agent's client.<sup>31</sup> Needless to say, such broad expertise in an agent is difficult to come by.

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22. SPORTS LAW, *supra* note 8, at 124.

23. *Id.* at 126.

24. Ehrhardt & Rodgers, *Tightening the Defense Against Offensive Sports Agents*, 16 FLA. ST. U.L. REV. 633, 638-39 (1988) [hereinafter Ehrhardt].

25. *Id.*

26. Sobel, *supra* note 13, at 705.

27. REPORT, *supra* note 2, at 71.

28. *Hearings*, *supra* note 3, at 282 (testimony of Martin Blackman, agent).

29. *Id.*

30. Ehrhardt, *supra* note 24, at 639.

31. *Id.*

## 2. *Financial Services*

After completing the task of contract negotiation, the athlete bears the burden of managing a large income. Realizing this, many opportunistic agents act as financial consultants and income managers to the athletes they represent.<sup>32</sup> Prudent agents, aware that professional athletes have a limited career span, will place the athlete's income in financially sound investments with the goal of long-term financial security.<sup>33</sup> As in the negotiation process, accomplishment of this goal requires the agent's knowledge of legal and tax issues.<sup>34</sup>

## 3. *Marketing*

Commercial endorsements and public appearances provide today's athletes with income opportunities in addition to employment contracts and investments.<sup>35</sup> Some agents, therefore, have taken it upon themselves to solicit such opportunities on behalf of their clients.<sup>36</sup> If marketed properly, a talented athlete can significantly increase his yearly income through a variety of activities that commercially capitalize on his name and reputation. Furthermore, unlike the more traditional services provided by the agent, this assistance may last well into an athlete's retirement.

### D. *Types of Agent Misconduct*

Two general categories describe the most common forms of agent misdealing: incompetency and unscrupulousness. The latter represents the most publicized failing of the industry, but is no more damaging to the client than the former.

#### 1. *Incompetency*

As mentioned earlier, sports representation has evolved from mere contract negotiation into a full service industry whereby agents have become financial advisors and planners, securities brokers, marketing consultants, and legal and tax counselors.<sup>37</sup> Obviously, very few individuals have expertise in all of these areas, and many agents have no experience in any of them.<sup>38</sup> Realizing a lack of expertise in a certain field, many agents will, in the best interest of their clients, seek out professionals to perform some of these services. Greed, however, prevents some from soliciting aid because such fastidiousness results in lower fees in their pockets. Furthermore, they are competing against other agents who offer a prospective client a full range of services. If the agent is honest and manifests a lack of knowledge in a

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32. SPORTS LAW, *supra* note 8, at 132.

33. Sobel, *supra* note 13, at 708.

34. *Id.* at 709.

35. Ehrhardt, *supra* note 24, at 638-39.

36. *Id.*

37. See *supra* notes 24-36 and accompanying text.

38. For a general discussion of incompetency among agents, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS 319-21 (1979) [hereinafter J. WEISTART].

certain area, he will not be as attractive to a prospective client as the less-than-honest agent who purports to be a master of all trades.

## 2. *Unscrupulous Dealings*

The potential for dishonorable dealings among agents begins long before an agent has ever signed a contract with an athlete. Certainly, the most pronounced misdealing of agents has been the illegal recruitment of clients off college campuses.<sup>39</sup> In 1987 widespread revelations of illegal payoffs and inducements to sign athletes rocked the sports world<sup>40</sup> and triggered an outbreak of state regulation aimed at protecting the athletes and their respective colleges or universities.<sup>41</sup>

Once an athlete signs an agreement with an agent, the potential for abuse still exists. The next step in the relationship involves the negotiation of the athlete's employment contract with a particular club and, in this context, an agent's lack of ethics or general incompetence begins to affect the player in a material way.<sup>42</sup> Players' associations have tried to limit the potential application of unconscionable fees that an agent may charge a naive athlete. For example, both the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA) have set a limit on the maximum percentage of the athlete's contract that the agent may receive. Both also prohibit the agent from receiving his fee until the player receives the compensation upon which the fee was based.<sup>43</sup> As a result, agents sometimes negotiate for terms that insure they are paid immediately, regardless of the long-term financial and tax consequences such terms may have on the athlete.<sup>44</sup>

The potential for abuse remains in the post-contract negotiation relation-

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39. Another ruse implemented in the past involves an agent misleading an organization into believing that he represents a particular athlete when he in fact does not. The agent then will negotiate a deal with the club and use the offer from the club as an inducement to lure the athlete into a management contract. *Id.* at 320.

40. Revealed was the determination of certain agents to sign college athletes to premature agency contracts in knowing violation of NCAA rules. The agents solicited these agreements with substantial cash and other tangible benefits. The major players in these revelations were Norby Walters and Lloyd Bloom, a.k.a. World Sports & Entertainment, Inc., and Jim Abernethy, an Atlanta-based agent. These three paid out hundreds of thousands of dollars in illegal inducements. The NCAA declared at least twelve college players ineligible for all or part of their senior seasons as a result of signing premature agency contracts. For a discussion on the dealings of these three and their subsequent indictments, see Ehrhart, *supra* note 24, at 643-49.

41. For a discussion of state regulation of sports agents, see *infra* notes 57-58 and accompanying text.

42. SPORTS LAW, *supra* note 8, at 137.

43. For details of the complex fee limitations, see NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS § 4C (1983) [hereinafter NFLPA REG.] and NBPA REGULATIONS GOVERNING PLAYER AGENTS § 4B (1986) [hereinafter NBPA REG.].

44. In *Burrow v. Probus Management, Inc.*, No. 16840 (N.D. Ga. Aug. 9, 1973) (unpublished order) the judge found that

the advice and counsel given by the Defendant . . . to accept all of the bonus in one lump sum was advice not for the best interest of the Plaintiff but given for the purpose of acquiring immediate funds for the benefit of the Defendant which created additional tax liability in the amount of approximately twelve hundred dollars.

*Id.* slip op. at 6, reprinted in J. WEISTART, *supra* note 38, at 321 n.709.

ship between the agent and athlete. Once the player begins to receive the wages negotiated under his contract, many agents, qualified or not, act as managers or brokers to handle the athlete's financial affairs.<sup>45</sup> While athletes may justifiably trust most agents at least to act in good faith with respect to the management of finances, recent history is replete with instances of misappropriation and mismanagement of athletes' funds.<sup>46</sup> Moreover, since the athlete usually possesses little or no business savvy, he may easily be deceived by an agent's misrepresentation of the services the agent will provide. As a result, many agents perform quite illusory income management services and still receive fees comparable to those charged by reputable firms that provide meaningful investment and tax counseling in connection with athletes' dealings.<sup>47</sup>

As in any fiduciary relationship, the potential for an agent to abuse his position is immense. Unlike many fiduciaries, however, an agent has no professional code of ethics or state legislation that governs his conduct. Various institutions have attempted to regulate sports agent activity, but to this point each attempt has had its limitations.

## II. ATTEMPTS AT REGULATION

### A. *The National Collegiate Athletic Association*

The NCAA conducts an annual registration program for agents that requires them both to notify a school's athletic director before contacting any of its athletes and to refrain from participating in any activity that might jeopardize an athlete's NCAA eligibility.<sup>48</sup> The major flaw in this registration program, however, is its voluntariness.<sup>49</sup> While the organization has the power to regulate the activities of its member institutions, it has no juris-

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45. For a general discussion of financial services that agents provide athletes, see *supra* notes 32-34 and accompanying text.

46. *People v. Sorkin*, No. 46429 (Nassau County, N.Y. Nov. 28, 1977), *aff'd mem.*, 64 A.D.2d 680, 407 N.Y.S.2d 772 (1978) demonstrates the result of a person with no credentials who enters the sports agent field and squanders his client's money through incompetency and misappropriation. Richard Sorkin, a sportswriter by trade, entered the agent profession in 1971. Despite having no business, financial or legal skills, Sorkin accumulated an impressive list of clients through contacts initiated by his brother-in-law. Incredibly, by 1975 he was earning \$415,000 a year. Sorkin assumed each of his clients' financial affairs, including paying bills and making investments, and had their paychecks sent directly to his office. A chronic gambler, Sorkin ultimately used his clients' money to accumulate \$626,000 in gambling debts (to which he ultimately plead guilty to grand larceny), and his poor investment skills also cost his clients at least \$271,000 in stock market losses. Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pro's Agent*, N.Y. Times, Oct. 9, 1977, § 5, at 1, col. 1. See also REPORT, *supra* note 2, at 74, regarding an agent who agreed to represent athletes and manage their finances but neither paid their bills nor kept promises of off-season employment and endorsement contracts. A subsequent inquiry of the agent turned up no discoverable assets whereby the athletes could be reimbursed. For a discussion of other examples of misappropriation and mismanagement of funds, see Note, *Regulation of Sports Agents: Since at First It Hasn't Succeeded Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1035-37 (1988).

47. J. WEISTART, *supra* note 38, at 321.

48. NCAA Letter, *supra* note 4. Applications for registration with the NCAA may be obtained by contacting the organization at Nall Avenue at 63rd Street, P.O. Box 1906, Mission, Kansas 66201, Attn: Legislative Services, or by calling (913) 384-3220.

49. Kohn, *supra* note 4, at 11.



diction over the activities of sports agents.<sup>50</sup> Consequently, the only agents who register with the NCAA are the ones who most likely do not need their activities regulated.

### B. *Players' Unions*

Under federal labor law, employee unions have the power to represent their employees in collective bargaining and other employment agreements.<sup>51</sup> Unlike the NCAA, then, the respective players' associations have the authority to screen and to regulate the activities of those seeking to represent the players in contract negotiations.<sup>52</sup> Recognizing the need to protect their members, the NFLPA, NBPA, and Major League Baseball Players Association (MLBPA), have all established regulations governing agents.<sup>53</sup>

The major shortfall of these regulatory attempts lies in the fact that they only protect athletes who are members of the union, that is, those who have already signed professional contracts.<sup>54</sup> A first-year player does not become eligible to become a member of the union until he signs a professional contract, so any agent he retains to negotiate his first contract remains unregulated. Since many first-year players sign multi-year contracts, they may be in the professional league for five or six years without the benefit of union regulation of their contracts.

These regulations are also impotent in curtailing the illegal recruitment of college athletes, perhaps the most flagrant misconduct of agents.<sup>55</sup> Once again, since these college athletes are not union members, the union regulations do not afford any protection against such conduct. While these regulations are certainly more effective than those promulgated by the NCAA, they clearly are still too limited in scope and jurisdiction to satisfactorily curb the wide range of abuses available to agents.<sup>56</sup>

### C. *State Legislation*

Recognizing the inadequacies of the aforementioned regulatory attempts, at least seventeen states have enacted legislation of their own aimed at controlling the activities of agents.<sup>57</sup> These statutes vary widely in their substance and scope, and several common problems pervade them. The states certainly are not as limited as the NCAA and players' unions in regulating the broad range of agent activities, but they have proven no more effective in

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50. *Id.* at 9.

51. National Labor Relations Act, 29 U.S.C. § 157 (1988); *see also* *Kudla v. N.L.R.B.*, 821 F.2d 95, 100 (2d Cir. 1987).

52. 29 U.S.C. § 157; *Kudla*, 821 F.2d at 100.

53. For a detailed discussion of the regulations imposed by the NFLPA, NBPA, and MLBPA, *see* Kohn, *supra* note 4, at 7-9.

54. *See* NFLPA REG., *supra* note 43, § 1.

55. *See supra* notes 39-41 and accompanying text.

56. For a more extensive comparison of the effectiveness of the NCAA regulations and those of the respective players associations, *see* Note, *supra* note 46, at 1041-49.

57. Alabama, California, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas have all enacted legislation.

their attempts to curtail misconduct. The following sections study the sum and substance of the Texas acts regulating agent activity,<sup>58</sup> analyze the problems associated with the statutes, and present some more realistic approaches to tackling the problem of agent misconduct.

### III. THE TEXAS STATUTORY SCHEME

In 1987, Texas became the fourth state to enact legislation regulating the activities of sports agents.<sup>59</sup> The Texas Athlete Agent Act (Athlete Agent Act) governs the conduct of athlete agents<sup>60</sup> but restricts its protection to nonprofessional athletes.<sup>61</sup> The statute establishes a registration system for agents, sets guidelines for contacting athletes, restricts advertising techniques of agents, governs the contractual relationships between agents and athletes, and provides both civil and criminal remedies for violations.

One month prior to the passage of the Athlete Agent Act, the state legislature passed the Violation of Collegiate Athletic Association Rules Act (NCAA Act).<sup>62</sup> This Act basically adopted the NCAA rules that were in effect on January 1, 1987, and imposed civil liability on any person who violated a rule of that organization.<sup>63</sup> It is unclear why this narrow rule was not included in the regulatory scheme of the Athlete Agent Act, but that omission forms a part of the following discussion of the far more substantive Athlete Agent Act.

#### A. Registration and Renewal Requirements

Prior to directly or indirectly contacting an athlete located in the state an agent must register with the secretary of state.<sup>64</sup> The agent must complete an application issued by the secretary of state and pay a fee to be deposited

58. TEX. REV. CIV. STAT. ANN. art. 8871, §§ 1-11 (Vernon Supp. 1990); TEX. CIV. PRAC. & REM. CODE ANN. §§ 131.001-.008 (Vernon Supp. 1990).

59. The Texas Athlete Agent Act became effective on October 2, 1987, but the Act did not require agents to register or comply with the Act until January 1, 1988. TEX. REV. CIV. STAT. ANN. art. 8871, § 12(b) (Vernon Supp. 1990). The Texas "NCAA-Act" became effective two months prior to the Athlete Agent Act. TEX. CIV. PRAC. & REM. CODE ANN. §§ 131.001-.008. The three states to pass legislation before Texas were California (1981), Oklahoma (1985), and Louisiana (1987).

60. The Athlete Agent Act defines an "athlete agent" as a person that, for compensation, directly or indirectly recruits or solicits an athlete to enter into an agent contract, professional sports services contract, or financial services contract with that person or that for a fee procures, offers, promises, or attempts to obtain employment for an athlete with a professional sports team.

TEX. REV. CIV. STAT. ANN. art. 8871, § 1(a)(2). That person who is the agent may be an individual, company, corporation, association, partnership, or any other legal entity. *Id.* § 1(a)(1).

61. The Act defines an "athlete" as an individual who resides in the state and who: a) is eligible to participate on an intercollegiate sports team at an institution of higher education located in the state, or b) has participated on such a team and has never signed a professional contract. *Id.* § 1(a)(5). The statute, therefore, does not protect professional athletes or, in the case of baseball, high school seniors in their dealings with agents.

62. TEX. CIV. PRAC. & REM. CODE ANN. §§ 131.001-.008.

63. *Id.* §§ 131.002-.003.

64. TEX. REV. CIV. STAT. ANN. art. 8871, § 2(a).

in the state treasury.<sup>65</sup> The applicant first must provide the name and principal business address of the individual agent or entity.<sup>66</sup> The application must also include the business(es) or occupation(s) that the applicant was involved in for the five years immediately preceding the application date,<sup>67</sup> a description of all formal training, practical experience, and education that relate to the activities of being an agent,<sup>68</sup> the names and addresses of five professional references (if specifically requested by the secretary of state),<sup>69</sup> and finally, the names and addresses of all persons (except bona fide employees on stated salaries) financially interested in the operation of the business of the agent.<sup>70</sup> If a corporation or partnership applies, the above information must be provided for each officer, partner, or associate of the entity.<sup>71</sup>

Furthermore, if the applicant intends to enter into a financial services contract<sup>72</sup> with an athlete, the agent must furnish a \$100,000 surety bond that must be written on the secretary of state's bond form approved by the State Board of Insurance.<sup>73</sup> An athlete or his representative may make a claim against the bond to pay damages caused by reason of intentional misrepresentation, fraud, deceit, or any unlawful or negligent act or omission of the agent or his representatives while acting within the scope of the contract.<sup>74</sup>

Once the agent satisfies the above registration requirements, the secretary of state's office will issue a certificate of registration. The certificate remains valid for one year from the date of issuance, although the secretary of state may adopt a system under which certificates expire on various dates during the year.<sup>75</sup> Upon expiration of the certificate, the agent may renew his registration by filing a renewal application, accompanied by the renewal fee.<sup>76</sup> The renewal application should include both the names and addresses of all athletes whom the agent represents at the time of renewal and the names and addresses of all athletes whom the agent has represented during the three

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65. *Id.* § 2(b),(e). Curiously, the statute provides for an annual renewal fee, but makes no mention of an original registration fee to be paid by the agent. This appears to be a statutory oversight and the secretary of state's office does, in fact, impose an initial registration fee. Texas Application for Registration of Athlete Agent (1989) [hereinafter Texas Application]. The Act gives the secretary of state discretion in setting the fees. *Id.* § 2(f). While there is no prescribed maximum limit, the secretary is required to set fees in amounts "reasonable and necessary to cover the costs of administering this Act." *Id.* The registration and renewal fee is currently set at \$1,000. Texas Application, *supra*.

Applications for registration as an athlete agent may be obtained by contacting the secretary of state's office at P.O. Box 12887, Austin, Texas 78711, Attn: 7 Statutory Documents, or by calling (512) 463-5558.

66. TEX. REV. CIV. STAT. ANN. art. 8871 § 2(b)(1).

67. *Id.* § 2(b)(2).

68. *Id.* § 2(b)(3).

69. *Id.* § 2(b)(4).

70. *Id.* § 2(b)(5).

71. *Id.* § 2(c).

72. The Act defines a "financial services contract" as "any contract or agreement under which an athlete authorizes an athlete agent to provide financial services for the athlete, including the making and execution of investment and other financial decisions by the agent on behalf of the athlete." *Id.* § 1(a)(4).

73. *Id.* § 2(h).

74. *Id.*

75. *Id.* § 2(d).

76. *Id.* § 2(e).

years preceding the date of application.<sup>77</sup>

### B. Permitted Contacts with Athletes

Under the Act, each college and university located in the state must sponsor "athlete agent interviews."<sup>78</sup> These interviews are to be held on each institution's campus before the athlete's final year of intercollegiate eligibility.<sup>79</sup> The purpose of the interviews is to discuss the agent's provision of financial services and advice to the athlete or the agent's representation of the athlete in the marketing of the athlete's ability or reputation.<sup>80</sup> Each institution must give at least thirty days public notice before the interview period on campus begins and must provide written notice of the time, place, and duration of the interview period to all agents who have previously supplied the school's athletic director with their addresses.<sup>81</sup> The interview period must be conducted in the final year of eligibility and may not exceed thirty consecutive days.<sup>82</sup>

### C. Solicitation Requirements and Prohibitions

The Act does not prohibit an agent from sending an athlete any materials relating to that agent's professional credentials or specific services,<sup>83</sup> but all forms of advertising must disclose the name and address of the agent.<sup>84</sup> Within this general framework several prohibitions exist. First, the Act prohibits the agent from engaging in any false, fraudulent, or misleading activities manifested through publications, promises, or representations to any person.<sup>85</sup> Second, to prevent a conflict of interest, the agent may not divide fees with or receive compensation in any form from a professional sports league or franchise.<sup>86</sup> Third, the agent may not offer anything of value to an employee of any college or university located in the state in return for referral of clients.<sup>87</sup> Fourth, the agent may not offer anything of value, exclusive of entertainment and travel expenses to the agent's place of business, to in-

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77. *Id.*

78. *Id.* § 7(a).

79. *Id.*

80. *Id.*

81. *Id.* § 7(b).

82. *Id.* § 7(c). The member schools of the Southwest Athletic Conference have collectively agreed to set an interview period from January 15th to February 1st of each year. The state, however, has had difficulty in persuading some other major institutions in the state to comply with this interview requirement. Telephone interview with Jim Mathieson, Staff Attorney, Office of the Secretary of State (Oct. 10, 1989) [hereinafter Mathieson].

83. TEX. REV. CIV. STAT. ANN. art. 8871, § 6(c). While the Act does not explicitly prohibit mail solicitation, it may do so implicitly with regard to unregistered agents. Since the Act requires that an agent be registered with the state before he contact an athlete either directly or indirectly, it appears that an unregistered agent may violate the Act even if his entire relationship with the athlete consists of sending him a brochure describing the agent's qualifications and services performed. *Id.* § 2(a).

84. *Id.* § 6(a).

85. *Id.* § 6(b)(1).

86. *Id.* § 6(b)(2). This prohibition also extends to any representative or employee of a professional league or franchise. *Id.*

87. *Id.* § 6(b)(3).

duce an athlete to agree to be represented by the agent.<sup>88</sup> Finally, except for the school-sponsored interviews discussed in the previous subsection,<sup>89</sup> the Act prohibits an agent from directly contacting any athlete who participates in a team sport at a college or university located in the state.<sup>90</sup> Naturally, therefore, the agent also may not enter into any representation agreement with the athlete until after completion of the athlete's last intercollegiate contest.<sup>91</sup> While the Act prevents an agent from contacting an athlete before his eligibility has expired, it does not prohibit the athlete, or any representative on behalf of the athlete, from contacting and interviewing a prospective agent to determine that agent's professional proficiency in certain areas.<sup>92</sup>

#### D. Contracts

The agent must file with the secretary of state's office any contract he enters into with an athlete,<sup>93</sup> and the contract must state any fees and percentages to be paid by the athlete to the agent.<sup>94</sup> Additionally, the contract must (1) state that the agent is registered with the secretary of state, (2) instruct the athlete not to sign the contract if it contains blank spaces or if the athlete has not read it, and (3) include a cancellation option in favor of the player.<sup>95</sup>

The player has sixteen days to cancel the contract,<sup>96</sup> and the agent is required to file a copy of the contract with both the secretary of state and the athletic director of the athlete's school within five days of signing.<sup>97</sup> The school is therefore notified before the contract becomes binding on the ath-

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88. *Id.* § 6(b)(4).

89. *See supra* notes 78-82 and accompanying text.

90. TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(5).

91. *Id.*

92. *Id.* § 6(c).

93. *Id.* § 5(c). The contract must include a schedule of fees and percentages to be paid to the agent, as well as the services to be performed. *Id.* Changes in the fee schedule may be made, but such a change will not become effective until the seventh day after the secretary of state's office has received the change. *Id.*

94. *Id.* § 5(b).

95. Each contract must include the following statements in at least ten-point boldface type:

#### NOTICE TO CLIENT

1) THIS ATHLETE AGENT IS REGISTERED WITH THE SECRETARY OF STATE OF THE STATE OF TEXAS. REGISTRATION WITH THE SECRETARY OF STATE DOES NOT IMPLY APPROVAL OR ENDORSEMENT BY THE SECRETARY OF STATE OF THE COMPETENCE OF THE ATHLETE AGENT OR OF THE SPECIFIC TERMS AND CONDITIONS OF THIS CONTRACT.

2) DO NOT SIGN THIS CONTRACT UNTIL YOU HAVE READ IT OR IF IT CONTAINS BLANK SPACES.

3) IF YOU DECIDE THAT YOU DO NOT WISH TO PURCHASE THE SERVICES OF THE ATHLETE AGENT, YOU MAY CANCEL THIS CONTRACT BY NOTIFYING THE ATHLETE AGENT IN WRITING OF YOUR DESIRE TO CANCEL THE CONTRACT NOT LATER THAN THE 16TH DAY AFTER THE DATE ON WHICH YOU SIGN THIS CONTRACT.

*Id.*

96. *Id.* § 5(f).

97. *Id.* § 5(e).

lete, creating a check for the protection of the athlete to make certain that the athlete knows the consequences of the contract. The cancellation option thus allows the player to change his mind in the event that the agent pressured him into signing the contract or misinformed him as to its effect.

The Act further protects the athlete from an agent attempting to take advantage of a multi-year employment contract between the athlete and a professional sports team. If the agent negotiates such a contract for the athlete, the agent may not collect in any twelve-month period a fee that exceeds what the athlete will receive under the contract during that same period.<sup>98</sup>

### E. Remedies for Violation

Any contract between an agent and athlete that fails to comply with the Act becomes void.<sup>99</sup> Additionally, the secretary of state, upon determination that a person regulated under the Act has violated any rule adopted by the Act, may assess a civil penalty not to exceed \$10,000.<sup>100</sup> Notwithstanding the civil fine, an agent who violates either the registration requirements<sup>101</sup> or the advertising requirements<sup>102</sup> of the Act may be subject to several further penalties. A violation, for instance, may also subject the agent to: (a) the forfeiture of any right of repayment by an athlete for anything of value received by the athlete as an inducement to sign or while the athlete was still a participant in intercollegiate athletics;<sup>103</sup> (b) a refund of any consideration paid to the agent on behalf of the athlete;<sup>104</sup> and (c) the reasonable attorney's fees and court costs of an athlete who sues to recover against an agent for a violation of the Act.<sup>105</sup> An agent who *knowingly* violates either of these sections may also be criminally charged with a class A misdemeanor.<sup>106</sup>

In addition to the remedies available under the Athlete Agent Act, the Texas NCAA Act penalizes agents who violate NCAA rules.<sup>107</sup> The Act

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98. *Id.* § 5(d).

99. *Id.* § 8(b).

100. *Id.* § 9(a)-(b). If, after investigation, the secretary of state determines that a violation has in fact occurred, the secretary must issue a preliminary report to the agent which details the facts upon which the conclusion is based, the imposition of a civil penalty, and the amount of the penalty. *Id.* § 9(c). The Act gives the agent the right to a hearing to contest the penalty if he or she responds to the preliminary report within twenty days of the day the report was sent. *Id.* § 9(d). Failure to either request a hearing or remit the amount of the penalty within the specified time constitutes a waiver of the right to the hearing. *Id.* If the secretary determines at the hearing that the agent has committed the alleged violation, the secretary must give the agent written notice of the findings established. *Id.* If the agent wishes to further contest the penalty, he must, within thirty days of receipt of the notice, either pay the fine or forward the assessed amount to the secretary for deposit into an escrow account pending judicial review of the decision. *Id.* § 9(e). Failure to complete either of these acts within the given time results in a waiver of all legal rights. *Id.* § 9(f).

101. *See supra* notes 64-77 and accompanying text.

102. *See supra* notes 83-92 and accompanying text.

103. TEX. REV. CIV. STAT. ANN. art. 8871, § 8(a)(2) (Vernon Supp. 1990).

104. *Id.* § 8(a)(3).

105. *Id.* § 8(a)(4).

106. *Id.* § 8(c).

107. TEX. CIV. PRAC. & REM. CODE ANN. § 131.003 (Vernon Supp. 1990). This rule,

creates a civil cause of action on behalf of the Southwest Athletic Conference and member NCAA institutions against anyone who violates an NCAA rule, holding the guilty party liable for any damages caused by the violations.<sup>108</sup>

The preceding summary of the Texas acts typifies the attempt by many state legislatures to regulate the activities of sports agents. While various states have enacted legislation that differs from the Texas acts, each such piece of legislation, like the Texas acts, has its problems. The following section analyzes the problem areas of the Athlete Agent Act, makes certain proposals to augment the underlying objectives of the regulation of sports agents, and explores possible alternative sources of regulation.

#### IV. ANALYSIS AND PROPOSALS

##### A. Jurisdictional Reach

Perhaps the greatest drawback of the Athlete Agent Act lies in its definition of what constitutes an "athlete."<sup>109</sup> Since that definition includes only current college athletes and former college athletes who have never signed professional contracts, the statute leaves two important groups unprotected. The first is comprised of high school or former high school athletes who choose to pursue professional athletic careers in lieu of attending college.<sup>110</sup> These athletes certainly need statutory protection as much, if not more, than college athletes. Some of the more recent state statutes have recognized this problem and have included language to remedy the problem.<sup>111</sup> Such a provision as an amendment to the Texas statute would be consistent with the intent to protect naive athletes from unscrupulous agents.<sup>112</sup>

The second group left unprotected by the Texas statute encompasses the athletes who already have signed professional contracts. This omission is less troubling, however, because the professional players' unions regulate the relationship between their members and agents.<sup>113</sup> While this union protection ensures supervision of that relationship, the deterrent of the state's power to impose civil and criminal penalties still does not exist with respect to this group of athletes.

The Texas Legislature recently passed a law entitled the Texas Talent

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however, does not limit liability to agents. The Act clearly extends to nonagent lawyers and possibly even school boosters. *Id.* § 131.001(2).

108. *Id.* §§ 131.003-004. These damages specifically include lost television revenues and ticket sales. *Id.* § 131.006.

109. For the actual statutory definition of "athlete," see *supra* note 61.

110. Unlike football and basketball, baseball players are commonly drafted out of high school and choose to forgo or postpone college. Likewise, nonteam sport athletes, such as golfers or tennis players, frequently turn professional without attending college.

111. The states which currently extend protection beyond existing and former collegiate athletes include Kentucky, Louisiana, Maryland, Minnesota, Mississippi and Oklahoma.

112. Texas could accomplish this purpose by adopting language similar to Minnesota's definition of "athlete." That state's definition of "student athlete" includes not only current college athletes, but "any individual who may be eligible to engage in collegiate sports in the future." MINN. STAT. ANN. § 325E.33.2 (West Supp. 1989).

113. See *supra* notes 51-54 and accompanying text.

Agency Act (Talent Act), designed to regulate the relationship between talent agencies and artists (actors, musicians, models, and the like).<sup>114</sup> The structure of the statute is strikingly similar to that of the Athlete Agent Act,<sup>115</sup> and the definition of "artist" could include professional athletes.<sup>116</sup> While such an interpretation would effectively regulate agent conduct with respect to professional athletes, the agency in charge of the Talent Act has indicated that it will not be the policy of the state to enforce the statute in such a manner.<sup>117</sup> This is unfortunate, because the Talent Act is well suited to handle the problems that a professional athlete may have with his agent, while the Athlete Agent Act is structured primarily for the security of college athletes. Nevertheless, the legislature should amend one of the acts specifically to include in its protection the professional athlete.

### B. Registration and Renewal

A fundamental deficiency in the Athlete Agent Act (and all state statutes for that matter) is the lack of compliance with the registration requirements. To date, Texas has only forty agents registered to do business in the state.<sup>118</sup> While Texas remains far ahead of any other state in its effort to register those agents who intend to do business in the state, several agents simply have refused to comply. Under present conditions in which the secretary of state's office administers the Act but lacks enforcement officers, strict enforcement of the Act is impossible, and agents who have not complied with the Act's registration requirements go undetected.<sup>119</sup>

A second problem with the registration process involves the ease with which a person or entity may become registered. As the law currently stands, anyone who supplies the requested information and pays the fee will become an agent.<sup>120</sup> The state conducts no background checks of applicants and requires no special training.<sup>121</sup> The fact that agents are not required to be specially trained is one of the major problems with the industry as a

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114. TEX. REV. CIV. STAT. ANN. art. 5221a-9 (Vernon Supp. 1990).

115. The Talent Act contains a registration requirement with a bond provision, certain contractual regulations, and various civil and criminal remedies available to the artist.

116. The Talent Act defines an artist in part as "any other individual who renders analogous professional services in a motion picture, theatrical, radio, television, or other entertainment production." TEX. REV. CIV. STAT. ANN. art. 5221a-9, § 1(H). It is arguable that an athlete renders professional services in an entertainment production.

117. Telephone interview with Mary Baylie, Texas Department of Licensing (Oct. 10, 1989).

118. Mathieson, *supra* note 82. Texas, however, should be commended for its efforts in attempting to register agents. Other states simply have been lethargic in this endeavor. Oklahoma, for example, has no agents registered under a statute which has been in effect since 1985. Telephone interview with Brenda Coffman, Oklahoma Secretary of State's Office (Jan. 2, 1989). California, with an eight year-old statute, had only seventeen agents registered as of early 1988. Kohn, *supra* note 4, at 11. Until states get serious about enforcement of the registration requirements, the state statutes will remain a non-factor in the effort to control the dealings of agents.

119. The Act is currently administered by one staff attorney and one paralegal. Mathieson, *supra* note 82.

120. *Id.*

121. *Id.*



whole; agents perform "professional" services, but have no professional requirements or standards to which they must rise.<sup>122</sup>

Another problem with the Texas registration process lies in the surety bond requirement. Many states require the agents to post bond,<sup>123</sup> but Texas appears to be the only state that limits the requirement to agents who provide financial services for their clients. This approach apparently does not consider the possibility of agents causing pecuniary damage to their clients in areas other than financial investments and money management. History had proven, however, that agent misdealing has not limited itself to the financial services domain.<sup>124</sup> The obvious solution to this problem involves amending the statute to require all registered agents to post the bond. Furthermore, Texas should consider alternative sources of security. Requiring a trust account or cash deposit in addition to the bond would make the proceeds more readily available. Alternatively, the state, as others have done, could require liability insurance in lieu of the surety bond.<sup>125</sup>

Texas should also consider an exemption to the registration requirements of the Act for any professional working within the scope of his profession.<sup>126</sup> This recommendation in no way proposes that attorneys or other professionals are not susceptible to the agent misdealing described in this Comment. The conduct of these individuals, however, is governed by the rules and ethics of their respective professional associations. Furthermore, burdensome registration requirements act as a deterrent to these professionals entering

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122. Commentators often have stated that all one needs to become an agent is a client. See Ehrhardt, *supra* note 24, at 635; Kohn, *supra* note 4, at 1. While this adage is regrettably accurate, no changes appear imminent. Restricting the opportunity to represent athletes to a few selected professions (*i.e.*, attorneys, certified financial planners) would most likely create an unreasonable restraint on trade. However, see *infra* text accompanying notes 189-194, in which the recommendation is made for a professional association of sports agents whose membership would require certain qualifications.

123. See, *e.g.*, *Alabama*: ALA. CODE § 8-26-14 (Supp. 1989); *California*: CAL. LAB. CODE § 1519 (a) (West 1989); *Georgia*: GA. CODE ANN. § 43-4A-13 (Supp. 1989); *Mississippi*: MISS. CODE ANN. § 73-41-9 (Supp. 1988); *Oklahoma*: OKLA. STAT. ANN. tit. 70, § 821.62G (West 1989). These bond requirements range from \$25,000 to \$100,000 in amount and some give an agent the option to purchase the equivalent amount of professional liability insurance.

124. The most obvious financial damage an agent can cause his client outside the realm of a financial services contract is the charging of exorbitant fees for the agent's services. The agent accomplishes this by contracting for and receiving an unconscionable percentage of the athlete's compensation. Equally abusive is the agent who receives his percentage of an athlete's contract up front, even though the contract does not guarantee that the athlete will receive the full amount of the total contract. In *Brown v. Woolf*, 554 F. Supp. 1206, 1207-08 (S.D. Ind. 1983), for instance, an agent contracted to represent an athlete for 5% of the athlete's contract. The athlete, however, received only 24% of his entire contract, and the agent, by receiving his fee up front, ended up with 21% of the salary the player actually received. The Texas Act prohibits such conduct, and a bond requirement would guarantee the payment of damages to the athlete. TEX. REV. CIV. STAT. ANN. art. 8871, § 5(d) (Vernon Supp. 1990).

125. See, *e.g.*, ALA. CODE § 8-26-14 (Supp. 1989) (may provide malpractice insurance, certificate of deposit or savings account in lieu of \$50,000 bond); OKLA. STAT. ANN. tit. 70, § 821.62(G) (West 1989) (may provide proof of liability insurance in lieu of posting \$100,000 bond).

126. The Act should not require an attorney, for instance, to register under the Act if all he does is provide his legal expertise (*i.e.*, contract negotiation, contract draftings). Similarly, a registered broker or certified financial planner should not be required to register if he simply enters into a financial services contract with an athlete.

the field. Such a result violates the underlying objective of the statute, that of ensuring competent and ethical representation of athletes. Professionals acting within the scope of their profession undeniably provide the most qualified and skilled representation to athletes. The statute should therefore encourage their entry into the field, not discourage it.

One of the jurisdictional problems of the statute is the secretary's lack of power to go beyond state borders to enforce its provisions. In order to minimize this shortcoming, Texas should follow Ohio's lead by incorporating a long-arm statute into the Act.<sup>127</sup> Such a provision would prevent an agent from evading state law by bringing an athlete outside the state and secretly signing the athlete to a representation agreement.

### C. Permitted Contacts with Athletes

If administered properly, the Athlete Agent Act provides a safe and efficient forum for contacts between agents and athletes.<sup>128</sup> Recognizing that it would be practically impossible to absolutely prohibit agents from contacting athletes before the athletes' intercollegiate eligibility has expired, the state has permitted controlled contacts by establishing mandatory interviews at each institution in the state.<sup>129</sup> While most of the major institutions in the state have complied with this requirement, some have been uncooperative.<sup>130</sup> With interested compliance from all schools, however, this system could benefit the interests of the agent, the athlete, and the school that the athlete attends.<sup>131</sup>

In May of 1989, state legislators proposed an amendment to the Athlete Agent Act that would have required each school to establish a compliance coordinator position to organize the compliance of the school with respect to the requirements in the Texas statute.<sup>132</sup> Such a position could also serve as a watchdog at the particular college or university for the illegal activity of agents. The establishment of this position would greatly aid the secretary of

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127. OHIO REV. CODE. ANN. § 4771.06 (Anderson Supp. 1988). The Ohio law allows a court of that state to exercise personal jurisdiction over a non-resident agent as to a cause of action arising from the agent entering into a contract with an Ohio collegian when the athlete is outside the state. *Id.*

128. See *supra* notes 78-82 and accompanying text.

129. TEX. REV. CIV. STAT. ANN. art. 8871, § 7(a) (Vernon Supp. 1990).

Oklahoma has adopted the more restrictive approach of prohibiting agents from contacting NCAA student-athletes before their NCAA eligibility expires unless the school voluntarily sponsors on-campus interviews. OKLA. STAT. ANN. tit. 70, § 821.64(8) (West 1989). This restrictive approach may be part of the reason the state has had such difficulty in convincing agents to register under the statute. See *supra* note 118.

130. Mathieson, *supra* note 82.

131. Ideally, the agent benefits from the opportunity to sell himself to the athlete at an early stage, the athlete benefits from the opportunity to screen agents in a controlled environment, and the school benefits by being able to closely monitor the conduct of agents with respect to its student athletes.

132. Proposed Tex. S.B. 876, 71st Leg. (1989). The Governor vetoed the proposed bill because it applied only to football and basketball players. The Governor felt the proposed law should include baseball players in its definition of what constitutes an "athlete." Telephone interview with Chuck Pauley, agent (Sept. 14, 1989). See TEX. REV. CIV. STAT. ANN. art. 8871, § 1(a)(5) (current definition of "athlete").

state's office in ferreting out illegal agent activity.<sup>133</sup> Unfortunately, the Governor vetoed the bill for other unrelated reasons, but the adoption of such an amendment would be a tremendous help to the secretary of state's office in its efforts to administer and enforce the law.

#### D. Solicitation Requirements and Prohibitions

A problem common to all state regulatory schemes is the disadvantage at which they place attorney-agents in the area of solicitation of clients. While competent attorneys are generally well qualified agents, they are handicapped in the intense competition to solicit clients because the American Bar Association Model Rules of Professional Conduct,<sup>134</sup> as well as the rules of every state bar, prohibit the solicitation of clients. As a result, attorney-agents are forced either to give up the practice of law or to compete with nonattorney agents at a distinct disadvantage. Therefore, attorney-agents who wish to represent athletes and still practice law must walk a fine line when it comes to recruiting clients.<sup>135</sup>

Another problem with the rules on solicitation involves the lack of a requirement for the agent to disclose potential conflicts of interest that might be present in his representation of an athlete. Certainly, an abundance of potential conflicts may arise in a player-agent relationship.<sup>136</sup> Several regulatory schemes have addressed the issue, though by no means in a uniform manner. The NFLPA and the NBPA have broad provisions prohibiting agents from engaging in any activity that creates an actual or potential conflict of interest with the effective representation of players.<sup>137</sup> The state statutes, on the other hand, do not prohibit conflicts of interest in general. A few state regulations, however, require an agent who gives investment advice to disclose any financial interest he may have in an entity about which such

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133. The schools have a bona fide interest in curbing illegal agent activity. The athletic department of the school, therefore, is a logical place to begin the investigatory process.

134. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

135. Perhaps little can be done about this problem because lawyers will not lower their standards when it comes to client solicitation. It is also highly unlikely that any regulatory body will limit the ability of nonattorney agents to actively recruit potential clients.

136. The case of *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984) is an example of just one conflict that has arisen in recent years. The case involved the contract negotiations in 1983 of former Heisman trophy winner Billy Sims. Sims was negotiating with both the NFL Detroit Lions and the USFL Houston Gamblers when it was revealed that Sims' agent, Jerry Argovitz, was president of the Gamblers franchise. Despite this clear conflict of interest, Argovitz still attempted to act as Sims' agent in this bidding war. Argovitz misrepresented to his client that the Lions were bargaining in bad faith and ultimately convinced Sims to sign a contract with the Gamblers. The court ruled that Argovitz breached his fiduciary duty by not giving the Detroit management an opportunity to better the offer Sims received from the Gamblers. *Id.* at 545-49.

137. NFLPA REG., *supra* note 43, § 5(B)(3); NBPA REG., *supra* note 43, § 3(B)(g). A particular question that is often raised with respect to conflict of interests is whether such a conflict exists when an agent represents more than one player on the same team. Can an agent truly act in the best interest of several players who are teammates? The NBPA has answered that question in the affirmative. At least in professional basketball, the representation of more than one player on the same team does not create a conflict of interest. NBPA REG., *supra* note 43, § 3(B)(g).

advice is given.<sup>138</sup> The inclusion in the Athlete Agent Act of a conflict of interest provision similar to those of the NFLPA and NBPA would further the goal of protecting the athlete and give the state another line of defense against unethical agent behavior.

Finally, an interpretive problem recently has arisen with respect to the offering of gifts or money as inducements for an athlete to sign a contract.<sup>139</sup> Section 6(b)(4) of the Athlete Agent Act prohibits the offering of anything of value to induce an athlete to sign a contract with an agent.<sup>140</sup> The Act does not specify, however, whether the prohibition against gifts limits itself to the athlete himself or extends to others, such as family members and friends. The state legislature should amend this provision to make it absolutely clear that the Act includes these individuals and any others who are in a position of influence over the athlete.

### E. Contracts

The provisions of the Athlete Agent Act governing the contracts between agents and athletes leave much room for improvement. First, the Act allows an agent to sign an athlete without giving prior notice to the athlete's college or university. The benefit of prior communication of an agency contract is that such communication would give the school adequate notice that one of its athletes will soon be ineligible.<sup>141</sup> The school thus would have adequate time either to attempt to persuade that athlete to stay in school or to remove him from his team.

Texas should look at Georgia's approach to notice. Before signing a Georgia athlete to an agency agreement prior to the expiration of that athlete's eligibility, an agent must notify the Georgia Athlete Agent Regulatory Commission, which in turn notifies the athlete's school.<sup>142</sup> The agent may then sign the athlete to the contract thirty days after the Commission has received notice.<sup>143</sup> Such a statute provides a much more direct and effective method of protecting not only the school but also the athlete.<sup>144</sup>

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138. See, e.g., ALA. CODE § 8-26-31 (Supp. 1989); CAL. LAB. CODE § 1535.7 (West 1989).

139. Agent Johnny Rodgers recently admitted giving a fur coat and other items to the mother of University of Houston quarterback Andre Ware in an attempt to induce Ware to sign a representation agreement. The Dallas Morning News, Dec. 28, 1989, at 6B, col. 1. The Secretary of State has taken the position that this gift is a violation of § 6(b)(4) of the Athlete Agent Act, which prohibits an agent from giving anything of value in an attempt to lure an athlete into signing a contract. *Id.* Rodgers, on the other hand, did not believe that his contact with Mrs. Ware violated the Act. *Id.*

140. TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(4) (Vernon Supp. 1990).

141. As the Texas law currently stands, an agent must file a copy of the contract with the school's athletic director within five days of the signing of the contract. *Id.* § 5(e). It is true that the athlete has fifteen days to cancel the contract, thereby giving him at least ten days to cancel after the school is notified, but many problems may still arise. For instance, if the player participates in an NCAA contest between the time he signed the contract and the school's notice of such contract, both the player and the school are in violation of NCAA rules. Such a predicament carries a civil penalty in Texas. TEX. CIV. PRAC. & REM. CODE ANN. §§ 131.002-.003 (Vernon Supp. 1990).

142. GA. CODE ANN. § 43-4A016(a) (Supp. 1989).

143. *Id.*

144. The benefit to the athlete comes in the form of adequate time to seek outside in-

One shortfall of both Texas and Georgia schemes, however, lies in the fact that both statutes place no corresponding burden of notification on the athlete. Conversely, Tennessee requires both the agent and the athlete to give notice of an agency contract to the school within seventy-two hours of the execution of the agreement.<sup>145</sup> By requiring both parties to the agreement to give notice, the school has a double layer of protection from the liabilities that may arise from playing an ineligible player.

To further encourage notice, especially from the agent, Tennessee gives the athlete the right to rescind the agreement within twenty days of the signing of the contract, or the receipt of the contract by the athlete's school, or, if no notification is given, the date that the athlete's eligibility expires.<sup>146</sup> The statute tolls the twenty-day rescission period until the last of these three events occurs.<sup>147</sup> The agent, therefore, has a genuine interest in providing notice of any agreement to the school in order to prevent the athlete from being able to rescind the contract long after he signs it. A similar provision in Texas would simply require a small amendment to section 5(f) of the Athlete Agent Act.<sup>148</sup>

A second problem arises with respect to the mandatory contractual provision imposed by the statute.<sup>149</sup> The three-part notice required in all agency contracts under the Act certainly provides a sound basis for ensuring that the athlete is not misled into signing an agreement.<sup>150</sup> The required language omits, however, a notice to the athlete that his participation in the agreement will jeopardize his amateur standing.<sup>151</sup> While the Act does give the secretary of state discretion to reject any contract form presented,<sup>152</sup> the secretary would not likely disapprove a contract solely on this basis.<sup>153</sup> Nevertheless, public policy and the inherent naivete of youth dictate that an

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dependent counsel to review the agency agreement for fairness. Historically, athletes who have entered into premature agency agreements have been without this benefit because of the secretive nature of the dealings and the risk of losing their college eligibility. This atmosphere resulted in unconscionable agreements in favor of the agent. See Ehrhardt, *supra* note 24, at 654. The thirty-day waiting period in Georgia, however, allows the athlete to equalize the negotiation with the agent by seeking a competent third party to review the agency agreement.

145. TENN. CODE ANN. § 49-7-2104(b)(4) (Supp. 1989).

146. *Id.* § 49-7-2104(b)(5)(A)(i)-(iii).

147. *Id.*

148. See TEX. REV. CIV. STAT. ANN. art. 8871, § 5(e) (Vernon Supp. 1990). Section 5(f)(1) could read: Within twenty days of the last of the following to occur, the athlete shall have the right to rescind the contract or any contractual relationship with the agent by giving notice in writing to the agent of his intent to rescind: (a) date on which the contractual relationship between the athlete and agent; (b) notification, as provided in subsection 5(e), of such contractual relationship is received by the athlete director of the athlete's institution; or (c) if such notice as required in subsection 5(e) is not given, expiration of the eligibility of the athlete. (2) The athlete may not, under any circumstances effect a waiver of the right to rescind.

149. See *supra* notes 93-95 and accompanying text.

150. See *supra* note 95 and accompanying text.

151. Both the Alabama and California statutes include such a provision. ALA. CODE §§ 8-26-22 to -23 (Supp. 1989); CAL. LAB. CODE § 1530.5 (West 1989).

152. TEX. REV. CIV. STAT. ANN. art. 8871, § 5(a) (Vernon Supp. 1990).

153. The fact that the statute explicitly provides the mandatory contractual provisions nullifies any argument that the omission of an amateur standing warning is sufficient to void the contract. If such were the intent of the drafters, they would have included the language in the mandatory provision.

amateur standing warning should be a conspicuous element of every agreement an agent enters into with any amateur athlete.<sup>154</sup>

Tennessee has gone one step further and requires a provision in the agency agreement that puts an athlete on notice that his school and teammates could be adversely affected if he signs the contract.<sup>155</sup> If an athlete signs early, he not only forfeits his own eligibility, but also may force his school to forfeit games and miss post-season bowl and tournament opportunities. At least at the NCAA Division I level, this could cost schools several million dollars.<sup>156</sup>

#### F. Remedies for Violations

Certainly the most difficult task of the secretary of state's office lies in discovering violations of the statute.<sup>157</sup> As mentioned earlier, the secretary of state oversees an administrative agency not equipped with the resources to

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154. An amateur standing warning could fit into the Athlete Agent Act with the other warnings under § 5(b) as subsection (4). Section 5(b) already requires the language to be in ten-point, bold-face type. TEX. REV. CIV. STAT. ANN. art. 8871, § 5b. For text of present warnings, see *supra* note 94.

155. TENN. CODE. ANN. § 49-7-2104(b)(2) (Supp.1989). The following statement must appear in at least ten-point boldface type: "IF YOU SIGN THIS CONTRACT PRIOR TO YOUR LAST INTERCOLLEGIATE GAME AND DO NOT NOTIFY YOUR COLLEGE OR UNIVERSITY OF THIS CONTRACT, YOUR TEAM MAY BE REQUIRED TO FORFEIT ALL GAMES IN WHICH YOU PARTICIPATE THEREAFTER, AND YOU MAY CAUSE YOUR TEAM TO BE INELIGIBLE FOR POST SEASON GAMES." *Id.* Consistent with the recommendation in *supra* note 154 this provision could be included in the Athlete Agent Act as § 5(b)(5).

156. For instance, if a violation forced a school to miss the 1990 Rose Bowl, that school would lose a \$5.5 million payout for its participation in the game. The Dallas Morning News, Dec. 31, 1989, at 16B, col. 4. In 1988, the University of Alabama was forced to return the over \$250,000 that the school had earned in the 1987 NCAA basketball tournament because two of its players had signed early with Norby Walters and Lloyd Bloom. Atlanta Const., May 10, 1988, at 1E, col. 2. For a discussion of the case, see Ehrhardt, *supra* note 24, at 644-45.

157. In spite of the lack of investigatory and enforcement resources needed to properly administer the Act, Texas nevertheless recently became the first state to actually impose the maximum civil fine available under the statute on an agent. In December of 1989, the secretary of state's office fined former Heisman Trophy winner Johnny Rodgers and the sports marketing firm he represents, TEAM America, Inc., \$10,000 for alleged violations of the contacts provision of the Act. The Dallas Morning News, Dec. 28, 1989, at 6B, col. 1. Rodgers allegedly prematurely met with the 1989 Heisman winner, University of Houston quarterback Andre Ware, and offered Ware \$20 million to sign a representation agreement. Furthermore, Rodgers admitted buying Ware's mother a fur coat and other items in an attempt to lure Ware into signing a contract.

Notwithstanding the Rodgers incident, however, the secretary of state has taken disciplinary action against only two other agents since the Act was promulgated in 1987. Mathieson, *supra* note 82. The first action was taken against an agent who merely overlooked renewal of his registration. *Id.* The agent continued to file his contracts with the secretary's office, but did not file a renewal application. This violation required little investigation since the agent was already on file and actively trying to comply with the statutory requirements.

The second violation involved a California agent who failed to meet the registration requirements of the Act before contacting an athlete within the state. *Id.* The secretary of state felt that the agent was acting in good faith and simply was not aware of the Texas law. The state fined both agents \$250 for their violations.

Ironically, two of the three penalties that have been imposed under the Act have been against agents acting in good faith and trying to comply with the various requirements of the various states. Because of the difficulties in enforcement, Texas has only once penalized an agent engaged in the type of conduct that the statute was designed to prevent.

actively seek out and investigate the misconduct of agents.<sup>158</sup> As a result, the office has to rely primarily on assistance from outside sources in reporting any violations.

The major problem with the above situation is that a party privy to the illegal conduct of an agent would rarely be interested in reporting the violation.<sup>159</sup> The system currently views the athlete as the victim, and unless that athlete becomes disenchanted with the deal he receives from his agent, he has no interest in reporting an illegal contract that he may have executed.<sup>160</sup> While the athlete's institution may have a genuine pecuniary interest in reporting agent violations of the statute, the difficulty still remains that rarely does anyone associated with the institution know that an illegal contract has been signed.

It seems that the time has come to establish a means to deter both the agent and the player from engaging in illegal conduct.<sup>161</sup> Experience has shown that athletes are not as innocent or naive as the Act seems to imply. By imposing civil or criminal penalties on athletes who knowingly deal with agents in violation of NCAA rules and state law, the state would provide another wall of protection to its attempt to curb illegal agent activity. Thus, in order to execute a premature agency contract, both the agent and the athlete would have to be willing to break the law. Perhaps the threat of criminal liability would cause the athlete to think again before accepting financial inducements and entering into an illegal contract.<sup>162</sup> Furthermore,

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158. See *supra* notes 118-119 and accompanying text.

159. The authors drafted the statute with the idea that the athlete is the victim. Mathieson, *supra* note 82. As a result of this mindset, the state levels all penalties against the agent, and the athlete keeps any perquisites which he accumulated during the relationship. TEX. REV. CIV. STAT. ANN. art. 8871, § 8(a)(2) (Vernon Supp. 1990). The apparent rationale is that if the state allows the athlete to keep the money, he will be more likely to come forth and incriminate the agent. A couple of fallacies exist in this reasoning, however. First, most athletes are not disenchanted with their agents. On the contrary, athletes who have received gifts and inducements from their agents to sign should be extremely satisfied and look forward to a continuing relationship with their agent. Second, the athlete who enters into a premature agency contract does not want to lose the remainder of his college eligibility. The only way to enjoy the benefit of his bargain and continue to participate at the collegiate level is to keep his contract with the agent confidential.

160. On the contrary, the athlete has a legitimate interest in keeping any agreement between the two secret, because disclosure would jeopardize the athlete's college eligibility and subject his agent to the various penalties discussed in this Comment. See *supra* notes 99-108 and accompanying text.

161. In recognizing that many state statutes have given the athlete a free ride when it comes to regulatory schemes, the Florida legislature recently enacted a statute that holds the athletes responsible for their own actions in dealing with agents. FLA. STAT. ANN. §§ 468.451-.454 (West 1989). In many cases, the college athlete is as guilty of misconduct as the agent. Certainly, college athletes know the NCAA rules as well or better than the sports agents who recruit them. "Yet, like the agent, the athletes ignore those rules, their scholarship commitment to their university, and, in some instances, state law, to satisfy their monetary appetites." Ehrhardt, *supra* note 24, at 673. Florida, therefore, prescribes criminal sanctions not only against the agent for a violation of state law, but also the athlete. FLA. STAT. ANN. § 468.454(1) (first degree misdemeanor for athlete failing to provide timely notice of agency contract to institution).

162. One may argue that if an athlete is willing to secretly sign an agency contract in violation of NCAA rules, he may be equally willing to risk a possible misdemeanor charge. However, risking college eligibility on the one hand, and being charged with a crime on the

if the statute required the athlete to forfeit any money he received as an inducement in violation of state law, he would be less willing to risk his eligibility through accepting such an incentive or entering into a premature agreement.<sup>163</sup>

Since enforcement of the Act remains so difficult for the secretary of state,<sup>164</sup> an alternative means to increase compliance is to raise the penalty for violation of the law. Under the Athlete Agent Act, the maximum civil penalty is currently \$10,000.<sup>165</sup> Since the percentage that an agent receives of an athlete's contract in many cases far exceeds this amount, the legislature should increase the maximum penalty to compel agents to reconsider before blatantly violating the statute.<sup>166</sup> The current statute also carries a criminal penalty in the form of a class A misdemeanor.<sup>167</sup> This penalty should also be strengthened to a felony, with possible prison time involved for the most blatant abuses.<sup>168</sup> Furthermore, consistent with the recommendation of holding the athletes as well as the agents accountable under the statute,<sup>169</sup> civil and criminal penalties against the athlete would lend to the statute the added potency needed for compliance.<sup>170</sup>

Even with the enhanced penalties for violation, however, the likelihood of illegal behavior being detected remains minimal without active enforcement of the Act. One viable alternative to increase the enforceability of the Act is to involve the state attorney general in the investigation and prosecution of violations. Another means of accomplishing the same purpose is to create a special enforcement arm under the supervision of the secretary of state, funded by a tax on all agent transactions.

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other are two very different matters. It seems the possibility of having a criminal record would be a far more effective deterrent than missing a few games during one's senior year of college.

163. This argument ends in a polycentric decision, however, with the answer depending on where one wishes to place the risk of loss. If the Act does not allow the athlete to keep the money paid to him as an illegal inducement, then it would be returned to the agent, who paid it as an illegal inducement in the first place. While this may deter the athlete, it encourages the agent to offer such inducements because he knows that if there is a problem, he will get the money back. On the other hand, if the Act allows the athlete to keep the money, he will be encouraged to accept inducements from an agent and possibly even seek out the most lucrative deal he can muster, knowing that the risk of loss is on the agent.

164. See *supra* notes 157-160 and accompanying text.

165. TEX. REV. CIV. STAT. ANN. art. 8871, § 9(b) (Vernon Supp. 1990).

166. Perhaps the \$10,000 fine imposed on Johnny Rodgers and TEAM America, Inc. last December will catch the attention of agents who previously took this part of the statute lightly. See *supra* note 157. If the maximum penalty were \$50,000, however, even more of a deterrent would exist.

167. TEX. REV. CIV. STAT. ANN. art. 8871, § 8(c).

168. Such a suggestion is certainly not out of the ordinary in light of several recent statutes: ALA. CODE § 8-26-41 (1989 Supp.) (violation of a felony, punishable by fine of not more than \$5,000 and imprisonment from one to ten years); FLA. STAT. ANN. § 468.453(3) (West 1989) (violation of a third degree felony, punishable by fine of \$5,000 and imprisonment for up to five years); IND. CODE ANN. § 35-46-4-4(1)-(2) (Burns 1989) (violation of a class D felony, punishable by fine of not more than \$10,000 and imprisonment for fixed term of two years).

169. See *supra* notes 161-163 and accompanying text.

170. Even if a state rarely enforced such sanctions, the possibility of enforcement might put enough fear into the athlete to prevent him from illegally signing with an agent until his eligibility has expired. The practical effect of such an inclusion would be far more productive than the actual words themselves.



In many cases the athlete's school becomes the only real victim of a premature agency agreement, since it may not only lose a star athlete but also, more significantly, lose substantial television and post-season revenue.<sup>171</sup> Therefore, a cause of action on behalf of these schools for the recovery of damages caused by an agent should be an essential part of any statutory scheme. While the Texas NCAA Act creates such a cause of action for any agent that breaks NCAA rules,<sup>172</sup> the scope of that statute should be expanded to include damages incurred by the institution as a result of any violation of the Athlete Agent Act. Furthermore, to promote statutory efficiency, this new provision should be contained in the Athlete Agent Act, and the Texas NCAA Act should be repealed. In a provision similar to the one suggested, Tennessee expressly defines possible damages as lost revenues from television appearances, ticket sales, and participation in post-season tournaments or bowl games.<sup>173</sup>

## V. THE ALTERNATIVE OF FEDERAL REGULATION

### A. History

The option of federal regulation has been suggested more than once.<sup>174</sup> The obvious question that Congress must answer before considering various proposals for federal attention is whether this area involves a matter of federal concern. As early as thirteen years ago members of Congress recognized that sports are of such importance to the nation that some form of congressional oversight on an ongoing, permanent basis is required.<sup>175</sup> At that time, however, a House Select Committee conducting an inquiry into professional sports examined the role played by agents in the sports industry and determined that the examples of malpractice were insufficient to base any recommendation for legislation.<sup>176</sup> The Committee did suggest that a successor committee be formed to investigate the matter more thor-

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171. See *supra* note 156.

172. See *supra* text accompanying note 108.

173. TENN. CODE. ANN. § 49-7-2106 (Supp. 1989). Furthermore, the Tennessee Act allows treble damages in an amount equal to three times the value of the athletic scholarship that the school provided the athlete. *Id.* § 49-7-2107.

174. See, e.g., Kohn, *supra* note 4, at 13-16 (suggestion for certification through instructional programs and testing); Note, *supra* note 46, at 1064-69 (recommendation for preemptive federal statute similar to the proposed Professional Sports Agency Act of 1985).

175. 122 CONG. REC. 34,049 (1976) (statement of Rep. Sisk, chairman of the Select Committee on Professional Sports). Rep. Sisk remarked:

Congress has a duty to protect the fan interest of this Nation in its sports. Sports provide entertainment and recreation. They are supportive of our Nation's traditional values of sportsmanship and fair play. They are a national asset. If congressional oversight can serve as a conscience for the American sports world, keeping the eyes of those who run sports in America on its important national goal, they have in their care: spiritual and physical integrity, then this is a task we should seriously look into and take on if necessary.

*Id.* at 34,049-50.

176. REPORT, *supra* note 2, at 77. That inquiry took place, however, before the real abuse began. One question whether Congress would reach the same conclusion today, in the wake of the Walters, Bloom and Abernethy scandals. See *supra* notes 40 & 154 and accompanying text.

oughly.<sup>177</sup> In light of the scandals that have compromised the integrity of the entire sports industry in the past few years, perhaps now is the time for Congress finally to involve itself.

### B. Rationales for Federal Regulation

The rationales for federal regulation are quite compelling. First, the sports agent profession clearly involves interstate activities,<sup>178</sup> and activities that affect interstate commerce are routinely regulated by Congress through its power granted under the commerce clause of the Constitution.<sup>179</sup> Second, federal regulation would create uniformity, a trait the present system lacks. As more states enact legislation, the process of registration and compliance will become ever more burdensome on the individual agent.<sup>180</sup> The prospect of requiring agents to register only once and pay a single fee should be appealing even to those agents who otherwise oppose federal regulation.<sup>181</sup> Third, the question has been raised as to whether these state statutes violate the dormant commerce clause, which blocks a state from regulating in a way that would materially burden or discriminate against interstate commerce.<sup>182</sup> Because of the intrinsically interstate nature of this business, a state statute would have to pass the often cited *Pike v. Bruce Church, Inc.*<sup>183</sup> balancing test to be upheld. Though certainly skewed towards constitutionality, this test balances the legitimate local interest advanced by the statute with the burden it places on interstate commerce.<sup>184</sup> If, for example,

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177. REPORT, *supra* note 2, at 78. Congress never established this successor committee. Thus, as the incidence of agent abuse has increased during the 1980's, no congressional oversight has been present to "serve as a conscience for the American sports world." See *supra* note 175. The lack of congressional interest manifested itself again in 1985 when the National Sports Lawyers Association drafted a proposed federal statute, The Professional Sports Agency Act of 1985, but was unable to find a sponsor for the bill. The organization is still feeling out Congress to determine the proper time, place, and source of introduction of the bill. Kohn, *supra* note 4, at 14.

178. REPORT, *supra* note 2, at 79. The fact that the entire professional sports industry is interstate in nature is evidenced by the fact that no professional sports league has more than four teams from any single state; four Major League Baseball organizations domicile in California—the California Angels, Los Angeles Dodgers, Oakland Athletics and San Francisco Giants. Agents, then, not only engage in interstate commerce when recruiting athletes from the colleges and universities of the various states, but also when negotiating contracts with various teams from around the league.

179. U.S. CONST. art. I, § 8, cl.3.

180. It is not unreasonable to believe that several states will enact their own statutes in the near future. In 1988 alone, twelve states passed legislation regulating various activities of sports agents. These states were Florida, Georgia, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania and Tennessee. Arizona, Massachusetts, Nebraska, New Hampshire, New York, South Carolina, Vermont and Washington all have considered similar legislation or have legislation pending.

181. An argument may be made that the lack of compliance with state regulations is a function of the burden created by the registration requirements of each state. To comply with the registration requirements of every state would effectively price many agents out of the market, thereby reducing the field of qualified agents from which an athlete might like to choose.

182. Rodgers, *States Revamp Defense Against Agents*, THE SPORTS LAWYER, Winter 1988-89, at 1, 7.

183. 397 U.S. 137, 142 (1970).

184. The test is enunciated as follows: "Where the statute regulates even-handedly to effec-

a court found that the burden of the registration and bond requirements of a certain state outweighed the local interest of regulation, then it would strike the state statute down as unconstitutional.<sup>185</sup> Although no agent has judicially challenged a state statute to date, the legal community should keep this consideration in mind since this confrontation is certain to take place at some point in the future. Finally, preemptive federal regulation would provide the effectiveness and enforcement authority that the state statutes currently lack.<sup>186</sup> The federal government has a greater pool of resources from which to extract investigatory and enforcement mechanisms. Furthermore, federal legislation carries with it a greater air of deterrence than any state statute might provide.<sup>187</sup>

### C. Recommendations for Federal Legislation

Eight years ago, the National Sports Lawyers Association (NSLA) drafted a proposed federal statute entitled the Professional Sports Agency Act of 1985 (PSAA) to regulate the activities of sports agents.<sup>188</sup> That organization recognized the need for federal legislation and sought to find a sponsor for the bill in Congress. Unfortunately, the proposed bill was never formally introduced due to a lack of congressional interest.<sup>189</sup> In light of the path the industry has taken in recent years, however, it is time for Congress at least to reconsider some form of federal legislation.

Although the PSAA is by no means perfect, it does provide a solid foundation for regulation by requiring all agents to become members of a national sports agency association approved by and registered with the Secretary of Commerce (Secretary).<sup>190</sup> The Act also requires the agent to meet certain standards of training, experience, and competence set by the Secretary and the association to which the agent applies.<sup>191</sup> Though not

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tuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

185. Such a scenario would only be likely when an agent had minimum contacts, such as mere contact with an athlete, in a state that imposes a heavy burden through egregious registration or bonding requirements.

186. A fundamental reason for the lack of effectiveness and perceived enforcement authority of state regulations is that the sports agent profession is truly national in scope. At least one commentator has likened the agent-athlete relationship to that of a stockbroker-client, which has been federally regulated since 1934. See Note, *supra* note 46, at 1066-67; Securities Exchange Act of 1934, 15 U.S.C. § 78 (1988).

187. Agent Mike Trope enunciated this view when he stated that he will ignore NCAA regulations unless they are "laws of the United States, and you can go to prison for ten years if you break them." McLeese, *A Whole New Ballgame for Lawyers*, STUDENT LAW., Oct. 1980, at 46.

188. Professional Sports Agency Act of 1985 (1985) [hereinafter PSAA] (drafted by the National Sports Lawyers Association and yet to be introduced before Congress).

189. Kohn, *supra* note 4, at 14.

190. PSAA, *supra* note 188, § 6(b). "National sports agency association means any association of sports agents which has been approved by and registered with the Secretary as a national sports agency association." *Id.* § 3(5).

191. *Id.* § 6(c)(1). Such a measure would eliminate the biggest complaint about agents, that they may be certified without any minimum level of expertise in, or knowledge relating to, representing or advising athletes.

required by the PSAA, such standards should require applicants to pass an examination before registration is granted.<sup>192</sup> This examination should be administered by the players' associations of the individual sports and should test the applicant's proficiency in a wide array of matters concerning the rules and procedures of each league.<sup>193</sup> Generally, the agent should be able to demonstrate a knowledge of tax laws and principles of finance to ensure he possesses the competence to negotiate adequate compensation packages. Specific topics that should be covered by such testing include the constitutions, bylaws, and amateur draft procedures of the professional leagues to which the agent has applied. Furthermore, the agent should be aware of the collective bargaining agreements, waiver procedures, and free agency systems currently in effect.<sup>194</sup> The examination should also test the agent's understanding of the fundamental rules of the sports, as well as the significance of individual statistics in the negotiation of the agent's salary and bonus clauses.<sup>195</sup> The various professional players' associations should administer these tests and should follow them with mandatory continuing education seminars, similar to the continuing legal education credits attorneys must accumulate.<sup>196</sup> These recommendations will ensure that agents are adequately qualified and current in their knowledge of the various issues important to the representation of professional athletes.

In addition to the above registration and testing requirements, the proposed regulatory scheme should protect all athletes, whether or not they have signed a professional contract. It should also impose severe civil and criminal sanctions on an agent who violates one of its provisions. Furthermore, any federal legislation should include the various contacts, solicitation, and contractual provisions recommended in the previous section for the Texas Athlete Agent Act. A federal statute of the type recommended here would serve the purpose of protecting all athletes (professional or not) and all schools from the problems discussed in this Comment.

#### *D. Compromise: Model Sports Agency Act*

Since Congress has yet to display a serious interest in regulating the sports industry, the creation of a uniform Model Sports Agency Act (Model Act) might be a viable compromise between the current inconsistent state regulations and the expansive proposed federal scheme. Much like the Uniform Securities Act, a Model Sports Agency Act would promote uniformity among the states, but still allow each state a choice to adopt certain provisions it deemed necessary. Such a system, however, would not ease the bur-

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192. See generally Kohn, *supra* note 4, at 14-15. Section (6)(c)(2) of the PSAA gives the Secretary and the individual association discretion whether to test applicants.

193. See generally Kohn, *supra* note 4, at 15 (recommendation for comprehensive program involving mandatory instructional seminars and extensive testing).

194. For a general treatise discussing these issues in professional sports, see *SPORTS LAW*, *supra* note 8.

195. Kohn, *supra* note 4, at 15.

196. The registration, testing, and continuing education requirements could be funded through the penalties assessed under the Act, as well as fees charged to prospective and current members of the associations.

den of having to register in several states unless it contained a reciprocity agreement among the states. Such an agreement could require an agent to register and post bond in one state, but allow him to do business in other states, with the agreement that the registration and bond cover his conduct in all states in which he is doing business. If the states have adopted the Model Act or something substantially similar, the agent would know what to expect, and few problems would exist with respect to administration and reciprocity. In any event, the substance of the Model Act should be similar to that suggested for the state and federal legislation in this Comment.

## VI. CONCLUSIONS

The professional sports industry exists as an entertainment and relaxation medium to millions of Americans. It unites entire cities, teaching the value of teamwork and unity. It is truly a national asset.

Without a doubt, the industry has received a black eye in recent years as a result of both the incompetence and unscrupulousness of sports agents. While many entities have tried to cure the ills caused by agent activities, none has yet found an effective panacea. Federal regulation certainly seems the most workable solution, especially if it incorporates measures similar to those suggested in this Comment. Until members of Congress display an interest in regulation, however, that alternative remains illusory.

State legislation, while certainly not as efficient as federal regulation, could effectively produce the desired result of protection to both the athlete and his school if the states were willing to execute the laws they have enacted. The burden of registration and lack of uniformity, however, would still remain. Nevertheless, until the states enforce their registration requirements and allocate the necessary resources to investigate and prosecute agents who do not comply, their statutes will continue to be ignored by most agents.

A Model Act would achieve most of the goals of federal regulation, but still leave the ultimate regulatory power in the states. Perhaps this is the most likely alternative in view of the recent congressional affinity for deregulation. To be feasible, however, such a system would require the cooperation of all states in enacting the Model Act and enforcing it in a uniform manner.

Regardless of how it is accomplished, one thing remains clear: the time has come for someone to take the lead in sports agent regulation. The future and integrity of American sports are at stake.