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## Tightening the Defense Against Offensive Sports Agents

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# TIGHTENING THE DEFENSE AGAINST OFFENSIVE SPORTS AGENTS

CHARLES W. EHRHARDT AND J. MARK RODGERS

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## TIGHTENING THE DEFENSE AGAINST OFFENSIVE SPORTS AGENTS

CHARLES W. EHRHARDT\* AND J. MARK RODGERS\*\*

“AGENTS,” it has been said, “are the most destructive force in sports.”<sup>1</sup> They have also been called vipers,<sup>2</sup> parasites,<sup>3</sup> charlatans,<sup>4</sup> vultures,<sup>5</sup> bloodsuckers,<sup>6</sup> and leeches.<sup>7</sup> One writer accounted, “Like serpents they infest the gardens and groves of American sport, poised to strike at the wealth professional athletes earn in such plenty.”<sup>8</sup> Said one professional athlete, “They’re all bad—all agents.”<sup>9</sup>

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1. INQUIRY INTO PROFESSIONAL SPORTS: FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. Rep. No. 1786, 94th Cong., 2d Sess. 70 (1977) (statement by Harrison Vickers, Houston Aeros).

2. Neff, *Den of Vipers, A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 76.

3. *Id.*

4. Powers, *Coaches, Athletes Are Artful Hustlers, Too*, The Sporting News, Nov. 16, 1987, at 12, col. 1.

5. USA Today, Jan. 26, 1988, at 7C, col. 3. The term “vultures” was used by Mike Gottfried, the head football coach at the University of Pittsburgh, who began a crusade against agents in January 1988. The University of Pittsburgh lost one of its outstanding football players, Craig “Ironhead” Heyward, when, after his junior season, Heyward made the decision to turn professional. Heyward had one year of collegiate eligibility remaining at Pittsburgh. Gottfried believed Heyward made the decision to leave school after consulting with a sports agent. Pittsburgh lost Heyward only a few months after players Charles Gladman and Teryl Austin were declared ineligible for collegiate competition when it was discovered that the two had accepted money from an agent. Austin subsequently was reinstated. *Id.* at cols. 2-3.

Heyward’s leaving prompted Gottfried to respond, “These agents stalk the players like vultures and prey on their innocence.” *Id.* at col. 3. Gottfried stated, “I’d like to apologize to the bird species for connecting these two.” *Id.* at 9C, col. 1.

6. Orlando Sentinel, June 12, 1988, at C-10, col. 1.

7. *Id.*

8. Neff, *supra* note 2, at 76.

9. *Id.*

The truth is, not *all* sports agents are bad. Some—the ones rarely publicized—are competent, honest, and trustworthy. However, there is a substantial number who are unscrupulous, deceitful, and a severe threat to athletes and organized sports, both amateur and professional. This latter group has drawn the scorn and contempt toward the profession which prevails today and has attracted the keen interest of state lawmakers.

In 1988, twelve states, including Florida, passed legislation which will make the sports agent and, in some cases, the athlete, accountable for indiscretions against colleges and universities.<sup>10</sup> The total number of states with agent legislation stands at seventeen.<sup>11</sup> Additionally, several states have either considered or currently have similar legislation pending.<sup>12</sup>

This Article examines the reasons for this rash of legislation. The authors begin by exploring the background of sports agency and outlining the positive effects that competent agents can produce for athletes. Also examined are the bad agents, those who ignore rules, laws, and regulations in pursuit of personal wealth. The authors outline legislation which has been passed to curtail and control unscrupulous agents. Finally, the authors review Florida's new law, which places a burden on the athlete and the agent.

## I. BACKGROUND: THE ATHLETE AND THE AGENT

The adage is worn but accurate: All you need to be an agent is a client. Indeed, it is that truth which begins to describe the wide spectrum of humanity that represents professional athletes. Attorneys, accountants, stockbrokers, ex-coaches, insurance agents, retired professional athletes, college professors, a dry-cleaning manager, a kosher caterer, and a dentist, are only a sampling of the estimated 2,000 to 20,000 people who call themselves "sports agents."<sup>13</sup> It is a simple vocation: no

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10. Florida, Georgia, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania, and Tennessee. See *infra* notes 84-223 and accompanying text.

11. In addition to the 12 states listed *supra* note 12, Alabama, California, Louisiana, Oklahoma and Texas have passed agent legislation. See *infra* notes 84-96 and accompanying text.

12. The *NCAA News* has compiled a list of pending legislation related to the regulation of athlete agents. The compilation includes: Arizona (S. 1011), Nebraska (L. 224), New Jersey (A. 3002), New York (A. 5765, S. 6310), South Carolina (H. 3348, S. 1057), Virginia (H. 1617, H. 1105), Washington (S. 6225). See *NCAA News*, Aug. 31, 1988, at 13-14; *id.*, Feb. 8, 1989, at 14-15.

13. Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701, 703 (1987); Steinberg, *Time to Revise Game Rules?*, *The Sporting News*, Nov. 16, 1987, at 10, col. 1.

educational or professional credentials are necessary, nor are skill, training or knowledge.<sup>14</sup>

### A. *Why an Athlete Hires an Agent*

Professional sports is big business and its wealthiest beneficiaries are the athletes. The average annual salaries in the four major professional sports leagues provide sound testimony:

<u>LEAGUE</u>	<u>AVERAGE ANNUAL SALARY</u>
National Basketball Association	\$ 587,000 <sup>15</sup>
Major League Baseball	\$ 438,000 <sup>16</sup>
National Football League	\$ 240,000 <sup>17</sup>
National Hockey League	\$ 188,000 <sup>18</sup>

And the above are just *averages*. Consider that professional basketball players Kareem Abdul-Jabbar and Ervin "Magic" Johnson, teammates on the Los Angeles Lakers, each earned salaries of \$2.5 million for the 1987-1988 season.<sup>19</sup> New York Mets catcher Gary Carter garnered \$2,360,714 for the 1988 baseball season, making him one of eleven Major League Baseball players to earn at least \$2 million during the season.<sup>20</sup> Seventy-one Major League Baseball players earned at least \$1 million.<sup>21</sup> At \$1,391,750, Bo Jackson was the highest paid player in the National Football League (NFL) in 1987; additionally, he earned another \$533,000 as an outfielder for the Kansas City Royals in 1988.<sup>22</sup>

Those salaries are not gifts. Many are the product of tedious, calculated, and methodical planning. Comparable to other high stakes business negotiations, sports contract negotiations can entail bitter and exhaustive wrangling which may drag on for months and, in some cases, years. Additionally, the complexities of a multi-million dollar, multi-

14. Kohn, *Sports Agents Representing Athletes: Being Certified Means Never Having to Say You're Qualified*, ENT. & SPORTS LAW., Vol. 6, No. 3, Winter 1988, at 1. Bob Woolf, the pioneer of sports agents, has negotiated more than 2,000 contracts during his 25-year career. He recognizes the loose credentials of his profession: "Anybody today can become an agent. You can be on your way to jail or getting out. . . . Thank God there are some good ones out there. But a lot are irresponsible." Orlando Sentinel, June 12, 1988, at C-10, col. 1. See Shulruff, *The Football Lawyers*, A.B.A. J., Sept. 1985, at 46.

15. Fichtenbaum, Rosenblatt & Sandomir, *How Golden the Goose*, SPORTS INC., Jan. 2, 1989, at 29 [hereinafter *How Golden the Goose*].

16. *Id.*

17. *Id.*

18. *Id.*

19. Levine, *The Sport 100 Salary Report*, SPORT, June 1988, at 23-24.

20. USA Today, Oct. 13, 1988, at 1C, col. 2.

21. *Id.*

22. Levine, *supra* note 19, at 25.

year contract can demand a sophisticated understanding of income taxes, annuities, salary deferments, incentive bonuses, injury protection, and the collective bargaining process. For expertise on these and other matters inherent to large salaries, an athlete hires an agent.<sup>23</sup>

The emergence of the sports agent, a relatively recent phenomenon in sports, was spawned by the historic unfairness athletes encountered at the bargaining table.<sup>24</sup> Matched against shrewd general managers, players who possess minimal bargaining power and even less negotiation experience often had little choice but to accept a team's low salary offer.<sup>25</sup> But that imbalance began to shift in the late 1960s. Increased revenue from network television, competition from rival leagues, and free agency in baseball, forced teams who wanted to remain competitive to crack their vaults.<sup>26</sup> Athletes, at the behest of their new found agents, leaped inside and stuffed their pockets. Not by coincidence, as more and more athletes hired agents, average salaries soared.<sup>27</sup> Clearly, agents proved a decisive advantage for the athlete.<sup>28</sup>

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23. Generally, the word agent is "used to describe a person authorized by another to act on his account and under his control." RESTATEMENT (SECOND) OF AGENCY § 1 comment e (1958). For purposes of this Article, the word "agent" will be synonymous with sports agent, athlete agent, and player representative. For background information on sports agents, see generally Kohn, *supra* note 14; Massey, *The Crystal Cruise Cut Short: A Survey of the Increasing Regulatory Influences Over the Athlete-Agent in the National Football League*, 1 ENT. & SPORTS L. J. 53 (1984); Ruxin, *Unsportsmanlike Conduct: The Student-Athlete, The NCAA, and Agents*, 8 J.C. & U.L. 347 (1981-1982); Sobel, *supra* note 13; Note, *Agents of Professional Athletes*, 15 NEW ENG. L. REV. 545 (1980); Note, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need For Regulation*, 30 BUFFALO L. REV. 815 (1981).

24. Before 1968, NFL teams did not allow players to be accompanied by their advisors during contract negotiations. Sobel, *supra* note 13, at 703 n.3.

25. Neff, *supra* note 2, at 76. "A player who did not have much experience in the business world was completely outmanned in his negotiations with the general managers." *Id.* (quoting Tom Condon).

26. *Id.*

27. For example, in 1967, the average major league baseball player earned \$19,000; by 1988, the average salary had ballooned to \$438,000. *How Golden the Goose*, *supra* note 15, at 29.

Another example of skyrocketing salaries in professional sports is found in the number of millionaires—that is, athletes who earn at least \$1 million in one calendar year. In 1982, 23 professional athletes earned at least \$1 million. In 1988, the number of professional athletes earning \$1 million or more was 118. Levine, *supra* note 19, at 23.

28. A House of Representatives Select Committee on Professional Sports held hearings in 1977 to learn more about issues affecting professional sports. One of the topics was sports agents. The committee heard from three full-time player agents, an executive director of a players' association who was also a player agent, three player association executives, team owners, and league officials. INQUIRY INTO PROFESSIONAL SPORTS: FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. REP. NO. 1786, 94th Cong., 2d Sess. 70-79 (1977). In its final report, the Committee wrote:

[P]layer agents are now generally accepted as a permanent, highly visible, and at times

## B. *The Agent's Role*

Sports agents today perform four primary tasks: negotiate the athlete's employment agreement; secure, negotiate and review commercial opportunities; provide financial advice and income management; and counsel on legal and tax matters.<sup>29</sup> Performed ethically and competently, these services maximize an athlete's earning power during the relatively short period when the athlete is physically able to compete on the professional level.

### 1. *Negotiation of Employment Agreement*

Generally, an athlete's primary source of income is derived from the salary paid to him by his team. The employment contract, therefore, must be negotiated with great care. An effective agent can—through research and market studies of comparable salaries—determine the value of a player's services to a team and, in turn, attempt to persuade the team of that value.<sup>30</sup> Additionally, the agent must attempt to fashion a compensation package that best meets the player's needs.<sup>31</sup> Finally, the agent can ensure that the athlete's rights and interests stipulated under the league's collective bargaining agreement are protected.<sup>32</sup>

Utilizing an agent to negotiate the employment agreement also allows the athlete to be shielded from the often intense bickering inherent in the negotiation process. Especially prevalent during the negotiation of a veteran player's contract is a team's accentuation of a player's deficiencies and weaknesses in support of its salary offer. This, of course, is a fundamental negotiation strategy. However, by employing an agent, the athlete is insulated from those comments which can generate ill will toward his team.

### 2. *Additional Income Opportunities*

The popularity of sports in our society provides an additional economic opportunity for athletes through commercial endorsements and other public appearances. However, few of these opportunities come un-

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positively beneficial, element in the sports labor relations process. . . . Today there is recognition of the benefits in negotiating personal services contracts with a knowledgeable, competent representative rather than with a youthful or unsophisticated athlete, his parent or a friend of the family.

*Id.* at 70-71, reprinted in Sobel, *supra* note 13, at 709.

29. See generally Sobel, *supra* note 13, at 705-09.

30. Ruxin, *supra* note 23, at 355.

31. *Id.*

32. Sobel, *supra* note 13, at 706.

solicited. Therefore, the athlete's agent can test the athlete's marketability and pursue potential interests on behalf of the athlete.

Once commercial opportunities are located, the agent's responsibility has only begun. An evaluation of the opportunity will determine whether it best suits the image and personality. Additionally, a contract must be negotiated which fairly compensates the athlete and thoroughly protects his rights and concerns.

### 3. *Financial Advice and Income Management*

The ability to command large salaries brings with it the burden of managing and investing the income. Generally inexperienced in these matters, some athletes utilize their agent as a financial advisor who ideally helps the athlete choose the most sound investment opportunities consistent with a long-term plan for financial security. Some agents also are employed as money managers and business managers with responsibility for paying the athlete's bills and allotting the athlete a monthly allowance for living and personal expenses.<sup>33</sup>

### 4. *Legal Matters*

Many agents are not lawyers. Thus, while an agent may be quite competent to negotiate the principal terms of a player contract or endorsement agreement, the prudent agent will hire a lawyer to review and refine the agreement and to draft the contract. Additionally, an agent will retain a tax lawyer for advice and analysis on the income tax consequences of a proposed transaction.<sup>34</sup>

## II. THE BAD AGENT

Ideally, an agent's principal role is to maximize the athlete's earning potential while establishing a foundation for the athlete's lifetime financial stability. The agent's responsibility is that of a fiduciary.<sup>35</sup> However, some agents—lost in their zeal to cash in on the big business of sports—have abandoned their professional and moral responsibilities.

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33. *Id.* at 708.

34. *Id.* at 709.

35. A fiduciary is defined as "[a] person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. As an adjective it means . . . relating to or founded upon a trust or confidence." BLACK'S LAW DICTIONARY 563 (5th ed. 1979).



Until recently, the most prevalent problems associated with a bad agent were income mismanagement,<sup>36</sup> excessive fees,<sup>37</sup> conflicts of interest,<sup>38</sup> and incompetence.<sup>39</sup> These problems attracted the attention of lawmakers, players associations, and special interest groups, who concentrated their efforts on formulating regulations that controlled the agent and protected the athlete within the athlete-agent relationship.<sup>40</sup> However, beginning in March 1987, the sporting world painfully discovered that the athlete was not the only party who required protection from the unscrupulous agent. Entire universities trembled as agents, stampeding over themselves to recruit new clients, threatened the foundation of collegiate athletics. College administrators, athletic departments, and coaching staffs were cast as the newest victims of the bad agent, who ignored collegiate eligibility and amateur status in pursuit of personal riches.<sup>41</sup>

### A. *The Recruiting War*

The proliferation of agents in professional sports has accelerated competition for clients. And the word competition is an understatement; it is more accurately described as war.<sup>42</sup>

36. Sobel, *supra* note 13, at 710. Stories are legendary about professional athletes losing large amounts of money entrusted to their agents. Most notable, perhaps, is the saga of professional basketball player Kareem Abdul-Jabbar, the longtime center for the Los Angeles Lakers. In 1987, Abdul-Jabbar filed a \$59 million lawsuit against his former business manager, Tom Collins. In the complaint, Abdul-Jabbar charged Collins and his associates with breach of their fiduciary duty, breach of contract, fraud, and negligent misrepresentation. Abdul-Jabbar claimed, for example, that Collins often entered into deals on his behalf without a thorough explanation of the risks. Additionally, Collins allegedly arranged bank loans for several investors, including other athletes, by exposing Abdul-Jabbar personally for liability on the full amount of the loans—\$7.4 million—rather than on Abdul-Jabbar's \$1.6 million pro rata share without Abdul-Jabbar's knowledge. Papenek, *A Lot of Hurt: Inaction Got Kareem Creamed*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 89. For other accounts of athletes losing money entrusted to their agents, see Keteyian, *'At Times You Flat Cry'*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 90; Nack, *Thrown For Heavy Losses*, SPORTS ILLUSTRATED, Mar. 24, 1986, at 40; Looney, *Thrown for Some Big Losses*, SPORTS ILLUSTRATED, Aug. 12, 1985, at 22; USA Today, June 22, 1987, at C9, col. 1.

37. Sobel, *supra* note 13, at 710. In his book, *An Athlete's Guide to Agents*, attorney Robert Ruxin gives this account of an example of overcharging a client:

A few years ago an NFL rookie signed a \$25,000 contract for two years with a \$10,000 bonus. "That's a total of \$60,000 and the agent took his 10 percent, \$6,000, right off the top," the president of the NFL Players Association told a reporter. "Well, the kid didn't make the team, so all he got to keep was the \$4,000 left over from his bonus and the agent got to keep the \$6,000. That isn't fair."

R. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 57 (1982).

38. Sobel, *supra* note 13, at 710. For examples of conflicts of interest involving sports agents, see Neff, *supra* note 2, at 83-85.

39. Sobel, *supra* note 13, at 710.

40. See *infra* notes 84-99 and accompanying text.

41. See *infra* notes 47-83 and accompanying text.

42. Neff, *In Hot and Heavy Pursuit*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 84 (describing the aggressive tactics employed by sports agents as they pursue potential clients).

The solicitation of clients begins early. Often agents start contacting athletes prior to or during their sophomore year of college.<sup>43</sup> An athlete projected to be an early round NFL draft selection can expect to be contacted by literally hundreds of agents. George Rogers, who won the Heisman Trophy during his senior season at the University of South Carolina, estimated that 300 agents offered to represent him.<sup>44</sup> Another Heisman Trophy recipient, Mike Rozier, who played at the University of Nebraska, estimated he received “almost 1,200 letters, most of which came from people that I had never heard of, and who did not even know me, or want to know me. All they wanted was to line their pockets with the money that I soon would earn in professional football.”<sup>45</sup>

But an athlete does not have to win the Heisman Trophy—symbolic of the year’s most outstanding collegiate football player in the country—to attract interest from agents. Even average players, those who quite obviously will be middle to late round draft choices or free agents, are courted by dozens of agents.<sup>46</sup>

The pursuit of the college athlete is intense. Initially, there are letters, cards, brochures, telephone calls, and late-night uninvited visits to the athlete’s college residence. Some agents pay college coaches to “deliver” clients<sup>47</sup> while others hire full time “runners” or recruiters to make the chase. Apparently, there is nothing some agents would not do to induce a client: they give jobs to family members;<sup>48</sup> they stir rumors about rival agents and cast doubt about their credibility and competence;<sup>49</sup> and they make promises—“I can make you more money”; “I’ll take care of your family”; “I’ll fly you and your girlfriend to the Coast.”<sup>50</sup> Some even offer to provide sexual favors.<sup>51</sup>

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43. *Id.*

44. NAT’L. COLLEGIATE ATHLETIC ASS’N, A CAREER IN PROFESSIONAL SPORTS: GUIDELINES THAT MAKE DOLLARS AND SENSE 4 (1984) [hereinafter GUIDELINES].

45. *Id.* at 6 (quoting Mike Rozier).

46. Neff, *supra* note 42.

47. A newspaper investigation of Lance Luchnick, a Houston-based agent, uncovered that Luchnick paid basketball coaches amounts ranging from \$100 to \$14,269 for helping Luchnick recruit their players. *Newsday*, April 3, 1988, at 5, 19. In one case, the newspaper reported that Luchnick charged a client a 10% commission for negotiating a professional basketball contract and, in turn, paid the client’s high school coach a 3% commission for helping Luchnick recruit the athlete. *Id.* at 19. The newspaper also reported that Luchnick gave a college player at least \$6,000 in cash and gifts in a successful effort to induce him as a client. *Newsday*, April 4, 1988, at 79. See also Neff, *supra* note 2, at 86.

48. One agent hired the brother of a star college football player as a “special assistant” at an annual salary of \$39,000. Leiber, *A Sad Goodbye to Columbus*, *SPORTS ILLUSTRATED*, Aug. 3, 1987, at 38.

49. Neff, *supra* note 42, at 84.

50. *Id.*

51. *Id.* at 85.

Then there is the money: An estimated fifty percent of the top football and basketball talent available for the annual professional drafts receive some sort of payment or favor from agents before the expiration of their collegiate eligibility.<sup>52</sup> Such payments are strictly prohibited by the National Collegiate Athletic Association (NCAA),<sup>53</sup> the private governing body of major college athletics.<sup>54</sup> The NCAA also prohibits its athletes from signing an agency contract or agreeing to be represented by an agent before the end of their college eligibility.<sup>55</sup> However, it is estimated that thirty to seventy percent of the "highest draft picks" in football and basketball sign a contract with an agent or agree to be represented by an agent before the end of their college career.<sup>56</sup> Most of these athletes are "presumed to accept cash or other inducements" to sign.<sup>57</sup>

Evidently, NCAA rules do not deter the unscrupulous agent. The accounts of illicit payments and inducements are myriad; below are some samples:

52. Neff, *Agents of Turmoil*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 34, 36. Estimates vary widely on the percentage of collegiate athletes who agree to be represented by an agent and/or accept money from an agent before the expiration of their eligibility. One former agent estimated that 20% to 80% of the top 330 senior college football players in 1987 accepted payments from agents while in school. USA Today, Dec. 17, 1987, at C1, col. 4. Another former sports agent claims that, while he was in the business, 60% of the players drafted in the first three rounds of the NFL draft had "made a commitment, in one form or another, to an agent before their season ended." M. TROPE, NECESSARY ROUGHNESS 77 (1987).

53. NCAA Bylaws §§ 12.01.1, 12.1.1 (a)-(f), reprinted in PROPOSED 1989-90 NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL 57-58 [hereinafter NCAA MANUAL]. This document was adopted as the official *NCAA Manual* at the annual meeting of the National Collegiate Athletic Association on January 9-12, 1989.

The [*NCAA Manual*] has been revised extensively in an effort to make NCAA regulations more readily accessible and more easily understood by those responsible for their application. . . .

Along with major restructuring of the content, there has been considerable rewriting of many sections of the Manual. Extreme care has been taken to avoid changing the meaning of legislation. . . .

Memorandum from Richard D. Schultz, NCAA Executive Director to Chief Executive Officers, Faculty Athletics Representatives, Directors of Athletics and Senior Women Administrators, of NCAA Member Institutions (Nov. 21, 1988) (subject: Revised *NCAA Manual*). The *NCAA Manual* contains a User's Guide to explain the changes made in the new edition. *Id.* Additionally, it includes section-by-section cross references to the 1988-1989 manual to facilitate comparison and research.

54. The NCAA is a voluntary association of approximately 1,000 members which includes almost all of the major universities and colleges in the United States. NCAA News, Sept. 2, 1987, at 1, col. 3. See generally NCAA CONST. arts. 1, 3, reprinted in NCAA MANUAL, *supra* note 53, at 1, 7-15. For a comprehensive analysis of the NCAA's authority and the deficiencies inherent in the Association's regulations, see Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903 (1972).

55. NCAA Bylaws §§ 12.3.1, .2, .3, .4(a)-(c), reprinted in NCAA MANUAL, *supra* note 53, at 61-62.

56. Neff, *supra* note 42, at 85.

57. *Id.*

—Tim McGee, a wide receiver in the National Football League, claims that agents offered him a Mercedes-Benz automobile and a house for his mother while he was a student at the University of Tennessee.<sup>58</sup> “If you’re a top-notch player, it’s automatic that you’re going to be offered money by agents to sign with them,” McGee said.<sup>59</sup>

—George Rogers claimed that one agent who attempted to sign him before the conclusion of his senior season offered him one-third of the agent’s corporation.<sup>60</sup>

—Michael Brooks, a former linebacker at Louisiana State University, claims he was offered \$65,000 to sign with an agent. “He had [the money] in his briefcase, and he showed it to me. It was in \$100 dollar bills,” Brooks said. “A lot of [agents] said if I signed early, they’d put the contract in a safe-deposit box and they wouldn’t tell anybody about it.”<sup>61</sup> Brooks claimed he declined those offers along with invitations from agents who offered to fly him, all expenses paid, to New York, Chicago, St. Louis, Dallas, and Houston.<sup>62</sup>

### B. *The Heartbreak of Overzealousness*

While sordid dealings between athletes and sports agents have been commonplace for several years, the far-reaching implications of these acts were not realized publicly until 1987, when three agents sent shock waves through the sporting world with revelations of widespread payoffs to college athletes.<sup>63</sup> Norby Walters and Lloyd Bloom, operating as World Sports & Entertainment, Inc., and Jim Abernethy, an Atlanta-based agent, became the main players in a bizarre tale of excess and greed. In all, Walters and Bloom doled out \$800,000 to sign at least forty-four athletes, including five who were selected in the first round of the 1987 NFL draft.<sup>64</sup> Of those who signed, seven were declared ineligible for all or part of their senior seasons because they signed with Walters and Bloom before their collegiate eligibility had

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58. *Id.* at 84-85.

59. *Id.* at 84. McGee admitted that he accepted \$3,500 from agent Norby Walters while he was still eligible to compete for the University of Tennessee. *Id.* at 85.

60. GUIDELINES, *supra* note 44, at 4.

61. Neff, *supra* note 42, at 85.

62. *Id.*

63. For an itemized and comprehensive review of the turmoil caused by sports agents in 1987, see Atlanta J. and Const., Dec. 27, 1987, at 21D, col. 1.

64. Selcraig, *The Deal Went Sour*, SPORTS ILLUSTRATED, Sept. 15, 1988, at 32.

expired.<sup>65</sup> Abernethy, who had publicly berated Walters and Bloom for their actions, later admitted he utilized the same tactics to lure clients. Five athletes who dealt with Abernethy lost their collegiate eligibility.<sup>66</sup>

But lost college careers was just the beginning. Below are some examples.

—For the first time a university was held accountable for the actions of its athletes with agents. The University of Alabama was forced to return \$253,447 to the NCAA, money the school had earned participating in the association's 1987 championship basketball tournament, because two of its players, Derrick McKey

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65. Atlanta J. and Const., Dec. 27, 1987, at 26D, col. 1. While there is proof that only 30 athletes received money from Walters and Bloom before the conclusion of their collegiate eligibilities, a total of 52 athletes have been identified as having contact with Walters and/or Bloom while in college. A vast majority of the athletes were not exposed until after the conclusion of their college careers and thus escaped NCAA sanctions. *Id.*

However, revelations subsequent to the expiration of some athletes' collegiate careers have led to other measures. For example, Paul Palmer, a running back and kick-return specialist for the Kansas City Chiefs, admitted that he accepted a \$5,000 loan and monthly cash payments from Walters and Bloom in 1986 during his final season at Temple University. Orlando Sentinel, July 26, 1988, at D-2, col. 3. Palmer earned All-America honors and finished second in the voting for the Heisman Trophy in 1986 in leading the Owls to a 6-5 record.

In 1988, two years after leaving Temple, Palmer admitted that he accepted the money from the sports agents. Telephone interview with Mike Kaine, Associate Sports Information Dir., Temple University (Aug. 1, 1988). Temple University officials reacted swiftly to the confession by voluntarily forfeiting all six victories from the 1986 season. Additionally, the school erased Palmer's statistics from that season. The school's action excised several individual game, season, and career records Palmer had amassed during a four-year Temple career, which unquestionably was tarnished by his subsequent revelations. *Id.*

But that did not end the anguish for Palmer. It was also discovered that he was defrauded of nearly one third of his \$450,000 signing bonus by Bloom. Selcraig, *The Deal Went Sour*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 32-33. Bloom persuaded Palmer to invest the amount in a "credit repair" business. *Id.* at 33. However, Bloom instead used the money to cover personal expenses including the leasing of a \$160,000 Rolls-Royce, paying off a \$6,958 clothing bill, credit card bills, and his ex-wife's rent. *Id.*

66. Atlanta J. and Const., Dec. 27, 1987, at 21D, col. 1; *id.* at 26D, col. 5. Abernethy claimed that he spent \$500,000 during a 12-month spree of recruiting potential clients. USA Today, Dec. 17, 1987, at C-1, col. 4. Additionally he claimed that he spoke to between 200 and 250 athletes and that each was willing to accept money from him or were already being paid by another agent. Said Abernethy: "Everyone is being paid and signed. If anyone says otherwise, they're really stupid, blind or they're lying." *Id.*

During a short-lived career as a player agent, Abernethy instituted a unique system of compensating athletes. He provided bonuses linked to performance and holidays. The amounts varied from \$75 to \$1,100. For example, Abernethy's agency contract with Memphis State University basketball player Sylvester Gray stipulated that he would receive, in addition to \$500 per month, a \$1,000 Christmas bonus and a \$200 Thanksgiving bonus. Abernethy agreed to pay Texas Christian running back Wayne Waddy \$75 for each touchdown he scored. USA Today, Dec. 16, 1987, at 9-C, col. 2.

and Terry Coner, had signed early with Walters and Bloom.<sup>67</sup> During McKey's junior season, 1986-1987, when he was named the Southeastern Conference Player of the Year, McKey accepted \$2,000 from the two and signed an agreement to accept \$300 a month and an automobile.<sup>68</sup>

—Athletes were faced with the realities and the accountabilities of their actions. More than sixty were subpoenaed before a federal grand jury in Chicago and faced the possibility of being indicted on fraud and tax-evasion charges.<sup>69</sup>

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67. Atlanta Const., May 10, 1988, at 1E, col. 2. The basis for the penalty was set forth in a December 16, 1987 letter from Richard D. Schultz, the Executive Director of the NCAA, to Thomas L. Jones, Professor of Law at the University of Alabama, the contents of which are set forth below:

This is to advise you that the NCAA Executive Committee, on its December 14 telephone conference, denied the University of Alabama, Tuscaloosa's, appeal of the application of Executive Regulation 1-3-(j) to the participation of two ineligible student-athletes representing the institution in the 1987 NCAA Division I Men's Basketball Championship.

Executive Regulation 1-3-(j) states in part that "When an ineligible student-athlete participates in an NCAA championship and the student-athlete or the institution knew or had reason to know of the ineligibility, . . . 90 percent of the institution's share of net receipts from such competition in excess of the regular expense reimbursement shall be withheld by the NCAA executive director. . . ." Based on the information presented in the appeal, the Executive Committee determined that the two involved student-athletes knew or had reason to know of their ineligibility.

Accordingly, 90 percent of the institution's share of net receipts from the championship will be withheld. This calculation will be based on the Southeastern Conference's formula for distributing such receipts among its member institutions and amounts to \$253,447 (50 percent of the total share of \$633,616, minus the 10 percent previously sent to Alabama).

In addition, the Executive Committee affirmed the application of Executive Regulation 1-4-(f), which states in part that "When a student-athlete representing the institution in a team championship is declared ineligible subsequent to the tournament, . . . the record of the team's performance shall be deleted, the team's place in the final standings shall be vacated, and the team's trophy and the ineligible student-athletes' awards shall be returned to the Association." We would appreciate your forwarding the ineligible student-athletes' watches to the attention of Dennis L. Poppe of this office.

Although it could not determine with certainty that the institution knew or should have known of the student-athletes' involvement with professional sports agents, the Executive Committee expressed considerable concern that the university did not appear to have made sufficient effort to advise the athletes regarding the ramifications of such involvement or, subsequently, to fully ascertain the facts of the situation . . .

68. Neff, *supra* note 52, at 36.

69. Atlanta J. and Const., Dec. 27, 1987, at 21D, col. 1. The fraud charges stemmed from the fact that the athletes, once they had signed with Walters and Bloom, defrauded their schools by later signing standard documents claiming they had not been involved in any behavior that would jeopardize their collegiate eligibility. Neff, *supra* note 52, at 35. Facing potential indictments for racketeering, mail fraud, and obstruction of justice, 43 former college players agreed to enter a pre-trial diversion program. The 43 violated NCAA regulations when they dealt with

—Former Ohio State University wide receiver Cris Carter was indicted by a federal grand jury on one count of mail fraud and one count of obstruction of justice for his association with Walters and Bloom.<sup>70</sup> Carter, who now plays for the Philadelphia Eagles, faces ten years in prison and a \$500,000 fine.<sup>71</sup>

—Agents, too, were held accountable for their actions. Walters and Bloom were indicted by a federal grand jury in Chicago on charges which include racketeering, conspiracy to commit extortion and mail fraud.<sup>72</sup> The eight count, eighty-five page indictment culminated a seventeen month investigation<sup>73</sup> which uncovered that Walters and Bloom had signed forty-four athletes to professional contracts before their collegiate eligibilities had expired.<sup>74</sup> The “indictment alleges that Walters and Bloom offered players clothing, concert and airline tickets, automobiles, cash, interest-free loans, hotel accommodations, use of limousines, insurance policies, trips to entertainment events, introductions to celebrities, and cash to their families, in exchange for the athletes’ signatures on contracts.”<sup>75</sup> Additionally, the indictments connected Walters and Bloom to a reputed mobster and alleged that the pair had threatened physical harm to four former clients who later signed contracts with other agents.<sup>76</sup> The two each face a maximum seventy years in prison, \$2 million in fines and forfeiture of their sports business if convicted.<sup>77</sup>

—Walters and Bloom also were indicted in Alabama on charges of violating the state’s Deceptive Trade Practices Act, commercial bribery, and tampering with a sports event for their involvement with

Walters and Bloom during the football seasons of 1985, 1986 and/or 1987. Atlanta Const., Aug. 25, 1988, at 1A, col. 4; *id.* at 21A, col. 1. The athletes also agreed to repay their former schools the monetary equivalent of their athletic scholarships and to provide between 100 and 250 hours of community service during a one-year probation period. *Id.* Finally, the athletes agreed to testify in the government’s case against Walters and Bloom. *Id.* However, the athletes were not rendered immune from possible action by the Internal Revenue Service for failure to report the cash and gifts received from Walters and Bloom. *Id.*

70. Atlanta Const., Aug. 25, 1988, at 1A, col. 5.

71. *Id.* at 21A.

72. Selcraig, *The Deal Went Sour*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 32.

73. *Id.* The investigation was sparked when athlete agent Kathie Clements was slashed and beaten in her Skokie, Illinois office by a man wearing a ski mask and gloves. Neff, *supra* note 52, at 34. Chicago detectives termed the incident a “message beating.” Atlanta J. and Const., Dec. 27, 1987, at 21D, col. 1 & 26D, col. 2. Clements, an associate of a Chicago sports agent, earlier had been scolded on the telephone by Walters and Bloom because the agency she worked for had signed three of the pair’s former clients. Neff, *supra* note 52, at 34. Additionally, former Auburn University running back Brent Fullwood told the Chicago grand jury investigating Walters and Bloom that Bloom threatened to “bump off” his agent, George Kickliter. *Id.* at 35-36.

74. Selcraig, *supra* note 72, at 32.

75. *Id.*

76. *Id.*

77. *Id.*

McKey and Coner.<sup>78</sup>

—Abernethy, indicted in Alabama under the same charges as Walters and Bloom for his dealings with Auburn University football player Kevin Porter, was convicted by a jury of tampering with a sports event.<sup>79</sup> He was sentenced to one year in jail and fined \$2,000 on the misdemeanor conviction.<sup>80</sup>

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78. USA Today, Feb. 2, 1988, at 11C, col. 1. In a 12-count indictment, Alabama charged Walters, Bloom, and Walters' company, World Sports Entertainment, Inc., with violating sections 8-19-5, 13A-11-120, and 13A-11-143 of the Code of Alabama. *Alabama v. Walters*, G. J. No. 2779, Tuscaloosa County, Ala., Jan. Term, 1988. The charges, violation of the state's Deceptive Trade Practices Act, commercial bribery, and tampering with a sports contest, carry a maximum six-year jail term and up to \$12,000 in fines. *Atlanta Const.*, May 9, 1988, at 1D, col. 5.

In a settlement worked out with the state on May 2, 1988, Bloom pleaded guilty to one count of deceptive trade practice and agreed to testify in the state's case against Walters. The agreement included the stipulation that, if Walters was convicted, Bloom would wash state police cars nine hours a day for one week. During that week, Bloom could lodge at the Tuscaloosa, Alabama, hotel of his choice. *Scorecard*, SPORTS ILLUSTRATED, May 9, 1988, at 13.

Bloom never had to wash any police cars, however, as Walters was not tried on the charges. Instead, Walters settled the matter by agreeing to pay \$200,000 in damages to the University of Alabama as partial reimbursement for the money the school was forced to return to the NCAA for using two ineligible players, Derrick McKey and Terry Coner, during the 1987 NCAA basketball championship. *Atlanta Const.*, May 10, 1988, at 1E, col. 2. See *supra* note 67 and accompanying text. In return for the \$200,000 payment, the state dropped its criminal charges against Walters. Walters also agreed never to conceal any other dealings which may have occurred between him and any other athlete from the Southeastern Conference. *USA Today*, Feb. 3, 1988, at 11C, col. 1.

The settlement of the criminal charges also put to rest a pending civil action against Walters filed by the University of Alabama. In the suit filed in the Circuit Court of Tuscaloosa County, Alabama, on May 11, 1988, the school sued Walters and his company for \$3,000,000 claiming past, future and punitive damages. Civ. No. 83-372, Tuscaloosa County, Ala., filed May 11, 1988 [hereinafter Civil Action]. The suit charged that Walters and his associates "intentionally interfered with the contractual relationship" between the University and the players. *Id.* at 7. The contractual relationship referred to the scholarships signed by the athletes with the University. Athletic scholarships entered into between student and school have been held to create a contractual obligation between the parties. See, e.g., *Begley v. Corporation of Mercer Univ.*, 367 F. Supp. 908, 909 (E.D. Tenn. 1973); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. Ct. App.), cert. denied, 192 S.E.2d 197 (1972).

The complaint prayed for future damages and past damages. The past damages included the \$253,447 the University was forced to return to the NCAA. Future damages included money the school claims it may have earned if Derrick McKey had been eligible to compete for the University during the 1987-1988 collegiate basketball season. Civil Action at 7.

79. *Montgomery Advertiser*, March 2, 1988, at 1A, col. 5. Abernethy was found innocent on charges of commercial bribery and violation of deceptive trade law. *Id.*

80. *Id.* Abernethy's conviction was later reversed by the Alabama Court of Criminal Appeals. *Abernethy v. State*, No. 413, slip op. (Ala. Crim. App., 5th Div. 1988). The court found that Abernethy lacked the requisite criminal intent to be convicted of tampering with a sports event under Alabama Code 1975, § 13A-11-143. *Id.*, slip op. at 4-5. The court stated:

In the context of this case, a violation of the N.C.A.A. rules and regulations does not constitute the criminal offense of tampering with a sports contest unless that violation was done "with the intent to influence the outcome of a sports contest." Mere tampering with a player's eligibility in violation of N.C.A.A. rules is not a criminal of-



—Walters and Bloom, in turn, attempted to utilize the courts and other judicial bodies to retrieve money they claim was owed to them by athletes who originally signed contracts with them but later switched to other agents.<sup>81</sup>

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fense unless done with the specific intent to influence the outcome of a sports contest. *Id.*, slip op. at 6-7. "The fundamental reason why Abernethy's conviction must be reversed is because the crime of tampering with a sports contest was obviously not intended to and does not, embrace the agent contract type of situation involved in this case." *Id.*, slip op. at 12.

The office of the Attorney General of Alabama filed an application for rehearing with the Court of Criminal Appeals on January 13, 1989. Application for Rehearing, *Abernethy v. State*, (Ala. Crim. App., 5th Div. 1989) (No. 413).

81. Atlanta J. and Const., Dec. 27, 1987, at 26D, col. 1. Thus far, Walters and Bloom have been unsuccessful in claims against former clients. In one action filed in a New York federal district court, the two sued Brent Fullwood, formerly a runningback at Auburn University, claiming Fullwood breached his agency contract. *Walters v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987). Fullwood had agreed to be represented by Walters and Bloom and signed a \$4,000 promissory note with the two on August 20, 1986, just weeks before the start of his final season at Auburn. *Id.* at 157. However, just prior to being selected in the first round of the 1987 National Football League draft, Fullwood hired a different agent to represent him, thus prompting the lawsuit. *Id.*

The court examined the alleged agreement between Walters and Fullwood and determined that "[t]here is a powerful inference that the agreement was actually signed before or during the college football season . . . and unethically postdated." *Id.* Stating that the parties had full knowledge that the agreement "was fraudulent and wrong," the court dismissed Walters' claim. *Id.* at 163-64. The court wrote, "We decline to serve as 'paymaster of the wages of crime, or referee between thieves.'" *Id.* at 160 (quoting *Stone v. Freeman*, 298 N.Y. 268, 271, 82 N.E.2d 571, 572 (1948)).

In another action against a former client, Walters and Bloom attempted to collect more than \$54,000 which they had paid to University of Iowa running back Ronnie Harmon, his girlfriend and members of his family. *Bloom v. Harmon*, No. 11059-014 (1987) (Culver, Arb.). Prior to his senior season at Iowa, Harmon entered into an agency agreement with World Sports Entertainment, Inc. (WSE), Walters' company, and signed a promissory note for \$2,500. *Id.* at 2-4. The parties also agreed that WSE would pay Harmon at least \$250 per month until he negotiated a professional sports contract. *Id.* at 4. In addition to cash payments, WSE provided Harmon, his girlfriend, and family members other gifts including more than \$32,000 as a downpayment on a Mercedes-Benz automobile, plane tickets, and concert tickets. *Id.* at 5. Finally, WSE paid Harmon \$1,500 for revealing the telephone number of one of his collegiate teammates. *Id.* Harmon subsequently was drafted in the first round of the 1987 NFL draft by the Buffalo Bills. Bloom began negotiations with the Bills on Harmon's behalf, but was fired by Harmon before an agreement was reached. *Id.* at 5-7.

WSE filed a grievance against Harmon with the National Football League Players Association (NFLPA), requesting repayment for its work in Harmon's contract negotiations. Further, WSE sought reimbursement for more than \$54,000 which it had given Harmon and his family. In conjunction with the NFLPA grievance, WSE filed a civil action against Harmon in the New York Supreme Court seeking similar relief. The New York court ordered the action stayed pending the outcome of the NFLPA arbitration. *Id.* at 9.

Arbitrator John C. Culver ruled that Harmon was obligated to pay WSE for the services it rendered on Harmon's behalf and the \$2,500 promissory note. *Id.* at 25-29. However, Culver ruled that the other cash and gifts did not have to be repaid as there was no credible evidence of any obligation owed by Harmon. *Id.* at 26. The arbitrator opined:

[I]n the absence of any written documents or other reliable evidence establishing that these payments were loans, the Arbitrator will not order Mr. Harmon to repay

—Faced with a threatened lawsuit by the Big Ten Athletic Conference, Walters and Bloom agreed never to approach an athlete from that conference in the future.<sup>82</sup> Additionally, the two turned over to conference officials all information they possessed on past or current Big Ten athletes.<sup>83</sup>

### III. REGULATION OF THE ATHLETE AGENT

Norby Walters, Lloyd Bloom, and Jim Abernethy were not the first agents to offer inducements to college athletes; nor were they the first to sign athletes early. However, the subsequent course of events surrounding the three were novel to collegiate athletics and prompted a wholesale review of existing regulations and a rash of new legislation focusing on the third party victims of agent-athlete indiscretions.

#### A. *The Law Before Walters, Bloom & Abernethy*

The initial approach to sports agent legislation smothered the agent with regulations, red tape, and restrictions.<sup>84</sup> These laws generally are

them. . . . If WSE intended these items to be loans, it had the burden of establishing clear and formal agreements outlining the reciprocal obligations of the parties.

*Id.* at 26-27.

The Arbitrator further noted that WSE may have considered the advances to Harmon as "an investment in [Harmon] and in its fledgling sports representation business." *Id.* at 27. The arbitrator wrote, "WSE may have invested this money in Mr. Harmon with the hopes that it would 'pay off' in endorsements for Mr. Harmon, on which WSE would earn substantial commissions, and with the promise of attracting other players to represent in years to come." *Id.* at 28.

However, while the arbitrator freed Harmon of a substantial financial burden, he did not exonerate Harmon for his dealings with the agents:

It should be emphasized that the Arbitrator does not wish to excuplate Mr. Harmon from the role he played in this distasteful case. Indeed, Mr. Harmon knew or should have known that his acceptance of these payments was wrong; it compromised his integrity and jeopardized his relationship with the NCAA and his university. Mr. Harmon admitted that he affirmatively requested money from WSE on several occasions. Although the Arbitrator finds that Mr. Harmon has no obligation under the NFLPA Regulations to repay this money, because there was no agreement to do so, he will not, of course, be relieved of the incalculable cost of his conduct in personal terms. The Arbitrator also observes that there are other forums in which the consequences of Mr. Harmon's activities may be addressed.

*Id.* at 28-29.

82. Atlanta J. and Const., Dec. 27, 1987, at 26D, col. 1.

83. *Id.*

84. States that utilize this approach are Alabama, California, Louisiana, Oklahoma, and Texas. These states were the first five to pass legislation aimed directly at sports agents. Four states, Georgia, Iowa, Maryland, and Mississippi subsequently passed similar legislation. See *infra* note 85. For an extensive account and explanation of the law in Alabama, California, Louisiana, Oklahoma, and Texas, along with non-statutory regulations which affect agents, see Sobel, *supra* note 13, at 724-80; Kohn, *supra* note 14, at 11-13.

characterized by extensive registration requirements,<sup>85</sup> which most often include a lengthy application form accompanied by a fee ranging from the nominal to the excessive.<sup>86</sup> The registration often requires annual renewals.<sup>87</sup> The application is reviewable by either a commission or the secretary of state,<sup>88</sup> and the license is revocable by those authorities if an agent commits a violation of the law.<sup>89</sup> Additionally, these laws require the posting of a surety bond ranging from \$25,000 to \$100,000.<sup>90</sup> The agent must file a schedule of fees to be charged<sup>91</sup>

85. **Alabama:** ALA. CODE §§ 8-26-4, -5 (Supp. 1987); **California:** CAL. LAB. CODE § 1511 (West Supp. 1988); **Georgia:** GA. CODE ANN. §§ 43-4A-4, -5 (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 9A.3.1, .2, 1988 Iowa Legis. Serv. 556 (West) (to be codified at IOWA CODE § 9A.3.1, .2); **Louisiana:** LA. REV. STAT. ANN. § 4:422(C) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 633(b) (Supp. 1988); **Mississippi:** MISS. CODE ANN. § 73-41-5(1) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.62.C (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 2(b) (Vernon Supp. 1988).

86. Application fees range from \$50 in Mississippi to \$1,000 in Oklahoma, with others to be set by administrative action. **Alabama:** ALA. CODE § 8-26-12 (Supp. 1987); **California:** CAL. LAB. CODE § 1517 (West Supp. 1988); **Georgia:** GA. CODE ANN. § 43-4A-12 (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 9A.3.4(a), 1988 Iowa Legis. Serv. 556 (West) (to be codified at IOWA CODE § 9A.3.4); **Louisiana:** LA. REV. STAT. ANN. § 4:422(E) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 633(f) (Supp. 1988); **Mississippi:** MISS. CODE ANN. § 73-41-5(3) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.62.E (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 2(f) (Vernon Supp. 1988).

87. **Alabama:** ALA. CODE § 8-26-9 (Supp. 1987); **California:** CAL. LAB. CODE § 1515 (West Supp. 1988); **Georgia:** GA. CODE ANN. § 43-4A-9 (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 9A.3.3, 1988 Iowa Legis. Serv. 556 (West) (to be codified at IOWA CODE § 9A.3.3); **Louisiana:** LA. REV. STAT. ANN. § 4:422(D) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 633(E) (Supp. 1988); **Mississippi:** MISS. CODE ANN. § 73-41-5(2) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.62.D (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, §§ 2(d), (e) (Vernon Supp. 1988).

88. **Alabama:** ALA. CODE § 8-26-6 (Supp. 1987); **California:** CAL. LAB. CODE § 1512 (West Supp. 1988); **Georgia:** GA. CODE ANN. §§ 43-4A-6, -7 (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 5, 1988 Iowa Legis. Serv. 557 (West) (to be codified at IOWA CODE § 9A.4); **Mississippi:** MISS. CODE ANN. § 73-41-7(1) (Supp. 1988).

89. **Alabama:** ALA. CODE § 8-26-8 (Supp. 1987); **California:** CAL. LAB. CODE § 1527 (West Supp. 1988); **Georgia:** GA. CODE ANN. § 43-4A-8 (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 9A.5, 1988 Iowa Legis. Serv. 557 (West) (to be codified at IOWA CODE § 9A.4); **Louisiana:** LA. REV. STAT. ANN. § 4:422(F) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 634 (Supp. 1988); **Mississippi:** MISS. CODE ANN. § 73-41-7(2) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.62.I (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 3 (Vernon Supp. 1988).

90. **Alabama:** ALA. CODE § 8-26-14 (Supp. 1987); **California:** CAL. LAB. CODE § 1519(a) (West Supp. 1988); **Georgia:** GA. CODE ANN. § 43-4A-13 (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 6.1, 1988 Iowa Legis. Serv. 537 (West) (to be codified at IOWA CODE § 9A.5.1); **Mississippi:** MISS. CODE ANN. § 73-41-9 (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.62.G (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 2(h) (Vernon Supp. 1988).

91. **Alabama:** ALA. CODE § 8-26-24 (Supp. 1987); **California:** CAL. LAB. CODE § 1531(a) (West Supp. 1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 7.3, 1988 Iowa Legis. Serv. 558 (West) (to be codified at IOWA CODE § 9A.5A.3); **Louisiana:** LA. REV. STAT. ANN. § 4:423 (C) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 635(a) (2) (Supp. 1988); **Oklahoma:** OKLA.

and must have the proposed contract approved by the appropriate authority.<sup>92</sup> The agent also is required to retain specific records of all transactions with and for the athlete.<sup>93</sup>

These laws generally prohibit both solicitation<sup>94</sup> and the signing of an athlete to a representation agreement before the athlete's collegiate eligibility has expired.<sup>95</sup> Also, these laws uniformly provide both criminal and civil penalties for violators.<sup>96</sup>

While these attempts to regulate the athlete agent are meritorious, they have proved to be ineffective. Many agents circumvent the laws by avoiding contacts within the state;<sup>97</sup> others simply ignore the rules'

STAT. ANN. tit. 70, § 821.63 (C) (West Supp. 1988); Texas: TEX. REV. CIV. STAT. ANN. art. 8871, § 5(b), (c) (Vernon Supp. 1988).

92. **Alabama:** ALA. CODE § 8-26-22 (Supp. 1987); **California:** CAL. LAB. CODE § 1530 (West Supp. 1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 7.1, 1988 Iowa Legis. Serv. 557 (West) (to be codified at IOWA CODE § 9A.5A.1); **Louisiana:** LA. REV. STAT. ANN. § 4:423(A) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 635(a) (1) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.63(A) (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 5(a), (c) (Vernon Supp. 1988).

93. **Alabama:** ALA. CODE § 8-26-26 (Supp. 1987); **California:** CAL. LAB. CODE § 1532 (West Supp. 1988); **Louisiana:** LA. REV. STAT. ANN. § 4:427 (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 638 (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.67 (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 10 (Vernon Supp. 1988).

94. **Kentucky:** KY. REV. STAT. ANN. § 518.080(1) (Michie Supp. 1988); **Maryland:** MD. ANN. CODE art. 56, § 636(b)(5)(i), (ii) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.64(8) (West Supp. 1988); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(5) (Vernon Supp. 1988).

95. **Iowa:** Act of May 14, 1988, H.F. 2432, § 8.2.3-.5, 1988 Iowa Legis. Serv. 558 (West) (to be codified at IOWA CODE § 9A.6.3-.5); **Kentucky:** KY. REV. STAT. ANN. § 518.080(1) (Michie Supp. 1988); **Louisiana:** LA. REV. STAT. ANN. § 4:424(8) (West 1987); **Michigan:** Mich. H.B. 4634, § 1(1)(a) (1988) (Proposed MICH. COMP. LAWS § 750.411e(1)(a) (approved Dec. 27, 1988)). **Mississippi:** MISS. CODE ANN. § 73-41-11(g) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.64.8 (West Supp. 1988); **Pennsylvania:** Pa. H.B. 1879, § 1(a)(1) (1988) (proposed 18 PA. CONST. STAT. ANN. § 7107(a)(1) (approved Dec. 21, 1988)); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(5) (Vernon Supp. 1988).

96. **Alabama:** ALA. CODE § 8-26-41 (Supp. 1987); **California:** CAL. LAB. CODE §§ 1541, 1547 (West Supp. 1988); **Georgia:** GA. CODE ANN. § 43-4A-16(c) (1988); **Iowa:** Act of May 14, 1988, H.F. 2432, § 11, 1988 Iowa Legis. Serv. 558-59 (West) (to be codified at IOWA CODE § 9A.8); **Kentucky:** KY. REV. STAT. ANN. § 518.080(2) (Michie Supp. 1988); **Louisiana:** LA. REV. STAT. ANN. § 4:426 (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 639 (Supp. 1988); **Michigan:** Mich. H.B. 4634, § 1(2) (1988) (proposed MICH. COMP. LAWS § 750.411e(2) (approved Dec. 27, 1988)); **Mississippi:** MISS. CODE ANN. § 73-41-15 (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.66 (West Supp. 1988); **Pennsylvania:** Pa. H.B. 1879, § 1(b) (1988) (proposed 18 PA. CONST.-STAT. ANN. § 7107(b) (approved Dec. 21, 1988)); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, §§ 8, 9 (Vernon Supp. 1988).

While Mississippi generally follows the older pattern of regulation, it provides for substantial recovery of damages from both the agent and the athlete in the case where an athlete loses his eligibility because of his contact with a sports agent. MISS. CODE ANN. § 73-41-23 (Supp. 1988). The school may recover the price of the athlete's scholarship and other damages, including lost revenues, suffered as a direct result of the athlete's loss of eligibility. *Id.*

97. Hochberg, *The State of Agent Legislation*, SPORTS INC., May 30, 1988, at 42-43. Okla-

existence.<sup>98</sup> Enforcement has been difficult, if not impossible, because often the only parties with knowledge of the agent's dealings are the agent and the athlete recruited. Neither party, obviously, has an incentive to notify state authorities that the agent and/or the athlete have violated state law—that is, as long as the athlete and the agent are satisfied with the relationship.<sup>99</sup>

### B. *A New Approach to Agent Regulation*

Widespread revelations of payoffs and inducements by agents to college athletes put college administrators and state legislators on notice that existing state regulations were an insufficient deterrent to aggressive sports agents. The actions of bad agents prompted states which considered adopting legislation to reconsider the thrust of the regulations. In 1988, six states, including Florida,<sup>100</sup> abandoned or modified the onerous registration requirements characteristic in some states<sup>101</sup> and shifted their attention toward more practical legislation.

#### 1. *Georgia*

Georgia takes a dual approach toward regulating sports agents. The state adopted the comprehensive registration requirements characteristic of early state legislation, yet also addressed more present concerns by requiring notice of an agency contract prior to its execution.

An agent who intends to sign a Georgia collegian to an agency agreement prior to the expiration of the athlete's eligibility must notify the Georgia Athlete Agent Regulatory Commission in writing.<sup>102</sup> The commission, in turn, will notify the athlete's school of the pending agreement.<sup>103</sup> Finally, thirty days after the commission receives notice from the agent, the agent may sign the athlete to a valid agency agreement.<sup>104</sup>

homa State Senator Norman Lamb, Repub., Enid, sponsor of Oklahoma's agent legislation, has stated that agents who do not live in Oklahoma "'don't pay any attention'" to the law. *Id.* at 43 (quoting Sen. Lamb).

98. For example, California has had a registration requirement since 1981 for all agents who do business in the state. As of early 1988, only 17 agents had registered. Kohn, *supra* note 14, at 11. Other states with agent registration requirements have similar compliance results. *Id.* at 12. See also Roberts, *Protecting the College Athlete from Unscrupulous Agents*, SPORTS LAW., Fall 1987, at 8-9.

99. See, e.g., Neff, *supra* note 52, at 42.

100. Indiana, Minnesota, Ohio and Tennessee, as well as Florida, have adopted legislation that eliminates registration almost entirely. Georgia's legislation combines the older requirements with the new approach. See *infra* notes 102-223 and accompanying text.

101. See *supra* notes 84-99 and accompanying text.

102. GA. CODE ANN. § 43-4A-16(a) (1988).

103. *Id.*

104. *Id.*

Requiring prior notice to state and school authorities *before* the athlete executes the agency contract is the most significant preventative measure taken by states. However, only four states presently require prior notice.<sup>105</sup> In Georgia, the prior notice requirement is a two-pronged protective mechanism for the state's colleges and universities. First, because a warning before the execution of the agency agreement is mandatory, the school is provided sufficient notice that one of its athletes soon will be ineligible for intercollegiate competition. The school can act promptly by dissuading the athlete from signing or dismissing the athlete from the team. Second, if the agent ignores the notice requirement and signs the athlete, the agent risks forfeiting the \$100,000 surety bond which must be posted with the state upon registration.<sup>106</sup> This money is payable to the athlete's school if the secret signing leads to sanctions against the school for using an ineligible player.<sup>107</sup>

105. **Georgia:** GA. CODE ANN. § 43-4A-16(a) (1988); **Indiana:** IND. CODE ANN. § 35-46-4-4(1), (2) (Burns Supp. 1988); **Minnesota:** Act of April 28, 1988, ch. 701, § 1(2), 1988 Minn. Sess. Law Serv. 1076 (West) (codified at MINN. STAT. ANN. § 325E.33) (Supp. 1989); **Ohio:** Ohio Subst. S.B. 263, § 1, at 2 (1988) (proposed OHIO REV. CODE ANN. § 4771.02(B)) (approved Mar. 14, 1988).

Three states that passed agent legislation before 1988—Louisiana, Oklahoma, and Texas—had provisions which called for notification of the athlete's school. However, these states required notice *after* the signing.

Louisiana was the first state to require that the contract between an agent and an athlete be filed with the athletic director of the athlete's institution. LA. REV. STAT. ANN. § 4:423(E) (West 1987). However, Louisiana's law is quite narrow. That is, only contracts signed between an agent and a "Louisiana non-NCAA athlete," defined in the statute as "an athlete in a team sport who resides in this state who is not a Louisiana NCAA athlete," *id.* § 4:421(A)(5), must be filed with the athletic director within five days of the signing of the contract. Therefore, athletes at Louisiana institutions which belong to the NCAA are not covered by the filing requirement. Additionally, Louisiana allows a non-NCAA athlete to terminate the agency agreement within 10 days of its filing with the secretary of state. *Id.* § 4:423(E).

Oklahoma has a similar provision, requiring notice of the signing of a non-NCAA athlete within five days of the execution of the agency agreement. OKLA. STAT. ANN. tit. 70, § 821.63.E (West Supp. 1988). Like Louisiana, Oklahoma also allows a non-NCAA athlete to terminate his agency agreement within 10 days of its filing with the secretary of state. *Id.*

Texas also requires that the agency contract be filed with the athletic director within five days of signing. However, it does not distinguish between an NCAA and non-NCAA athlete. Texas requires that:

if the athlete is a student at an institution of higher education located in this state, the athlete agent must file a copy of the contract with the athletic director of the institution . . . not later than the fifth day after the date on which the contract is signed by the athlete.

TEX. REV. CIV. STAT. ANN. art. 8871, § 5(e) (Vernon Supp. 1988). A Texas athlete may cancel the agency contract up to 15 days after execution by written notification to the athlete agent. *Id.* § 5(f).

Maryland adopted the same notice and cancellation requirements as Texas. MD. ANN. CODE art. 56, § 635(c), (d)(1) (Supp. 1988).

106. GA. CODE ANN. §§ 43-4A-13, -14 (1988).

107. *Id.*

However, while Georgia's attempt to compel notice may be a threat to agents, the state's law is deficient in at least three ways. First, Georgia does not place a corresponding burden on the student athlete to notify the school of a pending agreement between the athlete and an agent. This apparently frees the athlete from any liability under the statute for breaching a scholarship commitment to the school. Second, Georgia caps damages against the agent at \$100,000. Experiences in other states serve as evidence that damages can exceed that amount. Finally, the failure to prescribe criminal sanctions weakens the impact of the law.

Despite the deficiencies, one positive aspect of the notice requirement is that it provides the athlete a mandatory time period which may be utilized to retain the guidance and expertise of a third party who can review the agency agreement for fairness and enforceability. In the past, some athletes who signed agreements while eligible for collegiate play subsequently found themselves bound to unconscionable deals. However, because of the secret nature of these signings and the fear of losing eligibility, the athlete rarely sought outside legal advice. This fact provided the unscrupulous agent with an advantage over the less-knowledgeable athlete. Under Georgia's act, however, the athlete can utilize the thirty-day waiting period to closely scrutinize the agency agreement.

## 2. *Indiana*

Before an agent can execute an agreement with a student athlete in Indiana, the agent must provide written notification of the pending agreement to the athletic director of the athlete's school.<sup>108</sup> Proper notice is required no later than ten days before the contract is to be executed.<sup>109</sup> Violation of the provision constitutes a Class D felony,<sup>110</sup> punishable by imprisonment for a fixed term of two years and up to a \$10,000 fine.<sup>111</sup>

The Indiana law also puts responsibility on professional sports teams or entities. That is, if a student athlete intends to enter into an agreement with a professional team or agrees to participate as a professional athlete in a non-team sport, the team or entity which will sign the athlete must give similar prior written notification to the athletic director of the student athlete's institution or face a Class D felony charge.<sup>112</sup>

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108. IND. CODE ANN. § 35-46-4(1), (2) (Burns Supp. 1988).

109. *Id.*

110. *Id.*

111. *Id.* § 35-50-2-7(a).

112. *Id.*

Indiana, like Georgia, does not place the same burden on its athletes. However, because of the severe criminal penalties prescribed in the act, agents may be less inclined to break the law in Indiana than in states like Georgia where criminal sanctions are nonexistent.

### 3. *Minnesota*

Minnesota is one of seven states that specifically includes athletes other than collegians within the scope of its legislation.<sup>113</sup> The state's definition of "student athlete" includes not only current collegians but "any individual who may be eligible to engage in collegiate sports in the future."<sup>114</sup> Therefore, Minnesota's law covers the state's high school athletes, including baseball players who are commonly drafted out of high school.<sup>115</sup> Additionally, the state law encompasses non-team sport athletes, such as tennis players and golfers, who frequently turn professional without attending college.

A Minnesota athlete who chooses to sign a professional sports contract and/or retain an agent before the expiration of collegiate eligibility must first file a "Waiver of Eligibility" with both the Minnesota Secretary of State and the athletic director of the athlete's institution.<sup>116</sup> The waiver is a formal revocation of the athlete's collegiate eligibility.<sup>117</sup> According to the Minnesota law, the athlete must then wait seven days after filing the waiver before entering into an agreement with an agent or professional sports organization.<sup>118</sup> The waiver

113. Kentucky, Louisiana, Maryland, Michigan, Mississippi and Oklahoma are the others. **Kentucky:** KY. REV. STAT. ANN. § 518.010(a) (Michie Supp. 1988); **Louisiana:** LA. REV. STAT. ANN. § 4:421.4(5) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 632(c)(2)(ii) (Supp. 1988); **Michigan:** Mich. H.B. 4634, § 1(3)(g) (1988) (proposed MICH. COMP. LAWS § 750.411e(3)(g) (approved Dec. 27, 1988)); **Mississippi:** MISS. CODE ANN. § 73-41-1(1)(e) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.61.A.5 (West Supp. 1988).

114. Act of April 28, ch. 701, § 1.1(b), 1988 Minn. Sess. Law Serv. 1076 (West) (codified at MINN. STAT. ANN. § 325E.33.1(b) (Supp. 1989).

115. Any amateur baseball player is eligible to be drafted during Major League Baseball's annual summer draft. In football and basketball, an athlete who has not completed collegiate eligibility or who has not been removed from high school for four years, must apply to the respective professional league for inclusion in its draft.

116. Act of April 28, ch. 701, § 1.2, 1988 Minn. Sess. Law Serv. 1076 (West) (codified at MINN. STAT. ANN. § 325E.33.2 (Supp. 1989).

117. According to Minnesota law, the waiver form must provide:

#### WAIVER OF INTERCOLLEGIATE ATHLETIC ELIGIBILITY

I, . . . hereby waive any and all intercollegiate athletic eligibility. This waiver is not effective until seven days after it has been received by the Minnesota secretary of state and the office of the athletic director.

This waiver is revocable until my intercollegiate athletic eligibility is terminated as a result of my entering either a contract with an athletic agent or a professional sports contract.

*Id.* at 1077.

118. *Id.* §§ 1(2), (3), at 1076-77.



places the athlete's institution on notice that the athlete will soon be ineligible for collegiate competition. An agent's failure to adhere to the prescribed waiting period allows the athlete to void the contract.<sup>119</sup> The agent must then return to the athlete any compensation received from the athlete for services rendered by the agent.<sup>120</sup>

This provision should be a significant deterrent to the agent who otherwise would choose to ignore the law and secretly enter into an agreement with a player who has not filed a waiver of eligibility. The agent is risking the possibility that the athlete may void the agency contract at any time, even after the agent has negotiated the player's professional contract, without any financial obligation to the agent.

In addition to prescribing conduct for the athlete, Minnesota law also provides that an agent cannot sign an athlete "before the effective date of [the] student athlete's waiver of intercollegiate athletic eligibility."<sup>121</sup>

Minnesota's law also addresses an area of concern that has been ignored in some states—the relationship between agents and school employees. It has long been rumored and only recently verified that college coaches accept cash and favors to persuade an athlete to employ a specific agent.<sup>122</sup> Minnesota addresses this gross conflict of interest by prohibiting anyone from offering, giving, or promising an employee of an educational institution "any benefit, reward, or consideration to which the employee is not legally entitled" in return for the employee's assistance in recruiting an athlete as a client.<sup>123</sup>

A violation of the Minnesota law exposes the agent to a maximum civil penalty of \$100,000 or "three times the amount given, offered, or promised as an inducement for the student athlete to enter the agency contract or professional sports contract."<sup>124</sup>

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119. *Id.* § 1(5), at 1077.

120. *Id.*

121. *Id.* § 1(3), at 1077.

122. See *supra* note 47 and accompanying text.

123. Act of April 28, 1988, ch. 701, § 1.4, 1988 Minn. Sess. Law Serv. 1077 (West) (codified at MINN. STAT. ANN. § 325E.33.4 (Supp. 1989)). Other states that include provisions to restrict relationships between agents and school employees are Iowa, Louisiana, Maryland, Michigan, Mississippi, Oklahoma, Pennsylvania, and Texas. **Iowa:** Act of May 14, 1988, H.F. 2432, § 8.5, 1988 Iowa Legis. Serv. 558 (West) (to be codified at IOWA CODE § 9A.6.5); **Louisiana:** LA. REV. STAT. ANN. § 4:424(6) (West 1987); **Maryland:** MD. ANN. CODE art. 56, § 636(b)(3) (Supp. 1988); **Michigan:** Mich. H.B. 4634, § (1)(b) (1988) (proposed MICH. COMP. LAWS § 750.411e(1)(b) (approved Dec. 27, 1988)); **Mississippi:** MISS. CODE ANN. § 73-41-11(f) (Supp. 1988); **Oklahoma:** OKLA. STAT. ANN. tit. 70, § 821.64(6) (West Supp. 1988); **Pennsylvania:** Pa. H.B. 1879, § 1(a)(3) (1988) (proposed 18 PA. CONS. STAT. ANN. § 7107(a)(3) (approved Dec. 21, 1988)); **Texas:** TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(3) (Vernon Supp. 1988).

124. Act of April 28, ch. 701, § 1.3, 1988 Minn. Sess. Law Serv. 1077 (West) (codified at MINN. STAT. ANN. § 325E.33.3 (Supp. 1989)).

#### 4. Ohio

An agent must satisfy two prerequisites before signing an Ohio collegian to a contract.<sup>125</sup> First, the agent must prepare an integrated written contract.<sup>126</sup> Second, the agent must file a copy of that contract with the athletic director of the athlete's school no later than fourteen days prior to the execution of the contract.<sup>127</sup> Failure to adhere to these two steps renders the agency contract unenforceable.<sup>128</sup>

Ohio's law allows the state attorney general to obtain an injunction against an agent if the attorney general has reasonable cause to believe that the agent is not complying with the fourteen-day notice requirement.<sup>129</sup> The attorney general may seek a temporary restraining order or an injunction "to restrain and prevent the violation."<sup>130</sup> The court may issue the order or injunction upon a showing "by a preponderance of the evidence that the athlete agent has violated or is violating" the notice requirement.<sup>131</sup>

Additionally, Ohio is the only state that incorporates a long-arm statute into its act.<sup>132</sup> Specifically, the state's law allows an Ohio court 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."<sup>133</sup>

This long-arm provision is significant because it allows Ohio to pursue criminal action<sup>134</sup> against agents who attempt to circumvent the state's legislation by secretly signing the athlete while the athlete is outside the state. Though there is little substantive proof of these signings, it is a logical belief that some agents avoid state regulations by paying expenses for athletes to visit the agent's office outside the state. Additionally, some agents solicit athletes while the athletes are travelling outside of the state for competition or vacation.

#### 5. Tennessee

In Tennessee, a contractual relationship<sup>135</sup> entered into between a student athlete and an agent is not valid or enforceable until notice of

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125. Ohio Subst. S.B. 263, § 1, at 2 (1988) (proposed OHIO REV. CODE ANN. § 4771.02 (approved Mar. 14, 1988)).

126. *Id.* (proposed OHIO REV. CODE ANN. § 4771.02(A) (approved Mar. 14, 1988)).

127. *Id.* (proposed OHIO REV. CODE ANN. § 4771.02(B) (approved Mar. 14, 1988)).

128. *Id.* (proposed OHIO REV. CODE ANN. § 4771.04 (approved Mar. 14, 1988)).

129. *Id.* (proposed OHIO REV. CODE ANN. § 4771.05 (approved Mar. 14, 1988)).

130. *Id.*

131. *Id.*

132. *Id.* (proposed OHIO REV. CODE ANN. § 4771.06 (approved Mar. 14, 1988)).

133. *Id.*

134. *Id.* (proposed OHIO REV. CODE ANN. § 4771.99 (approved Mar. 14, 1988)).

135. Tennessee's definition of a "contractual relationship" is broad. The state defines at

the contract is received by the "chief executive officer" of the athlete's school.<sup>136</sup> Such notice must be given to the school by *both* the athlete *and* the agent within seventy-two hours of the execution of the agreement.<sup>137</sup>

Additionally, an athlete has the right to rescind the agreement, which must be in writing,<sup>138</sup> within twenty days of either the signing of the contract, the receipt of the contract by the athlete's school, or, if no notification is given to the school, the date the athlete's eligibility expires.<sup>139</sup> The twenty-day rescission period does not begin to run until the last of these three events occurs.<sup>140</sup> Therefore, the athlete may rescind a contract long after entering into it. For example, if a collegian in Tennessee signs a contract with an agent before the start of the athlete's senior season, and neither the athlete nor the agent notifies the school of that agreement, the athlete maintains the right to rescind the agreement for twenty days after participating in the school's final competition of the athlete's senior season. Of course, the failure to notify the institution within seventy-two hours of the signing is a violation of state law.<sup>141</sup>

Tennessee law also requires that language be included in the contract which puts the athlete on notice that signing the contract could adversely affect the athlete's collegiate teammates.<sup>142</sup> This language,<sup>143</sup> while legally insignificant, appears to be aimed at the athlete's con-

least three situations in which a contract between an agent and athlete can arise:

- (A) A contract to represent the student athlete in pursuing a professional sports career;
- (B) Loans or advances of money in any way connected with the student athlete pursuing a professional sports career; or
- (C) Providing services or material goods in any way connected with the student athlete pursuing a professional career in sports.

TENN. CODE ANN. § 49-7-2104(a)(2) (Supp. 1988). Tennessee's provision clearly discourages any relationship between an agent and a collegiate athlete while the athlete is still eligible for collegiate play.

136. TENN. CODE ANN. § 49-7-2104(b)(4), (b)(8)(A) (Supp. 1988).

137. *Id.* § 49-7-2104(b)(4).

138. *Id.* § 49-7-2104(b)(1)(A).

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

140. *Id.*

141. *Id.* § 49-7-2104(b)(4).

142. *Id.* § 49-7-2104(b)(2).

143. The following language must be included in the agency agreement in 10-point, bold 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 POSTSEASON GAMES.

*Id.*

science. That is, by signing early, the athlete not only jeopardizes his eligibility, but may cause the team to forfeit victories or prevent it from competing in post season tournaments or bowl games.

While protecting the school and the athlete, Tennessee's law also contemplates serious financial penalties for the non-compliant agent.<sup>144</sup> For example, an agent is not entitled to reimbursement for "[a]ny money, things of value, extra benefits or any other form of consideration given by" the agent to the collegian.<sup>145</sup> Such benefits are considered a "gift" and may be retained by the athlete upon rescission of the contract or if the contract is rendered void or unenforceable due to a violation of the act.<sup>146</sup> Therefore, an agent who induces a client with money or other gifts to sign a representation agreement is incurring a substantial financial risk as Tennessee views the inducement as a part of the cost of doing business in the state.

Additionally, and significantly, a Tennessee college or university may recover from the athlete agent damages caused by that agent's direct violation of the act.<sup>147</sup> Damages may include lost revenue from television appearances, ticket sales, and participation in post-season tournaments or bowl games.<sup>148</sup> Such revenue can range from a few dollars to millions.

#### IV. FLORIDA'S NEW AGENT REGULATION

Three different bills directed at sports agent's abuses were filed during the 1988 session of the Florida Legislature.<sup>149</sup> While each bill was unique, all three were similar in certain respects.<sup>150</sup> The thrust of each

144. *Id.* §§ 49-7-2103(b)(2), -2104(b)(10), -2106, -2107.

145. *Id.* § 49-7-2104(b)(10).

146. *Id.*

147. *Id.* §§ 49-7-2103(a), -2106, -2107.

148. *Id.* § 49-7-2106.

149. Fla. H.B. 127 (1988); Fla. H.B. 1095 (1988); Fla. S.B. 73 (1988).

150. HB 127, sponsored by Representative Sidney Martin, Dem., Hawthorne, would have regulated all athlete agent contracts with professional sports teams. It provided that the State Athletic Commission would administer oral examinations to determine whether people were qualified to be athlete agents. Also, it proposed to levy a license fee for agents of not more than \$500 annually, and would have required the filing of a surety bond of not less than \$3,000. Fla. H.B. 127, § 2, at 3-4 (1988). The commission would regulate agent contracts and fees agents charge subject to certain limitations. *Id.* at 6. A series of prohibited acts by agents were enumerated, and the proposal would have authorized the commission to impose a fine of up to \$5,000 for violations. *Id.* at 7-8, 10-11.

HB 1095, sponsored by Representative James Burke, Dem., Miami, proposed to require all athlete agents to register with the Department of State which would evaluate the qualifications of the applicant. Fla. H.B. 1095, §§ 3-4 (1988). It did not specify the amount of the filing fee, but it proposed to require agents to file either a surety bond in the amount of \$100,000 or an appropriate substitute. *Id.* § 9(1)-(2), at 6. It proposed that all agent contracts be filed with the Depart-

was to eliminate the "bad" agent. The bills all adopted the older approach of oppressive regulation and attempted to insure that all people who represent professional athletes meet certain levels of competence and character. Each provided for a state administrative agency to investigate applicants and to license those who meet the standards. The agency also would regulate the agents after licensure. The proposals included the requirement that a substantial surety bond be posted by each athlete agent. To provide funds to pay for this regulatory structure, substantial filing fees would be set by the commission. Such a scheme was considered and rejected for at least two reasons. First, the economic cost for a person to qualify as an agent would be substantial. Thus, the number of agents would be significantly reduced. Absent an agent's belief in a reasonable chance to represent a middle- to high-round draft choice, compliance with the Act might not prove economically sensible. Second, the practical result of establishing such a licensing procedure would be similar to what has apparently occurred in the states that have adopted similar processes; i.e., the agents simply ignore the state regulation and do business without complying. Since there was no legislative intent to provide for adequate regulatory enforcement, it was likely that agents in Florida similarly would ignore the provision if adopted. Adopting regulatory schemes which would probably be ignored by a substantial number of those regulated was thought to be poor public policy. The concept of licensing after an evaluation of credentials was never seriously debated by any committee of the Florida Legislature.

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ment of State, and it regulated their contents. *Id.* § 12(1)-(5), at 8-9. Also, it proposed to regulate the fees an athlete agent could charge, and required the establishment of a trust fund to administer the payments received by the agent on behalf of the athlete. *Id.* §§ 13(2), 14, at 10-11. It delineated a series of prohibited acts by the agent. *Id.* § 16, at 11-14. Many of these were included in the Act as finally adopted by the Legislature. As sanctions, HB 1095 proposed to provide void contracts with agents who have registered with the department. A person who acts as an athlete agent without registering could be found guilty of a first degree misdemeanor. *Id.* §§ 19-20, at 15.

SB 73, filed by Senator George Kirkpatrick, Dem., Gainesville, proposed to create a 10 member Athlete Agent Regulatory Commission which would evaluate the qualifications of an athlete agent to enable that person to represent all athletes who seek employment with a professional team. Fla. S.B. 73, §§ 2(1), 8, at 2, 6 (1988). It proposed to require an annual filing fee in an amount sufficient to administer the costs of the proposed legislation. Also, it proposed to require each agent to post a surety bond in the amount of \$50,000, or an appropriate substitute. *Id.* §§ 13-14(1), (2), at 8. Student athletes subject to the rules of the NCAA would be required to give notice to their university that they had signed an agent contract. *Id.* § 18(2), at 11. The bill was to impose a 10% cap on agent fees, and was to require the establishment of a trust fund. *Id.* §§ 19-20, at 11-12. The bill delineated a series of actions in which agent participation would be prohibited. *Id.* §§ 23-24, 26-27, at 12-13. Contracts with unregistered agents would be void, and a person acting as an agent without registering could be found guilty of a third-degree felony. *Id.* §§ 31-32, at 15.

This approach was abandoned early in the legislative process. In its place was substituted the concept of having agents register without any background investigation or licensing procedure based on the competency of the registrant. The emphasis was placed on providing protection both for Florida colleges and universities as well as the athletes enrolled in them, and on regulating the contract between the agent and the athlete.<sup>151</sup>

*A. People to Whom the Act Applies*

“Athlete agents” under the Act are people who recruit or solicit a student athlete for the purpose of entering into an agent contract to represent the athlete when the athlete seeks employment with a professional athletic team.<sup>152</sup> An agent also is defined as a person who for a fee “procures, offers, promises, or attempts to obtain employment for a student athlete with a professional sports team or as a professional athlete.”<sup>153</sup> Anyone who acts in the manner outlined above is an agent and subject to the remainder of the legislation, without exception. Therefore, any lawyer who represents an athlete for the purposes regulated by the Act is an agent and must register and comply with the Act’s other provisions.

A “student athlete” is an athlete who practices for or participates in intercollegiate athletics at a college or university located in Florida.<sup>154</sup> While the Act does not define the term “college or university,” it regulates only those contracts by athletes who are subject to the rules and regulations of the NCAA, the National Association for Intercollegiate Athletics, or the National Junior College Athletic Association.<sup>155</sup> Thus, the intent seems clear that the term college or university includes any Florida junior college or four-year college or university which is a member of one of three specifically mentioned organizations.<sup>156</sup> The provisions of the registration portion of the Act, as well as its other provisions, are inapplicable to an agent who represents athletes who are already professional or who are still in high school. Students enrolled at colleges or universities outside of Florida apparently are excluded from the Act’s protection even if they or their family reside in Florida.

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151. Ch. 88-229, 1988 Fla. Laws 1289 (codified at FLA. STAT. §§ 468.451-.454 (Supp. 1988)).

152. *Id.* § 2, 1988 Fla Laws at 1290 (codified at FLA. STAT. § 468.452(2) (Supp. 1988)).

153. *Id.*

154. *Id.* (codified at FLA. STAT. § 468.452(3) (Supp. 1988)).

155. *Id.* § 4, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.454 (Supp. 1988)).

156. Since nearly all the athletes who sign agent contracts are enrolled at colleges and universities which are members of the NCAA, this Article will discuss the rules and regulations of that organization.

Agents may attempt to avoid the registration requirements of the Act<sup>157</sup> by leaving the state to sign the representation contract with the athlete. However, when a person directly or indirectly seeks to recruit or solicit a student athlete, the person is acting as an agent for the purposes of the Act.<sup>158</sup> Therefore anyone who solicits or recruits a student athlete in Florida for the purpose of serving as an athlete agent is subject to the Act, regardless of where the contract is signed.

Many agents have representatives or scouts who engage in much of the preliminary contract and recruitment. In this situation, both the principal agent and the representative would be subject to the terms of the Act; the agent's representative would be "directly" recruiting and soliciting, and the principal agent would be "indirectly" engaging in the same activities. So too, if the agent attempts to solicit or recruit the athlete by contacting a member of the athlete's family or a friend for the purpose of furthering the recruitment or solicitation, these actions would be subject to the Act.<sup>159</sup>

### B. Registration of Agents

Under the Act, every athlete agent is required to register biennially with the Florida Department of Professional Regulation (DPR).<sup>160</sup> The process is not one of licensing in which the DPR would determine whether the agent possesses certain minimum qualifications of competency; nor is there any requirement that a surety bond be posted before an agent can do business. Rather, a person desiring to do business as an athlete agent simply would complete a registration form provided by DPR and pay a registration fee. That fee will be set by DPR in an amount not to exceed fifty dollars. Upon payment of the registration fee and completion of the form, DPR will issue a registration certificate which entitles the individual to operate as an athlete agent for two years.<sup>161</sup>

Although the Act is silent as to the contents of the registration form, apparently it envisions that at least the business address of the agent will be included since it requires an athlete agent operating in Florida to notify DPR of the change of business address within thirty days.<sup>162</sup> Each person who acts as an agent must register even though

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157. *Id.* § 3, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.453 (Supp. 1988)).

158. *Id.* § 2, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.452(2) (Supp. 1988)).

159. *Id.*

160. *Id.* § 3, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.453(1) (Supp. 1988)).

161. *Id.*

162. *Id.* (codified at FLA. STAT. § 468.453(2) (Supp. 1988)).

several people may be members of the same firm, business, or agency.<sup>163</sup>

The failure to comply with the registration provisions of the Act will result in criminal sanctions. It is a third-degree felony if a person "operates" as an athlete agent without complying with Act's registration provisions.<sup>164</sup> By its use of the term "operate,"<sup>165</sup> the Legislature apparently intended to prohibit unregistered people from acting as athlete agents. Therefore, if an agent directly or indirectly recruits an athlete at a Florida college or university, that agent will be subject to criminal penalties if the agent fails to register, regardless of the jurisdiction in which the contract is signed. The intent of the Legislature was to protect Florida athletes and universities. The crime occurs when the recruitment takes place in Florida when the recruiter has been operating as an agent without registering.

### C. Regulation of the Agent Contract

The most significant portion of the Act is section 4, which regulates an agent contract or agreement in which the student athlete authorizes an athlete agent to represent the athlete in the marketing of the athlete's ability or reputation in a sport.<sup>166</sup> In this section, the Legislature attempted to build into each agent contract protections for both the student athlete and the university.

#### 1. Notice to College or University

The chief protection for Florida colleges and universities is the notification provision.<sup>167</sup> When a student athlete who is subject to the rules of the NCAA enters into an agent contract with an athlete agent or with a professional team, both the student athlete<sup>168</sup> and the athlete agent<sup>169</sup> have the affirmative duty to give written notice to the athletic director or president of the athlete's university that the athlete has entered into the contract. The notice must be given within seventy-two hours of the signing of the contract or before the athlete practices or

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163. *Id.* (codified at FLA. STAT. §468.453(3) (Supp. 1988)).

164. *Id.* In Florida, a person convicted of a third degree felony may receive a term of imprisonment not to exceed five years, FLA. STAT. § 775.082(3)(d) (1987), and a fine which shall not exceed \$5,000, *id.* § 775.083(1)(c). An habitual offender may receive a greater sentence. *Id.* § 755.084.

165. Ch. 88-229, § 3, 1988 Fla. Laws 1289, 1290 (codified at FLA. STAT. § 468.453(3) (Supp. 1988)).

166. *Id.* § 4, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.454 (Supp. 1988)).

167. *Id.* (codified at FLA. STAT. § 468.454(1) (Supp. 1988)).

168. *Id.*

169. *Id.* (codified at FLA. STAT. § 468.454(2) (Supp. 1988)).



participates in an athletic event on behalf of the college or the university, whichever event occurs first.<sup>170</sup> Such notice will enable the university to be aware that the student athlete's eligibility is in doubt, and will give it the opportunity to take appropriate action before the student athlete competes and jeopardizes both the institution and the athlete's teammates.

The notice is required only from an athlete enrolled at a Florida college or university because the Act's definition of "student athlete" is limited to one "who practices for or otherwise participates in intercollegiate athletics at any college or university that is located in this state."<sup>171</sup> Thus, athletes who reside in Florida but attend a college or university in another state are not subject to the notice provision upon signing an agent contract. Further, athletes who are students at a college outside of Florida and who sign a contract with an agent residing in Florida are not subject to the notice provision.

It is unclear whether a student athlete who has completed athletic eligibility but remains enrolled at the college or university must comply with these notice provisions. The Act requires the notice of the contract when a "student athlete . . . is subject to the rules and regulations of the National Collegiate Athletic Association."<sup>172</sup> For example, a football or basketball player who has finished the fourth and final year of eligibility ordinarily would remain in school during the spring term to graduate. Student athletes remain subject to NCAA regulations so long as they receive financial aid. The NCAA Bylaws deal with the limits upon the receipt of job-related income by student athletes who are "ineligible for participation in intercollegiate athletics, but who [are] receiving institutional financial aid."<sup>173</sup> Thus, the Act

170. *Id.* (codified at FLA. STAT. § 468.454(1), (2) (Supp. 1988)).

171. *Id.* § 2, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.452(3) (Supp. 1988)).

172. *Id.* § 4, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.454(1) (Supp. 1988)).

173. NCAA Bylaws § 15.2.6.4, *reprinted in* NCAA MANUAL, *supra* note 53, at 129. A student athlete will not be eligible if financial aid is received in an amount which "exceeds the value of tuition and fees, room and board, and required course-related books." NCAA Bylaws § 15.1, *reprinted in* NCAA MANUAL, *supra* note 53, at 128. In determining the amount of financial aid received, the institution must count various forms of non-summer employment related income. NCAA Bylaws § 15.1.1(a), *reprinted in* NCAA MANUAL, *supra* note 53, at 128. Funds received from a job, or a bonus, or salary from a professional sports organization following the final season of eligibility, specifically are required to be counted. NCAA Bylaws §§ 15.1.1(e), 15.2.6, *reprinted in* NCAA MANUAL, *supra* note 53, at 128, 131.

An institution is required to adjust the grant-in-aid of a student-athlete who receives a bonus, salary or other compensation during the academic year (or thereafter) from participation in an athletics event, so that the total amount from such sources, when coupled with the institutional financial aid, does not exceed the value of a full grant-in-aid for the balance of the academic year.

NCAA Bylaws § 15.3.1.4.2, *reprinted in* NCAA MANUAL, *supra* note 53, at 133.

seems to require notice when the student athlete who is receiving financial aid signs an agent contract while enrolled as a student at the college even if the athlete's four years of competition have been completed.

On the other hand, the notice provision was intended to protect the university from a penalty as a result of permitting an ineligible player to participate in an athletic contest in violation of NCAA rules. If the player has completed eligibility, the athlete cannot compete in any additional contests. Therefore, the purpose for requiring notice from this athlete would not be furthered, since there is no interest of the university to protect. This latter interpretation would seem to further the intent of the legislation. However, the plain language of the Act appears clearly to negate that intent, requiring notice even after eligibility has been exhausted.<sup>174</sup>

Although agent contracts entered into prior to October 1, 1988, generally are not subject to the provisions of the Act,<sup>175</sup> it does provide that if a student athlete who is subject to the rules and regulations of the NCAA has signed an agent contract, both the student and the agent must give the required notice to the university on October 1, 1988, even though the contract was signed prior to that date.<sup>176</sup> If the student athlete was not enrolled at a college or university and was not subject to the NCAA rules at that time, the notice would not be required. The obvious intent was to protect the university from permitting athletes to compete while the institution believed that the athlete had eligibility remaining, even though the athlete had signed an agent contract prior to October 1, 1988.

## 2. Sanctions

Two provisions were included to provide an impetus for both the student athlete and the agent to comply with the notice provision. The first affects the contract and the second affects the parties to the contract. One provision declares the contract void and unenforceable if the required notice is not provided to the college or university.<sup>177</sup> Both the agent and the athlete are required to give notice. If either gives the necessary notice to the university, the contract will not be rendered void since the university's interest is protected as soon as it has knowl-

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174. Ch. 88-229, § 4, 1988 Fla. Laws 1289, 1290 (codified at FLA. STAT. § 468.454 (Supp. 1988)).

175. The Act took effect Oct. 1, 1988. *Id.* § 10, 1988 Fla. Laws at 1292 (codified at FLA. STAT. § 468.454 (Supp. (1988))).

176. *Id.* (codified at FLA. STAT. § 468.454(3) (Supp. 1988)).

177. *Id.* (codified at FLA. STAT. § 468.454(5) (Supp. 1988)).

edge of the contract. Since the agent probably has a strong financial motive to uphold the contract, it is likely the notice will be given. Additionally, the Act provides that if the athlete agent fails to provide the required notice, the agent may be found guilty of a third-degree felony.<sup>178</sup>

Rather than placing the entire burden on the agent, the Legislature took a unique step in seeking to ensure that the student athlete will fulfill his or her duty to give the required notice. The failure of the student athlete to give timely notice is a first-degree misdemeanor.<sup>179</sup> This criminal penalty indicates that the Legislature primarily was seeking to protect the interests of the Florida colleges and universities. However, the effectiveness of this provision remains to be seen. If athletes are willing to secretly sign agent contracts early, in violation of NCAA rules, they may be equally willing to risk a possible misdemeanor charge.

Allowing an ineligible athlete to compete in an NCAA championship event is a violation of NCAA rules,<sup>180</sup> which may result in the university being required to forfeit substantial revenues derived from participating in the event.<sup>181</sup> The Act seeks to protect Florida colleges and universities from this financial harm. It establishes a cause of action on behalf of the college or university against both the agent and the student athlete for any damages caused to the college or university as a result of the failure to provide the required notification.<sup>182</sup> The damages could include any proceeds that the institution had to return to the NCAA as well as any other financial loss the university could prove was caused by the failure to have notice of the player's loss of eligibility.<sup>183</sup>

If the athlete's ineligibility becomes known before the championship event, the athlete will not be able to compete in the championship. Additionally, the team's eligibility to compete in the event might be affected, either because it may have to forfeit games as a result of using an ineligible player,<sup>184</sup> or the appropriate selection committee

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178. *Id.* (codified at FLA. STAT. § 468.454(2) (Supp. 1988)).

179. *Id.* (codified at FLA. STAT. § 468.454(1) (Supp. 1988)). In Florida, a person convicted of a first-degree misdemeanor may receive a definite term of imprisonment not exceeding one year, FLA. STAT. § 775.082(4)(a) (1987), and a fine not exceeding \$1,000, *id.* § 775.083(1)(d). An habitual offender may receive a greater sentence. *Id.* § 775.084.

180. See NCAA Bylaws § 14.1.1.1, reprinted in NCAA MANUAL, *supra* note 53, at 97.

181. See NCAA Exec. Reg. 31.2.2.5, reprinted in NCAA MANUAL, *supra* note 53, at 310.

182. Ch. 88-229, § 5, 1988 Fla. Laws 1289, 1291 (codified at FLA. STAT. § 468.454(6) (Supp. 1988)).

183. *Id.*

184. NCAA Enforcement Rules § 19.6(b)-(c), reprinted in NCAA MANUAL, *supra* note 53, at 254.

does not believe that the team is worthy of selection. In this situation, both the team and the university are damaged. However, it may be difficult to prove the amount of the financial damages the university has suffered. Generally, when the amount of damages caused to a person are speculative, a judgment awarding damages usually may not be awarded.<sup>185</sup> For example, the financial payout to each university competing in the NCAA Division I Men's Basketball Tournament increases with each game the team wins as it progresses to a later round in the tournament. In this situation, it is probably not possible for a university to prove the amount of damage it sustained if an ineligible athlete had not competed. It cannot prove that its team would have been selected for the tournament if the student athlete had been eligible for the entire season. If the team was selected, it would be very difficult for the university to prove that its team would have progressed to a later round in the tournament had the student athlete been eligible to compete.

The Act provides that if the university had not been notified of the contract, it can recover liquidated damages in the amount equal to three times the value of the athlete's scholarship furnished by the university. It is not necessary that the university prove any actual damage before these liquidated damages can be recovered.<sup>186</sup> This provision appears to permit the university to recover some of its monetary damages even though proof of actual amount of damage is not possible.

According to the legislative language, the recovery of liquidated damages may be available in addition to any actual damages that can be proved. The Act uses the term "treble damages."<sup>187</sup> This provision may have been intended to provide a civil penalty similar to other treble damage provisions which provide an incentive to an injured person to seek redress. It would operate to provide an additional deterrent against these violations.

The cause of action for damages is recognized only for a statutory violation caused by the failure of the agent or athlete to give timely notice. There is no similar cause of action recognized for other violations of the act.

### 3. *Form of Agent Contract*

To make the student athlete aware of his or her duties and the implications of signing an agent contract, the Act requires that the con-

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185. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 149 (1973) (the plaintiff is under the obligation of proving the *amount* of damages suffered with reasonable certainty).

186. Ch. 88-229, § 5, 1988 Fla. Laws 1289, 1291 (codified at FLA. STAT. 468.454(6) (Supp. 1988)).

187. *Id.*

tract include the following warnings near the space for the student athlete's signature in ten point, bold type:

**WARNING: IF YOU AS A STUDENT ATHLETE SIGN THIS CONTRACT, YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE IN INTERCOLLEGIATE ATHLETICS. PURSUANT TO FLORIDA LAW, YOU MUST NOTIFY THE ATHLETIC DIRECTOR OR PRESIDENT OF YOUR COLLEGE OR UNIVERSITY IN WRITING PRIOR TO PRACTICING FOR OR PARTICIPATING IN ANY ATHLETIC EVENT ON BEHALF OF ANY COLLEGE OR UNIVERSITY OR WITHIN 72 HOURS AFTER ENTERING INTO THIS CONTRACT, WHICHEVER OCCURS FIRST. FAILURE TO PROVIDE THIS NOTICE IS A CRIMINAL OFFENSE.<sup>188</sup>**

It is not clear whether these provisions invalidate oral agent contracts. This legislative requirement seems to imply that all agent contracts must be in writing. Oral contracts would by implication be invalid and unenforceable or would not be controlled by the Act. If oral contracts were determined to be outside the Act, the notice and other provisions likewise would be inapplicable to them.

On the other hand, the definition of an agent contract apparently applies to all contracts or agreements and is not limited only to written contracts. It provides that an agent contract is a "contract or agreement pursuant to which a student athlete authorizes an athlete agent to represent him in the marketing of his athletic ability or reputation in a sport."<sup>189</sup> Both oral and written contracts and agreements would meet this definition. Thus, the required notice would have to be given when an oral agreement is entered into between the agent and the student athlete. This is the preferred interpretation since it furthers the intent of the Legislature to protect Florida universities from being harmed by playing ineligible athletes. Under the NCAA Bylaws, a person loses eligibility in a sport when he or she contracts "orally or in writing" to be represented by an agent in the marketing of his athletic ability in a sport.<sup>190</sup> Thus, a student athlete who enters into an oral agent contract or agreement is ineligible and should be required to give the necessary notice.<sup>191</sup>

The agent and the athlete may attempt to enter into a contract before the athlete has completed eligibility by postdating the contract

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188. *Id.* § 4, 1988 Fla. Laws at 1291 (codified at FLA. STAT. § 468.454(4) (Supp. 1988)).

189. *Id.* § 2, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.452(1) (Supp. 1988)).

190. NCAA Bylaws § 12.3.1, reprinted in NCAA MANUAL, *supra* note 53, at 61.

191. Ch. 88-229, § 4, 1988 Fla. Laws 1289, 1290 (codified at FLA. STAT. § 468.454(1)-(2) (Supp. 1988)).

with a date subsequent to the completion of his eligibility. On the face of the contract, it would appear that the parties did not violate the provisions of this Act and did not jeopardize the athlete's eligibility. However, a postdated contract is a violation of the act.<sup>192</sup> There are no sanctions specified for general violations of the Act, except that the agent's registration may be suspended or revoked for such a violation.<sup>193</sup>

#### 4. *Athlete's Right of Rescission*

To protect the student athlete from the pressures that might be exerted to sign an agent contract, the Legislature provided that the student has the right to rescind an agent contract if the student complies with the requirements of the section.<sup>194</sup> This right cannot be waived.<sup>195</sup> This provision is similar to other Florida consumer protection legislation that provides for similar rescissionary rights for certain types of consumer contracts.<sup>196</sup> Also it is based on a similar policy that underlies the NCAA legislation which provides for a non-contact period with the athlete for two days before the date when the athlete can sign a national letter of intent.<sup>197</sup> The individual is provided a period of time in which to consider the alternatives out of the presence of those who seek to pressure the athlete into signing the contract or agreement.<sup>198</sup>

The athlete has ten days in which to rescind.<sup>199</sup> The time runs either from the date on which the contractual relationship arises between the athlete and the agent or the date on which the college or university is notified of the contractual relationship, whichever date is later.<sup>200</sup> Coupling the right of rescission to the date of the notice rather than the date the contract was signed gives a greater motive to the agent to give timely notice.

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192. *Id.* § 6, 1988 Fla. Laws at 1292 (codified at FLA. STAT. § 468.454(8) (Supp. 1988)).

193. *Id.* § 7, 1988 Fla. Laws at 1292 (codified at FLA. STAT. § 468.455 (Supp. 1988)).

194. *Id.* § 6, 1988 Fla. Laws at 1291 (codified at FLA. STAT. § 468.454(7) (Supp. 1988)).

195. *Id.*

196. For example, a client may cancel a contingent fee contract with an attorney without any reason if there is notice in writing within three days of the date the contract is signed, FLA. R. PROF. COND. 4-1.5(F)(4)(a)(2), and a buyer of a motor vehicle has the right to rescind a retail installment contract until the seller has delivered or mailed to the buyer a copy of the contract if the buyer has not yet received the motor vehicle, FLA. STAT. § 520.07(1)(c) (1987).

197. NCAA Bylaws §§ 13.02.4.4, 13.1.3.8.1, *reprinted in NCAA MANUAL, supra* note 53, at 70, 77.

198. Ch. 88-229, § 6, 1988 Fla. Laws 1289, 1291 (codified at FLA. STAT. § 468.454(7) (Supp. 1988)).

199. *Id.*

200. *Id.*

To be an effective rescission, the athlete must give written notice to the agent and must repay the agent all monies paid by the agent to the student athlete.<sup>201</sup> However, the Act provides that there need not be reimbursement of any amounts expended by the agent on behalf of the student athlete for travel, entertainment and room and board.<sup>202</sup> The policy decision apparently was based on the fact that it would be difficult for the athlete to repay amounts which were not personally received but were paid to third-party businesses on his or her behalf. Not requiring the reimbursement of expenditures received on behalf of the athlete may be in conflict with actions required by the NCAA to restore the eligibility of a student athlete who had attempted to rescind an agent contract. Although an athlete loses NCAA eligibility upon signing a contract with an agent,<sup>203</sup> at least one athlete's eligibility has been restored by the NCAA Eligibility Committee where all monies paid directly and those spent on behalf of the student were reimbursed.<sup>204</sup> While there is no assurance that eligibility will be restored if there is complete reimbursement,<sup>205</sup> it is doubtful that such action would result without it. Thus under the Florida Act it is possible that an agent contract may be legally rescinded but the athlete may be ineligible under NCAA rules for further competition.

Additionally, if the contract is rescinded, as a matter of substantive contract law no contract exists.<sup>206</sup> Obviously, a strong argument can

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201. *Id.*

202. *Id.*

203. NCAA Bylaws § 12.3.1, reprinted in NCAA MANUAL, *supra* note 53, at 61. See *supra* note 55. A similar restriction is placed upon an individual with eligibility remaining who places his or her name in a professional league's draft and subsequently withdraws from the draft before it is held. NCAA Bylaws § 12.2.4.2 (a), reprinted in NCAA MANUAL, *supra* note 53, at 61.

204. The NCAA Eligibility Committee for Division I restored the final season of eligibility for University of Pittsburgh student athlete Teryl Austin. Upon repayment of a loan of \$2,500 received from the agent and confirmation that the student athlete was free of an contractual obligations to the agent, the committee voted to restore Austin's eligibility after he was withheld from the first two games of the 1987 varsity football schedule. NCAA News, Sept. 2, 1987, at 2, col. 3.

205. Two Texas A&M football players who had signed agent contracts and received money from the agent were unsuccessful in their attempt to have their eligibility restored even though they agreed to make restitution to the agent and terminated all contractual obligations with him. Apparently, the NCAA declined to restore their eligibility because the athletes did not come forward and disclose the agent contracts until after the story was reported in the press; and because when they renewed their scholarships they had signed documents which falsely asserted that they had done nothing to jeopardize their eligibility. See Atlanta Const., Dec. 22, 1987, at 1D, col. 5, 6D col. 3 (quoting Steve Morgan, NCAA Asst. Exec. Dir.).

206. The duties under a contract are terminated when a contract is rescinded. Usually there must be a mutual agreement of the parties to the contract to rescind. The Legislature has given the student athlete the unilateral right to rescind if he or she complies with the statute. See generally A. CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION § 1234 (1952).

be made that since there is no enforceable contractual agreement with the agent, the student should not lose eligibility. However, the NCAA Bylaws provide that if an individual has signed a contract or commitment of any kind to play professional athletics in a sport, the athlete is no longer eligible to compete in that sport, regardless of the "legal enforceability" of the contract or commitment.<sup>207</sup> Thus, it seems that in the eyes of the NCAA, an athlete will be ineligible to compete even though the athlete has no valid contract with an agent.

#### D. Regulation of Agent's Conduct

While the Act generally regulates the agent contract, it goes beyond this concept and specifically prohibits five types of activities by agents.<sup>208</sup> It prohibits the publication of false or misleading information or advertisements by an agent.<sup>209</sup> Additionally, it forbids giving any false information or the making of false promises concerning employment to an athlete.<sup>210</sup> This section applies not only to an agent who directly makes the false statement or representation, but also to an agent causing another to make such misrepresentations. Thus, not only would an agent violate the Act by directly misrepresenting his credentials or client list, but he would also be in violation by causing his representative or scout to do so.

The remainder of that section deals with offers or payments by the agent of valuable considerations to induce an athlete to sign an agent contract. If a coach or an employee of a Florida college or university refers an athlete to an agent, the agent is prohibited from offering anything of value in exchange for the referral.<sup>211</sup> In addition to a broad prohibition against offering any consideration, the Act specifically prohibits the rendition of free legal services and the rendition of legal services for a reduced fee by the agent in exchange for the referral.<sup>212</sup> The reference to an employee of the university most frequently would apply to the staff of the athletic department, such as trainers or members of the athletic director's staff, but also would apply to non-athletic department employees, most frequently university faculty. The Act prohibits the agent from accepting as a client any athlete referred by a coach or employee who has been offered anything of

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207. NCAA Bylaws § 12.1.3 (a), reprinted in NCAA MANUAL, *supra* note 53, at 59.

208. Ch. 88-229, § 8, 1988 Fla. Laws 1289, 1292 (codified at FLA. STAT. § 468.456 (Supp. 1988)).

209. *Id.* (codified at FLA. STAT. § 468.456(1) (Supp. 1988)).

210. *Id.*

211. *Id.* (codified at FLA. STAT. § 468.456(2) (Supp. 1988)).

212. *Id.*



value.<sup>213</sup> Additionally, it prohibits the agent from entering into a written or oral agreement with a coach or employee in which the agent offers anything of value for the referral of the student athlete.<sup>214</sup> There appears to be little reason for having two separate provisions covering the same matter. The two subsections basically provide that if an agent offers anything of value to a coach or employee for a referral of the athlete, the agent cannot accept the athlete as a client and any agreement between the agent and the coach or employee is invalid.

An agent is prohibited from offering anything of value to induce the athlete to enter into an agreement under which the agent will represent the athlete.<sup>215</sup> Specifically exempted are negotiations regarding the agent's fee.<sup>216</sup> Negotiations over the amount of the agent's fee may occur and it will not be regarded as a breach of the act.<sup>217</sup> An agent is not prohibited from offering the athlete a lower fee to obtain the signature of the athlete on the contract.<sup>218</sup> Under this provision, the Act would be violated if the agent offered the athlete an automobile or a cash payment to induce the athlete to sign the agent contract. However, the provision is not limited to payments or other offers of value directly to an athlete who the agent is attempting to sign. The provision states that the "agent shall not offer anything of value to induce a student athlete to enter into an agreement."<sup>219</sup> Payments or offers to members of the athlete's family or to his friends similarly would be prohibited. If the registration of the athlete agent has been suspended, the agent shall not conduct business as an athlete agent.<sup>220</sup>

While there are criminal penalties attached to violations of other parts of the legislation, and failure to comply with specific provisions will result in a void agent contract, there are no specific sanctions for the violation of the regulation provisions regarding the agent's conduct. If an agent fails to comply with any of the provisions, the agent's registration may be revoked or suspended.<sup>221</sup> If such suspension or revocation occurs, it would be a third-degree felony for the agent to operate as an athlete agent.<sup>222</sup>

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213. *Id.*

214. *Id.* (codified at FLA. STAT. § 468.456(3) (Supp. 1988)).

215. *Id.* (codified at FLA. STAT. § 468.456(4) (Supp. 1988)).

216. *Id.*

217. *Id.*

218. *See id.*

219. *Id.*

220. *Id.* (codified at FLA. STAT. § 468.456(5) (Supp. 1988)).

221. *Id.* § 7, 1988 Fla. Laws at 1292 (codified at FLA. STAT. § 468.455 (Supp. 1988)).

222. *Id.* § 3, 1988 Fla. Laws at 1290 (codified at FLA. STAT. § 468.453(3) (Supp. 1988)).

The failure to provide additional criminal or civil remedies for the prohibited actions of an agent does not mean that the athlete is without recourse if the agent's violation of the statute's provisions were the cause of damages. Some other independent basis for the cause of action may be present. For example, if the athlete sued the agent alleging that the agent's negligence in representing his qualifications caused the athlete monetary loss, the athlete could rely on the violation of the statute prohibiting the agent from publishing false or misleading statements as being negligence per se or evidence of negligence. Additionally, the criminal statutes of Florida or another jurisdiction might provide that the conduct in question is criminal, even though it is not criminal under the Act. Making false and misleading statements might very well be a violation of state or federal criminal statutes which generally prohibit that type of activity.<sup>223</sup>

## V. CONCLUSION

The Florida Legislature has made an earnest attempt to combat the havoc that unscrupulous agents can create. State lawmakers exhibited keen hindsight by avoiding the burdensome and ineffective registration and bonding requirements used in some states.<sup>224</sup> Additionally, Florida has included two provisions in its law which will give the sports agent legislation a fighting chance.

First, Florida has developed guidelines for *both* the sports agent *and* the athlete. In so doing, Florida appropriately recognizes that, in many cases, the collegiate athlete is as guilty of an indiscretion as the sports agent. Indeed, collegians know NCAA rules as well as or better than the sports agents who recruit them so doggedly. 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. The victims, at least in the agent-athlete scenario, are the colleges and universities which attempt to run respectable, law-abiding sports programs. While their athletes may quiver at such legislation, these institutions will find a degree of solace in sports agent legislation like that found in Florida.

Second, the Florida legislation prescribes criminal sanctions for those agents and athletes who violate the law.<sup>225</sup> The spectre of prison may be just the remedy to harness the vigor of even the most enthusiastic agent. Further, an athlete may attract less attention from profes-

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223. See *supra* notes 69-70 and accompanying text.

224. See *supra* notes 84-99 and accompanying text.

225. See *supra* notes 164, 178-79 and accompanying text.

sional teams if the athlete faces a criminal conviction. Mere threats?—perhaps. But Jim Abernathy's experience in Alabama may supply the appropriate response to those agents and athletes who may want to test a state's interest in curbing abuses.

Florida's new legislation ultimately may prove effective in preventing the type of nightmare experienced at the University of Alabama in 1987.<sup>226</sup> However, it is obvious that state legislation is not a panacea for combatting the unscrupulous sports agent. This is true primarily because only seventeen states have passed agent legislation. The bad agent is a persistent predator who will continue to feed in those states that do not have legislation. Moreover, experience has proved that agent legislation in some states is flatly ignored. But it appears that Florida has passed legislation which cannot simply be ignored—at least by those agents and athletes who want to avoid criminal sanctions.

The price of playing the game in Florida will be steep indeed.

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226. See *Wall Street Journal*, Oct. 6, 1987, at 37, col. 5.