

Chicago Daily Law Bulletin®

Volume 157, No. 111

Tuesday, June 7, 2011

Sporting Judgment

Recent agent-athlete scandals spur regulatory action

By Timothy L. Epstein

In response to a recent trend of sports agent impropriety affecting collegiate athletics, state legislatures across the country are taking action. In the past year alone, agent-related scandals have plagued major universities such as the University of Florida, University of North Carolina at Chapel Hill, University of South Carolina and University of Oregon, and these schools were just the ones that got caught. In an October 2010 interview with *Sports Illustrated*, former agent Josh Luchs confessed to giving money to dozens of NFL players while they were still in college. When money exchanges hands between agents and student-athletes, usually the university and the athlete receive the lion's share of media attention and punishment while the agent faces virtually no repercussions. Texas legislators are seeking to buck that trend. House Bill 1123, proposed by Rep. Harold Dutton, imposes harsh penalties against unethical sports agents including felony convictions and up to 10 years in prison. These Draconian sanctions would be the most stringent agent regulation laws in the country, by far. Texas' response is justifiable given the prominence of the issue and the difficulties that inhere to detecting and regulating the type of impermissible contacts between student-athletes and agents, but its efforts may be misguided.

Forty-two states have laws regulating the behavior of sports agents. Most state laws are based on the Uniform Athletes Agent Act (UAAA), which is a model law promulgated by the National Conference

of Commissioners on Uniform State Law. The UAAA seeks to regulate agent-athlete interaction by establishing uniform registration and certification procedures and imposing civil and criminal penalties against violators. It also imposes specific regulations regarding contracts between athletes and agents. Agency contracts must provide clear notice that signing the agreement constitutes a forfeiture of the athlete's eligibility and the contract may not include a waiver of the athlete's right to terminate the contract. Illinois became the 39th state to effectuate a version of the UAAA on January 1st of this year. 225 ILCS 401 (2011). Penalties under most state laws include fines, suspension, revocation of license and misdemeanor charges.

Agents are also regulated at the federal level. The Sports Agent Responsibility and Trust Act (SPARTA) was enacted in 2004 to combat illicit agent behavior. 15 U.S.C. § 7801. SPARTA provides a federal cause of action for universities and state's attorneys for damages caused by agents. Id. It also gives the Federal Trade Commission (FTC) the power to impose penalties because the clandestine actions of the agent are seen as deceptive acts of trade under 15 U.S.C. 57a. SPARTA allows for up to \$11,000 in civil penalties against agents, but in practice it is little more than a supportive measure for state laws and a fallback regulation for states without their own legislation.

Of course, laws like SPARTA and the UAAA at their core are aimed at preserving the distinction between amateur and professional athletes. Amateurism, however, is a fiction, created in large part by the contours of the NCAA rules that provide for how student-athletes and agents can interact. As the primary beneficiary of agent-law enforcement, the NCAA must do its part to ensure that its student-athletes are aware of the boundaries of permissible contact with agents and protect them

from unscrupulous ones. The NCAA regulations on the issue are confusing and differ depending on the sport, making infractions likely for the unwary. One method that is employed at a number of universities is the use of panels created to regulate a school's elite student-athlete's interactions with agents. These panels, which consist of representatives from the school's athletic department, faculty and administration, develop programs to formally educate their athletes on agent issues, and invite certain agents who have registered with the panel to visit the school. The NCAA has considered mandating the creation of such panels through its membership, but has not yet done so.

Agent regulation is certainly well intentioned, but it has not achieved its purpose. States simply do not have the resources or motivation to enforce criminal penalties against agents, especially when fines are minimal. In fact, Florida legislators recently sought to deregulate agents as a budget-cutting measure, but ultimately were dissuaded from doing so in part at the urging of University of Florida Athletic Director Jeremy Foley. Universities also possess the power to enforce agent laws through civil action, but schools simply have not pursued litigation. This, too, may be attributable to a lack of investigative resources, or it may be an issue of proving damages. After all, star athletes often generate huge profits for university athletic departments. Players' unions can also exercise control over agents through licensing and fines, but rarely employ this power. Last year, the NFL Players Association suspended now deceased agent Gary Wichard for his involvement in the scandal at North Carolina, but such action is the exception rather than the rule. At the federal level, the FTC has not imposed any penalties against agents since the inception of SPARTA. Clearly the problem lies in the lack of enforcement.

Timothy L. Epstein is a partner and chairman of the sports law practice group at SmithAmundsen LLC. He also serves as an adjunct professor at Loyola University Chicago School of Law, teaching courses in sports law. His sports law practice is all-encompassing, but focuses on the litigation needs of players, coaches, teams and schools. He can be reached at tepstein@salawus.com.

Continued...

This is not to say that increased penalties against unscrupulous agents are a bad idea. As noted, the fines levied against violators under most states' agent laws are minimal, especially compared to the windfall of commission an agent receives when a major client signs a professional contract. Absent stronger penalties, agents will continue to skirt the law. This sentiment was echoed by former Nebraska head coach and Congressman Tom Osborne. See, Sports Agent Responsibility and Trust Act: Hearing on 108 H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 108th Cong. 4-8 (2003) (articulating that there is too much money to be made as an agent to be deterred by monetary penalties alone). A possible felony conviction and 10-year prison sentence is certainly enough to make an agent think twice.

Ultimately, however, increasing the severity of the penalty is not a definitive solution. Alternative corrective measures must be undertaken to adequately remedy this pervasive problem. As it stands, agents know they can evade the current laws and will continue to do so unscathed.

Stronger regulation and enforcement efforts need to be undertaken by the federal government. While the UAAA has provided a good model for many states, the regulations are still too divergent

when it comes to enforcement rules and penalties. Some states allow civil action against agents and athletes, other states only permit action against agents, and still a minority of states remain completely unregulated. Collegiate and professional athletics operate at the national level across state lines, so it reasons that regulations should emanate from the national level as well. This could come in the form of a modified UAAA implemented at the national level including a national registry system and a more proportional allocation of resources; or it could be furthered by the FTC actually employing its enforcement power granted under SPARTA. See, Eric Willenbacher, "Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem," 78 St. John's L. Rev. 1225 (2004). Uniformity will allow ethical agents to stay in compliance while improving enforcement measures against those who act immorally.

Athletes and universities need to be more proactive as well. Universities' compliance offices must thoroughly and diligently educate student athletes to ensure awareness not only with NCAA bylaws, but federal and state laws. Regardless of a NCAA mandate, agent-athlete panels are a must. Student-athletes should be made aware that individuals who offer benefits often do so

with predatory intentions, and that accepting these ostensible gifts is detrimental to their career and may be illegal.

The NCAA could help thwart this temptation by implementing a program to supplement student-athletes' living costs beyond scholarships thereby reducing student-athlete impropriety stemming from necessity. This idea has recently received public support from Big Ten Commissioner Jim Delany, among others. It is also essential the student-athletes are held accountable. The agent is often the main culprit, but in situations where an athlete disregards his commitment to the school, punishment should be assessed accordingly. This is especially true in our collegiate system that is little more than a conduit to professional stardom for some of the top prospects.

Overall, agency regulation needs to be multi-faceted in order to succeed. While Texas' proposed penalties may prove to be a moderate deterrent against underhanded agents, in practice, the threat of incarceration is as innocuous as a speeding ticket absent actual enforcement. Penal disincentives are useful, but only when coupled with strong enforcement tactics and enhanced education. Until the problem is adequately addressed, do not be surprised when the next big scandal comes to light because in reality, very little discourages this behavior.