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Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform its Sports Agent Laws to Conform with True Agency Principles

Marc Edelman[1]

Abstract

The accompanying article argues that most sports agent laws subordinate athletes' interests to those of the National Collegiate Athletic Association ("NCAA"), and that sports agent laws need to change to better protect both professional and amateur athletes. This article is timely in light of the Uniform Law Commission's recent decision to amend the Uniform Athlete Agents Act to encompass a broader range of topics. In addition, this article builds upon recent sources that call into doubt the legitimacy of the NCAA's power within American society.

[1] Professor Marc Edelman (Marc@MarcEdelman.com) is an Associate Professor of Law at the Zicklin School of Business, Baruch College, City University of New York. He is also a summer adjunct professor at Fordham University School of Law. Professor Edelman earned his B.S. in economics from the Wharton School (University of Pennsylvania) and both his J.D. and M.A. from the University of Michigan. He has published more than twenty law review articles on the intersection of sports and the law. Professor Edelman wishes to thank the following students for their research assistance: Asad Ali; Daniel Berger; Derek Carrillo; Kristen Chiger; Alexis Echevarria; John Mijangos; Michael Nissenbaum; Robert Pellow; Ani Rodriguez; Shaun Rosenberg; and Robert Stone. He also wishes to thank his wife, Rachel Leeds Edelman, for reviewing an earlier draft of this article.

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Introduction

Traditional agency law governs the relationship that arises when one party (the "principal") selects another party (the "agent") to act on its behalf and subject to its control.[2] The main purpose of agency law is to ensure that agents act in the best interests of their principals, and not for their own personal gain.[3]

One would expect sports agent regulations to serve the same purpose.[4] However, that has rarely been the case.[5] To the contrary, most sports agent regulations subordinate the interests of both athletes and their agents to those of a powerful trade organization: the National Collegiate Athletic Association ("NCAA").[6] For example, the Sports Agent Responsibility and Trust Act ("SPARTA") provides NCAA member schools with a private

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[2] Restatement (Third) of Agency § 1.01 (2006) (current through August 2011); *see also* Black's Law Dictionary (9th ed. 2009) (defining "agency" as "[a] fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions"); William A. Gregory, The Law of Agency And Partnership 3 (3d ed. 2001) ("The basic theory of the agency duties is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another's efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed."); Dial Temp. Help Serv., Inc. v. Shrock, 946 F. Supp. 847, 852 (D. Or. 1996) ("Agency is the fiduciary relationship which results when one party consents to having another party act on its behalf subject to its control, coupled with the consent of the other party to so act.").

[3] *See* Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 124 F.3d 252, 275 (1st Cir. 1997) (stating that agency liability is only precluded if the agent either "acted in the best interests of its principal" or at the very least "did not act solely to advance his own personal interests").

[4] *See, e.g.*, Ken Tysiac, *ACC Leader Targets Sports Agents*, News and Observer (Raleigh, NC), Jul. 26, 2010, *available at* 2010 WLNR 14851286 (presuming, perhaps incorrectly, that sports agent regulations are "designed to protect athletes"); Timothy Davis, *Regulating the Athlete-Agency Industry: Intended and Unintended Consequences*, 42 Willamette L. Rev. 781, 792–93 (2006) (noting that "[i]n addition to contractual provisions, the common law of agency imposes fiduciary obligations on agents in their dealings with their athlete clients"); Richard Karcher, *Solving Problems in the Player Representation Business*, 42 Willamette L. Rev. 737, 748 (2006) (defining the player-agent relationship as a "fiduciary relationship").

[5] *See*, *infra*, notes 6–8 and accompanying text.

[6] *See* Symposium, *The Uniform Athlete Agents Act*, 13 Seton Hall J. Sports L. 345, 365 (2003) (quoting sports agent Tony Agnone as describing the NCAA as a "trade association" that has attempted to protect its own interests over those of athletes and agents); *id.* at 373 (quoting attorney and sports agent Craig Fenech as describing the NCAA as "a trade association" that sought agent regulations such as

cause of action against sports agents that pay college athletes.[7] Meanwhile, the Uniform Athlete Agents Act ("UAAA") grants NCAA member schools an additional cause of action against student-athletes who do not disclose their agency contracts.[8]

By placing the interests of NCAA member schools above those of professional and amateur athletes, U.S. sports agent regulations operate like a Trojan Horse.[9] On the outside, they appear to provide athletes with legal protection against their agents.[10] Yet, on the inside, they attack the very autonomy and financial well-being that traditional agency law is intended to protect.[11]

This article argues that sports agent laws need to change to better protect the interests of athletes as the true principals in any athlete-agent relationship. Part I of this article provides a brief discussion of the history of sports agency and offers various examples of sports agent misconduct. Part II discusses the common law remedies traditionally available to athletes that have been victims of agent misconduct. Parts III and IV introduce the UAAA and SPARTA, explaining how each act serves to protect the interests of the NCAA rather than those of U.S. athletes. Part V analyzes three other statutory schemes that have done a superior job of safeguarding principal interests within a fiduciary relationship. Finally, Part VI proposes the core ideology for a new federal act that would regulate sports agents in a manner more aligned with the traditional agency principles found in other statutory schemes.

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the Uniform Athlete Agents Act for the benefit of the interests of its member schools).

[7] *See* Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7805 (2012) ("Protection of Educational Institution").

[8] UNIF. ATHLETE AGENTS ACT (2000) (Prefatory Note); *see generally The Uniform Athlete Agents Act*, *supra* note 6, at 352–53 (quoting John Cannell of the New Jersey Law Revision Commission expressing the State of New Jersey's doubts about whether to adopt the UAAA because of ethical concerns with the UAAA's provision granting NCAA member schools an independent cause of action against student-athletes that fail to divulge their agency contracts).

[9] *See Trojan Horse Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/Trojan+horse (last visited Feb. 19, 2013) (explaining that the term "Trojan Horse" has come to mean "a person or thing intended to undermine or destroy from within." The term comes from a classical Greek mythology.).

[10] *See*, *infra*, notes 116–118 and accompanying text.

[11] *See*, *infra*, notes 145–160 and accompanying text.

I. The History of Sports Agency in the United States

A. The Beginnings of Sports Agency

In the year 1859, baseball pitcher Jim Creighton became America's first professional athlete when the Excelsior Club of Brooklyn paid him $500 to join their baseball team.[12] Shortly thereafter, other sports clubs began to pay even larger salaries to their athletes.[13] However, it was not until 1925 that the first professional athlete hired an outside representative to help negotiate his playing contract.[14]

That year, University of Illinois running back Harold "Red" Grange decided to leave college and enter the National Football League ("NFL").[15] At the time, Grange was one of the nation's most skilled college football

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[12] *See* Bob Liff, *New Field and New Dreams: Borough Has Rich Tradition*, N.Y. Daily News, Aug. 29, 2000, at 3 (explaining that Jim Creighton became "the first professional player" when he was paid a "lump sum" to jump from the short-lived Brooklyn Niagaras to the Excelsiors for the 1860 season); *see also* Peter Morris, *From First Baseman to Primo Basso: The Odd Saga of the Original Pirate King*, Nine, Mar. 22, 2007, at 46, *available at* 2007 WLNR 26624762 (noting that "[a]s early as 1859 . . . Jim Creighton . . . had accepted money to join the Excelsiors with a salary presumably paid by a wealthy patron"); Maxwell Kates, *Of Horsehides and Hexagrams: Baseball as a Vehicle for American Jewish Culture*, Nat'l Pastime, Jan. 1, 2004, at 118, *available at* 2004 WLNR 22458920 (noting that "Jim Creighton was a salaried member of the Brooklyn Excelsiors in 1860").

[13] *See* George Vescey, *Baseball Since 1869; Last Pennant Only Seems that Long Ago*, N.Y. Times, Aug. 23, 2010, at D3 (noting that by 1869 the members of the Cincinnati Red Stockings baseball team were earning pay); Jack Curry, *Another Clue that Auction Has Stolen Items,* N.Y. Times, Aug. 5, 2009, at 4 (referring to the 1869 Cincinnati Red Stockings as "the first all-paid team"); *History: Birth of Pro Football*, Pro Football Hall of Fame, http://www.profootballhof.com/history/general/birth.aspx (last visited Feb. 19, 2013) (noting that the first paid professional football player was William "Pudge" Heffelfinger, who was openly paid $500 to play in a game for the Allegheny Athletic Association football team against the Pittsburgh Athletic Club on November 12, 1892); Michael Tanier, *Long History for Holdouts*, N.Y. Times, Aug. 19, 2010, at B11 (noting that in 1892 when the Allegheny Athletic Association played the Pittsburgh Athletic Club in football, both teams sought to pay Yale University's All-American guard William Heffelfinger).

[14] *See infra,* notes 15–20 and accompanying text.

[15] *See* Michael J. Cozzillio et al., Sports Law: Cases and Materials 1227 (2d ed. 2007) (noting that the first player representation in American sports involved C.C. Pyle representing Red Grange); *The Uniform Athlete Agents Act*, *supra* note 6, at 353 (quoting Wharton School professor Scott Rosner explaining that "when we think about the history of sports agency, you have to go way back to 'Red' Grange, the Galloping Ghost, in the 1920s, and his agent C.C. 'Cash-and-Carry' Pyle, who negotiated deals with him").

players, and many different NFL teams wanted to hire his services.[16] Rather than negotiate directly with each NFL team, Grange decided to delegate the task to retired boxer and Illinois businessman Charles C. Pyle.[17]

Acting as an agent, Pyle helped Grange to secure a playing contract with the Chicago Bears that earned him nearly $10,000 per game.[18] In addition, Pyle secured for Grange a bonus that was contingent upon an increase in Bears game attendance once Grange joined the roster.[19] By all accounts, this was the most lucrative playing contract in NFL history.[20]

For the next forty years, however, few other professional athletes followed Grange's lead in hiring an agent.[21] Some athletes avoided agents because they lacked Grange's negotiating leverage.[22] Others feared

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[16] *See* Dave Scheiber, *A Ghost Story*, ST. PETERSBURG TIMES, Feb. 1, 2009, at 7L (noting that at the time Red Grange sought to enter the NFL, he already had a "larger-than-life persona as a star at the University of Illinois in the early 1920s"); *see also* Michael Mink, *Football Legend 'Red' Grange*, INVESTOR'S BUSINESS DAILY, Jun. 23, 1999, at A8, *available at* 1999 WLNR 7950212 (noting that "[i]n 1925 Red Grange was the most famous football player in America, and the National Football League was in its fifth year and hurting").

[17] *See Biography of C.C Pyle*, THE GREAT AMERICAN FOOTRACE, http://archive.itvs.org/footrace/progress/ccpyle.htm (last updated 2002) (discussing the plan for Pyle to represent Grange in both securing a contract with the Bears and procuring endorsement deals).

[18] *See* Westbrook Pegler, *And How Is One Red Grange to Escape the Curse of Cash*, CHI. TRIB., Nov. 20, 1925, at 27 (noting Grange's initial salary was "$10,000 a game"); *see generally* Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 344 (2010) (discussing Red Grange's NFL arrival).

[19] *See Red Arrives Today to Sign on Pro Team*, CHI. TRIB., Nov. 22, 1925, at A1 (noting that under the terms of Grange's contract, the Bears agreed to pay Grange approximately 45 percent of all gate proceeds on Thanksgiving that exceeded the club's average game revenues of $14,000); Edelman & Wacker, *supra* note 18, at 344 n.26.

[20] *See Harold 'Red' Grange: Historical Marker*, EXPLORE PA HISTORY, http://explorepahistory.com/hmarker.php?markerId=1-A-30E (last updated 2011) (noting that "the next-highest salary in the teetering National Football League was just $500 a game").

[21] *See* COZZILLIO ET AL., *supra* note 15, at 1227; *The Uniform Athlete Agents Act*, *supra* note 6, at 354 (discussing that Babe Ruth was one of the few other early professional athletes represented by an agent, "a gentleman by the name of Christy Walsh").

[22] *See The Uniform Athlete Agents Act, supra* note 6, at 354–55 (quoting Wharton School professor Scott Rosner explaining that "[f]or a long time in all of the [sports] leagues . . . athletes did not have the right to free agency" and thus "they had very little leverage"); *see also* COZZILLIO ET AL., *supra* note 15, at 1227 (noting that "[f]or

repercussions from potential employers.[23] Meanwhile, still others avoided agents at the urging of their college coaches and athletic directors.[24]

Nevertheless, once athletes began to unionize in the late 1960s, a rapid movement toward hiring sports agents followed.[25] At first, many players

several years" after Grange's employment of C.C. Pyle, "club management chose to ignore those persons purporting to represent the athletes within the team's employ and, at times, retaliated against players who were so bold as to seek the services of outside counselors, lawyers, or agents").

[23] *See, e.g.*, Donald Fehr, *Union Views Concerning Agents: With Commentary on the Present Situation in Major League Baseball*, 4 MARQ. SPORTS L.J. 71, 72 (1993) (explaining that up until the time when the Major League Baseball players unionized, "clubs would tell players, 'you are my potential employee, or you are my actual employee, and if you want to talk to me about a new contract or a raise, I will be glad to talk to you, by yourself, on my terms, for as long as I want to, and you cannot bring anyone with you.'"); William Rothstein, *The Business of Sports Representation: Agent Evolution in the "Industry,"* 9 VA. SPORTS & ENT. L.J. 19, 24 (2009) (relaying the famous story about how when Green Bay Packers Pro Bowl center Jim Ringo brought an agent to a contract negotiation meeting with his coach Vince Lombardi, Lombardi simply excused himself from the meeting and traded Ringo to the Philadelphia Eagles); Stacey Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91, 96 (2010) (recalling that in 1952, Major League Baseball player Ralph Kiner arrived at a Major League Baseball Executive Council meeting with his attorney; however, nobody would allow his attorney to become involved in the negotiations).

[24] *See* Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all (explaining a college athletics culture in which the rules induce student-athletes to avoid talking to agents at risk of losing eligibility).

[25] *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS & THE LAW: TEXT, CASES AND PROBLEMS 322 (2d. ed. 1998) (discussing the impact of unionization on the emergence of the modern profession of sports agents); *The Uniform Athlete Agents Act*, *supra* note 6, at 352–55 (Wharton School professor Scott Rosner explaining that the sports agent business began to thrive once "the unions in each of the leagues got stronger, [and] negotiated more complex collective bargaining agreements"); *see also* Jeremy Geisel, Comment, *Disbarring Jerry Maguire: How Broadly Defining "Unauthorized Practice of Law" Could Take the "Lawyer" Out of "Lawyer-Agent" Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 229 (2007) (attributing the "boom of agents" in part to the increase in interleague competition that occurred as "rival professional leagues formed and forced their competitors to spend more to keep players."); COZZILLIO ET AL., *supra* note 15, at 1227 (noting that "[s]everal factors undoubtedly have contributed to the emergence of agents as a dominant feature in the sports landscape," such as free agency and salary arbitration, escalation of player salaries, and the emergence of powerful players' unions).

teamed with agents who were their friends or business acquaintances.[26] Yet, within a few years, athletes began to prefer agents that had successfully represented their colleagues.[27] As athletes began to express their preference for more experienced agents, the role of sports agent emerged as a full-time profession.[28]

B. The Profession of Sports Agent Emerges

As the profession of "sports agent" emerged in the 1970s and into the 1980s, the competition among sports agents to sign clients became "fierce."[29] According to several sources, it was not long before there were more self-proclaimed sports agents in the United States than there were professional athletes.[30]

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[26] *See* WEILER & ROBERTS, *supra* note 25, at 322 (discussing how sports agent Bob Woolf got started by representing Boston Red Sox pitcher Earl Wilson—a player he first met when serving as his lawyer in a claim related to a car accident).

[27] *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS & THE LAW: TEXT, CASES AND PROBLEMS 363 (3d. ed. 2004) (explaining that "it is worthwhile for players (at least those earning more than the league minimum) to pay someone with talent and experience in this work to deal with the seasoned general managers who bargain on behalf of their 'clients'").

[28] *See* Phillip Closius, *Hell Hath No Fury Like a Fan Scorned: State Regulation of Sports Agents*, 50 U. TOL. L. REV. 511, 512 (1999) (noting that "[i]n the late 1960s, the occupation of 'sports agent' emerged").

[29] Karcher, *supra* note 4, at 746; *see also* Geisel, *supra* note 25, at 227 (noting that as professional sports transitioned "to big business in the late 1970s and early 1980s, agents became commonplace, forcing changes to the landscape of sports, not all of which were good").

[30] *See* Davis, *supra* note 4, at 793 (explaining that the primary "reason for the fierce competition [among sports agents] is the increase in the number of agents certified by the players associations without a corresponding increase in the number of potential clients"); *see also* Jonathan Amoona, *Top Pick: Why a Licensed Attorney Acting as a Sports Agent Is a "Can't Miss" Prospect*, 21 GEO. J. LEGAL ETHICS 599, 599 (2008) ("[O]f the more than 1,100 agents registered to represent players in the National Football League today, a mere thirty percent can claim they represent at least one of the 1,900 athletes currently on an NFL roster") (internal citation omitted); Eric Willenbacher, *Regulating Sports Agents: Why Current Federal and State Efforts Do Not Deter the Unscrupulous Athlete-Agent*, 78 ST. JOHN'S L. REV. 1225, 1227 (2004) (noting that as of April 2002, almost two-thirds of 1,200 total certified player agents did not have a client); *The Uniform Athlete Agents Act*, *supra* note 6, at 375 (attorney and sports agent Craig Fenech surmised that "there were more registered agents with the NFLPA than there were players in the NFL").

With an overabundance of sports agents, some agents began to seek an edge by engaging in dubious business practices.[31] For instance, some agents advanced money secretly to amateur athletes in exchange for their promise, upon turning professional, to hire their services.[32] These payments often were based on the mere attempt to circumvent the NCAA's stringent amateurism rules.[33] However, occasionally payments from agents to athletes were intended also to manipulate young and unsophisticated athletes into promising to pay them a high percentage of all future earnings.[34]

Meanwhile, other sports agents began to engage in secret side deals and misrepresent their loyalties to their clients.[35] For example, in one case, a prominent sports agent renegotiated a hockey player's contract to reduce the player's overall salary while still protecting his own full commission.[36] In

[31] *See* Karcher, *supra* note 4, at 746–48 (arguing that "fierce" competition among agents for new clients has led to unethical conduct); *The Uniform Athlete Agents Act*, *supra* note 6, at 361 (sports agent Tony Agnone concedes that "today probably more than at any time, we are in a situation where [sports agents] have become so competitive and the money has become so big that they will do just about anything to secure a client").

[32] *See, e.g.*, Jim Litke, *The Sports Agent Problem*, Associated Press (Jan. 8, 1998), http://www.apnewsarchive.com/1998/The-Sports-Agent-Problem/id-f439ba9248971a694993a00c1fb0af6f (sports agent Leigh Steinberg acknowledged that "it wasn't unusual for top college prospects to take cash and clothing, even cars, from two or three agents at a time"); *see also The Uniform Athlete Agents Act*, *supra* note 6, at 370–71 (former New York Giants linebacker Michael Strahan recalling declining a sports agent's offer of an upfront cash payment while in college).

[33] *See, e.g.*, George Dohrmann, *Confessions of an Agent*, Sports Illustrated (Oct. 18, 2010), http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html (former sports agent Josh Luchs secretly gave a player $2,500 for his mother's rent, knowingly circumventing NCAA rules); Alexander Payne, *Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game*, 13 Vand. J. Ent. & Tech. L. 657, 680 (2011) (describing cases in which the payment by the agent to the student-athlete was used primarily to cover simple necessities such as food; however, if the payment was made public, it would still violate the NCAA's internal rules).

[34] *See* Closius, *supra* note 28, at 512–13 (noting the unsavory business practices in the 1980s of sports agents Norby Walters and Lloyd Bloom, who signed a large number of college football players to post-dated contracts, and whose "ties to organized crime and their reported physical threats to the lives and well-being of rival agents and dissatisfied players brought a new level of criminality to Division I athletics").

[35] *See infra* notes 36–39 and accompanying text.

[36] *See* Brown v. Woolf, 554 F. Supp. 1206, 1207 (S.D. Ind. 1983) (discussing allegations made by Indianapolis Racers hockey player Andrew Brown against agent Bob Woolf). Allegations of similar conduct continue to occur in varying forms today. *See The Uniform Athlete Agents Act*, *supra* note 6, at 371 (quoting retired New

another, an agent continued to negotiate a contract for his client to join the Philadelphia Eagles while he secretly negotiated his own contract to become part of the Eagles management.[37] Similarly, in yet a third instance, an aspiring football agent attempted to both represent rookie football players and serve as the president of a United States Football League team, the Houston Gamblers.[38] The agent's attempt to serve in this dual capacity became most troubling when the agent purportedly lured one of his clients to join the Gamblers rather than to sign with the NFL's Detroit Lions.[39]

C. Sports Agency Today

Today, the sports agent industry has become more regulated; however, it continues to face scrutiny because some agents "resort to unethical and illegal behavior."[40] In addition, the industry is facing new ethical challenges based on a recent wave of consolidation that has featured "notable sports agents selling their firms and becoming absorbed by corporate conglomerates."[41]

One of the new ethical challenges faced by a consolidating sports-agent industry involves agencies that represent multiple players on the same

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York Giants linebacker Michael Strahan explaining that he has witnessed "so many little tricks of the trade," for example "agents who keep renegotiating and extending contracts . . . for their benefit [such as to obtain] another little bonus from his upcoming salary . . . right then and there").

[37] *See* Evans, *supra* note 23, at 114–15 (noting how when agent Patrick Forte was negotiating a contract between former NFL linebacker Reggie White and the Philadelphia Eagles, Forte was also "negotiating on his own behalf to become an assistant to Eagles president, Harry Gamble").

[38] *See* Detroit Lions v. Argovitz, 580 F. Supp. 542, 543 (E.D. Mich. 1985) (noting that "[o]n December 18, 1983, the Detroit Lions, Inc. and Billy R. Sims filed a complaint in the Oakland County Circuit Court seeking a judicial determination that the July 1, 1983 contract between Sims and the Houston Gamblers, Inc. [was] invalid because the defendant Jerry Argovitz breached his fiduciary duty when negotiating the Gamblers' contract and because the contract was otherwise tainted by fraud and misrepresentation").

[39] *See id.* at 545 (noting that during Sims's final negotiations with the Gamblers, "Mr. Nash of the Lions telephoned Argovitz, but even though Argovitz was at his office, he declined to accept the telephone call").

[40] Davis, *supra* note 4, at 801 (quoting 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, 1228 (2004)) (internal quotations omitted).

[41] *Id.* at 799; (noting that "[i]n addition to contractual provisions, the common law of agency imposes fiduciary obligations on agents in their dealings with their athlete clients").

team.[42] These multiple representations are most concerning in team sports that enforce a cap on total team salaries.[43] This is because, in salary-capped sports, the higher the salary that an agent negotiates for one player, the less money that remains available for all other players on that same team.[44]

Another area of increasing ethical concern involves agencies that seek to represent both players and coaches/managers.[45] While the basketball and hockey players' unions have refused to certify agents who represent coaches or managers,[46] other players' unions have taken a more liberal approach. For example, two of America's largest sports agencies—Creative Artists and Octagon—currently represent both NFL players and coaches.[47] Neither agency believes that this creates a problem.[48]

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[42] *See* Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123, 130–34 (2007) (discussing what the author describes as a "concurrent conflict of interest"); *see also* Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193, 212 (2004) (noting, for example, that when agent Leigh Steinberg attempted in 1995 to represent three different players competing for the Pittsburgh Steelers starting quarterback job, this may have created a conflict, albeit such was common practice at the time among elite sports agents). For many other examples of potential conflicts of interest in agent representation, *see generally* Evans, *supra* note 23, at 112–13.

[43] Neiman, *supra* note 42, at 131.

[44] *See* MICHAEL A. LEEDS & PETER VON ALLMEN, THE ECONOMICS OF SPORTS 268 (3d ed. 2008) (explaining that salary caps, which first emerged as a counterbalance to free agency, "set maximum payroll figures for each team").

[45] *See* Rick Horrow, *Sports Agency Business: Cleaning Up for the Long Haul*, CBSSPORTS.COM (May 5, 2003), http://www.cbssports.com/general/story/6230048 (noting that one of the problems in the agency business involves agents "representing both players and coaches on the same team"); *see also* Jason Cole, *Unanimous Vote or Not, Reps Behind Smith*, YAHOO! SPORTS (Mar.16, 2009), http://sports.yahoo.com/nfl/news?slug=jc-smithreaction031609 (stating that "there are apparent growing concerns of agents representing both coaches and players from the same team").

[46] *See* Darren Heitner, *The NBA Coach Carousel*, BLEACHER REPORT (Dec. 29, 2008), http://bleacherreport.com/articles/98011-the-nba-coach-carousel (noting that "NBA regulations prohibit agents from representing both coaches and players").

[47] *See* CAA SPORTS, http://sports.caa.com (last visited Feb. 19, 2013) (describing CAA Sports as an agency that "represents more than 650 of the world's best athletes . . . coaches, broadcasters, and other sports personalities"); Liz Mullen, *Octagon Signs a Three-Pack of High Profile NFL Coaches*, SPORTSBUSINESS JOURNAL (Jan. 14, 2008), http://www.sportsbusinessdaily.com/Journal/Issues/2008/01/20080114/Labor-Agents/Octagon-Signs-A-Three-Pack-Of-High-Profile-NFL-Coaches.aspx (stating that "Octagon has had an active coaches division for years").

[48] *Cf.* Barney Gimbel, *A Hollywood Agency with Star Power*, CNN MONEY (Oct 4, 2007, 9:59 AM), http://money.cnn.com/2007/09/28/magazines/fortune/hollywood_agent.fortune/index.htm?hostversion=2007100409 (explaining that, according to a

Finally, a third area of rising concern involves agencies that now seek to represent both players and team owners.[49] Although it is rare for sports agencies to represent owners, there are a few notable exceptions.[50] For instance, basketball player agent David Falk has continued to represent the Hall of Fame basketball player Michael Jordan even though Jordan has transitioned from player to team owner.[51] Meanwhile, different divisions of the sports agency Creative Artists recently represented the New York Yankees in the sale of their stadium naming rights and the team's star shortstop, Derek Jeter, in contract negotiations against the Yankees.[52]

To some, Creative Artists' recent representation of both Jeter and the Yankees marks the epitome of an ethical conflict, given that the agency was negotiating both for and against the Yankees.[53] Nevertheless, this dual representation was not necessarily in violation of any existing law. In addition, it never gave rise to any legal challenge.[54]

CAA agent, there are "intangible benefits in getting clients from different fields together").

[49] *See infra* notes 50–54 and accompanying text.

[50] *See* Rosner, *supra* note 42, at 216.

[51] *See id.*

[52] *See* Terry Lefton, *CAA Hired To Land Sponsors For Yankees*, SPORTSBUSINESS JOURNAL (Oct. 1, 2007), http://www.sportsbusinessdaily.com/Journal/Issues/2007/10/20071001/This-Weeks-News/CAA-Hired-To-Land-Sponsors-For-Yankees.aspx (noting that when the New York Yankees were building the new Yankee Stadium, they hired Creative Artists Agency to represent the Yankees in their sales and marketing for the new Yankee Stadium, while at the same time Creative Artists Agency agent Casey Close represented shortstop Derek Jeter).

[53] *See generally* Marc Edelman, *Sports Agencies Representing Both Players and Ownership: Conflict-of-Interest or Common Sense?*, SPORTS AGENT BLOG (Oct. 3, 2007, 12:54 AM), http://sports-law.blogspot.com/2007/10/sports-agencies-representing-both.html (questioning the potential conflict of interest in this scenario); *cf.* Nate Silver, *Jeter's Predictable Predicament*, FIVE THIRTY EIGHT BLOG, N.Y. TIMES (Nov. 23, 2010, 6:58 PM), http://fivethirtyeight.blogs.nytimes.com/2010/11/23/jeters-predictable-predicament (noting that retaining Derek Jeter improves the Yankees brand which consequently puts more fans in the seats); Andrew Marchand, *What's Derek Jeter Worth to the Yanks?*, ESPN NEW YORK (Nov. 12, 2010, 9:31 AM), http://sports.espn.go.com/new-york/mlb/columns/story?columnist=marchand_andrew&id=5764717 (noting that according to sports marketing expert Marc Ganis, Derek Jeter's value to the Yankees is impossible to quantify based on the intangible value he provides).

[54] *Cf.* Joe Flint, *Evolution Media Capital Making Mark in Sports*, LATIMES.COM (Mar. 20, 2012, 10:21 AM), http://latimesblogs.latimes.com/entertainmentnewsbuzz/creative-artists-agency (explaining that in the context of Creative Artists, the agency maintained "a strict division between the two operations even though they share real estate").

II. Traditional Remedies

Until the year 2000, most attempts to hold sports agents accountable for unethical conduct involved either the filing of civil lawsuits or the reporting of agents to their professional associations or players' unions.[55] Yet neither approach has sufficiently deterred some sports agents from engaging in unethical behavior.[56]

A. Breach of Contract

For many years, athletes have attempted to sue their agents for wrongdoing under contract law.[57] These breach-of-contract claims may arise either from the breach of an express provision in an athlete's agency agreement, or from a breach of an implied term present in every contract such as the implied "covenant of good faith and fair dealing."[58]

The benefit of an athlete suing his agent for breach of contract is the chance to recover "the difference between [his] value as represented [in the contract] and the value received."[59] From an athlete's perspective, such

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[55] *See* Davis, *supra* note 4, at 802 (discussing players turning to the judicial system to bring suit against their agents under common law).

[56] *See, supra*, notes 31–39 and accompanying text (providing examples of unethical conduct by sports agents prior to the year 2000).

[57] *See, e.g.*, Smehlik v. Athletes & Artists, Inc., 861 F. Supp. 1162, 1165–66, 1171 (W.D.N.Y. 1994) (discussing the lawsuit filed by Czechoslovakian professional hockey player Richard Smehlik against his agency Athletes & Artists for breach of contract, arguing they failed to secure him a contract in a timely manner); Bias v. Advantage Int'l, Inc., 905 F.2d 1558, 1560 (D.C. Cir. 1990) (a case in which the estate of rookie basketball player Len Bias sued the agency that represented him, arguing breach of contract for failure to secure an endorsement contract between Bias and Reebok before Bias's passing).

[58] *See, e.g.*, UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., 525 So. 2d 746, 757 n.8 (Miss. 1987) (stating that all contracts contain an implied covenant of good faith and fair dealing in performance and enforcement.); Wood v. Lucy, 118 N.E. 214 (N.Y. 1917) (noting that contracts resulting from an exclusive agency arrangement always require both parties to adhere to a duty of good faith and fair dealing); Jones v. Childers, No. 88-85-Civ-T-22C, 1992 WL 300845, at *12 (M.D. Fla., Jun. 26, 1992) (finding this implied duty to exist within a contract by a purported investment adviser to provide investment advice to a professional football player) (internal citations and quotations omitted), *rev'd in part on other grounds*, 18 F.3d 899 (11th Cir. 1994).

[59] Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 817 (Tex. 1997) (defining benefit-of-the-bargain damages as those damages that "measure the difference between the value as represented and the value received"); Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 50 (Tex.

claims serve to compensate for the economic disappointment caused by the agent's failure to perform as promised.[60] Meanwhile, from a societal perspective, the possibility of an athlete recovering expectation damages is intended to deter future agents from failing to honor their contractual commitments.[61]

Athletes' claims for breach of contract, however, are often not sufficient to remedy agent wrongdoing.[62] For example, breach of contract suits cannot be used where an athlete and agent never reached an initial agreement with one another.[63] In addition, breach of contract suits would fail where the agent merely acts slothfully but without violating an express contractual term.[64] Indeed the implied covenant of good faith and fair dealing, much like any other equitable principle, is often read narrowly and cannot trump an express, contrary term in a contract.[65]

1998) (explaining that under the benefit-of-the bargain measure, "lost profits on the bargain may be recovered if such damages are proved with reasonable certainty").

[60] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages* 764, 768 (1999), *available at* http://encyclo.findlaw.com/3700book.pdf (explaining that "[i]f damages merely equal harm, injurers' motivations to take precautions will be inadequate and their incentive to participate in risky activities will be excessive" and thus to remedy these problems, "the damages that are imposed in those instances where injuries are found liable should be raised sufficiently so that injurers' expected damages will equal the harm they cause").

[61] *See* Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 844 (2007) (explaining that, put in economic terms, expectation damages "force the promisor to internalize the cost of his breach to the promisee"); *but see* Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach,* 61 S. CAL. L. REV. 629, 630 (1987–88) (discussing the theory of efficient breach as being one that asks the question of whether it is more efficient for a party to breach a contract than it would be to perform as promised).

[62] *See infra,* notes 63–65 and accompanying text.

[63] *See generally* THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 1 (Wolters Kluwer, 5th ed. 2008) (noting that "[a] showing of mutual assent is necessary for an enforceable contract").

[64] *See* John Dvorske et. al., 1A C.J.S. ACTIONS § 134 (May 2012) (noting that "[a]ctions in contract and in tort are to be distinguished in that an action in contract is for the breach of a duty arising out of a contract either express or implied, while an action in tort is for a breach of duty imposed by law").

[65] *See* Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 651 (1981) (noting that there is such vagueness in the definition of the duty of good faith and fair dealing that a judge could reasonably misapply it); *see also* Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1236

In addition, the threat to an agent of being sued for breach of contract is not always sufficient from an *ex ante* perspective to deter breach, as courts generally only award compensatory damages (and not punitive damages) for a breach of contract.[66] Thus, an agent who is found to have breached his contract finds himself no worse off than if he had complied with his contract initially.[67]

Furthermore, in today's society there is rarely any social stigma attached to breaching a contract because most "breach of contract" claims are settled outside of court, subject to confidentiality agreements.[68] In these private settlements, the parties often stipulate that no wrongdoing ever occurred.[69] Thus, the public rarely learns about the full nature of the underlying conflict.[70]

(1992) (explaining that the good faith and fair dealing criterion "has been criticized for being so difficult to define that it is unhelpful as a legal standard.").

[66] *See* Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1354 (2009) (stating that "[t]he common law rule . . . is that punitive damages are not recoverable in breach-of-contract cases.").

[67] *Cf.* Curtis Bridgeman, *Corrective Justice in Contract Law: Is There a Case for Punitive Damages?*, 56 VAND. L. REV. 237, 274 (2003) (arguing on a similar basis that there is a need to extend punitive damages to the contract law setting).

[68] *See, e.g.*, Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), http://www.nytimes.com/2008/08/08/business/08law.html (according to a consulting firm representative, the "vast majority of cases do settle—from 80 to 92 percent by some estimates"); *see also* Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1473 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992) (suggesting that after Hall of Fame basketball player Kareem Abdul-Jabbar sued his agent Thomas Collins for alleged wrongdoing, the parties confidentially settled their case to avoid a public stigma to Collins).

[69] *See Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?*, 78 JUDICATURE 304, 304, 306 (May–June 1995) (explaining that "it is common for a defendant to condition the settlement on an agreement from the plaintiff to dismiss the lawsuit and not to disclose the terms of the settlement," and that settlement language would likely only include some "kind of watered-down version of the allegations of the complaint with denials by the defendant of any wrongdoing of any kind").

[70] *Id.* at 304 (explaining that in the process of settlement of a civil claim, "sometimes the plaintiff must return documents, information, and evidence obtained through the discovery process or otherwise, and the plaintiff often agrees not to discuss the case or the settlement" in order to "ensur[e] that the defendant's reputation is not harmed as a result of the litigation").

B. Tort

A second type of legal claim traditionally available to athletes is grounded in tort law.[71] One common tort claim filed by athletes against their agents is "fraudulent misrepresentation."[72] A claim for fraudulent misrepresentation requires an athlete to show that he relied to his detriment on a knowingly false statement that was made by his agent.[73] Such claims historically have been most successful where an agent has secretly served in an ownership capacity with a sports team, or where an agent has encouraged an athlete to invest in financial products without disclosing his personal stake in those products.[74]

Another common tort claim involves the breach of a fiduciary duty.[75] A fiduciary duty arises where a unique degree of trust and confidence is expected between parties based on one of the parties' "superior knowledge,

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[71] *See* 1A C.J.S. ACTIONS § 137 ("In determining whether an action to be brought should be in contract or in tort, the nature of the duty violated as arising out of agreement of the parties or as arising from law apart from any agreement governs. The same circumstances may constitute a breach of both of such duties, in which case the wronged party may bring his or her action in contract or tort.").

[72] *See, e.g.*, Hernandez v. Childers, 806 F. Supp. 1368, 1372 (N.D. Ill. 1992) (involving allegations of fraudulent misrepresentation when player-agent John Childers advised a client athlete to invest in certain financial products without disclosing his own interest in those products); Detroit Lions v. Argovitz, 580 F. Supp. 542, 548–49 (E.D. Mich. 1985) (finding that player-agent Jerry Argovitz did not present sufficient evidence of informing his client of every material fact influencing client's signing decision to overcome the presumption of fraud deriving from Argovitz's own ownership interest in the team).

[73] *See, e.g.*, Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983) (noting that the elements of a claim for fraudulent representation require a plaintiff to show: "(1) that a material representation was made; (2) that it was false; (3) that, when [defendant] made it, he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that [defendant] made it with the intention that it should be acted upon by the party; (5) that [plaintiff] acted in reliance upon it; and (6) that [plaintiff] therby suffered injury.") (internal citation omitted).

[74] *See, e.g.*, *Argovitz*, 580 F. Supp. at 548–49 (finding agent Jerry Argovitz to have committed fraud where Argovitz had an ownership interest in the team with which his client Billy Sims signed a player contract and failed to fully disclose this ownership interest to Sims); *Hernandez*, 806 F. Supp. at 1372.

[75] *See infra* notes 76–77 and accompanying text; *see generally* Gracey v. Eaker, 837 So. 2d 348, 353 (Fla. 2002) (noting that "[t]he elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages") (internal citations omitted).

skill or expertise."[76] For example, in Detroit Lions v. Argovitz, the U.S. District Court for the Eastern District of Michigan held that a player agent owed a fiduciary duty to his clients, and that the agent breached this duty when, without providing full disclosure, he negotiated a contract between his client and a team in which the agent held a financial interest.[77]

As compared to breach of contract claims, tort claims are probably better at deterring agent wrongdoing because they sometimes allow for the recovery of punitive damages.[78] Nevertheless, given that the elements of tort claims are highly fact-intensive, it is often difficult to predict whether particular conduct would be deemed tortious.[79] For example, while an agent's failure to disclose an ownership stake in the team for which his client plays would clearly indicate the breach of a fiduciary duty, it is unclear whether a court would likewise find a breach where an agent fails to make a lesser disclosure, such as his role in representing other players on his client's team.[80]

Moreover, from an *ex ante* perspective, the threat of tort litigation may not deter wrongdoing by agents because not every tort victim is ultimately able to recover.[81] Even if an athlete knows that he has been injured by an agent's misconduct, the athlete may still have difficulty proving so in court.[82] Also, some athletes may not want to invest the time or expense

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[76] Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 420 (2d Cir. 2000) (internal citation omitted); *see also* Jones v. Childers, No. 88-85-Civ-T-22C, 1992 WL 300845, at *8 (M.D. Fla. June 26, 1992), *rev'd in part on other grounds*, 18 F.3d 899 (11th Cir. 1994) (finding a fiduciary relationship to exist between an NFL football player and his financial adviser because "confidence is reposed on one side and there is a resulting superiority and influence on the other") (internal citation omitted).

[77] *See Argovitz*, 580 F. Supp. at 548–49.

[78] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 764, 768 (Boudewijn Bouckaert & Gerrit De Geest eds., 1999), *available at* http://encyclo.findlaw.com/3700book.pdf.

[79] *See* Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060, 1079 (Ala. 1984) (Torbert, C.J., dissenting), *vacated*, 475 U.S. 813 (1986) (noting that "[b]ecause tort cases are so fact-intensive and the liability rules so amorphous, the results at trial are unpredictable and often inconsistent").

[80] *Cf.* Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393, 420 (2007) (citing Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 425 (1993)) (discussing how different fiduciary classes have different fiduciary duties that "may deviate substantially from one agency relation to another").

[81] *See* G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998) (discussing the lack of deterrent effect that remains within tort law).

[82] *See* Polinsky & Shavell, *supra* note 78, at 764.

required to bring a lawsuit against their agent.[83] Meanwhile, still others may ultimately never recover if an agent lacks the financial means to pay damages upon judgment.[84] Thus, the likelihood of punishment for engaging in the wrongdoing is less than certain.[85]

C. Professional Association Sanctions

A third means by which athletes could hold their agents accountable involves reporting agent misconduct to a trade association.[86] For the nearly fifty percent of sports agents that are admitted attorneys, any wrongful acts may be subject to punishment by their state bar associations.[87]

Most state bar associations have adopted the American Bar Association's model rules of professional conduct.[88] These model rules include numerous requirements that may relate to the conduct of attorney-agents.[89] For example, Model Rule 1.5 requires an attorney to charge no more than a reasonable fee for his work.[90] While there is no quantifiable definition of the word "reasonable," attorney-agents that have advanced money to college athletes in exchange for the promise of above-market returns upon turning professional have likely violated this model rule.[91] In addition, charging a

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[83] *Id.*

[84] *See* Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375, 1375 (1994) (noting that "[a] tortfeasor who cannot fully pay for the harms that it causes is said to be 'judgment proof' and that "judgment-proof tortfeasors will not fully internalize the costs of the accidents they cause").

[85] *See supra* notes 81–84 and accompanying text.

[86] *See infra* notes 87–97 and accompanying text.

[87] *See* MODEL RULES OF PROF'L CONDUCT (2012); Neiman, *supra* note 42, at 129 (noting that the Model Rules of Professional Conduct were adopted by the American Bar Association's House of Delegates in 1983, and as currently amended are enforced by most state bars as the ethical code of legal conduct); Davis, *supra* note 4, at 805 (noting that "approximately fifty percent of sports agents are admitted attorneys" according to some estimates).

[88] *See State Adoption of the ABA Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 12, 2013).

[89] *See* Neiman, *supra* note 42, at 129 (discussing broadly the Model Rules of Professional Conduct); Kenneth L. Shropshire, AGENTS OF OPPORTUNITY 41 (1990) (noting that for an attorney seeking to become a sports agent, securing clients while complying with the model rules of professional responsibility represent one of "the greatest barriers to entering the field").

[90] MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2012).

[91] *See id.*

player a full commission despite negotiating a reduction in the player's salary might likewise violate the rule.[92]

Similarly, Model Rule 1.7 prevents attorneys from representing competing parties of interest without full disclosure and informed consent.[93] Under this rule, there is a strong argument that attorney-agents cannot simultaneously represent players and team owners without first fully divulging the nature of their relationships to both clients.[94] In addition, there is a somewhat weaker argument that attorney-agents cannot represent multiple players on the same team in a salary-cap sport without first divulging these potential conflicts to all affected parties.[95]

Finally, Model Rule 7.3(a) states that "[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain . . . ."[96] This rule seems to call into doubt the permissibility of attorney-agents attempting to attract new clients through in-person solicitation, which frequently occurs in the race among sports agents to sign new clients.[97]

At first glance, these three model rules may seem effective in deterring sports agents from engaging in unethical behavior.[98] Yet, in practice, the threat of trade association sanctions is at least as limited as the threat of litigation.[99] One problem with attempting to deter agent misconduct

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[92] *See id.*

[93] *See id.* at R. 1.7 (2012) (explaining that, subject only to a limited number of exceptions, "a lawyer shall not represent a client if . . . (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

[94] *See, e.g.*, Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 TEX. REV. ENT. & SPORTS L. 37, 55–58 (2003–2004); Neiman, *supra* note 42, at 136–38.

[95] *See* Doman, *supra* note 94, at 54.

[96] MODEL RULES OF PROF'L CONDUCT R. 7.3 (2012) (noting, however, an exception to this rule where the solicited party is a lawyer, a family member, a close personal friend, or had a professional relationship with the soliciting party); *cf.* Karcher, *supra* note 4, at 748 (explaining that "the rationale behind prohibiting individuals acting in a fiduciary capacity from soliciting clients is the potential for abuse inherent in direct in-person or telephone contact by the fiduciary with a prospective client known to need services").

[97] *See* Doman, *supra* note 94, at 50.

[98] *Id.* at 38–39 (presuming that "higher standards of professional responsibility" are placed on attorney-agents).

[99] *See infra* notes 100–102 and accompanying text.

through professional sanctions is that many agents are not part of any regulated profession and thus no ethical code of conduct would apply to them.[100] Another problem is that attorney-agents who practice primarily in the capacity of sports agents would often rather surrender their legal licenses than comply with heightened ethical requirements.[101] For that reason, a number of today's most prominent sports agents have elected not to become members of any state bar, even though they have graduated from law school.[102]

D. Players' Union Sanctions

Finally, since 1984, players' unions in most professional sports have provided another avenue for regulating sports agents.[103] Players' unions enjoy the power to regulate sports agents pursuant to Section 9(a) of the National Labor Relations Act, which grants unions the exclusive right to negotiate with employers over the mandatory terms and conditions of employment, such as hours, wages, and working conditions.[104] Most players' unions, in turn, have delegated this authority to individual agents, subject to a certification and decertification process.[105]

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[100] *See* Davis, *supra* note 4, at 805–806 (noting that "non-attorney agents are not subject to state bar association standards of conduct").

[101] *See generally* David S. Caudill, *Sports and Entertainment Agents and Agent-Attorneys: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 AKRON L. REV. 697, 698 (2010) (discussing the "two hats" argument).

[102] *See* Darren Heitner, *Should a Sports Agent Go to Law School?*, SPORTS AGENT BLOG (Jan. 9, 2006), http://www.sportsagentblog.com/2006/01/09/should-a-sports-agent-go-to-law-school (discussing the dilemma of whether a prospective sports agent is better served as an attorney or non-attorney).

[103] *See* Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1471–1474 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992) (discussing the attempt by a basketball players' union to regulate agent conduct).

[104] *See* National Labor Relations Act § 9, 29 U.S.C. § 159(a) (2012); *see also* Black v. Nat'l Football League Players Ass'n, 87 F. Supp. 2d 1, 2 (D.D.C. 2000); *Collins*, 850 F. Supp. at 1471. Specifically, Section 9 of the National Labor Relations Act states as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employers in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other considerations of employment.

National Labor Relations Act § 9, 29 U.S.C. § 159(a).

[105] *See, e.g.*, *Collins*, 850 F. Supp. at 1475 ("A union may delegate some of its exclusive representational authority on terms that serve union purposes, as the [National Basketball Players Association] has done here."); *cf.* Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 357, 358–59

The unions in all four of the premier U.S. sports leagues currently enforce rules to ensure "players . . . receive agent services that meet minimum standards of quality at uniform rates."[106] In addition, some unions prohibit agents from representing groups that would seemingly create a conflict of interest, such as general managers and coaches.[107] Meanwhile, other unions impose stringent limits on agent fees.[108]

Nevertheless, much like the threat of being decertified by a state bar association, the threat of being decertified by a players' union once again is not a very strong deterrent.[109] One problem with the threat of being decertified by a players' union is that sports agents are rarely willing to disclose the wrongdoing of competitors in fear that competitors will retaliate by bringing claims against them.[110] Moreover, there is rarely a consensus among athletes about which agents are problematic.[111] For every player that wishes to see a particular agent decertified, there is often another vouching

(2007–2008) (explaining that the players association generally delegates at least some authority to third-party agents to avoid a potential conflict of interest between the individual players and the union in situations where each free agent player is competing against all other free agent players in seeking the best possible contract); *see also* H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 721 (1981) (noting a similar allocation of rights from a theatrical union to theatrical agents).

[106] *Collins*, 850 F. Supp. at 1471.

[107] *See* National Basketball Players Association Regulations Governing Player Agents § 2(C) (1991) [hereinafter NBPA Agent Regulations].

[108] *See* National Football League Players Association Regulations Governing Contract Advisors § 4(B)(1) (2012) [hereinafter NFLPA Agent Regulations] (noting that the maximum fee that an NFLPA certified agent may charge is 3 percent, and that, for certain classes of players, this maximum fee drops even lower to 1 or 2 percent); *see also* NBPA Agent Regulations § 4(B) (noting that, for players earning in excess of the league's minimum compensation, NBPA certified agents may charge up to 4 percent, and for other players NBPA agents may charge up to 2 percent). In addition, both the NFLPA and the NBPA enforce rules that prevent player agents from circumventing maximum fee provisions by intentionally increasing fees for other services such as financial consultation, money management or negotiating a player's endorsement contracts. *See* NFLPA Agent Regulations § 3(B)(16); NBPA Agent Regulations § 3(B)(o).

[109] *See infra* notes 110–112 and accompanying text.

[110] *See* Davis, *supra* note 4, at 822 (noting that, according to NFLPA lawyer Richard Berthelsen, the NFLPA had difficulty taking action against agents who violated the NFLPA's sports agent regulations because most agents who complained about wrongdoing "never named names").

[111] *See infra* note 112 and accompanying text.

for the agent's veracity and actively petitioning the union against the agent's decertification.[112]

Another problem with regulating sports agents through players' unions is that it affords no protection to athletes in non-unionized sports.[113] Likewise, athletes in unionized sports lose their protection if the union either decertifies or files a disclaimer of interest.[114] Given that both the professional football and basketball players' unions attempted to disclaim interest as recently as 2011, relying on sports unions to regulate agents effectively is somewhat problematic.[115]

III. The Uniform Athlete Agents Act

Recognizing the limits of civil litigation and professional sanctions, a movement began in the 1990s to pass new statutes to govern sports agents.[116] One of the groups favoring new statutory law included some of

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[112] *See, e.g.*, Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1473–1474 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992) (noting that even as the National Basketball Players Association sought to decertify agent Thomas Collins due to misconduct surrounding his representation of Kareem Abdul-Jabbar, another NBA all-star, Terry Cummings, petitioned the league to grant interim certification to Collins so that he could continue employing Collins as his agent).

[113] *See supra* notes 105–108 and accompanying text.

[114] *See* Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing The Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. Davis L. Rev. 1221, 1255–56 (2012) (explaining that "[e]mployees can exercise their right to dissolve their union in the middle of collective bargaining through a formal decertification process or a disclaimer of interest" and that each method "effectively terminates a union, the collective bargaining process, and the bargaining relationship between employers and employees").

[115] *See generally* Gary Washburn, *Players Reject NBA Proposal*, Boston Globe (Nov. 15, 2011), http://www.boston.com/sports/basketball/articles/2011/11/15/players_reject_nba_proposal (noting that the National Basketball Players Association has "filed a 'disclaimer of interest,' which officially disqualifies the NBPA as the official representatives of the league's players, the first step to decertification"); Greg A. Bedard, *Scrimmage Lines are Drawn*, Boston Globe (Mar. 22, 2011), http://www.boston.com/sports/football/articles/2011/03/22/scrimmage_lines_are_drawn (noting that the National Football League Players Association had filed a disclaimer of interest as a first step toward proceeding with an antitrust lawsuit against the NFL teams rather than a labor negotiation).

[116] *See* Danny Robbins, *Problem with Agents Must Be Addressed, Says NCAA Head*, Hous. Chron., Jan. 8, 1996, at 3 (noting that NCAA executive director Cedric Dempsey called for new laws to regulate sports agents); *House Oks Bill to Regulate Sports Agents*, Seattle Times (Mar. 20, 1991), http://community.seattletimes.nwsource.com/archive/?date=19910320&slug=1272678 (discussing efforts to pass state law

the more ethical sports agents, who believed that statutory law was needed to halt an ethical "race to the bottom."[117] Another group that supported new statutory law was the NCAA, which believed that the current law failed to curtail secret payments between agents and student-athletes in violation of the NCAA's internal Principle of Amateurism.[118]

A. Drafting of the Uniform Athlete Agents Act

While sports agents never moved forward with a plan for new statutory law, Florida State University president Sandy D'Alemberte approached the U.S. Uniform Law Commission in 1996 on behalf of the NCAA about draft-

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to regulate sports agents in the State of Washington); *N.C. Bill Would Regulate Sports Agents*, GREENSBORO NEWS & RECORD, Mar. 3, 1990, at A5 (quoting the North Carolina Secretary of State, explaining that people are surprised that without new statutory law a wide range of sports agent conduct that violates NCAA rules is not illegal).

[117] *See* Willenbacher, *supra* note 30, at 1227 (noting that "[i]n response to the numerous actors in the market and the limit on commissions, competition among agents has erupted, causing a race to the bottom where sports agents conduct themselves unethically in order to secure clients"); *see also* Symposium, *Panel III: Ethics and Sports: Agent Regulation*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 747, 754 (2004) (quoting John Genzale, the Editor-in-Chief of SportsBusiness Journal, expressing concern that "[g]ood agents are losing the battle for reputation and credibility, and they will keep on losing unless [sports agents overall] clean up their own act"). *But see* Glen Wong et al., *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 599–600 (2011) (arguing that most sports agents are ethical and well-meaning).

[118] *See* 2011–12 NCAA Division I Manual §§ 2.9, 12.1.2 (2011); Robert P. Baker, *The Unintended Consequence of the Miller-Ayala Athlete Agents Act: Depriving Student Athletes of Effective Legal Representation*, 12 UCLA ENT. L. REV. 267, 271 (2005) (noting that "in 1997 the NCAA and several of its largest member institutions lobbied the National Conference of Commissioners of Uniform State Laws (NCCUSL) to draft a model law regulating athlete agents"); *The Uniform Athlete Agents Act*, *supra* note 6, at 373 (quoting attorney and sports agent Craig Fenech describing the NCAA as "the driving force behind [the UAAA]").

ing model legislation to curb sports agent misconduct.[119] Thereafter, the Uniform Law Commission adopted the project.[120]

At the urging of D'Alemberte, the U.S. Uniform Law Commission selected a committee that included several drafters with direct ties to the NCAA.[121] One of the committee members, Charles Ehrhardt, served as the Chair of Florida State University's Athletics Board and as Florida State University's representative to the NCAA.[122] Another, Harvey S. Perlman, had an "extensive record of service on the Boards of Directors for the NCAA," as well as past leadership positions on the Board of Directors of the Big 12 Athletic Conference.[123]

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[119] *The Uniform Athlete Agents Act*, *supra* note 6, at 359 (quoting Michael Kerr, the Deputy Executive Director of the National Conference of Commissioners on Uniform State Laws, explaining how the National Conference of Commissioners on Uniform State Laws was first approached by Sandy D'Alemberte); *Panel III: Ethics and Sports: Agent Regulation*, *supra* note 117, at 758 (quoting NCAA's Assistant Director of Agent, Gambling, and Amateurism Activities, Rachel Newman-Baker as noting that "[s]everal years ago, several universities in the NCAA national office actually went to the National Conference of Commissioners on Uniform State Laws ('NCCUSL') to draft a UAAA").

[120] *The Uniform Athlete Agents Act*, *supra* note 6, at 359–60; *see also* Neiman, *supra* note 42, at 127 n.34 (noting that the National Conference of Commissioners on Uniform State Laws is "a national organization comprised of 300 attorneys, judges, law professors and state legislators appointed by their states to draft uniform and model state laws").

[121] *See* UNIF. ATHLETE AGENTS ACT (2000) (noting the 17 committee members); Biography of Florida State University Professor Charles Ehrhardt, http://www.seminoles.com/school-bio/fsu-erhardt.html (stating that during the period in which Professor Charles Ehrhardt helped to draft the UAAA, he was Chair of the Florida State University Athletics Board and the university's representative to the NCAA, as well as a member of many NCAA boards); *Harvey S. Perlman*, U. OF NEB., http://nebraska.edu/administration/chancellors-and-vice-presidents/harvey-s-perlman.html (last visited Feb. 17, 2013) (noting that Chancellor Perlman is a member of the "Bowl Championship Series Presidential Oversight Committee"); *Rodney K. Smith*, WASHINGTON AND LEE SCHOOL OF LAW, http://law.wlu.edu/faculty/profiledetailpr.asp?id=303 (last visited Feb. 17, 2013) (noting that Professor Smith served was a member of the Infractions Appeals Committee of the NCAA, Division I from 2003–2004).

[122] *See* Biography of Florida State University Professor Charles Ehrhardt, *supra* note 121.

[123] *See Harvey S. Perlman*, U. OF VA. L. LIBR., http://libguides.law.virginia.edu/content.php?pid=135150&sid=1255851 (last visited Feb. 17, 2013); *Harvey S. Perlman*, BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/person.asp?personId=8023109&privcapId=3777804&previousCapId=3777804&previousTitle=University%20of%20Nebraska%20-%20Lincoln (last visited Feb. 17, 2013).

By contrast, none of the Uniform Athlete Agents Act ("UAAA") committee members were professional athletes, nor were any recent college athletes.[124] As a result, the committee suffered from groupthink: a psychological phenomenon that occurs within homogenous groups when the desire for harmony in decision-making overrides any realistic analysis of alternatives.[125] Stated otherwise, the committee was single-mindedly focused on just one issue: how to deter sports agents from encouraging amateur athletes from turning professional or accepting money in violation of the NCAA's own internal bylaws.[126]

With this single purpose in mind, the U.S. Uniform Law Commission unveiled at its 2000 convention a new proposed act, the UAAA.[127] The act has since been adopted, either in whole or in part, by forty states, as well as by Washington, D.C., and the U.S. Virgin Islands.[128] However, the act remains highly controversial among both athletes and agents, perhaps due to their lack of voice at the drafting stage.[129]

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[124] *See* UNIF. ATHLETE AGENTS ACT (2000).

[125] *See* Melanie B. Leslie, *The Wisdom of Crowds? Groupthink and Nonprofit Governance*, 62 FLA. L. REV. 1179, 1183 (2010) (defining "groupthink" as "a phenomenon that occurs when members of a cohesive group, such as a corporation's board of directors, place the desire for group unity ahead of the [corporation's] best interests"); *see also* Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55, 57 (2010) (explaining that in 1972, research psychologist Irving Janis "arguably revolutionized social psychology when he published Victims of Groupthink," a book that discussed "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action" (internal quotation marks omitted) (citing IRVING L. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES (1972)).

[126] *See* Lloyd Zane Remick & Christopher Joseph Cabott, *Keeping Out the Little Guy: An Older Contract Advisor's Concern, A Younger Contract Advisor's Lament*, 12 VILL. SPORTS & ENT. L.J. 1, 5–7 (2005) (discussing the UAAA's single-minded focus in protecting the NCAA's own internal bylaws).

[127] *See* UNIF. ATHLETE AGENTS ACT (2000); *see also The Uniform Athlete Agents Act*, *supra* note 6, at 361 (quoting Michael Kerr, the Deputy Executive Director of the National Conference of Commissioners on Uniform State Laws, as explaining that "[i]n 1997 and '98, [the committee] started drafting").

[128] *See FAQ on Uniform Athlete Agents Act*, National Collegiate Athletic Association (July 29, 2010), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act.

[129] *See The Uniform Athlete Agents Act*, *supra* note 6, at 345 (discussing various sports agents' perspectives on the UAAA); *Panel III: Ethics and Sports: Agent Regula-*

B. UAAA Language

The UAAA is a rather long model act, consisting of twenty-two separate sections.[130] However, its requirements fall into four broad categories.[131] The first category of requirements mandates that those seeking to represent student-athletes must register with the Secretary of State and disclose to the agency a wide range of personal information.[132] This personal information may include the prospective agent's name, education, negotiating experience, partners and clients, references, and past disciplinary proceedings.[133]

The second category of requirements governs the form and content of every agency contract between a registered sports agent and a student-athlete.[134] The UAAA specifically requires that every agency agreement appear in standard written form and be signed and dated by the parties.[135] In addition, the act requires that the agency agreement include specific terms that relate to fees and services, as well as a bold-faced warning near the signature line indicating that the student-athlete understands that by signing an agency contract the athlete "may lose . . . eligibility to compete" in a given sport.[136]

The third category of requirements governs student-athletes' rights to terminate their agency agreements.[137] Most significantly, Section 12 of the

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tion, *supra* note 117, at 754 (discussing both athletes' and agents' perspectives on the Uniform Athlete Agents Act). .

[130] UNIF. ATHLETE AGENTS ACT (2000).

[131] *See* Michael Rogers, *The Uniform Athlete Agent Act Fails to Fully Protect the College Athlete Who Exhausts his Eligibility Before Turning Professional*, 2 VA. SPORTS & ENT. L.J. 63, 66–69 (2002) (describing these four general categories).

[132] *See* UNIF. ATHLETE AGENTS ACT § 5 (2000) (discussing registration requirements); *see also* Rogers, *supra* note 131, at 66 (noting that the UAAA requires "registration by the athlete agent as well as concomitant mandatory disclosure of important information" (footnote omitted)).

[133] *See* UNIF. ATHLETE AGENTS ACT § 5 (2000) (providing a full list of requirements for registration as a sports agent). The requirement to register is subject to a narrow seven-day safe harbor, which begins when an agent is initially solicited by a student-athlete, and is reciprocal between each of the states that have implemented the act. *See id.* § 4(b) (noting that "[b]efore being issued a certificate of registration, an individual may act as an athlete agent . . . for all purposes except signing an agency contract, if: (1) a student-athlete or another person acting on behalf of the student-athlete initiates communication with the individual; and (2) within seven days after an initial act as an athlete agent, the individual submits an application for registration as an athlete agent . . . .").

[134] *See infra* notes 135–136 and accompanying text.

[135] *See* UNIF. ATHLETE AGENTS ACT § 10 (2000).

[136] *See id.* § 10(b)–(c).

[137] *See id.* § 12.

UAAA contains an absolute right for the student-athlete to cancel his agency contract within fourteen days after the contract is signed.[138] If the cancellation is effected within this time frame, the UAAA states that the student-athlete will not owe any compensation to his agent.[139]

Meanwhile, the fourth category of requirements governs the course of dealing between student-athletes and their agents.[140] For example, Section 14(a) of the act makes it unlawful for a certified agent to make any material misstatements or payments of any kind to a student-athlete as a way of inducing him to enter into an agency agreement.[141] Meanwhile, Section 14(b)(1) prohibits an unregistered sports agent from making contact with a student-athlete.[142]

Beyond these four categories, the UAAA outlines both criminal and administrative penalties that the draftees believe the states should adopt when an athlete or agent violates the act.[143] The UAAA also creates a civil remedy that allows NCAA member schools to bring suit against either an agent or student-athlete if the school is penalized, disqualified or fined by either the NCAA or its conference for conduct arising from the student-athlete or the agent's violation of the UAAA.[144]

C. *Scholarly Criticism of the UAAA*

Even though the UAAA has been widely adopted by the states, it has been frequently criticized within legal scholarship.[145] This criticism is generally based on two arguments.[146] First, the UAAA subordinates student-

[138] *See id.* § 12(a).
[139] *See id.* § 12(c).
[140] *See id.* § 14.
[141] *See id.* § 14(a).
[142] *See id.* § 14(b)(1).
[143] *See* UNIF. ATHLETE AGENTS ACT §§ 15, 17 (2000).
[144] *See id.* § 16(a) (explaining that "[a]n educational institution has a right of action against an athlete agent or a former student-athlete for damages caused by violation of this Act." (alteration in original)); *see also id.* § 16(b) ("Damages of an educational institution . . . include losses and expenses incurred because, as a result of the conduct of an athlete agent or former student-athlete, the educational institution was injured by a violation of this Act or was penalized, disqualified, or suspended from participation in athletics by a national association for the promotion and regulation of athletics, by an athletic conference, or by reasonable self-imposed disciplinary action taken to mitigate sanctions likely to be imposed by such an organization." (alteration in original)).
[145] *See infra* notes 149–167 and accompanying text.
[146] *See infra* notes 149–167 and accompanying text.

athletes' interests to those of NCAA member schools.[147] Second, the act entirely disregards the need to regulate the relationship between professional athletes and their agents.[148]

1. How the UAAA Subordinates Student-Athletes to the NCAA

The UAAA subordinates the interests of student-athletes to those of NCAA member schools in a number of ways.[149] First, the act indoctrinates into law the NCAA's Principle of Amateurism, which fixes student-athletes' wages at zero, making them into the "last indentured servants of our society."[150] Until the UAAA's passing, the NCAA's Principle of Amateurism was merely "a private association's mandate and not a rule of law."[151] However, with the UAAA's requirement that all agency contracts include form language that pertains to the NCAA's amateurism rules, the NCAA's Principle of Amateurism becomes one step closer to law.[152]

In addition, the UAAA adopts aspects of the NCAA's Principle of Amateurism without even considering whether the principle is *bona fide*.[153] To-

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[147] *See infra* notes 149–160 and accompanying text.

[148] *See infra* notes 161–167 and accompanying text.

[149] *See infra* notes 150–160 and accompanying text.

[150] *The Uniform Athlete Agents Act*, *supra* note 6, at 374 (quoting attorney and sports agent Craig Fenech); *see also* Marc Edelman, note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 862 (2002) ("[B]y not paying student-athletes, the Principle of Amateurism leads to windfall profits for college coaches and administrators, who receive disproportionately high salaries and additional endorsement/promotion opportunities."); Sarah M. Konsky, note, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1585 (2003) ("[T]he NCAA maximizes profits beyond a competitive rate and keeps the windfall in the hands of select few administrators, athletic directors, and coaches."); Daniel Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 357 (2007) (noting several commentators' belief that the "economic impact of the NCAA's amateurism rules creates a wealth transfer from the players to their schools"). *But see* Banks v. NCAA, 977 F. 2d 1081, 1091 (7th Cir. 1992) (denying a college football player the right to challenge an NCAA rule under antitrust law based on the court's conclusion that the NCAA member schools are not "purchasers of labor" in the traditional sense).

[151] Marc Edelman, *Closing the 'Free Speech' Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 572 (2013) (citing NCAA Principle of Amateurism, 2011–12 NCAA Division I Manual § 2.9 (2011)).

[152] *See* Closius, *supra* note 28, at 513 (noting that statutes similar to the UAAA "have the effect of giving NCAA regulations the full force of law").

[153] *See* Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals*, 19 VILL. SPORTS & ENT. L.J. 371, 373 (2012) (explaining that "journalists and

day many question whether the NCAA truly promotes any of the traditional virtues of amateurism that derived from 1800s England, where members of a privileged upper-class competed in athletics purely for pleasure.[154] Indeed, the NCAA's modern version of amateurism involves a multi-billion dollar enterprise that "maximizes profits beyond a competitive rate and maintains wealth in the hands of a select few administrators, athletic directors, and coaches."[155] Ironically, just about the only party that is unpaid in the NCAA's brand of amateurism is the student-athletes, many of whom are extremely poor and in dire need of money for basic needs such as food and shelter.[156]

Finally, even the UAAA's remedies are skewed in favor of NCAA members.[157] For example, although the UAAA provides a private cause of action to NCAA member schools against sports agents, the act fails to provide student-athletes with the same right to seek a civil remedy against agent misconduct.[158] Meanwhile, much more disturbingly, the UAAA as-

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legal scholars have ridiculed the NCAA for issuing harsh suspensions to student-athletes and simultaneously generating billions of dollars in revenue from college athletics"); *see also* Darren Heitner & Jeffrey Levine, *Corking the Cam Newton Loophole*, 2 HARV. J. SPORTS & ENT. L. 341, 342 (2011) (noting that "while the NCAA trumpets its philosophy of amateur competition, an increasing refrain points to the hypocritical nature of the Association, as its financial success is built on the sweat of amateur athletes"); *cf.* Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1309 (1992) (discussing a general pattern of the American legal system deferring to the perceptions of amateurism posited by the NCAA, without recognizing that these bylaws themselves are often merely a pretense and have no true moral meaning in light of the NCAA's overall mode of operation).

[154] *See* Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. ENT. & SPORTS L. 13, 22 (2010) (noting that the principle of amateurism originally emerged from 1800s England, during which time young men of privileged economic status regularly engaged in unpaid athletic events at colleges); *see also* Lazaroff, *supra* note 150, at 331 n.7.

[155] Edelman, *supra* note 150, at 864.

[156] *See* Dohrmann, *supra* note 33 (interviewing former sports agent Josh Luchs and a number of Luchs's former clients about why money changed hands between student-athletes and sports agents); Payne, *supra* note 33, at 680–83 (discussing what the author refers to as "A Culture of Poverty and Entitlement"); Edelman, *supra* note 150, at 876 (relaying a story about how former professional basketball player Chris Webber, despite generating a large amount for revenue for the University of Michigan, could not even afford a fast-food dinner while in college).

[157] *See, infra,* notes 158–160 and accompanying text.

[158] *See* UNIF. ATHLETE AGENT ACT, § 16, comment (2000) ("Section 16 does not specifically authorize an action by a student-athlete against an athlete agent because the student-athlete can bring an action against an athlete agent under existing law."); *see also* Remick & Cabott, *supra* note 126, at 7 (noting that

toundingly grants a private cause of action to NCAA member schools against their *own* student-athletes who fail to publicly disclose agency agreements.[159] Thus, not only does the act fail to provide student-athletes with any meaningful legal protection, but, to the contrary, the act exposes them to an entirely new form of legal liability that does not otherwise exist in common law.[160]

2. Weaknesses of the UAAA in Protecting Professional Athletes

Beyond the UAAA's unfairness to student-athletes, the UAAA also neglects to govern the relationship between professional athletes and their agents, even though there are strong societal concerns about protecting professional athletes.[161] Specifically, the UAAA ignores entirely both industry and scholarly concerns about sports agents' conflicts of interest when representing professional athletes.[162]

The UAAA could have easily addressed these ethical concerns by expanding registering requirements to include those agents that exclusively

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"[i]ronically, the UAAA does not provide student-athletes with a right to seek civil remedies from agents if they are rendered ineligible due to an agent's failure to abide by UAAA regulations). Indeed, the only remedy that is afforded by the act to a student-athlete is the right to void an agency agreement that does not adhere to the act's requirements. *See* John A. Gray, *Sports Agents' Liability After SPARTA?* 6 VA. SPORTS & ENT. L.J. 141, 149 (2006) (noting that "[w]hile the UAAA does not give the student-athlete a statutory cause of action, a third major addition is that the UAAA does give a student-athlete the power to void any contract with a registered sports agent the terms of which do not conform strictly to the UAAA's requirements, and it also declares void any contract with an unregistered agent").

[159] UNIF. ATHLETE AGENTS ACT § 16(a) (2000).

[160] *The Uniform Athlete Agents Act*, *supra* note 6, at 352–53 (quoting John Cannell of the New Jersey Law Revision Commission questioning whether the UAAA is "a bill that protects [student-athletes] or not," and expressing that the "one provision that the [New Jersey Law Revision] Commission had some problem with . . . was the fact that the bill makes a student athlete liable to the university if he does things which affect his eligibility").

[161] *See id.* at 366 (quoting sports agent Tony Agnone noting that one of the problems with the UAAA is that while it "worr[ies] about legislating the student athlete, which is the NCAA concern," it fails to "worry about legislating the professional athlete, as well, because that's another area where there's prone of many problems and [sic] situations that will come into effect"); *see also* Neiman, *supra* note 42, at 125, 128 (explaining that the Uniform Athlete Agents Act "fails to address the dealings of the sports agent and the professional athlete, thereby failing to protect the professional athlete").

[162] *See* UNIF. ATHLETE AGENTS ACT (2000) (making no mention of sports agents' conflicts of interests in representing professional clients).

represent professional athletes.[163] The UAAA also could have imposed rules on agents requiring full disclosure of all active business interests and clients.[164] Perhaps the UAAA could have even implemented the same rules about disclosing conflicts of interest that most state bar associations have adopted for lawyers, such as ABA Model Rule 1.7.[165] However, the UAAA's drafters took none of these steps.[166] Instead, they chose to leave professional athletes conspicuously unprotected.[167]

D. Scholarly Praise for the UAAA

By contrast, there has been little scholarly praise for the UAAA.[168] Perhaps, the most optimistic view of the act appeared in a 2002 law review article written by Baylor School of Law Professor R. Michael Rogers, in which the professor, who is the son of a college basketball coach and has served on many NCAA committees, refers to the UAAA drafting committee's efforts as "praiseworthy."[169] According to Rogers, the act serves an important purpose in allowing student-athletes to receive "free unbiased advice about professional sports careers" from those affiliated with NCAA member schools, rather than from private sports agents.[170]

Yet even this argument seems to rely on two faulty presumptions: first, that all NCAA employees offer student-athletes unbiased advice; and second, that no sports agents offer honest advice.[171] While Rogers may feel this way based on his life experiences, a broader look at history shows that there are both ethical and unethical sports agents, as well as both ethical and

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[163] *See id.* § 5 (discussing current UAAA registration requirements).

[164] *Cf.* Investment Advisers Act of 1940, 15 U.S.C § 80b-6 (2006) (providing an example of a statute regulating financial advisers that includes a similar disclosure requirement).

[165] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012) (explaining that, subject only to a limited number of exceptions, "a lawyer shall not represent a client if . . . (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

[166] *See* UNIF. ATHLETE AGENTS ACT (2000).

[167] *See id.*

[168] A Westlaw search of Journals and Law Reviews (JLR) using the key term "Uniform Athlete Agents Act" yielded 61 documents; few if any took a positive view toward the UAAA.

[169] *See* Rogers, *supra* note 131, at 64–65.

[170] *Id.* at 94.

[171] *See infra* note 172 and accompanying text.

unethical NCAA employees.[172] In addition, individuals that work in each capacity have some financial incentive to lead student-athletes astray.[173] Sports agents earn profit from student-athletes turning professional.[174] Meanwhile, college employees profit from student-athletes staying in school.[175]

IV. The Sports Agent Responsibility and Trust Act

Within a few years of the UAAA's passing, many states began to recognize the UAAA's shortcomings.[176] Some states indicated that they would not adopt the act.[177] Others decided to take a wait-and-see approach.[178] Around this same time, Congress decided to form its own committee to draft federal sports agent laws that would become known as the Sports Agent Responsibility and Trust Act ("SPARTA").[179] Yet, unfortunately,

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[172] *Compare* Alec Powers, *The Need to Regulate Sports Agents*, 4 Seton Hall J. Sport L. 253, 257 (1994) (making the claim that "many sports agents are fraudulent and deceitful people"), *with* Michael A. Weiss, *The Regulation of Sports Agents: Fact or Fiction?*, 1 Sports Law. J. 329, 330 (1994) (contending that not all sports agents are fraudulent and deceitful, and that "unscrupulous" behavior by agents is primarily caused by "incompetence" and "greed" which has "interfered with their capabilities"). For an article that goes a step further and argues that student-athletes are more likely to receive ethical advice from sports agents than from employees of NCAA member schools, see Nocera, *supra* note 24, arguing that it would be helpful for student-athletes to be allowed under NCAA rules to communicate with sports agents because sports agents could provide student-athletes with "good advice about their professional prospects."

[173] *See infra* notes 174–175 and accompanying text.

[174] *See* Rogers, *supra* note 131, at 74 (noting the financial interest that sports agents have in encouraging student-athletes to turn professional).

[175] *Cf.* Wong, Zola, & Deubert, *supra* note 117, at 557 ("Amateur Athletic Union (AAU) basketball camps and teams have become particularly swarmed with coaches, recruiters, agents, and others looking for the next great college or professional star that can help their own careers.").

[176] *See infra* notes 177–178 and accompanying text; *see also* Remick & Cabott, *supra* note 126, at 12–19 (discussing in detail some perceived shortcomings of the act).

[177] *See FAQ on Uniform Athlete Agents Act*, NCAA.org, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act (last visited Mar. 12, 2013) (explaining that some of the states have elected not to adopt the UAAA).

[178] *See The Uniform Athlete Agents Act*, *supra* note 6, at 352–53 (noting the State of New Jersey's initial uncertainty about whether to adopt the UAAA).

[179] *See* Remick & Cabott, *supra* note 126, at 8 (noting that "SPARTA serves as a 'federal backstop' to the UAAA, as it focuses on regulation and enforcement"); *see*

Congress made many of the same mistakes that the U.S. Uniform Law Commission had made just a few years earlier.[180] For example, rather than select a balanced committee, Congress chose as one of its principal drafters Tom Osborne (R-Nebraska), the former head football coach at the University of Nebraska.[181] Based on his life experiences, Osborne seemed to look at the issue of sports agent regulation from the perspective of an NCAA employee.[182]

A. Language in SPARTA

Congress ultimately passed SPARTA on September 9, 2004, and President George W. Bush signed the bill into law two weeks later.[183] Nevertheless, SPARTA provided little, if any, new protection to athletes.[184] To the contrary, most of SPARTA's language was pulled almost directly from the UAAA.[185]

In terms of its substantive requirements, SPARTA only addressed the same few areas of concern as the UAAA.[186] For example, SPARTA prohibited sports agents from luring student-athletes as clients by "providing anything of value to a student athlete or anyone associated with the student

also Davis, *supra* note 4, at 812 (noting that "SPARTA's key provisions are modeled after the provisions of the UAAA").

[180] *See infra* notes 181–182 and accompanying text.

[181] *See Congress Oks Bill Regulating Sports Agents*, THE OREGONIAN, Sept. 14, 2004, at D5 (explaining that SPARTA "was co-authored by former Nebraska football coach Rep. Tom Osborne, R.-Neb., and Rep. Bart Gordon, D.-Tenn").

[182] *See Osborne Testifies on Sports Agents*, OMAHA WORLD-HERALD, Jun. 7 2002, at 2C (quoting Osborne's testimony before Congress that during his 36 years as a football coach, he was "deeply concerned by overly aggressive, unethical sports agents who compromised a student-athlete's eligibility" [sic]).

[183] *See* Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801–7807 (2004); *see also* Sports Agent Responsibility and Trust Act, GovTracks, H.R. 361, 108th Cong. (2003), http://www.govtrack.us/congress/bills/108/hr361.

[184] *See infra* notes 187–192 and accompanying text.

[185] *See infra* notes 187–192 and accompanying text.

[186] *See infra* notes 187–192 and accompanying text.

athlete."[187] In addition, SPARTA required agents to provide student-athletes with a "form disclosure document."[188]

In terms of its remedies, SPARTA provided a cause of action to just about every party other than the athletes.[189] SPARTA granted the Federal Trade Commission ("FTC") authority to enforce the act as if it were part and parcel to the FTC Act.[190] In addition, it permitted state attorneys general to bring suit against sports agents under the act, either in the same capacity as the FTC, or on behalf of its residents if the attorney general could show that the agent had threatened or adversely affected a resident's interests.[191] Meanwhile, SPARTA even allowed NCAA member schools to sue sports agents under the act if they could show that a sports agent's conduct resulted in expenses to the NCAA including "losses resulting from penalties, disqualification, suspension and/or restitution for losses suffered due to self-imposed compliance actions."[192]

B. Strengths and Weaknesses of SPARTA

Since SPARTA's passing, there have been thirty-two law review articles that have discussed the act.[193] Much like the UAAA, praise for SPARTA has been limited.[194] The most positive view of SPARTA seems to come from a 2006 *Willamette Law Review* article by Wake Forest University law professor Timothy Davis, in which the professor describes SPARTA as a

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[187] Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7802(a)(1)(B) (2004) (explaining further that, for purposes of this requirement, prohibited items of value include not only tangible items such as cash, but also "any consideration in the form of a loan, or acting in the capacity of a guarantor or co-guarantor for any debt").

[188] *See id.* § 7802(a)(2) (stating that "[i]t is unlawful for an athlete agent to enter into an agency contract with a student athlete without providing the student athlete with the disclosure document described in subsection (b)").

[189] *See id.* §§ 7803–7805 (discussing different parties able to bring suit under SPARTA and the remedies available).

[190] *See id.* § 7803 (Enforcement); *see also* Davis, *supra* note 4, at 813 (noting that the monetary penalty in 2006 was capped at $11,000); 16 C.F.R. § 1.98(c) (2010) (increasing the penalty for violation of the FTC Act to $16,000, subject to the Civil Penalties Inflation Adjustment Act).

[191] *See* Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7804 (2004) (Actions by States).

[192] Remick & Cabott, *supra* note 126, at 9.

[193] This count is based on a Westlaw search of Journals and Law Reviews (JLR) using the key term "Sports Agent Responsibility and Trust Act."

[194] *See* Davis, *supra* note 4, at 813 (providing a rare example of praise for SPARTA by Wake Forest University law professor Timothy Davis).

"crucial and progressive step[ ]."[195] According to Professor Davis, even though "it is unrealistic to rely on any single mechanism to provide a talisman that will resolve all the industry's problems, . . . [t]he UAAA and SPARTA represent the statutory layers of [a necessary] multi-layered approach."[196]

Additionally, SPARTA deserves some praise for not granting a private cause of action to NCAA member schools against their *own* student-athletes, as the UAAA had done.[197] Thus, the drafters of SPARTA avoided a repeat of that injustice, displaying at least a minimal understanding of the plight of the student-athlete.[198]

Nevertheless, to the extent that SPARTA marked a second attempt at regulating the sports agent industry, its drafters made many of the same mistakes as the U.S. Uniform Law Commission just a few years earlier.[199] For example, much like the drafters of the UAAA, SPARTA's drafters entirely ignored the need to regulate the relationship between professional athletes and their agents.[200] In addition, SPARTA's drafters failed to implement a civil cause of action for student-athletes who are harmed by their agents.[201]

In some ways, SPARTA's failure to provide these protections to student-athletes was even more troubling because the drafters of SPARTA were advised of the importance of granting student-athletes a remedy shortly before passing their act.[202] For example, the Director of the Bureau of Consumer Protection at the FTC, Howard Beales, had recently testified before Congress in favor of granting student-athletes a separate cause of action be-

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[195] *Id.* at 827.

[196] *Id.* at 815.

[197] UNIF. ATHLETE AGENTS ACT (2000) (Prefatory Note).

[198] *See supra* note 195–197 and accompanying text.

[199] *See infra* notes 200–291 and accompanying text.

[200] *See* Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7803–7807 (2004).

[201] *See* Remick & Cabott, *supra* note 126, at 12 (noting that neither SPARTA nor the UAAA "provide students with the right to bring an action against unscrupulous agents"); *see also* Damon Moore, *Proposals for Reform to Agent Regulations*, 59 DRAKE L. REV. 517, 553 (2011) (arguing in favor of revising SPARTA to add a federal cause of action for student-athletes); Gray, *supra* note 158, at 154 (arguing Congress should amend SPARTA to add "a statutory cause of action and remedy for student-athletes injured by an unscrupulous agent acting in violation of SPARTA").

[202] *See infra* note 203 and accompanying text; *see also* Willenbacher, *supra* note 30, at 1253 (citing 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, 12–13 (May 15, 2003) (statement of Scott Boras)).

cause he believed it "would allow athletes to vindicate their rights in all situations, whether or not FTC action is appropriate."[203] Nevertheless, SPARTA's drafters still chose not to include one.[204]

V. Inspiration for Better Sports Agent Regulations

The weaknesses of the UAAA and SPARTA, while not entirely surprising, could have been avoided through better drafting.[205] Although drafting any statute has ample challenges, there are other acts within U.S. jurisprudence that have done a far better job of safeguarding important fiduciary relationships.[206]

A. Muhammad Ali Boxing Reform Act

Perhaps the best example of a law that adequately safeguards a fiduciary relationship is the Muhammad Ali Boxing Reform Act ("Muhammad Ali Act"), which Congress passed in 2000 to protect "the welfare of professional boxers."[207] The Muhammad Ali Act, in pertinent part, prohibits any "contract terms and business practices" that are deemed to be "exploitive, oppressive, and unethical."[208] It also imposes criminal and civil sanctions against wrongful acts within the boxer-manager relationship.[209]

Among the many important provisions in the Muhammad Ali Act, Section 5 of the act specifically prohibits "conflicts of interest" between boxing promoters (those who host boxing events) and managers (those who operate like agents for boxers).[210] Under this section of the act, for boxing

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[203] Willenbacher, *supra* note 30, at 1254 (citing Sports Agent Responsibility and Trust Act: Hearing on 107 H.R. 4701 Before the Subcomm. on Commerce Trade and Consumer Protection of the House Comm. on Energy and Commerce, 107th Cong. 20–21 (June 5, 2002) (statement of Howard Beales, Director of the Bureau of Consumer Protection at the FTC)).

[204] *See id.* (citing Sports Agent Responsibility and Trust Act: Hearing on 107 H.R. 4701 Before the Subcomm. On Commerce Trade and Consumer Protection of the House Comm. on Energy and Commerce, 107th Cong. 20–21 (June 5, 2002) (statement of Howard Beales, Director of the Bureau of Consumer Protection at the FTC)).

[205] *See infra* notes 207–238 and accompanying text.

[206] *See supra* notes 207–238 and accompanying text (discussing the Muhammad Ali Boxing Reform Act, Investment Advisers Act, and Miller-Ayala Act).

[207] Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6301 (2006).

[208] *Id.*

[209] *Id.*

[210] *Id.* §§ 6301, 6308; *cf.* Chiapparelli v. Henderson, No. F046363, 2005 WL 1847221, at *3 (Cal. Ct. App. Aug. 5, 2005) (noting, in essence, no difference

matches of ten rounds or longer, a manager may not have any "financial interest in the promotion of a boxer."[211] In addition, no officer or employee of a boxing sanctioning organization may accept gifts from a boxing manager.[212]

The Muhammad Ali Act further grants a private cause of action to boxers who suffer harm based on their manager's misconduct.[213] Under this private cause of action, potential remedies available to the boxer may include not only any economic "damages suffered," but also "court costs, and reasonable fees and expenses."[214] These additional forms of recovery have an important deterrent effect on agent wrongdoing.[215]

Given the similarities between the boxer-manager relationship and the athlete-agent relationship, it would not be difficult to lift much of the language from Section 5 of the Muhammad Ali Boxing Reform Act and place it into a new sports agent laws.[216] Specifically, the act's prohibition on managers having a "financial interest" in the promotion of a boxer can easily be rewritten as a rule prohibiting sports agents from having a financial interest in a league or team of a sport in which they seek to represent athletes.[217]

Likewise, the private cause of action granted to boxers against their managers logically can be transformed into a cause of action for athletes against their agents.[218] Such a cause of action would have an appropriate retributive effect in instances where agents intentionally caused harm to athletes.[219] In addition, the requirement that dishonest agents pay not just

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between the title of "manager" in the context of boxing and mixed martial arts and the definition of "agent" as interpreted by sports agent regulations).

[211] Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6308 (2006).

[212] *Id.*

[213] *Id.* § 6309.

[214] *Id.*

[215] *See* Sharona Hoffman & Andy Podgurski, *In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information*, 48 B.C. L. REV. 331, 382–384 (2007) (noting that including a private cause of action in a federal statute bolsters the statute's deterrent power against wrongdoing).

[216] *See* Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6308 (2006).

[217] *Id.*

[218] *See id.* § 6309.

[219] *See* Marc Edelman, *Addressing the High School Hazing Problem: Why Lawmakers Need to Impose a Duty to Act on School Personnel*, 25 PACE L. REV. 15, 34 (2004) (explaining that, "[i]n juxtaposition to utilitarian justice, retributive justice (retribution) is a backward-looking theory of moral reasoning . . . , based on the principal that people who commit wrongs deserve to be punished"); *see also* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 16 (2d ed. 1999) (noting that retributivist justice is based on the notion that the wrongdoer deserves punishment, whether or not it will result in crime reduction).

economic damages, but also court costs, reasonable fees, and expenses, may have a deterrent effect against sports agent misconduct.[220]

B. Investment Advisers Act

Outside of the context of regulating sport, the Investment Advisers Act provides another example of a statutory scheme that more adequately safeguards the principals to a fiduciary relationship.[221] Congress passed the Investment Advisers Act in 1940 "to eliminate or at least to expose all conflicts of interest which might incline an investment adviser . . . to render advice which was not disinterested."[222] The act has since served as an important way to ensure that investment advisers remain loyal to their clients.[223]

Much like the UAAA and SPARTA, the Investment Advisers Act requires that investment advisers register with an appropriate agency.[224]

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[220] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 19 (2d ed. 2001) (explaining that general deterrence is a forward-looking purpose for punishment that involves inducing society to forgo undesirable behavior by using "punishment as an object lesson to the rest of the community"); *see also* Edelman, *supra* note 219, at 31 (noting that a person with "certain cognitive abilities" will be generally deterred from committing a crime when the punishment for such act becomes sufficiently large).

[221] *See* Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (2006).

[222] SEC v. Capital Gains Research Bureau, 375 U.S. 180, 191–192 (1963); *see also* Santa Fe Industries Inc. v. Green, 430 U.S. 471, n.11 (1977) (noting the Supreme Court's recognition that "Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); John A. Gray, *Reforms to Improve Client Protection and Compensation Against Personal Financial Planners' Unethical Business Practices*, 32 AM. BUS. L.J. 245, 252 (1994) (noting that the Investment Advisers Act makes clear the existence of a fiduciary relationship between investment advisers and their clients). *But see* Arthur B. Laby, *SEC v. Capital Gains Research Bureau and the Investment Advisers Act of 1940*, 91 B.U. L. REV. 1051, 1066, 1080 (2011) (contending that "[t]he Capital Gains Court neither stated nor implied that the Investment Advisers Act created a fiduciary duty governing advisers," and that "[t]he federal fiduciary duty for advisers originated neither in the Advisers Act nor in the Capital Gains case, but rather in the Santa Fe footnote years after Capital Gains was decided").

[223] *See* James T. Koebel, *Trust and the Investment Adviser Industry: Congress' Failure to Realize FINRA's Potential to Restore Investor Confidence*, 35 SETON HALL LEGIS. J. 61, 89 (2010) (explaining that "[t]he Investment Advisers Act's fiduciary standard permits investors to expect loyalty from their investment advisers").

[224] *See* Investment Advisers Act of 1940, 15 U.S.C. § 80b-3 (2006) ("[I]t shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.").

However, unlike the UAAA or SPARTA, the Investment Advisers Act also "construct[s] a towering regulatory edifice" that provides those who hire investment advisers with true protection against double dealing advisers.[225] For example, the Investment Advisers Act prevents investment advisers from acting in conflict of interest without first providing full, written disclosure to their clients.[226] In addition, the act explicitly prevents investment advisers from "acting as principal for [their] own account[s]" or from "acting as broker[s] for a person other than such client" without first providing a full disclosure.[227] According to one legal scholar, these additional requirements effectively "substitute a philosophy of caveat emptor with one of full disclosure."[228]

It would be fairly easy for drafters of new sports agent laws to adopt the Investment Advisers Act's mandate for written disclosure of any conflicts of interest.[229] In addition, doing so would mark an important step toward reducing the philosophy of *caveat emptor* that seems to prevail today in the athlete-agent relationship.[230] Formal written disclosure may be most important with regards to protecting athletes who are represented by large and diversified sports agencies, such as Creative Artists, that consist of various divisions and many agents.[231]

C. *California's Miller-Ayala Act*

Finally, California's Miller-Ayala Athlete Agents Act ("Miller-Ayala Act") provides yet a third example of an act that more appropriately safeguards a particular fiduciary relationship: this one directly involving athletes and their agents.[232] Albeit imperfect in many ways, the Miller-Ayala Act is a substantial improvement over the UAAA and SPARTA because it protects both amateur and professional athletes.[233] In addition, the Miller-Ayala Act

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[225] Laby, *supra* note 222, at 1051.

[226] Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(3) (2006).

[227] *Id.*

[228] Laby, *supra* note 222, at 1064 (citing SEC v. Capital Gains Research Bureau, *supra* note 222, at 186).

[229] Investment Advisers Act of 1940, 15 U.S.C. § 80b-6(3) (2006).

[230] *See supra* note 228 and accompanying text.

[231] *See supra* notes 47–54 and accompanying text.

[232] *See* Miller-Ayala Athlete Agents Act, CAL. BUS. & PROF. CODE § 18895 (West 2000).

[233] *See id.* §§ 18897–18897.5; *see also* Morton v. Steinberg, No. G037793, 2007 WL 3076934, at *1 (Cal. Ct. App. Oct. 22, 2007) (case in which an established NFL player, Chad Morton, brought suit against his agent, Leigh Steinberg, on a number of claims including several under the Miller-Ayala Athlete Agents Act).

provides athletes with a civil cause of action against agents that violate the act.[234]

Furthermore, the Miller-Ayala Act actively seeks to prevent conflicts of interest among sports agents.[235] For example, the Miller-Ayala Act disallows sports agents from having "an ownership or financial interest in any entity that directly employs athletes in the same sport" as any client that the agent is representing.[236] Likewise, the Miller-Ayala Act prohibits agents from dividing fees related to on-field compensation with, or receiving compensation from, any professional sports league or team.[237] In this vein, the Miller-Ayala Act language closely parallels the complete bar on conflicts of interest that Congress applies to boxing managers under the Muhammad Ali Act.[238]

Given that the very topic of the Miller-Ayala Act—regulating sports agents—is identical to that of both the UAAA and SPARTA, only a few changes to the disclosure requirements in the Miller-Ayala Act would be necessary before adopting them into new sports agent laws. In addition, the private cause of action provided to student-athletes against their agents under the Miller-Ayala Act can be lifted almost verbatim from the act into new sports agent laws.

VI. Proposing a New Federal Statute to Regulate Sports Agents

A. Three Core Themes for a New Sports Agent Law

When contrasting prevailing sports agent law in the U.S. with the Muhammad Ali Act, Investment Advisers Act, and the Miller-Ayala Act, it becomes clear that three themes are conspicuously omitted from most sports agent laws that are ubiquitous in other statutes governing fiduciary relation-

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[234] Miller-Ayala Athlete Agents Act, Cal. Bus. & Prof. Code § 18897.8 (West 2000) (noting that if a student-athlete is suspended or disqualified from collegiate competition as a result of his agent's misconduct, that student-athlete may sue to recover either the athlete's actual damages or $50,000, whichever is higher, as well as punitive damages, court costs, and reasonable attorney's fees); *see* Chiapparelli v. Henderson, No. F046363, 2005 WL 1847221, at *1, *2 (Cal. Ct. App. Aug. 5, 2005) (deeming a contract between a mixed martial artist and his agent void because the agent failed to comply with certain requirements under the Miller-Ayala Athlete Agents Act).

[235] *See infra* notes 236–238 and accompanying text.

[236] Miller-Ayala Athlete Agents Act, Cal. Bus. & Prof. Code § 18897.27 (West 2000).

[237] *Id.* § 18897.47. (st 895, art. 2 (West 2000)).

[238] *See* Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6308(b) (2006).

ships: principal protection, universality, and minimizing conflicts of interest.[239]

1. Principal Protection

"Principal protection," involves providing the primary legal remedy to the principal party in the fiduciary relationship.[240] In the Muhammad Ali Act, the boxers are the principal party because they hire managers to act on their behalf and subject to their control. Thus, under the Muhammad Ali Act, Congress grants boxers with a private cause of action to sue their managers if their managers violate the terms of the act.[241] Similarly, under the Investment Advisers Act, the individuals hiring investment advisers are deemed the principal parties because they seek out the advice of those that purport to have specialized knowledge in the field.[242] Thus, the investment clients are awarded with a private action against investment advisers who violate the act by either failing to disclose conflicts of interest or by breaching a statutory duty.[243] Meanwhile, under the Miller-Ayala Act, the athletes protected under the act are properly noted as the principals as a matter of law because these athletes manifest an intent for their agents to act on their behalf and subject to their control.[244] Thus, the Miller-Ayala Act grants athletes a private cause of action.[245]

In any statute involving a fiduciary relationship, there is great importance to providing the main cause of action to the principals because, by definition, fiduciaries are parties "required to act for the benefit of another person on all matters within the scope of their relationship."[246] That other person needs a method to enforce his rights, and common law remedies may not always be sufficient because of their lack of specificity, as well as their limited means of deterrence.[247]

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[239] *See supra* notes 207–238 and accompanying text.

[240] *See* RESTATEMENT (FIRST) OF AGENCY § 1(2) (1933) (noting that a "principal" is "[t]he one for whom action is to be taken").

[241] Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6309(d) (2006).

[242] *See* Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (2006).

[243] *See* Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 25 (1979).

[244] *See* GREGORY, *supra* note 2, at 4–5.

[245] Miller-Ayala Athlete Agents Act, CAL. BUS. & PROF. CODE § 18897.8 (West 2000) (discussing student-athletes' private cause of action).

[246] BLACK'S LAW DICTIONARY 702 (9th ed. 2009).

[247] See *supra* notes 56–85 and accompanying text for examples of how the common law failed to adequately protect principals against wrongdoing specifically in the athlete-agent relationship.

2. Universality

"Universality" relates to ensuring the act's general applicability to all members of a given class, or at least those members who engage in commerce of greater than a certain scope.[248] Indeed, the Muhammad Ali Act applies to all boxing managers that represent boxers in bouts of ten rounds or longer.[249] Similarly, the Investment Advisers Act applies to all investment advisers that transact business in excess of a particular statutory threshold.[250] Meanwhile, the Miller-Ayala Act applies to all athlete-agent relationships within the State of California, irrespective of whether professional or amateur.[251]

The purpose of laws having universal application is both to promote fairness and to establish consistency.[252] It is fairer for laws to have universal applicability because otherwise certain groups lack the necessary protection that others receive. Meanwhile, laws of broad applicability often lead to more consistent legal results because all parties designated by the same title or profession are governed the same under the law.

3. Minimizing Conflicts of Interest

Finally, minimizing conflicts of interest ensures that fiduciaries have true incentive to act for the benefit of their principals.[253] For instance, the Muhammad Ali Act includes an absolute bar on managers having a financial interest in the promotion of a boxer.[254] Similarly, the Miller-Ayala Act enforces an absolute bar against agents sharing fees with sports team owners or serving in an ownership capacity of a sports team.[255] The Investment Advisers Act does not implement a complete ban on investment advisers also having a financial stake in certain products. However, it does require investment advisers to provide "full, written disclosure" of these interests,

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[248] *See Universality Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/universality (last visited Feb. 19, 2013) (defining "universality" as "the character or state of being universal" or "existence or prevalence everywhere").

[249] *See* Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6308(b) (2006).

[250] *See* Investment Advisers Act of 1940, 15 U.S.C. § 80b-3 (2006).

[251] *See* Miller-Ayala Athlete Agents Act, CAL. BUS. & PROF. CODE §§ 18897–18897.5 (West 2000).

[252] *See infra* notes 248–251 and accompanying text.

[253] *See infra* notes 254–256 and accompanying text.

[254] *See* Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6308 (2006).

[255] Miller-Ayala Athlete Agents Act, CAL. BUS. & PROF. CODE §§ 18897–18897.5 (West 2000).

similar to how ABA Model Rule 1.7 requires attorneys to provide full, written disclosure of their conflicts.[256]

Preventing conflicts of interest is critically important to any statute governing fiduciary relations because the fiduciary is "required to act for the benefit of another person on all matters within the scope of their relationship."[257] Based on the nature of this role, "good faith, trust, confidence, and candor" are required.[258] Of course, none of these attributes are truly achievable if the fiduciary is conflicted.[259]

B. Applying these Core Themes to a New Sports Agent Law

A new sports agent law does not have to be complex. However, it must do a better job of applying the themes of principal protection, universality and the minimizing of conflicts that appear throughout the Muhammad Ali Act, Investment Advisers Act, and Miller-Ayala Act.[260]

In applying the theme of "principal protection," a new sports agent law needs to ensure that athletes who are injured by their agents' wrongdoing are the primary beneficiaries of the new act.[261] Furthermore, any remedy granted under a new sports agent law to NCAA member schools should be subordinate to the remedy granted to student-athletes, because NCAA member schools are not in a fiduciary relationship with the agents.[262] Moreover, NCAA member schools could easily overcome any loss they suffer from agents inducing athletes to turn professional or accept money by simply changing their own internal bylaws.[263]

Applying the theme of universality, a new sports agent law should apply to all forms of commerce involving sports agents, irrespective of whether the agents seek to represent professional or amateur athletes.[264] Although Professor Timothy Davis defends the piecemeal approach to sports agent law by arguing that a single statute regulating all aspects of sports agency would be "unrealistic," it seems evident that this is not the case.[265]

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[256] *See supra* note 93 and accompanying text; *see also* Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (2006) (discussing the requirement of full, written disclosure).

[257] BLACK'S LAW DICTIONARY 702 (9th ed. 2009).

[258] *Id.*

[259] *See supra* notes 253–259 and accompanying text.

[260] *See supra* notes 239–259 and accompanying text.

[261] *See supra* notes 240–247 and accompanying text.

[262] *See supra* notes 240–247 and accompanying text.

[263] *See supra* notes 240–247 and accompanying text.

[264] *See supra* notes 248–252 and accompanying text.

[265] Davis, *supra* note 4, at 815.

The Miller-Ayala Act, which is a single statute, has effectively regulated all aspects of sports agency in California.[266] Meanwhile, the Muhammad Ali Act has effectively governed all aspects of boxing managers as a standalone federal law.[267] A new sports agent law thus could likely achieve similar results if drafters stay away from the myopic focus of protecting the NCAA's version of amateurism and shift toward safeguarding the athlete-agent relationship.[268]

Finally, applying the principle of minimizing conflicts, any new sports agent law should adopt a hybrid approach.[269] The worst possible conflict of interest in sports agency entails an agent owning a share of a professional team, because the agent is essentially negotiating against himself. Thus, sports agent laws should adopt the Muhammad Ali Act and Miller Ayala Act's provisions that strictly prohibit sports agents from owning shares of any professional sports team.[270] Meanwhile, conflicts sometimes exist where sports agents seek to represent multiple players on the same team or both players and coaches/managers. In those situations, new sports agent laws should adopt the Investment Advisers Act's somewhat more lenient requirement of full, written disclosure.[271] In addition, where sports agencies seek to simultaneously represent ownership and players, the law should require these agencies to implement a firewall to prevent the exchange of confidential information across these separate divisions.[272]

VII. Conclusion

Although the practice of sports agency dates back to 1925, U.S. athletes were initially slow to hire sports agents, and U.S. legislators have been nearly as slow to develop laws to regulate the athlete-agent relationship. Even worse, once U.S. sports agent law emerged in the late 1990s and early

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[266] *See* Miller-Ayala Athlete Agents Act, West's Ann. Cal. Bus. & Prof. Code § 18896–18896.8 (2000).

[267] *See* Muhammad Ali Boxing Reform Act, H.R. 1832 (2000).

[268] *See supra* notes 248–252 and accompanying text.

[269] *See infra* notes 253–259 and accompanying text.

[270] *See* Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6308 (2006); *see also* Miller-Ayala Athlete Agents Act, Cal. Bus. & Prof. Code §§ 18897–18897.5 (West 2000).

[271] *See* Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (2006) (discussing the Investment Advisers Act's requirement of full written disclosure of conflicts).

[272] *See* Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 Wayne L. Rev. 601, 638 (2008) (noting that "[i]n recent years, firewalls have gained a growing acceptance by government agencies as a way to prevent the flow of similar sensitive information").

2000s, most prevailing law became skewed in favor of protecting NCAA member schools' interests at the expense of professional and amateur athletes.

As the UAAA and SPARTA become more fortified in their second decade, the weaknesses and statutory unfairness of each act have been fully highlighted both by empirical accounts and scholarly research. Indeed, neither act truly protects the interests of student-athletes, nor does either act fully acknowledge the professional athlete-agent relationship. Rather, both acts serve primarily to indoctrinate the NCAA's internal Principle of Amateurism into American law.

As society begins to recognize the importance of implementing more evenhanded sports agent law, the next generation of drafters should turn for guidance to the Muhammad Ali Boxing Reform Act, Investment Advisers Act, and Miller-Ayala Athlete Agents Act: all acts that have proven far more adept at safeguarding important fiduciary relationships from a more neutral perspective. In addition, future drafters should be mindful of the three important themes derived from these acts: principal protection; universality; and minimizing conflicts of interest.

The time has finally come for U.S. sports agent laws to become more than just a Trojan Horse employed by the NCAA to preserve its Principle of Amateurism. Indeed, sports agent laws must change decisively to protect the fiduciary relationship between athletes and their agents. Only with these changes will the sports agent industry be able to improve its ethical standing in society. Moreover, only with these changes will sports agents be able to fully meet the needs of their clients in the twenty-first century.