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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

ERIC WILLENBACHER[†]

"It's not show friends, it's show business."

Bob Sugar[‡]

INTRODUCTION

The life of a sports agent is an attractive one for many people who grew up following professional sports. Numerous young men and women fantasize about the prospect of spending their time around professional athletes, living a luxurious lifestyle, and earning a small fortune collecting commissions on playing and endorsement contracts.¹ Television programs such as HBO's *Arliss* and movies like *Jerry Maguire* serve to further romanticize the profession. Unfortunately, the allure of life as an agent has created an influx of potential agents vying for a very limited number of professional athletes and an even smaller group of superstars.²

Aspiring agents have used illegal, unethical, and unscrupulous methods in collecting clients, and states have been largely unsuccessful at

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[‡] Bob Sugar is a ruthless sports agent character played by actor Jay Mohr in the movie *JERRY MAGUIRE* (TriStar Pictures 1996).

¹ See Bryan Couch, Comment, *How Agent Competition and Corruption Affects Sports and The Athlete-Agent Relationship and What Can Be Done to Control It*, 10 SETON HALL J. SPORT L. 111, 112 (2000) (explaining the increased importance of agents because of the variety of functions they provide including financial management, accounting, public relations, investment, tax and estate planning, and legal counseling).

² See 149 CONG. REC. H4895, 4896-99 (daily ed. June 4, 2003) (statements of Reps. Stearns, Gordon, Sensenbrenner, Jackson-Lee, Osborne, Cannon and Dingell) (outlining the systemic problem of unscrupulous agents and the unfettered damages they cause to student-athletes and universities); Kenneth L. Shropshire, *Sports Agents, Role Models and Race-Consciousness*, 6 MARQ. SPORTS L.J. 267, 271-73 (1996).

regulating the industry.³ The purpose of this Note is to examine current and proposed deterrents for athlete-agents who choose to conduct themselves with disrepute. Part I of this Note will examine the effects that unprincipled agent conduct has on student-athletes, universities, and collegiate athletics in general. Part II introduces Congress' recent attempt at regulating this issue through a law entitled the Sports Agent Responsibility and Trust Act while Part III focuses on pre-existing federal and state mechanisms that are intended to deter sports agents from engaging in certain activities. In Part IV, this Note asserts that Congress' recently enacted statute will be ineffective because its enforcement provisions are no stronger than deterrents already in effect. Thus, it is asserted that the new law will be largely unsuccessful in regulating the industry. Finally, this Note concludes with suggestions on how Congress can effectively combat overreaching agents.

I. THE CURRENT STATE OF THE SPORTS AGENT INDUSTRY

A. *The Size of the Industry*

Currently, the magnitude of the athlete representation industry is staggering. For example, just five years ago, well-known sports agent David Falk sold his company to SFX Entertainment, Inc. for over \$100 million in cash and stocks.⁴ At the time of the transaction, Falk had just twenty-five employees and approximately forty clients, making the size of the transaction even more impressive.⁵ In 2000, SFX was subsequently sold to Clear Channel Communications for a staggering \$4.4 billion.⁶ Firms like SFX and International Management Group boast revenues and profits in the hundreds of millions of dollars.⁷

³ See *infra* Part IV (examining why current attempts at regulation are unsuccessful).

⁴ See Couch, *supra* note 1, at 112; Mark Hyman, *Sparks Fly at Management Powerhouse SFX*, BUS. WK ONLINE, June 18, 2001 (discussing how the sale was consummated for \$120 million), at http://www.businessweek.com/magazine/content/01_25/b3737094.htm.

⁵ Couch, *supra* note 1, at 112 (citing Stefan Fatsis, *Michael Jordan's Agent Scores Big in Takeover Deal*, WALL ST. J., May 5, 1998, at B13). It is also important to note that Michael Jordan was one of Falk's clients and accounted for a disproportionate amount of Falk's revenues. See Stefan Fatsis, *Michael Jordan's Agent Scores Big In Takeover Deal*, WALL ST. J., May 5, 1998, at B13.

⁶ See Hyman, *supra* note 4 (discussing how Falk was stepping down as Chairman of the multi-million dollar conglomerate to focus on personal issues).

⁷ Dan Harkins, *The Art in the Deal*, OHIO BUS. MAG. ONLINE (2003) (stating that IMG is a "global sports marketing empire now raking in about \$1 billion in annual revenues"), at <http://www.ohiobusinessmagazine.com/ME2/default.asp>; Associated Press, *Clear Channel Communications at a Glance*, KAN. CITY STAR, Sept. 29, 2002 (finding that SFX Sports Groups accounted for nine percent of \$8.5 billion in corporate revenues which is roughly \$765 million in revenues).

However, in April 2002, the NFL Players' Association reported that while there were nearly 1200 certified player agents, almost 800 of them did not have a single client, a statistic probably echoed in all the major sports leagues.⁸ As a result, the competition for these athletes has intensified to the extent that many agents have become willing to do whatever it takes to corral college athletes into signing an agency contract before they have finished college or officially declared themselves professionals.⁹

B. *Why Sports Agents Engage in Unethical Activities*

While prospective agents hope to “cash in” by representing athletes, the players' associations in each of the four major sports have limited the amount of commissions that an agent can collect for negotiating a player contract.¹⁰ In 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.¹¹ Even courts have fostered this competition by declaring that agents who attempt to steal athletes from each other through empty promises of more money or better promotional opportunities are not liable for **fraud** or interference with contract.¹² Generally, courts have found that an agent is not liable for attempting to steal an athlete from a competitor as long as the agent was engaging in competition rather than intentionally causing the breach of contract.¹³ This has created a precariously fine line

⁸ *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, 7 (May 15, 2003) [hereinafter *Hearing*] (statement of Rep. Tom Osborne). See generally Peter Larsen, *Agents and Labor: 'There Aren't Enough Jobs Out There for Everyone'*, SPORTS BUS. J., at <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=page.page&pageId=89> (last visited Oct. 20, 2004) (discussing the competitive nature of the business at length).

⁹ See *Hearing*, *supra* note 8, at 3–7 (statement of Rep. Tom Osborne) (detailing personal accounts of agent overreaching).

¹⁰ See Couch, *supra* note 1, at 113 n.11.

¹¹ See Rick Carroll, *Reputation Stains Sports Agents*, DALLAS BUS. J., July 1, 1996 (noting that the industry is so competitive that one has to act illegally or unethically to break into the business), available at <http://dallas.bizjournals.com/dallas/stories/1996/07/01/story2.html?page1>; Couch, *supra* note 1, at 113 (noting that in 1992, there were 200 agents registered with the Major League Baseball Player's Association and only 150 had clients).

¹² *E.g.*, *Speakers of Sport, Inc. v. ProServ, Inc.*, No. 97-C7853, 1998 WL 473469, at *5 (N.D. Ill. Aug. 7, 1998) (holding that a contract between Ivan Rodriguez and Speakers of Sport did not prevent Proserv from attempting to lure Rodriguez away if it could justify its statements to him as opinions about what the company's marketing could do for him); see also Couch, *supra* note 1, at 116–18.

¹³ Couch, *supra* note 1, at 116–19.

between legal and illegal conduct, where agents have free reign to steal each other's clients even if they are under contract.

In order to compete with large firms, individual agents with fewer resources resort to unethical and even illegal behavior.¹⁴ Most often, they engage in what amounts to extreme sales puffing, routinely overestimating the value of a student-athlete in order to convince him to join the agent's client stable.¹⁵ Additionally, when agents are unable or unwilling to meet with athletes directly, they employ runners to do their bidding.¹⁶ This occurs because various states,¹⁷ the National Collegiate Athletic Association ("NCAA"),¹⁸ and individual colleges¹⁹ put laws and rules into effect that attempt to limit the ability of an agent to infiltrate a campus. Therefore, a runner will befriend the student-athlete and then advertise himself to agents as a conduit,²⁰ offering his services as a close friend of the athlete and someone who can exert great influence over the decisions he makes.²¹ Additionally, an agent may already employ the runner and just implant him on the campus to pass money, cars, and other gifts to the athlete to induce him into signing an agency contract before he leaves college.²² The agent or runner may even pass illicit drugs to the student-athlete if he desires.²³ Unfortunately, all of these practices are flagrant violations of NCAA Bylaws which, if discovered, result in the loss of the athlete's college eligibility and severe penalties on the university for which he played, whether or not the school knew or should have known about the infraction.²⁴

¹⁴ H.R. REP. NO. 108-24, pt. 1, at 2 (2003); see Carroll, *supra* note 11 (finding that in order to break into the industry, people have to do unethical or illegal things); Todd L. Erdman, *The Long Awaited Quadruple Play: Proposed Amendments to Four Major Areas of the Alabama Athlete Agents Regulatory Act of 1997*, 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 191, 193-94 (1997) (noting also that agents circumvent the laws to sign athletes).

¹⁵ See, e.g., *Speakers of Sport, Inc.*, 1998 WL 473469, at *4-5 (holding that an agent engaged in competitive salesmanship when he attempted to lure Ivan Rodriguez away from his current agent); see also H.R. REP. NO. 108-24, pt. 1, at 2; Couch, *supra* note 1, at 112.

¹⁶ See *Hearing*, *supra* note 8, at 6 (statement of Rep. Tom Osborne); Couch, *supra* note 1, at 120.

¹⁷ See, e.g., COLO. REV. STAT. §§ 23-16-105 to -107 (2003) (prohibiting athlete-agents from entering campus unless they comply with a university monitored program).

¹⁸ See NCAA OPERATING BYLAWS art. 12, § 12.3 (2003-04) (prohibiting certain types of contact with agents), available at http://www2.ncaa.org/legislation_and_governance/rules_and_bylaws.

¹⁹ See Couch, *supra* note 1, at 120.

²⁰ See *id.*; see also *Hearing*, *supra* note 8, at 6 (statement of Rep. Tom Osborne).

²¹ See Couch, *supra* note 1, at 120-21.

²² *Id.*

²³ Edward Vincent King, Jr., *Practical Advice for Agents: How To Avoid Being Sued*, 4 MARQ. SPORTS L.J. 89, 92 (1993).

²⁴ NCAA OPERATING BYLAWS, §12 (Amateurism) (2003), at <http://www2.ncaa.org/legislat>

William S. Saum, the NCAA Director of Agent, Gambling and Amateurism Activities, has commented that “agents, motivated largely by financial considerations, are willing to use any means necessary to represent a student-athlete who has even a remote chance of playing professional sports.”²⁵ He noted that they often resort to “secret payments or gifts (goods, autos, cash, clothing) to the athlete, undisclosed payments to friends and relatives who may be in a position to influence the athlete, unrealistic promises and considerable arm-twisting.”²⁶ There have even been instances where agents have made payments to athletes or their families and then threatened to disclose the gifts to the NCAA Committee on Infractions if the athlete does not execute an agency contract with him.²⁷ These threats, which are essentially blackmail, put athletes in an extremely vulnerable position when they or one of their family members may have been taken advantage of or have unknowingly accepted gifts or loans.

C. *Effects of Illegal Agent Activities*

These unscrupulous agent activities have severely negative effects upon both the athletes and the universities for which they play. These practices can result in loss of athlete eligibility, substantial team and school penalties, and sanctions on universities that include repayment of money, loss of scholarships, less television revenue, post-season play ineligibility, and game forfeitures.²⁸ Unfortunately, it is not just the potential superstar

ion_and_governance/rules_and_bylaws (last visited Oct. 20, 2004).

²⁵ *Hearing, supra* note 8, at 13 (statement of William S. Saum, Director, Agent Gambling and Amateur Activities, NCAA).

²⁶ *Id.*; see Press Release, Senator Ron Wyden, Wyden Seeks to Limit Misleading Tactics of Sports Agents Courting Student Athletes (June 3, 2003), available at http://wyden.senate.gov/media/2003/06032003_sparta.html. But see ANDREW ZIMBALIST, UNPAID PROFESSIONALS 26 (1999), available at http://faculty.oxy.edu/whitney/classes/success/csp/ncaa_az.htm. Student-athletes may also just want a larger share of the revenue they produce. While they potentially contribute millions of dollars in wealth to the University and their respective coaches are compensated in the seven-figure range, student-athletes are given nothing more than a scholarship for their services. Thus, athletes may be tempted into accepting moneys to receive their fair share, especially those who come from poor families and whose only motivation to attend school was to become a paid professional. *Id.* at 26–29 (examining also the pay-for-play movement in the NCAA).

²⁷ H.R. REP. NO. 108-24, pt. 1, at 2 (2003); Press Release, Senator Ron Wyden, *supra* note 26 (discussing how some agents resort to blackmail to retain clients); see also *infra* note 35 (discussing the plight of Marcus Camby).

²⁸ See *Hearing, supra* note 8, at 6–7 (statement of Rep. Tom Osborne); H.R. REP. NO. 108-24, pt. 1, at 2. Agents have also committed various other types of injuries to the athlete including “(1) income mismanagement; (2) excessive fees; (3) conflicts of interest; (4) incompetence; (5) overly aggressive client recruitment practices; (6) disruption of existing contractual relationships; and (7) misappropriation of funds entrusted to the agent by the athlete.” Rob Remis, *Analysis of*

that agents pursue. They generally employ these extreme measures for client recruitment when there is even a minute chance of an individual becoming a paid professional.²⁹ Meanwhile, the NCAA has estimated that a college athlete has just a one percent chance of making a professional team at all.³⁰ Thus, while one's initial inclination may be that a student-athlete suffers little more than loss of eligibility on his way to a highly paid professional career, this viewpoint is not in line with reality. An athlete who violates the NCAA Bylaws on Amateurism through his conduct with an agent not only loses his eligibility, but his college scholarship as well, which may, in turn, result in him leaving school for financial reasons and failing to ever earn a degree.³¹ Tom Osborne, a Nebraska Congressman and former Head Coach of the national champion Nebraska Cornhuskers has also pointed out that "[w]hen a sports agent promises student-athletes fame and fortune—or a first-round draft selection—a focus on superstardom and wealth may prevent them from considering the consequences of signing away their NCAA eligibility."³² As a result, one onlooker has commented, "[A] youngster gambling his future on a pro contract is like a worker buying a single Irish Sweepstakes ticket and then quitting his job in anticipation of his winnings."³³ One particularly discouraging example is the well-known story of Lenny Cooke, a star high school basketball player who was misled by those around him.³⁴

Civil and Criminal Penalties in Athlete Agent Statutes and Support for the Imposition of Civil and Criminal Liability Upon Athletes, 8 SETON HALL J. SPORTS L. 1, 7–8 (1998). For a list of NCAA imposed penalties on students and universities in violation of NCAA regulations, see NCAA BYLAWS § 19.5 (Enforcement, Penalties) (2003).

²⁹ See *Hearing*, *supra* note 8, at 1 (statement of Rep. Chris Cannon).

³⁰ See *id.* at 1–2 (statement of Rep. Chris Cannon); NAT'L COLLEGIATE ATHLETIC ASS'N, FACT SHEET, tbl. 5 (2003) available at http://www1.ncaa.org/membership/ed_outreach/research/fact_sheet_11_02.htm (expounding upon research results showing that the probability of advancing from NCAA athletics to a professional team for each sport is as follows: men's basketball, 1.3%; women's basketball, 1.0%; football, 2.0%; baseball, 10.5%; men's ice hockey, 4.1%; men's soccer, 1.9%).

³¹ See *Hearing*, *supra* note 8, at 6 (statement of Rep. Tom Osborne) (detailing his supposition with anecdotal evidence); ZIMBALIST, *supra* note 26, at 52.

³² *Hearing*, *supra* note 8, at 6 (statement of Rep. Tom Osborne).

³³ ZIMBALIST, *supra* note 26, at 26 (quoting Tom McMillen, former college and NBA basketball player, former member of Congress and co-chair of the President's Council on Physical Fitness).

³⁴ Cooke was a highly touted high school basketball player, whose fame soared after he played LeBron James, the 2003 top NBA draft selection, at a summer camp. He was sought after by numerous agents and professional scouts, all of who promised him that he would be a top draft pick. Unfortunately, after entering the draft, Cooke was never selected and, as of the writing of this paper, is in the United States Basketball League, a type of minor league where he makes just \$400 per week. Cooke, who never graduated high school, can trace his downfall to the agents and "friends" who told him to concentrate on his game and forego college. He is the quintessential example of someone who was a victim of unscrupulous agents and self-promoters

In contrast to student-athletes who are victims of sports agents, there are many athletes who know full well what they are doing by accepting gifts from agents. These athletes knowingly jeopardize their NCAA eligibility and their school's reputation by accepting such items from potential agents and are then subject to agent manipulation. One such example is Marcus Camby, a basketball star at the University of Massachusetts in the mid 1990s. Camby violated NCAA rules by accepting gifts from agents and later found himself the unwitting victim of his unscrupulous agents.³⁵

Meanwhile, schools suffer a great deal from agent activities that violate NCAA Bylaws, including team and school penalties, loss of revenues, loss of post-season eligibility and damage to their reputations.³⁶ From 1985 to 1996, the average number of major NCAA infractions resulting in school probation and restrictions on scholarships and recruiting has remained steady at approximately thirteen per year, while minor infractions remain far more numerous.³⁷ In a well-publicized incident, the

who promised him the world and advanced him money and gifts when they believed he was a rising star, but quickly deserted him when he got injured, went undrafted, and the hype surrounding him faded. Michael O'Keeffe, *Cooke is Hungry for Success: Lenny Tries to Rebound After Run-In With LeBron*, N.Y. DAILY NEWS, June 22, 2003, at 90; see also J.A. Adande, *Man of the Moment? It Has To Be James*, L.A. TIMES, July 17, 2003, at D9 (discussing James' future as the top draft pick and consensus future superstar).

³⁵ Between October 1994 and April 1996, Camby accepted money, rental cars, jewelry and other gifts from agents John Lounsbury and Wesley Spears. Spears' overreaching went so far as to draft a lawsuit against Camby for the money owed him after Camby did not sign with him and Lounsbury. Spears delivered the draft to the home of Camby's mother in an effort to embarrass Camby and his family and pressure him into returning the under-the-table payments before the press learned about the misconduct. Camby, who is not without blame for knowingly accepting the money and gifts, found himself in an even more precarious position as, so he alleged, Spears tried to blackmail him into signing an agency contract with pictures of Camby and a naked woman at Spears' home and other stories of furnishing Camby with prostitutes. The University of Massachusetts was stripped of its 1996 regional championship and ordered to return the money it earned in reaching the Final Four that year while Camby found himself the prey of vicious agents who threatened to ruin his reputation and future endorsement prospects. See Associated Press, *Lawyer Reprimanded in Camby Case*, Jan. 29, 2001 available at http://www.umasshoops.com/history/alumni/marcus_camby/news/agent_incident_and_punch_jan2001.htm (last visited Oct. 31, 2004); Associated Press, *Would-be Agent Says He Bought Right to Represent Camby*, Feb. 17, 1999 available at http://www.umasshoops.com/history/alumni/marcus_camby/news/agent02171999.htm (last visited Oct. 20, 2004); see also Couch, *supra* note 1, at 126.

³⁶ See *supra* note 28 and accompanying text; see also Kevin Stangel, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 139 (2000) (discussing how NCAA violations severely damaged the reputation of the University of Minnesota in the eyes of the public and legislature according to the chairwoman of the Higher Education Finance Committee in Minnesota).

³⁷ See ZIMBALIST, *supra* note 26, at 46.

University of Michigan was recently penalized for money and loans that star basketball player Chris Webber received from a booster between 1988 and 1993, even though the school was unaware of the payments.³⁸ As a result of Webber's transgressions, Michigan was placed on two years of probation—making it ineligible for post-season play, was forced to forfeit 112 games from the 1990s, lost one scholarship per year for four years beginning in 2004,³⁹ and was required to return \$450,000 in NCAA tournament revenues.⁴⁰ Furthermore, the NCAA erased Webber's name from all record books⁴¹ and subjected the University of Michigan to a great deal of embarrassment, turning a once-revered program into an unattractive school for recruits.⁴² While the overreaching in this instance was caused by a “booster” of the program, rather than an agent, the repercussions that such conduct has on the university is evident.

In addition to the damage that these unethical activities bring to student-athletes and universities, the conduct of unethical agents causes all of intercollegiate athletics to suffer.⁴³ These continuing scandals create a negative perception of college athletics as a whole and vilify the specific school and student involved.⁴⁴ Meanwhile, the agent who caused the NCAA violations and antecedent scandal is not publicly attacked with the same force and fervor as the student(s) and university, because he is not the well-known public figure that an athlete or university is.⁴⁵

³⁸ Gennaro A. Filice IV, *Chris Webber Pleads Guilty; Former Michigan Basketball Star Erased from Record Books*, MICH. DAILY, July 22, 2003, available at <http://www.collegesports.com/sports/m-baskbl/uwire/072203aaa.html> (last visited Oct. 31, 2004). *But see* Dan Wetzel, *Michigan Apologetic, But More Penalties Likely on Way*, CBS SPORTSLINE, Nov. 7, 2002, at <http://cbs.sportsline.com/b/page/pressbox/0,1328,5868431,00.html> (last visited Oct. 31, 2004) (indicating that Michigan should have known better because “programs throughout the Big Ten and the nation” were always suspicious that Coach Steve Fisher's program was plagued by violations).

³⁹ *See* Filice, *supra* note 38 (noting that all of these penalties caused the school to lose money).

⁴⁰ *See* Wetzel, *supra* note 38.

⁴¹ *See* Filice, *supra* note 38.

⁴² Wetzel, *supra* note 38 (noting that Michigan Athletic Director, Bill Martin, felt that having to remove the commemorative banners from the years in question was like a dagger in his heart).

⁴³ *See* *Hearing*, *supra* note 8, at 6–7 (statement of Rep. Tom Osborne).

⁴⁴ *See id.*

⁴⁵ *See id.*; Peter Hockaday, *Wyden's Bill Could Lessen Agents' Power*, OR. DAILY EMERALD ONLINE ED., June 4, 2003, at <http://www.dailymerald.com/vnews/display.v/ART/2003/06/04/3ede1b4184f02> (last visited Oct. 31, 2004) (noting that an agent is often not held accountable for the damage he caused).

D. *Inability of a University to Protect Itself*

While it may seem unfair that universities are punished by the NCAA when, unbeknownst to them, their student-athletes are breaking NCAA rules with agents, courts continue to enforce NCAA penalties against both the universities and athletes. Appealing to judicial forces is a futile practice for athletes or universities looking for relief from NCAA regulations. For example, in *Gaines v. National Collegiate Athletic Ass'n*,⁴⁶ the Tennessee District Court enforced NCAA rules and denied a football player continued college eligibility after he entered the NFL draft and was not selected even though he never signed with an agent or professional team nor accepted money or gifts from either.⁴⁷ Gaines had challenged the NCAA's eligibility rules as a violation of anti-trust laws. The court held that the NCAA Bylaws were not subject to anti-trust challenges and that even if they were, they had a legitimate business justification.⁴⁸ Similarly, in *Bowers v. National Collegiate Athletic Ass'n*,⁴⁹ the district court upheld the NCAA's academic standards for eligibility challenged by a learning-disabled plaintiff. The court found that the Americans with Disabilities Act of 1990,⁵⁰ the Sherman Act,⁵¹ and various state statutes did not apply to the NCAA's promulgation of eligibility requirements.⁵²

The above examples serve to illustrate that courts are unwilling to reverse NCAA rulings or find its Bylaws illegal. If federal courts will not monitor the NCAA in anti-trust and disability areas, it seems unlikely that a plaintiff will be successful in having an NCAA penalty or regulation overturned in any arena. Thus, universities and athletes who are unwitting victims of sports agents who cause NCAA violations can expect to have little success appealing assessed penalties.

II. THE SPORTS AGENT RESPONSIBILITY AND TRUST ACT

In response to the unethical and illegal activities of sports agents, and the egregious consequences and damages that results from their conduct, both the House of Representatives and the Senate introduced a bill to punish unscrupulous agents. The Sports Agent Responsibility and Trust

⁴⁶ 746 F. Supp. 738 (M.D. Tenn. 1990).

⁴⁷ *Id.* at 740-41.

⁴⁸ *Id.* at 744-47.

⁴⁹ 9 F. Supp. 2d 460 (D.N.J. 1998).

⁵⁰ 42 U.S.C. § 12101 et seq.

⁵¹ 15 U.S.C. §§ 1-7 (2003).

⁵² *Bowers*, 9 F. Supp. 2d at 499 (holding that similar state anti-trust and common law duties did not apply).

Act⁵³ ("SPARTA") aimed to deter sports agents from engaging in certain overreaching activities and to prevent the unknowing violation of NCAA regulations by universities and athletes.⁵⁴ The bill had three primary objectives. First, it established as illegal certain activities by agents relating to the signing of contracts with student-athletes.⁵⁵ This is the true substance of the act in that it defines the duties of sports agents and prohibits certain conduct.⁵⁶ The last two objectives dealt with punishing sports agents who violate the law through fines and civil actions by universities and state attorneys general. Specifically, SPARTA's second objective was to treat violations of the Act as unfair or deceptive acts or practices of trade to be regulated by the Federal Trade Commission ("FTC") under 15 U.S.C. § 57a(a)(1)(B).⁵⁷ Thus, it effectively gives jurisdiction to the FTC and allowed the commission to issue penalties in accordance with its powers.⁵⁸ The last objective of the Act was to give institutes of higher learning and state attorneys general a federal cause of action for damages caused by agents who violate the law.⁵⁹

While the disclosure requirements and the prohibited activities of SPARTA will not be analyzed here, and are to be presumed sufficient to

⁵³ See S. 1170, 108th Cong. (2003); H.R. 361, 108th Cong. (2003).

⁵⁴ See *Hearing, supra* note 8, at 7 (statement of Rep. Tom Osborne); H.R. REP. NO. 108-24, pt. 1, at 2 (2003) (stating that the goal of SPARTA "is to define the prohibited conduct employed by [agents] . . . as well as require written disclosure to the student athlete prior to signing a contract and to the educational institution after a contract has been entered").

⁵⁵ See S. 1170, 108th Cong. § 3 (2003); H.R. 361, 108th Cong. (2003); H.R. REP. NO. 108-24, pt. 2, at 8 (2003) (statement of Rep. Sensenbrenner discussing what is prohibited by the Act); 149 CONG. REC. H4895, 4898 (daily ed. June 4, 2003) (statements of Reps. Osborne and Cannon outlining certain conduct surrounding agency contracts that is to be prohibited under SPARTA to protect the student-athlete). Among the activities prohibited include: (1) recruiting or soliciting a student-athlete to enter into an agency contract by giving false or misleading information, making a false promise or representation, or providing anything of value to the athlete or anyone associated with the athlete before entering into such a contract; (2) entering into an agency contract with a student-athlete without providing a required disclosure document signifying the loss of NCAA eligibility; (3) predating or postdating an agency contract. It also requires: (1) disclosure to the student-athlete that a written or oral agreement of representation will cause loss of NCAA eligibility; (2) both the athlete and agent to notify the athletic director at the athlete's educational institution that the athlete has entered into an agency contract within 72 hours or before his/her next athletic competition, whichever is earlier. S. 1170, 108th Cong. § 3 (2003); H.R. 361, 108th Cong. (2003); see Press Release, Senator Ron Wyden, *supra* note 26.

⁵⁶ See S. 1170, 108th Cong. § 3 (2003); H.R. 361, 108th Cong. § 3 (2003).

⁵⁷ S. 1170, 108th Cong. § 4; H.R. 361, 108th Cong. § 4.

⁵⁸ S. 1170, 108th Cong. § 4; H.R. 361, 108th Cong. § 4; H.R. REP. NO. 108-24, pt. 2, at 4 (June 2, 2003) (stating that one of the purposes of the law was to designate certain conduct by sports agents as unfair and deceptive acts regulated by the FTC).

⁵⁹ S. 1170, 108th Cong. §§ 5-6; H.R. 361, 108th Cong. §§ 5-6; H.R. REP. NO. 108-24, pt. 2, at 4 (stating that the Act gives either the FTC, the attorney general for the state, or the university harmed, a cause of action for economic damages).

achieve the intended goal, the penalties and consequences imposed for violating the law merit further discussion.⁶⁰ This Note asserts that making violations of the law unfair and deceptive practices of trade, and creating a civil remedy for state attorneys general and universities against agents violating the act, are insufficient proposals that will not deter agents from engaging in unscrupulous activities. Simply put, SPARTA is not strong enough to reach its goal of preventing certain agent activities because various state and federal deterrents for sports agents already exist, and SPARTA's penalty provisions are no stronger than deterrents that have already proved unsuccessful.

III. PRE-SPARTA: LAWS AND CAUSES OF ACTION INTENDED TO DETER SPORTS AGENTS FROM ENGAGING IN CERTAIN ACTIVITIES

A. Existing Federal Deterrents

Several federal criminal laws already exist that should deter certain agent activities. Though these federal laws seem to carry greater penalties—such as jail time—than FTC violations or civil suits, they have not deterred sports agents from engaging in illegal conduct.

In the revolutionary case of *United States v. Walters*,⁶¹ an Illinois District Court convicted **Norby Walters** and **Lloyd Bloom** of mail fraud, conspiracy, and Racketeer Influenced and Corrupt Organizations (“RICO”) Act violations.⁶² **Walters** and **Bloom** were sports agents who specialized in representing college football players by secretly signing them to agency contracts and then forcing them to lie about the existence of their contracts on NCAA eligibility forms so they could continue to receive scholarships and play football for their respective schools.⁶³ They provided signing bonuses in cash, loans, cars, and other gifts and postdated the signed agency contracts so that the students could retain their eligibility.⁶⁴ In all, **Walters** and **Bloom** recruited fifty-eight college players, but were such poor negotiators that all but two athletes signed with other agents upon graduating from college.⁶⁵ Instead of suing the athletes for the return of the money, loans, and gifts they bestowed upon them, **Walters** and **Bloom**

⁶⁰ This Note will focus on the last two objectives of SPARTA, which can be encapsulated as an attempt to deter sports agents from engaging in certain activities.

⁶¹ 704 F. Supp 844 (N.D. Ill. 1989), *rev'd*, 913 F.2d 388 (7th Cir. 1990).

⁶² 913 F.2d at 389–90 (noting that that the circuit court did reverse on procedural grounds).

⁶³ *Id.*

⁶⁴ *Id.*; see also Couch, *supra* note 1, at 121–23.

⁶⁵ 913 F.2d at 390 (stating that most athletes dismissed **Walters** and **Bloom** as their agents because they “felt cheated by [their] clandestine tactics”).

personally threatened the athletes in an attempt to enforce the contracts.⁶⁶ A jury found them guilty of various counts of mail fraud, RICO violations, and conspiracy to commit mail fraud and sentenced Walters to five years in prison followed by five years probation and Bloom to three years in prison followed by five years probation.⁶⁷ While the Court of Appeals for the Seventh Circuit eventually reversed the decision for procedural errors,⁶⁸ the impact of the case was far-reaching. It meant that sports agents would now be subject to various white-collar crimes and that their activities could be punished under certain federal laws even if their conduct was common among other dishonest agents.⁶⁹ While the prospect of jail time should have served as a significant deterrent to agents engaged in this conduct, the congressional testimony of Representative Osborne⁷⁰ and William Saum,⁷¹ an NCAA Executive, tells us that these same problems persist today.

In addition to Walters, the Securities and Exchange Commission has investigated whether sports agents have illegally served as financial advisors to their clients.⁷² For example, David Dayton Lukens, a California investment adviser, was forced to settle a lawsuit instituted by the SEC accusing him of stealing more than \$25 million from various athlete investors.⁷³ The prospect of SEC inquiries should serve as a deterrent to sports agents as well.

B. *State Criminal and Administrative Statutes*

In addition to federal laws that can potentially punish unscrupulous agents, there are many state statutes that attempt to regulate agent conduct.⁷⁴ Some academics believe that states are motivated to regulate athlete-agents by economic principles and should be left alone to do so.⁷⁵

⁶⁶ *Id.* (finding that while their attorneys found the contracts enforceable, despite their violations of NCAA bylaws, Walters and Bloom attempted to enforce them on their own rather than through a judicial process).

⁶⁷ *Id.* at 390–91.

⁶⁸ *Id.* at 393.

⁶⁹ See Couch, *supra* note 1, at 122–23.

⁷⁰ See *Hearing*, *supra* note 8, at 3–7 (statement of Rep. Tom Osborne).

⁷¹ See *id.* at 13–14 (statement of William Saum).

⁷² See Couch, *supra* note 1, at 133.

⁷³ See, e.g., Michael O’Keeffe, *Money Men in Demand: There Are 1,600 Agents and Advisers Vying for a Piece of the \$2.5 Billion NFL Players Will Earn*, N.Y. DAILY NEWS, Apr. 27, 2003 (including victims such as Simeon Rice, Eric Dickerson and Shannon Sharpe).

⁷⁴ E.g., CAL. BUS. & PROF. CODE §§ 18895–97 (Deering 2003); MICH. COMP. LAWS ANN. § 750.411e (2003); TEX. OCC. CODE ANN. §§ 2051.001–.553 (Vernon 2004); see also Diane Sudia & Rob Remis, *Athlete Agent Contracts: Legislative Regulation*, 10 SETON HALL J. SPORTS L. 317, 319 n.2 (2000) (describing various state laws that regulate athlete-agent contracts).

⁷⁵ Diane Sudia & Rob Remis, *The History Behind Athlete Agent Regulation and the ‘Slam*

Specifically, state economies generate a great deal of money through high profile NCAA football and basketball programs and when these programs suffer from NCAA penalties, the economic impact can be felt throughout the state.⁷⁶ This is especially true of state-funded institutions, which, if they do not generate athletics revenues, must supplement the university's funds with additional tax dollars.⁷⁷ The effects of this revenue shifting can be felt by out-of-state students, university employees, and other residents of the state.⁷⁸ Thus, states have great incentive to create statutes restricting agents' conduct in addition to protecting student-athletes.

As of the writing of this Note, more than half of the fifty states have passed athlete-agent signing statutes that attempt to regulate agent activities.⁷⁹ Many of these statutes have provisions similar to SPARTA, but have not successfully deterred the prohibited conduct.⁸⁰ Approximately half of the jurisdictions that have these statutes require the agent to register with the state and pay registration fees.⁸¹ An example of a typical statute is California's, which forbids the agent or his representative from offering or providing money or anything of value to the student-athlete.⁸² The law also limits athlete-agent contact and provides civil and criminal penalties ranging from fines of up to \$50,000 to one year in jail.⁸³ However, while this law exists, there have been relatively few cases where agents have seen any real jail time⁸⁴ and the prospect of fines is not a true deterrent in this industry.⁸⁵ Many statutes also expressly require that the agent provide

Dunking of Statutory Hurdles, VILL. SPORTS & ENT. L.J. 67, 70-73 (2001).

⁷⁶ *Id.* 70-71. The money generated by athletics is typically reinvested in numerous pursuits of the university.

⁷⁷ *Id.* at 72-73.

⁷⁸ *Id.* at 72-73 (examining the consequences to a state, such as lost scholarship opportunities for out of state students, employee lay-offs, and tax increases within the state).

⁷⁹ Sudia & Remis, *supra* note 74, at 319 n.2; e.g., CAL. BUS. & PROF. CODE §§ 18895-97; MICH. COMP. LAWS ANN. § 750.411e; TEX. OCC. CODE ANN. §§ 2051.001-.553.

⁸⁰ See *infra* Part IV.B-C.

⁸¹ Couch, *supra* note 1, at 131.

⁸² *Id.* (citing CAL. BUS. & PROF. CODE §§ 18895-18897.97 (West 1997)).

⁸³ *Id.* (citing CAL. BUS. & PROF. CODE §§ 18.897.8, 18897.93 (West 1997) (allowing an agent to be imprisoned or fined the maximum amount)); see also CAL. BUS. & PROF. CODE §18897.93 (giving courts the right to suspend or revoke a person's ability to continue business as an athlete-agent).

⁸⁴ An extensive Westlaw and Lexis search did not uncover a case where anyone was sentenced to jail time. While such cases may exist, they are presumably rare. Moreover, in 1993, there were only twenty-two agents registered in the entire state of California, yet many agents continued to do business in the state without penalty, including Leigh Steinberg, a well publicized football agent. See King, *supra* note 23, at 92. It has been suggested that the state just "has better things to do than send out the state's attorney to chase down agent regulation violators." *Id.*

⁸⁵ See *infra* Part IV.A.

notice of an agency contract to certain entities and individuals.⁸⁶ Some statutes require that the agent provide such notice within a certain time frame and regulate the content of the notice while others further establish requirements in which the contract execution must occur.⁸⁷ These types of provisions are not significantly different from the provisions in both the regulating and enforcement provisions of SPARTA.⁸⁸

Generally, the statutes impose administrative fines and penalties on the agent as well as make certain conduct a criminal offense punishable as either a misdemeanor or felony, depending on the jurisdiction.⁸⁹ However, many of the statutes criminalizing conduct have found the criminal prongs of their law unenforceable because of vagueness and lack of personal jurisdiction over the defendant.⁹⁰ Thus, states have resorted to prosecuting agents under other state statutes dealing with bribery and unlawful trade practices.⁹¹ Recently, in 2001, William "Tank" Black was convicted in Florida of fraud, conspiracy and obstruction of justice in connection with his activities as a player agent.⁹² Specifically, he was accused and convicted of stealing over \$14 million from athletes.⁹³ In sum, there already exist many state penal deterrents for agents who may wish to act unethically and cause athletes and schools to violate NCAA rules.

C. State Civil Statutes

In addition to criminal penalties, state legislatures have introduced civil remedies for states, universities, athletes, agents, and other injured parties to pursue against unscrupulous sports agents.⁹⁴ These civil provisions include the denial, suspension, or revocation of an agent's registration or license, and have been adopted by California, Florida, and

⁸⁶ Sudia & Remis, *supra* note 74, at 324.

⁸⁷ *See id.*

⁸⁸ S. 1170, 108th Cong. §§ 3–7 (2003); H.R. 361, 108th Cong. §§ 3–7 (2003); *see also supra* Part II.

⁸⁹ *See Sudia & Remis, supra* note 75, at 84.

⁹⁰ *See generally id.* at 87–91 (discussing an agent's ability to avoid agent laws by signing and executing out of state contracts and by exploiting various loopholes in state laws).

⁹¹ *See, e.g., Abernethy v. State*, 545 So.2d 185 (Ala. Crim. App. 1988) (while the jury trial found the defendant not guilty of bribery and unfair trade practices, the potential for prosecution under these laws did exist). However, *Abernethy* also held that an agent who gives student-athletes money and gifts could not be convicted of tampering with a sports contest. *Id.* at 191.

⁹² David Aldridge, *Agents of Change See Slow Progress in Sports*, ESPN.COM, Feb. 28, 2002, at http://espn.go.com/columns/aldrige_david/1342031.html (last visited Oct. 31, 2004).

⁹³ *Id.*

⁹⁴ *See generally Sudia & Remis, supra* note 75, at 83 (noting that over twenty athlete-agent statutes provide civil remedies for injured parties); Remis, *supra* note 28, at 13–22 (discussing various types of civil and administrative provisions aimed at regulating the sports agent including subjecting him to suit by universities and athletes).

Pennsylvania along with numerous other states.⁹⁵ Many states also provide that agent contracts entered into in violation of state law—while the student has not declared his intention to become a professional to his university—are either void or voidable.⁹⁶ Commonly, the statutes also provide that agents forfeit their right of repayment for the services, money and gifts conferred on the student-athlete when agent contracts are entered into illegally.⁹⁷

Most importantly, state statutes create private causes of action for injured persons, universities or student-athletes. However, the scope of the potential plaintiffs does vary from state to state—some allow any damaged party to seek relief and others only allow athletes to do so.⁹⁸ The various state statutes provide for damages including “actual damages . . . punitive damages . . . court costs . . . attorney fees . . . equitable relief . . . and treble damages”⁹⁹

D. *State Common Law*

There also exist common law actions for universities, student-athletes, and state attorneys general to pursue. Thus, even if a particular state has not provided for civil penalties or causes of action for injured parties, the common law may provide a remedy. For example, many state courts have found that a contractual relationship exists between a student-athlete and a university and that either party may bring an action against the other for breach of contract.¹⁰⁰ Courts have based this finding on the premise that the financial benefits bestowed on the student are valid consideration for their agreement to play, thus creating the contractual relationship.¹⁰¹ The examples are numerous.

As far back as 1972, in *Taylor v. Wake Forest University*,¹⁰² the North Carolina Court of Appeals held that a contract existed between the university and a student-athlete and his father.¹⁰³ Taylor agreed, in accordance with his scholarship, to abide by NCAA regulations, follow the

⁹⁵ Remis, *supra* note 28, at 12–14 (finding such laws also exist in Alabama, Arkansas, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, Tennessee, Texas, and Washington).

⁹⁶ *Id.* at 15.

⁹⁷ *See id.* at 15–16.

⁹⁸ *See id.* at 17–20 (noting that most states that create these causes of action generally just provide actions for the athlete and the university and not all persons who were consequently injured).

⁹⁹ *Id.* at 20 (emphasis omitted).

¹⁰⁰ *See Stangel, supra* note 36, at 140–42.

¹⁰¹ *Id.* at 140–46.

¹⁰² 16 N.C. App. 117 (N.C. Ct. App. 1972).

¹⁰³ *See id.* at 121–22 (finding proper consideration was received on each side).

training schedule for the football team, and to maintain a minimum grade point average in addition to other requirements.¹⁰⁴ Taylor and his father subsequently decided that he could circumvent certain training rules in order to maintain "reasonable academic progress."¹⁰⁵ As a result, the university terminated Taylor's scholarship and Taylor sued.¹⁰⁶ The court consequently dismissed Taylor's suit because it held that Taylor violated the contract between the parties when he did not comply with the team's training rules and physical eligibility requirements.¹⁰⁷ Thus, if the court was willing to find a breach of contract for violation of training rules the court, presumably, would also find a breach of contract when the athlete fails to conform to NCAA eligibility requirements that were also an element of the contractual relationship.

Similarly, in *Williams v. University of Cincinnati*,¹⁰⁸ an Ohio court found that a contractual relationship existed between a basketball player who had signed a national letter of intent to play basketball and the University of Cincinnati.¹⁰⁹ The court held that Williams had become academically ineligible after he failed to complete junior college as required by his scholarship and financial aid agreements which were valid contracts.¹¹⁰ The court also found that the university did not violate the contract by failing to sufficiently appeal the NCAA's ruling that Williams was ineligible.¹¹¹ In fact, the court declared that the student was the one who had violated the contractual relationship by failing to remain academically eligible.¹¹²

There are numerous jurisdictions that have made similar findings. In *Hendricks v. Clemson University*,¹¹³ the South Carolina Supreme Court also recognized that many aspects of the student/university relationship are contractual.¹¹⁴ In *Carr v. St. John's University*,¹¹⁵ the New York Court of

¹⁰⁴ See *id.* at 121 (concluding that the scholarship Taylor received was valid consideration in exchange for abiding by these requirements).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 121–22.

¹⁰⁷ *Id.* (holding that Taylor could not insert his own academic standards clause and that this was not an ambiguity in the agreement).

¹⁰⁸ 112 Ohio Misc. 2d 36 (Ohio Ct. Claims 2001).

¹⁰⁹ *Id.* at 47 (finding valid consideration was received on either side of the agreement).

¹¹⁰ *Id.* at 46–47 (holding that Williams did not pass the proper classes to allow him to graduate from junior college and thus make him eligible to play basketball for the University of Cincinnati).

¹¹¹ *Id.* at 46–47 (finding that the University was not responsible for fighting the actions of the NCAA to unreasonable ends).

¹¹² *Id.* at 47.

¹¹³ 578 S.E.2d 711 (S.C. 2003).

¹¹⁴ *Id.* at 716–17 (holding that the university did not expressly or impliedly promise to ensure student's athletic eligibility in exchange for his baseball scholarship and that it was only

Appeals held that a contractual relationship existed between the student and the private university to which the student was admitted.¹¹⁶ In *Begley v. Corporation of Mercer University*,¹¹⁷ a Tennessee district court held that Begley, an aspiring basketball player, had violated his scholarship contract by failing to achieve a minimum grade point average.¹¹⁸ There, the court also held that the university did not assume the risk that a student would be declared ineligible by the NCAA even if it should have known the player was ineligible at the time of contract.¹¹⁹

The above cases demonstrate that many state courts recognize that the relationship between an institute of higher learning and a student-athlete is contractual in nature. It is asserted that if a contract exists between the two parties, the university has the ability to bring an action against the student for breach of contract, which includes a violation of NCAA eligibility requirements outlined in the agreement.¹²⁰ Therefore, it follows that a university could also bring an action against an athlete for consequential damages that were reasonably foreseeable,¹²¹ which may include assessed penalties on the university. While contract law generally does not allow a party to sue for punitive damages, an exception is generally made for cases of **fraudulent** or outrageous conduct,¹²² which the violation of NCAA rules may constitute. In summary, a university that enters a contractual relationship with a student based on a scholarship or financial aid may sue a student in breach for compensatory, consequential, and/or punitive damages.

discussed after his enrollment).

¹¹⁵ 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962), *aff'g* 17 A.D.2d 632, 231 N.Y.S.2d 410, (2d Dep't 1962).

¹¹⁶ *Carr*, 17 A.D.2d at 633, 231 N.Y.S.2d at 413.

¹¹⁷ 367 F. Supp. 908 (E.D. Tenn. 1973).

¹¹⁸ *Id.* at 910.

¹¹⁹ *Id.* (holding that the school was not required to sustain a scholarship to a student-athlete who failed to meet academic requirements even if the school feared that such an outcome was possible or even likely when it extended the scholarship).

¹²⁰ *But see* Stangel, *supra* note 36, at 147–48 (arguing that, because the NCAA generally requires that national letters of intent, scholarship agreements, financial aid agreements, and student-athlete statements be uniform, that courts may view these agreements as adhesion contracts and unenforceable if there are any shocking clauses). Also, some statutes bar suits against students for violations of NCAA regulations. *Id.* at 150.

¹²¹ E. ALLAN FARNSWORTH ET AL., *CONTRACTS* 525 (6th ed. 2001) (discussing how consequential damages are permissible when they are foreseeable and arise from the circumstances of the contract); *see also* U.C.C. §§ 2-712(2), 2-715 (2003).

¹²² *See* FARNSWORTH ET AL., *supra* note 121, at 18 (explaining that punitive damages are allowed for tortious conduct that is sufficiently outrageous). This could also give rise to a common law **fraud** action if the athlete knowingly made a false representation to the university before entering into the contract. *See* Stangel, *supra* note 36, at 150–51.

Moreover, the university also has a common law action against a sports agent who causes an NCAA violation because he has tortiously interfered with its contract with the student-athlete. Generally, the tort of interference with contractual relations requires that the conduct is intentional, it interferes with the contract—usually, but not always, requiring that the defendant cause the party to break the contract—the defendant knew that the contract existed, and the plaintiff suffered some sort of pecuniary damages.¹²³ This tort remedy should be available against an agent because, presumably, he will always know or have constructive knowledge that the student-athlete has some sort of scholarship, financial aid agreement, or national letter of intent with his university and that violating NCAA rules breaches that contract. Furthermore, violating NCAA regulations will cause the university pecuniary damages, in the form of penalties, under the NCAA Bylaws.¹²⁴ Thus, when the agent intentionally showers the athlete with gifts, loans, and other benefits, the agent is interfering with the contract and subject to suit. Of course, tortious interference with a contract generally gives rise to punitive damages if the defendant's actions were intentional and without justification.¹²⁵ This potential for suit should serve as a deterrent to sports agents who design to interfere with student contracts with universities.

IV. CURRENT LAW DOES NOT AND WILL NOT DETER SPORTS AGENTS FROM ENGAGING IN UNSCRUPULOUS ACTIVITIES

A. SPARTA's Penalties and Civil Causes of Actions Are Not Substantially Different from Existing Law

These state and federal laws have not deterred the sports agent from overreaching and facilitating the violation of NCAA Bylaws.¹²⁶ It seems that the problem lies in the penalties, remedies, and potential deterrents the statutes attempt to employ. On the one hand, SPARTA is essential in creating a uniform national code of conduct and requirements for sports agents.¹²⁷ It imposes statutory regulations on agents in half of the fifty states where such laws do not exist¹²⁸ and creates uniformity in the others

¹²³ See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 1078, 1106 (10th ed. 2000).

¹²⁴ See *supra* note 28 and accompanying text.

¹²⁵ SCHWARTZ ET AL., *supra* note 123, at 1106 (postulating that a plaintiff may sue a third party for tortious interference with a contract in addition to suing on the contract).

¹²⁶ See *supra* Part I (discussing the current problems in the industry).

¹²⁷ See S. 1170, 108th Cong. § 3 (2003); H.R. 361, 108th Cong. § 3 (2003).

¹²⁸ See *supra* note 79 and accompanying text (discussing how half the states have such laws).

so that agents cannot take advantage of ambiguities in certain states.¹²⁹ However, the deterrents imposed by SPARTA, the creation of a civil cause of action for universities and state attorneys general, as well as FTC penalties, are not substantially different from deterrents that already exist.¹³⁰

First, finding an unfair or deceptive act or practice affecting commerce will only cause the FTC to order the actor to cease such activity.¹³¹ If the actor continues the unfair practice, the Commission may then seek a maximum civil penalty of \$11,000 for each act.¹³² This fine is certainly on par with criminal and civil penalties that already exist on state and federal levels.¹³³ In fact, some states, like California—a state where many agents originate—have civil penalties that rise to \$50,000.¹³⁴ Moreover, state statutes and common law already give universities the ability to sue agents who violate the law, as Congress proposes.¹³⁵ SPARTA does not provide any further deterrent.¹³⁶ If SPARTA's penalty and remedy provisions are no different from those that already exist, it begs the question: How will SPARTA effectively stop sports agents from engaging in these activities? The uneasy answer is that it will not. If the current deterrents are not working, then SPARTA, whose deterrents are strikingly similar to those already in effect, will be just as ineffective in keeping unscrupulous agents out of the athlete-representation industry.

B. *Civil and Criminal Penalties Do Not Deter Sports Agents*

It seems that the reason criminal and civil penalties are insufficient deterrents to illegal agent activity is because agents have far too much to gain from signing a potential superstar to be deterred by fines and other

¹²⁹ See *supra* note 90 and accompanying text (noting how agents may avoid state laws due to lack of personal jurisdiction or vagueness); see also Robert N. Davis, *Exploring the Contours of Agent Regulation: The Uniform Athlete Agents Act*, 8 VILL. SPORTS & ENT. L.J. 1, 2 (2001) (noting that state laws do not require reciprocal enforcement or registration requirements).

¹³⁰ See *supra* notes 74–88 and accompanying text.

¹³¹ 15 U.S.C. §§ 45(a)(2), 45(g) (2003).

¹³² 15 U.S.C. § 45(l)–(m), amended by 16 CFR § 1.98 (2003) (raising the FTC fine in 15 U.S.C. § 45(l)–(m) from \$10,000 to \$11,000).

¹³³ See *supra* Part III.A–B.

¹³⁴ See *supra* notes 82–83 and accompanying text.

¹³⁵ See *supra* Part III.C.

¹³⁶ See S. 1170, 108th Cong. (2003); H.R. 361, 108th Cong. (2003). *But see 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. 19–24 (June 5, 2002) (statement of Howard Beales, Director of the Bureau of Consumer Protection at the Federal Trade Commission) (stating that the FTC has the authority to institute civil actions seeking civil penalties, restitution or “disgorgement to the U.S. Treasury of defendants’ ill-gotten gains”).

penalties.¹³⁷ Currently, the average salary for a professional athlete is well over a million dollars per year: the NBA's average salary is \$4.5 million; MLB is \$2.4 million; the NHL is \$1.6 million; and the NFL pays approximately \$1.1 million per year.¹³⁸ Therefore, if an agent is able to secure just two NFL players as clients and takes just a four percent¹³⁹ commission on the players' salary, he will be able to collect \$88,000 for negotiating their contracts.¹⁴⁰ Though this does not seem like a lot of money on its face, this assumes that the agent only represents two average players. It also does not factor in any potential promotional contracts that he secures. If, for instance, an agent is able to secure just one superstar athlete, like LeBron James, whose average salary is between four and five million dollars per year¹⁴¹ and who earned over \$100 million in endorsement contracts before he even played a game,¹⁴² the deal becomes much more lucrative as the agent could earn well into seven or eight figures, considering commissions on endorsement deals grow to 10–20%.¹⁴³ Thus, an agent who can secure just a handful of superstars or a stable of average players has earnings potential of well into the millions of dollars.¹⁴⁴ It is postposterous to assume that penalties of \$11,000—as

¹³⁷ *Hearings, supra* note 8, at 1–2 (statement of Rep. Chris Cannon) (finding that there is too much money to make as a successful sports agent to be deterred by monetary penalties); *id.* at 4–8 (statement of Rep. Tom Osborne) (same).

¹³⁸ Thomas Heath, *Below the Red Line; As a Majority of Teams Appear to Lose Money, Expansion and Soaring Salaries are Blamed*, WASH. POST, Feb. 1, 2003, at D01.

¹³⁹ Michael Cohen, *Meet the Real Jerry Maguires*, BOSTON BUS. J., Oct. 5, 1998 (finding that the average commission for player contracts is between three and five percent), available at <http://boston.bizjournals.com/boston/stories/1998/10/05/focus1.html>; Eric Fisher, *The Lurid Lure of Money*, INSIGHT ON THE NEWS, Apr. 16, 2001, at 22 (declaring that commissions on playing contracts generally cap out at 4%).

¹⁴⁰ This is because four percent of \$2.2 million (two average NFL players) is \$88,000 (.04 x \$2.2 million).

¹⁴¹ Tom Withers, *No. 1 Draft Pick LeBron James Close to Signing with Cleveland Cavaliers* (July 2, 2003) (reporting that James will “make \$4.02 million (2003–2004), \$4.32 million (2004–2005) and \$4.62 million (2005–2006) over the next three seasons”), available at 2003 WL 58532546.

¹⁴² See Matt Hayes, *It's LeBron's World*, SPORTING NEWS, July 21, 2003, at 2 (hypothesizing about whether the media attention surrounding LeBron James will translate into playing success); Tom Withers, *LeBron James Hits Jackpot with Endorsement Deals*, USA TODAY.COM, May 22, 2003, at http://www.usatoday.com/sports/basketball/draft/2003-05-22-james-deals_x.htm.

¹⁴³ See Bill Borrows, *Show Me the Money: New Sitcom Trevors World Of Sport Takes a Free Kick at the Cut-Throat Game of the Celebrity Sports Agent*, THE GUARDIAN (London), Aug. 9, 2003, at 8 (discussing the potential to make commissions on various services as a sports agent); Fisher, *supra* note 139, at 22 (stating that commissions can reach as high as 20%).

¹⁴⁴ An agent who can corral a modest client base of five all-star NBA players can earn up to \$6.15 million per year or more. This is because four percent of a player's salary of approximately \$12 million is \$480,000; multiplied by five players, the amount rises to \$2.4 million. Plus, considering that an all-star player may earn an additional \$5 million per year in endorsements, a

proposed in SPARTA—will deter an agent from engaging in this enormous opportunity. There is simply too much to gain as a successful agent to be deterred by fines this low.

Some onlookers, however, believe that sports agents are currently undeterred because they can simply headquarter themselves in a state without substantial athlete-agent laws.¹⁴⁵ While there may be some merit to this viewpoint, the low monetary penalties also have a correlative effect and cannot be disregarded. Simply stated,

The multimillion-dollar value of professional athlete salaries, signing bonuses, and endorsement contracts has resulted in a proliferation of unscrupulous practices by some sports agents. . . . [A]gents, or their representatives, are willing to break the rules in order to sign promising student-athletes to an agency contract. Agents are willing to do this because the fees that accompany the representation of a professional athlete are considerable, and the consequences that the agent will suffer in comparison to the athlete or school are *limited or non-existent*.¹⁴⁶

Thus, while SPARTA's FTC penalties of \$11,000 per violation may dissuade an aspiring agent with little equity from acting illegally when attempting to enter the industry, it is not likely to deter an unscrupulous lawyer or businessman with capital reserves hoping to catalyze a career as a sports agent.

C. *The Potential for Civil Causes of Action Does Not Deter Agents*

Similarly, SPARTA's proposal of a federal cause of action for universities against athlete-agents will not deter sports agents from participating in illegal activities. As stated above, SPARTA's creation of a civil remedy for universities is not a novel concept as universities already have the ability to sue sports agents under state statutes and common law.¹⁴⁷ However, universities have traditionally not taken advantage of this remedy for a variety of reasons.¹⁴⁸

College sports are big business and universities make too much money from these programs to engage in publicized and damaging

fifteen percent commission on \$5 million is \$750,000; multiplied by five players, the amount rises to \$3.75 million. If the agent combines this with a dozen other average to below average players, his earnings are even larger.

¹⁴⁵ *Hearing, supra* note 8, at 7–9 (statement of Rep. Bart Gordon).

¹⁴⁶ H.R. REP. NO. 108-24, pt. 1, at 2 (2003) (emphasis added).

¹⁴⁷ *See supra* Part III.C–D.

¹⁴⁸ *But see* Associated Press, *Michigan Wants Webber to Pay Legal Fees* (Sep. 18, 2003) (reporting that the University of Michigan will seek to recoup legal fees and lost tournament earnings from former student-athlete, Chris Webber, for breach of contract for knowingly causing NCAA violations), *available at* <http://sports.espn.go.com/nba/news/story?id=1618310>.

lawsuits.¹⁴⁹ In 2001, the average NCAA Division I-A program had revenues of over \$25 million,¹⁵⁰ with the most successful program raising nearly \$80 million.¹⁵¹ Moreover, the average Division I-A university had 554 student participants spread out among nineteen sports,¹⁵² but the great majority of its revenues, an average of \$14,560,000, came from men's basketball and football programs,¹⁵³ whose participants are the most likely targets of sports agents. With all of this money coming into the university, it is not surprising that colleges are hesitant to upset this delicate balance. It is asserted that the lucrative revenues from some college sports present a very strong motive for universities to keep NCAA violations out of the public eye and to avoid potential fines, probations, and penalties. While there is no reliable data on the number of NCAA violations that have gone unpunished, one can hypothesize that coaches, athletic directors, and other university officials have addressed at least some potential violations "in house" without ever making them public.¹⁵⁴ An additional problem for universities hoping to recover damages against agents is that some agents are judgment proof. Because there exists just a one percent chance that a college athlete will make a professional team, even in a backup role,¹⁵⁵ the athlete and aspiring agent that cause a violation may not be able to pay a damage bill of six to seven figures to the university.¹⁵⁶ Instead of facing the wealthy agent who is undeterred by fines, the university must confront the agent who has no ability to satisfy a judgment. When one combines the judgment-proof agent with the potential loss of revenue that a university could suffer, it is asserted that the incentive to cover up such violations and not bring action against an unethical agent is strengthened.

However, even if an agent is not judgment proof, and the NCAA violation has already been discovered and sanctioned by the NCAA Committee on Infractions, the school may still be hesitant to pursue a civil suit against an agent or student-athlete for numerous reasons. First, such a

¹⁴⁹ See Stangel, *supra* note 36, at 151–52.

¹⁵⁰ DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS 2001, at 10 tbl.2.1 (2001), available at http://www.ncaa.org/library/research.html#participation_rates (last visited Oct. 20, 2004).

¹⁵¹ *Id.* at 15 tbl.2.4.

¹⁵² *Id.* at 10 tbl.2.1.

¹⁵³ *Id.* at 22 tbl.3.2.

¹⁵⁴ See Wetzel, *supra* note 38 (suggesting that the basketball coach was aware of NCAA violations but did not address them).

¹⁵⁵ *Hearing, supra* note 8, at 1–2 (statement of Rep. Chris Cannon).

¹⁵⁶ See *supra* note 8 and accompanying text (stating that a very large percentage of agents do not have athletes under contract and are without clients).

suit could negatively affect the university's reputation.¹⁵⁷ Universities already receive a great deal of criticism due to low graduation rates and the perception that they take advantage of student-athletes.¹⁵⁸ They also face the prospect of being perceived as hypocritical when they attempt to persuade the public that athletics are merely secondary to education and then sue their student for money.¹⁵⁹ Some commentators argue that "[l]egal action . . . could make a philosophical statement that universities are more concerned with operating a business than educating their student-athletes."¹⁶⁰ Instituting lawsuits against student-athletes or agents only stands to keep the controversy and rule violations in the public eye for a longer period of time.¹⁶¹ This, in turn, may damage the reputation of the university and hurt recruiting in addition to shrinking the general applicant pool. There is no question that it affects the school's ability to recruit new athletes because a litigious university is an unattractive one for athletes with professional aspirations.¹⁶² If a high school athlete is choosing between two colleges and one of the schools has a propensity to sue those who cause NCAA violations, be it agents or otherwise, it is only logical for a student to choose the school that does not take such a hard-line position.

Needless to say, it is certainly better for a university to put violations as far in the past as possible and not allow them to remain in the media or public eye. In addition to hurting recruitment and the attractiveness of the university to potential applicants who value a strong athletic program even as non-participants, university legal action has a negative effect on an institution's fundraising.¹⁶³ Alumni and other donors are reluctant to commit money to a troubled program or to a school whose name is being eviscerated in the public media.¹⁶⁴ In sum, when researching this area, cases where universities sued agents or student-athletes to recover

¹⁵⁷ See generally Stangel, *supra* note 36, at 151–52 (discussing in detail the potential negative ramifications of a university bringing a suit to recover damages for NCAA penalties).

¹⁵⁸ See *id.* at 151.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.*; see also Sudia & Remis, *supra* note 75 at 79–80 (disputing the NCAA's claim that its athletic programs are meant to preserve "the spirit and educational value of intercollegiate athletics" because schools do not have the same opportunity to win games and compete).

¹⁶¹ See Stangel, *supra* note 36, at 151.

¹⁶² *Cf. id.* at 152 (postulating that the Internet greatly impacts the recruiting of high school athletes and that students are very knowledgeable about the schools recruiting them, which makes it difficult to recruit a student when the university has previously pursued legal action against NCAA violators).

¹⁶³ See *id.* at 152.

¹⁶⁴ *Id.*

damages from NCAA violations were difficult to uncover.¹⁶⁵ In fact, there is a relative dearth of such instances.

In addition to choosing not to sue students and agents over NCAA violations, universities may simply be unable to successfully do so because of their constructive knowledge of the violations. Pressure is placed on coaches and athletic programs by alumni, boosters, fans, students, and other entities, which creates a "win-at-all-costs attitude"¹⁶⁶ at many of the larger Division I-A schools. "Big-Time" college programs regularly post home attendance figures of over 100,000 people per game, possess more funds and resources than smaller schools, and have a substantial recruiting advantage because of their tradition and national prowess.¹⁶⁷ This pressure causes coaches or other university personnel to engage in a type of "willful blindness"¹⁶⁸ to the activities surrounding their program, including the infiltration of agents and/or their runners.¹⁶⁹ There is a great deal for colleges to lose if the program goes through an uncompetitive year because of a recruiting drought.¹⁷⁰ This scenario presents a problem for the university when one of its employees in a position of power knew or should have known of the agent's conduct as it may make suit against the agent impossible due to the school's constructive knowledge.¹⁷¹

¹⁶⁵ See, e.g., *Taylor v. Wake Forest Univ.*, 16 N.C. App. 117, 121–22 (N.C. Ct. App. 1972) (implying that the school had a cause of action against the student for breach of contract but was not pursuing it); *Williams v. Univ. of Cincinnati*, 112 Ohio Misc. 2d 36, 47 (Ohio Ct. Claims 2001) (pointing out that the university did not seek damages against the student who willfully violated NCAA bylaws and caused the school to be sanctioned and even allowed him to keep his scholarship). *But see* Associated Press, *Michigan Wants Webber to Pay Legal Fees* (Sep. 18, 2003) (reporting that the University of Michigan will seek to recoup legal fees and lost tournament earnings from former student-athlete, Chris Webber, for breach of contract for knowingly causing NCAA violations), available at <http://sports.espn.go.com/nba/news/story?id=1618310>.

¹⁶⁶ Stangel, *supra* note 36, at 152–53; see also Sudia & Remis, *supra* note 75, at 79.

¹⁶⁷ See Sudia & Remis, *supra* note 75, at 79.

¹⁶⁸ See generally JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 160 (3d ed. 2003) (describing willful blindness as the equivalent of knowledge in criminal law when a defendant deliberately closes his eyes to what should be obvious to him). It is asserted here that courts will be unlikely to grant damages to universities that knew of the ongoing NCAA violations and did not attempt to stop them. It can be imputed that this is a type of contributory negligence or high level of comparative negligence that will either reduce or eliminate any hope of recovery.

¹⁶⁹ See Stangel, *supra* note 36, at 152–53.

¹⁷⁰ See FULKS, *supra* note 150, at 10 tbl.2.1 (detailing the revenues that Division I-A universities take in from various athletic programs).

¹⁷¹ See S. 1170, 108th Cong. § 6 (2003); H.R. 361, 108th Cong. § 6 (2003). While SPARTA gives educational institutions a cause of action against sports agents in Section Six of SPARTA, it does not lay out the elements of suit. However, it can be inferred that if the university knew about a continuing violation and did not address it until it was sanctioned by the NCAA, at least some of its damages, those from the continued violation, would not have been caused by a

One's initial reaction to this may be that SPARTA does not deal with the "willfully blind" university and that the law does not need to protect unethical universities from questionable agents. However, this reaction results from a misunderstanding of the purpose of SPARTA or the problem in general, which, when introduced by Representatives Tom Osborne and Bart Gordon, was primarily to protect the student-athlete.¹⁷² Therefore, despite the fact that SPARTA may correctly disallow a university that was at least partially at fault to recover damages from an agent who causes NCAA violations, the athlete is still at a loss. The athlete loses his eligibility and scholarship, and suffers other damages including damage to his reputation.¹⁷³ The need to deter the sports agent from taking advantage of the student-athlete is still present when the university is partially to blame. Indeed, in dealing with a university that will not come down hard on player-agent relationships, the agent has just cut off one potential remedy against him. In summary, deterrents currently in effect are not successful. Monetary penalties remain too low and universities, for a bevy or reasons, are unwilling to pursue civil actions against agents.

V. SOLUTIONS TO THE PROBLEM

A. Congress Should Create a National Sports Agent Registry

The problem of sports agents' damaging activities is still very prevalent.¹⁷⁴ While SPARTA's penalties may not be strong enough to deter agents from taking advantage of athletes and causing universities to be sanctioned by the NCAA, this Note proposes that there is a feasible solution to give the bill the effect that its sponsors had hoped.¹⁷⁵ Any federal legislation should include a provision creating a national registry of sports agents, on par with the registration requirements that many of the states have enacted.¹⁷⁶ This national registry, really a federal licensing

violation of the act, but through the university's own ineptitude. *Id.*

¹⁷² *Hearing, supra* note 8, at 7 (statement of Rep. Tom Osborne); *id.* at 9 (statement of Rep. Bart Gordon); *see also* H.R. REP. NO. 108-24, pt. 2, at 33 (June 2, 2003) (stating that the purpose of the bill is "to protect the often guileless student athlete from real-life consequences of dealing with the unscrupulous [agent]").

¹⁷³ *See supra* notes 28-32 and accompanying text (describing the damages that an athlete may incur).

¹⁷⁴ *See supra* Part I.

¹⁷⁵ *See Hearing, supra* note 8, at 7 (statement of Rep. Tom Osborne); *see also* H.R. REP. NO. 108-24, pt. 2, at 33.

¹⁷⁶ Many states have adopted the Uniform Athlete Agency Act, *see infra* note 183 and accompanying text, which includes a registration provision. UNIF. ATHLETE AGENTS ACT §§ 4, 6, 8 (2000). The problem with the states' registry laws is that agents can remain in and make contracts under the laws of states that do not require an agent to register with the state, thereby

system, can be used to monitor agent activities while serving as a prerequisite to conducting business as an agent.¹⁷⁷ Congress should then make it illegal for agents to enter agency contracts in the sports business without having a federal license or being listed on this registry.¹⁷⁸ The law should then make any commissions or other benefits to an agent forfeitable if garnered by an unregistered negotiator.¹⁷⁹ The prospect of forfeiture of moneys would provide the necessary impetus for agents to at least register or get the necessary license under the federal statute.

Once this national registry is in place, Congress must add to the list of penalties for violation of SPARTA's third section¹⁸⁰ the possibility of being removed from the registry either temporarily or permanently. This would prevent agents from benefiting from agency contracts entered into when their license was either suspended or revoked. If their contracts will be declared void, there is little incentive for agents to expend time, resources, and money chasing student-athletes.

The potential for losing one's ability to work as an agent should motivate more agents to conform to the law. If agents know that they may lose their livelihood if they behave unethically, the risks associated with taking advantage of young athletes become exponentially larger. Instead of facing minor fines and the remote possibility of suit, the agent may be stripped of his ability to work in his chosen profession and, consequently, frozen out of a billion dollar industry.

Congress must then couple the creation of a national registry with a requirement that professional sports teams and other entities dealing with professional athletes verify that the athlete-agent is indeed registered before entering a contract with them¹⁸¹ or face the prospect of the contract becoming void. Thus, the athlete will not be committed to a bad contract entered into by an unregistered or unlicensed agent. This will further protect the athlete from bad contracts that are otherwise difficult to escape.

avoiding ever having to register. *See Hearing, supra* note 8, at 7 (statement of Rep. Tom Osborne). If states' laws were uniform, the registry would be very effective.

¹⁷⁷ *Cf.* UNIF. ATHLETE AGENTS ACT §§ 4-8.

¹⁷⁸ *See* UNIF. ATHLETE AGENTS ACT § 4 and CAL. BUS. & PROF. CODE § 18896 (2003) for similar state registry laws.

¹⁷⁹ State acts have similar provisions that make the contracts of unregistered agents void. *See* UNIF. ATHLETE AGENTS ACT § 4; CAL. BUS. & PROF. CODE § 18897.9.

¹⁸⁰ *See* S. 1170, 108th Cong. § 3 (2003); H.R. 361, 108th Cong. § 3 (2003).

¹⁸¹ *Cf. Hearing, supra* note 8, at 13 (statement of Scott Boras, Sports Agent and former coach) (arguing that SPARTA should include "a provision requiring pro sports franchises to report to the NCAA their meetings and discussions with student-athletes, and which agents they've had contact with"). Boras argued that "Team representatives are invited to visit high school and college campuses. They draft and sign the players. . . . [Therefore,] [t]he conduct of a pro sports franchise should be subject to the same scrutiny as that of a sports agent." *Id.*

If the team or endorsement company failed to check the registry, and the agent was not licensed to work as a sports agent, then the contract could be voidable at the athlete's behest. While this restriction seems harsh, it does a great deal to protect the athlete at a relatively minor inconvenience for the large corporations or sports franchises that employ them. As teams and marketing firms will surely review the national athlete-agent registry in order to protect their contracts, unregistered agents will have a difficult time representing athletes as the industry polices itself.

SPARTA is not silent on the issue of creating agent registries and licensing systems. Section Eight of the Act states "It is the sense of Congress that States should enact the Uniform Athlete Agents Act of 2000 drafted by the National Conference of Commissioners on Uniform State Laws, to protect student-athletes and the integrity of amateur sports from unscrupulous sports agents."¹⁸² The Uniform Athlete Agents Act ("UAAA") has, as one of its centerpieces, the creation of a state licensing system similar to the one proposed in this Note.¹⁸³ Unfortunately, SPARTA steps short of actually implementing a version of the UAAA on the national level and merely urges states to adopt the uniform law.¹⁸⁴ The UAAA would create "a comprehensive, uniform registration process that will provide important consumer information for student-athletes, parents and institutions, as they will have access to the detailed information contained in the agent application."¹⁸⁵ However, if the registry system is implemented on just a state level, agents could escape prosecution or license revocation in one state by moving to another.¹⁸⁶

Why Congress did not propose some sort of registry in SPARTA is a conundrum. Perhaps Congress has Commerce Clause concerns in promulgating such a mandate.¹⁸⁷ However, it is clear that the sports agent

¹⁸² S. 1170, 108th Cong. § 8 (2003); H.R. 361, 108th Cong. § 8 (2003). As of June 2003, sixteen states have already adopted the UAAA while twelve others have introduced it into their legislatures. H.R. REP. NO. 108-24, pt. 1, at 2 (2003) (reported by Representative Billy Tauzin, Chairman of the Committee on Energy and Commerce). Among the states that have not enacted the UAAA, eighteen have some type of agent law(s) and the remaining sixteen have no law addressing agent conduct. *Id.*

¹⁸³ UNIF. ATHLETE AGENTS ACT §§ 4, 6, 8 (2000).

¹⁸⁴ S. 1170, 108th Cong. § 8 (2003); H.R. 361, 108th Cong. § 8 (2003).

¹⁸⁵ *Hearing, supra* note 8, at 14 (statement of William Saum) (noting that twenty-one states have already adopted the UAAA).

¹⁸⁶ *See Hearing, supra* note 8, at 1-2 (statement of Rep. Chris Cannon); Davis, *supra* note 129, at 1-2 (discussing the problems with current state registry systems).

¹⁸⁷ 149 CONG. REC. H4895, 4899 (daily ed. June 4, 2003) (statement of Representative Stearns postulating that the reason the bill may have been dropped from the 107th Congress was because it was perceived as a federal mandate). *But see* H.R. REP. NO. 108-24, pt. 2, at 8 (June 2, 2003) (finding that the constitutional authority for SPARTA lies in the Commerce Clause, U.S. CONST. art. I, § 8).

industry is interstate in nature as student-athletes attend schools in different states, are represented by agents based in other states, and are eventually employed by professional teams that compete across the country. In *United States v. Morrison*,¹⁸⁸ the Court held that, for a law to come under the purview of the Commerce Clause, the statute must: (1) regulate commerce or an economic enterprise;¹⁸⁹ (2) have an express jurisdictional element that limits its reach to activities affecting interstate commerce;¹⁹⁰ (3) have legislative history showing the activity affects interstate commerce;¹⁹¹ and (4) show that the link between the regulated activity and interstate commerce is more than just attenuated.¹⁹² The contractual relationship between the agent and athlete is commerce, or an economic enterprise, because it involves employment and contracts across state lines. While the jurisdictional element in the law is not clearly stated, *Morrison* finds this is not fatal to a statute's constitutionality when the other factors are very strong.¹⁹³ Moreover, the legislative history surrounding SPARTA is expansive, as has been detailed throughout this Note.¹⁹⁴ The regulation of an agency contract that is purely intrastate in nature—which may be the case in instances where agents and athletes are residents of the same state and execute a contract in that state—affects interstate commerce in more than an attenuated manner. Intrastate agent activities surely have a substantial effect on agents from other states because they are competing against one another for the same athlete and may take part in a “race to the bottom” in order to sign the athlete.¹⁹⁵ The constitutionality of such a law, therefore, is not likely to be in peril even under the strict *Morrison* test. Admittedly, this is just a cursory examination of constitutional law and a further assessment is still needed.

While prohibiting certain conduct as outlined in SPARTA, and creating a national registry or licensing system in conjunction with those prohibitions, will presumably dissuade some agents from engaging in these activities, this is admittedly not a perfect solution. There will always be agents that are outliers in the equation who are so desperate to break into the industry that they will violate the law under any circumstances in order to enhance their prospects of signing athletes. While the possibility of being removed from the national registry will not deter these agents, the

¹⁸⁸ 529 U.S. 598 (2000).

¹⁸⁹ *Id.* at 610.

¹⁹⁰ *Id.* at 611–12.

¹⁹¹ *Id.* at 612–13.

¹⁹² *Id.*

¹⁹³ *See id.* at 611–12.

¹⁹⁴ *See, e.g.*, H.R. REP. NO. 108-24, pt. 2 (June 2, 2003).

¹⁹⁵ *See supra* text accompanying note 3; Part IV.B–C.

FTC fines and potential lawsuits may deter them, because to these agents, a bevy of \$11,000 fines and/or even a remote chance of facing a six or seven figure judgment could deter them from breaking the law. Of course, admittedly, there are other aspiring agents who just cannot be deterred.

Whatever the reason, Congress has failed to implement an effective deterrent and regulatory mechanism. This is an area that needs better regulation¹⁹⁶ and the federal government would be justified in creating a licensing system or federal registry, monitored by the FTC, to control the unscrupulous agent.

B. Other Potential Solutions

Other commentators have suggested additional changes that should be made to SPARTA or added to future congressional attempts at regulation in order to protect student-athletes. Most notably, Scott Boras, a former coach and renowned sports agent,¹⁹⁷ has suggested that the bill should promulgate a civil action and remedy for student-athletes against agents who damage them.¹⁹⁸ While athletes may have common law contract actions for unconscionability, duress, or other overreaching, students do not possess, by federal statute, the right to sue agents for damages caused to their career, education, and reputation. Boras has argued that

[s]tudent-athletes and their families rarely understand the complexity of the NCAA and professional sports rules. In most instances, athletes are only left with the information that is given to them by a university or outside counsel. The decision whether to forgo a college scholarship and pursue a professional career requires sophisticated analysis and legal counsel.¹⁹⁹

Boras also postulates that Congress should better promote the use of legal counsel in making these decisions and that any federal law should differentiate between an agent who is pursuing his own interests and that of an attorney, who is required to serve the best interests of his client.²⁰⁰

Boras also believes that professional sports teams should have a duty to report to the NCAA any dealings they have with agents and student-athletes in order to better help the NCAA regulate itself and to deter agents

¹⁹⁶ See *supra* Part I.A–D.

¹⁹⁷ John Henderson, *Saint or Elsewhere; After Bringing Salaries into the Stratosphere, Those in Baseball Either Swear by Superagent Scott Boras or Swear at Him*, DENVER POST, July 19, 1999, at D-01 (detailing Boras' immense success); Sara J. Welch, *Scott Boras is the World's Greatest Negotiator*, 50 SUCCESSFUL MEETINGS 56, 56–57 (Nov. 2001) (illustrating Boras' immense success).

¹⁹⁸ See *Hearing*, *supra* note 8, at 13 (statement of Scott Boras).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 12–13.

from acting to cause NCAA violations.²⁰¹ Boras suggests that Congress should allow the athlete to recover up to one million dollars in damages from an agent who causes the player's collegiate eligibility to be terminated.²⁰² He proposes that this remedy will deter sports agents from engaging in dishonorable practices because agents will be unable to count on the athlete's secrecy in the agent's wrongdoing.²⁰³

In addition to Boras's suggestions to strengthen SPARTA, Howard Beales, the Director of the Bureau of Consumer Protection at the FTC, also suggests that any bill should include a private right of action for student-athletes against agents.²⁰⁴ He suggests that this private right of action may be more appropriate than FTC action taken in the public interest, because it would allow athletes to vindicate their rights in all situations, whether or not FTC action is appropriate.²⁰⁵ He also suggests that the regulated activities of the agent should be more in line with the NCAA Constitution and Bylaws in order to prevent the loss of eligibility.²⁰⁶ For example, he suggests that the NCAA rules prohibit the athlete from entering either an oral or written contract with an agent, but SPARTA only referred to written contracts.²⁰⁷ Thus, he believes SPARTA or any federal law should be nearly identical to NCAA rules so that there is no doubt about what the law prohibits.

CONCLUSION

The current magnitude of the athlete-representation industry is overwhelming. More and more prospective agents enter the market every day and the competition among them propels many actors to engage in overreaching and illegal activity. These agents purposely put athletes and universities at risk of violating the NCAA Constitution and Bylaws and execute unconscionable contracts with athletes. There is little disagreement that a problem exists in this area.

While athlete-agent laws already exist in more than half of the fifty states, national uniformity is greatly needed. Congress's attempt to regulate this activity on a federal level through the Sports Agent

²⁰¹ See *id.* at 13.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See *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 Federal Trade Commission).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 21.

²⁰⁷ *Id.*

Responsibility and Trust Act is a much-needed step in the right direction. Without uniformity, agents execute contracts in states without athlete-agent statutes and take advantage of ambiguities in the law. However, uniformity is not enough—adequate deterrents are also required. The deterrents currently in effect on both a federal and state level are not strong enough. They do not deter wealthy agents because the gains that can be realized from signing star athletes more than offset any penalties or lawsuits they will have to face for violating the law. Similarly, the deterrents do not entirely discourage startup agents because these agents are judgment proof.

To combat these problems Congress should create a federal registry/licensing system for sports agents that would require athlete contracts, both playing and endorsement deals, to be brokered by registered agents only, declaring void or voidable all contracts administered by agents who are not registered. Penalties should then include revocation or suspension of an agent's license to deter them from putting their livelihood in jeopardy through questionable activities that may cause damages to athletes or universities. An amended SPARTA or any other federal bill must include provisions similar to those of the Uniform Athlete Agency Act regarding a registry system—merely urging the states to adopt such a system is not enough.

The sports agent industry is a cutthroat competitive world where an agent will do whatever it takes to land a client. This type of business needs tougher penalties than those currently in place or proposed by Congress. Currently, the prohibition on certain activities of agents is adequate, but their enforcement provisions are deficient. In order for its directive to be heard, Congress must come down harder on these agents.

