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There Is No Need to Reinvent the Wheel: The Tools to Prevent Agent-Related NCAA Violations May Already Be In Our Hands

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There Is No Need to Reinvent the Wheel: The Tools to Prevent Agent-Related NCAA Violations May Already Be In Our Hands

*Matthew Mills**

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INTRODUCTION

With the current climate of ever-escalating salaries for professional athletes in the major sports, especially in the National Football League (NFL) and National Basketball Association (NBA),[1] athlete's agents are increasingly willing to bend or break National Collegiate Athletic Association (NCAA) rules to sign the next big star. As a result, the NCAA has resorted to increasingly harsh penalties for schools where violations occur. Examples of this can be found at the University of Alabama ("Alabama") in the 1990s and early 2000s as well as at the University of Southern California ("USC") in 2010. Due to Alabama's rules violations in 2002, the NCAA placed Alabama's football program on probation, required it to reduce its number of scholarships, and prohibited it from playing in bowl games for two years.[2] These penalties made Alabama's football program less competitive for years and cost Alabama arguably millions of dollars in lost ticket sales, goodwill and alumni donations, and advertising and television revenue. Similar consequences are being projected for the football program at USC.[3] With

* For a look at escalation of median salaries in both the NFL and NBA, as well as in Major League Baseball and the National Hockey League, one can consult the USA Today Salary Database. *USA Today Salaries Databases*, USA TODAY (Oct. 25, 2010, 8:56 PM), http://content.usatoday.com/sports/basketball/nba/salaries/default.aspx; *USA Today Salaries Databases*, USA TODAY (Oct. 25, 2010, 8:55 PM), http://content.usatoday.com/sports/football/nfl/salaries/default.aspx?Loc=Vanity. For instance, in 2000 the highest median team salary in the NFL was the Detroit Lions' $619,050 while the highest median team salary in the NFL in 2009 was the San Francisco 49ers' $1,325,000.

2. John Zenor, NCAA rolls Crimson Tide for Violations, USA Today, Feb. 1, 2002, http://www.usatoday.com/sports/college/football/2002-02-01-alabama-violations.htm

3. *See* Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, N.Y. TIMES, June 10, 2010, http://www.nytimes.com/2010/06/11/sports/ncaafootball/11usc.html (discussing the NCAA violations and noting that the resulting penalties will be a significant setback); Zach Rosenfield, *Impact of USC's NCAA Violations*, ACCUSCORE, June 10, 2010, http://accuscore.com/impact-of-uscs-ncaa-violations (asserting the real effect of the penalties comes from the loss of scholarships and will not be felt until after the post-season ban is lifted). Interestingly, USC is taking advantage of a loophole to postpone the effects of the NCAA's sanctions. *See* Stewart Mandel, *Kiffin skirting recruiting sanctions as USC continues appeals process*, SPORTS ILLUSTRATED, Jan. 28, 2011, http://sportsillustrated.cnn.com/2011/writers/stewart_mandel/01/24/usc.recruiting/index.html. If a school appeals its penalties, they are stayed while the appeal is ongoing. *Id.* Thus, since USC appealed the NCAA's sanctions and had not received a decision by the national signing day, USC was able to ignore the scholarship reduction and sign a full class of student-athletes. *Id.* If USC's appeal is denied, the full penalties

such severe penalties, one would expect schools to crack down on violations by agents and athletes, but high-profile violations continue to occur.[4]

There have been calls for more regulation of the agent industry,[5] action from the professional players' unions barring violating agents from representing members,[6] and even an end to amateur status for NCAA athletes,[7] but, while all of those solutions may work in theory, the adoption and implementation of any of them is completely impractical. Rather, the tools for preventing such conduct have already been placed in the hands of the affected schools, waiting for a chance to be used. With the passage of the Uniform Athlete Agent Act ("UAAA") at the state level and the Sports Agent Responsibility and Trust Act ("SPARTA") at the federal level, a school can bring a civil suit against any agents who cause it damage.[8]

Accordingly, this Comment will argue that to prevent future NCAA rule violations by agents, schools should bring a civil suit against any agent that causes the school damage. Part I of this Comment will look at the current climate surrounding amateur athlete-agent relations including overviews of the NCAA, the sports agent industry, and early cases and legislation. Special emphasis will be placed on the passage and contents of the UAAA and SPARTA. Part II will

will be applied from the date of the decision going forward. *Id.*

4. *See Jim Calhoun to be suspended in 2011-12*, ESPN, Feb. 23, 2011, http://sports.espn.go.com/ncb/news/story?id=6146656 (discussing the rules violations at the University of Connecticut and the subsequent penalization of its men's basketball program).

5. *See* Eric Willenbacher, Note, *Regulating Sports Agents: Why Current Federal And State Efforts Do Not Deter The Unscrupulous Athlete-Agent And How A National Licensing System May Cure The Problem*, 78 ST. JOHN'S L. REV. 1225 (2004) (asserting that regulation of a new national licensing system would prevent agents from violating NCAA rules).

6. *See* Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781 (2006) (discussing players associations regulations and powers to sanction agents as possible ways to deter agents from violating NCAA rules)

7. Diane Sudia & Rob Remis, *The History Behind Athlete Agent Regulation And The "Slam Dunking of Statutory Hurdles"*, 8 VILL. SPORTS & ENT. L.J. 67 (2001) (proposing that the NCAA's insistence on preserving amateur status may no longer be realistic or desirable).

8. UNIF. ATHLETE AGENT ACT § 16 (2000); Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7805 (2004).

then consider previously proffered solutions, specifically, calls for more regulation, eliminating the amateur status requirement, and the intervention by professional players' unions. After considering these previously proffered solutions, Part III will assert that the best solution to the problem is civil suits brought by the harmed schools against the violating agents. This section will consider both statutory and common law actions that schools may bring as well as address potential concerns and the viability of this solution. Part IV will then discuss other parties who may have claims against violating agents, which may serve as a supplement to any claims that schools may bring. Part V concludes the Comment.

BACKGROUND OF AMATEUR ATHLETE-AGENT RELATIONS

Amateur athlete-agent relations are complex in that they affect numerous parties outside the immediate relationship. Not only do you have the athlete and the agent involved, but you also have the NCAA, the agent industry, legislators, and even the courts as part of the complete picture. Thus, in order to gain a full understanding of amateur athlete-agent relations, one needs to understand each party's role.

The NCAA

The NCAA was founded in 1906 due to concerns over dangerous athletic practices, particularly those in football.[9] After decades of success and expansion, in 1973, the NCAA divided into its present three-division format and, in 1980, the NCAA began overseeing women's collegiate sports.[10] Because of its continued expansion and the increased difficulties it had to contend with, the NCAA began establishing commissions starting with the President's Commission in 1984.[11] Presidents from schools belonging to the NCAA's three divisions compose these commissions and develop solutions to

9. *History*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Sept. 17, 2010, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history.

10. *Id.*

11. *Id.* The President's Commission was charged with setting the NCAA's agenda and was composed of university presidents from each of the three divisions. *Id.*

unique and specific problems confronting the NCAA.[12] Also introduced by the NCAA in 1984, the Professional Sports Counseling Panel was created to provide student athletes with competent advice regarding their futures without putting their amateur status at risk.[13] But, this panel never became widely used.[14]

The development of the Professional Sports Counseling Panel at such an early stage of the NCAA's development of commissions highlights the significance the NCAA places on keeping collegiate athletics separate from professional sports. The principle of amateurism is addressed in article two of the NCAA constitution:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[15]

Article 12 of the NCAA Division I Manual provides further guidance on the principle of amateurism.[16] Only amateur athletes are allowed to participate in intercollegiate athletics and athletic programs are designed to be part of educational programs.[17] In addition to an athlete being automatically ineligible if they ever compete on a professional team, athletes become ineligible if they agree to be represented by an agent, even if the retention of the agent is for future negotiations.[18] Further, athletes will be deemed ineligible if they, their relatives, or their friends ever accept transportation or benefits from an agent.[19]

12. One such commission, the Knight Commission, issued a report in 2010 addressing fiscal transparency and academic accountability. *See* Gary Brown, *NCAA backs Knight Commission's reform principles*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, June 17, 2010, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/NCAA+News/NCAA+News+Online/2010/Association-wide/NCAA+backs+Knight+Commissions+reform+principles+NCAA+News.

13. Matthew Bender & Co., Inc., SPORTS LAW PRACTICE § 10.14[2][b] (2009) [hereinafter Bender].

14. *Id.*

15. NCAA CONST. art. II

16. NCAA, DIVISION I MANUAL 65-80 (AUG. 1, 2010).

17. *Id.* at 65.

18. *Id.* at 71, 73.

19. *Id.*

The Sports Agent Industry

The nature of the sports agent industry, where the priority is to gain high-profile clients at any cost, is also a primary cause of the problems addressed in this Comment. The public perception of the sports agent market is that it is overcrowded, and that is certainly true. One reason for the surplus of agents is that it is so easy to become one. Former agent, Josh Luchs ("Luchs"), has said that all it took to become an NFL agent in 1988 was filling out some paperwork and paying a registration fee of approximately three hundred dollars.[20] While some substance has been added to those requirements, one would still certainly not classify them as onerous. The current requirements to become an agent registered with the NFL Players Association are (1) an application fee of $1,650, (2) undergraduate and post graduate degrees,[21] (3) a background check, (4) attendance at a two day seminar, (5) completion of a proctored examination, and (6) a valid email address.[22] One is able to begin representing players upon passage of the examination and the purchase of liability insurance.[23]

As a result of the ease with which one can become an agent and the consequential market overcrowding, agents' competition for clients has become fierce, with some willing to go to any lengths to gain a client. Often, the agents act in contravention of NCAA rules by paying athletes or providing them with other benefits in order to entice them to sign an agent agreement.[24] Corey Sawyer, a former football player at Florida State University ("Florida State"), confirmed this assertion, admitting to going on an agent-funded shopping spree at Foot Locker while still playing at Florida State.[25]

20. George Dohrmann, *Confessions of an Agent*, SPORTS ILLUSTRATED, Oct. 12, 2010, http://sportsillustrated.cnn.com/2010/magazine/10/12/agent/index.html?eref=sihp.

21. The postgraduate degree can be either a master's or law degree. *Agent Regulations*, NFL PLAYERS ASSOCIATION, http://www.nflplayers.com/About-us/Rules—Regulations/Agent-Regulations/ (last visited Oct. 27, 2010).

22. *Id.*

23. *Agent Certification FAQs*, NFL PLAYERS ASSOCIATION, http://www.nflplayers.com/about-us/FAQs/Agent-Certification-FAQs/ (last visited Oct. 27, 2010).

24. Willenbacher, *supra* note 5, at 1229-32.

25. Sonja Steptoe & E.M. Smith, *Anatomy Of A Scandal*, SPORTS ILLUSTRATED, May 16, 1994, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1005183/

Luchs also confirmed the assertion and admitted to paying players as a way to establish a client list and break into the industry.[26]

Luchs' method of paying players consisted of giving players small monthly payments, instead of large lump sums, in order to make the player stay in contact with him.[27] The use of this method partly explains why many schools and coaches have a hard time determining if a player is being paid by or receiving benefits from an agent. If a player showed up to practice in a brand new Mercedes Benz, the coach would suspect something, but if a player is receiving enough to buy video games and pizza on the weekends, there is likely no way for someone to discover wrongdoing. Thus, the current sports agent market can best be classified as overcrowded, fiercely competitive, and filled with people who know how to bend and break the rules without being detected.

Making matters worse, there is an attitude of disdain toward the NCAA among some, if not most, sports agents. As former agent, Mike Trope, once said:

> The NCAA rules are not the laws of the United States. They're simply a bunch of hypocritical and unworkable rules set up by the NCAA. As an agent, I absolutely was not bound by them. NCAA rules are meaningless. The coaches themselves, the people who are supposed to be bound by them, don't abide by them either. Hell, nobody follows the NCAA rules.[28]

Thus, because of the lack of any real sanction mechanism and the seeming lack of respect by agents, any further attempt by the NCAA to regulate the sports agent industry would likely be similarly unsuccessful, necessitating action to be taken by other parties.

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index.htm. In addition to attending the shopping spree at Footlocker with at least six of his teammates, Sawyer and at least five other Florida State football players accepted cash and other benefits totaling nearly $60,000 from Raul Bey and his "bird dog" Nate Cebrun. *Id.* Eventually, Bey and Cebrun were found guilty of failing to register with Florida as sports agents. *See* Jack McCallum & Richard O'Brien, *Scorecard July 15, 1996*, SPORTS ILLUSTRATED, July 15, 1996, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1008373/index.htm. Bey was fined $12,000 and sentenced to one year in jail while Cebrun was fined $2,000 and sentenced to thirty days in jail. *Id.* For its part in the scandal, the NCAA placed Florida State on probation for one year for failing to monitor the activities of agents. *Id.*

26. Dohrmann, *supra* note 20.
27. *Id.*
28. Bender, *supra* note 13, § 10.14[2][d].

Early Cases Against Sports Agents

Due to the nature of the sports agent industry causing unscrupulous agents to break NCAA rules to sign athletes, the NCAA was forced to penalize the athletes and schools that played a part in the violations. Because the schools and athletes had no real recourse at that time, prosecutors attempted to deter future incidents by going after some such agents.[29] This was the motivation behind such cases as *Abernathy v. State* ("*Abernathy*"),[30] *United States v. Walters* ("*Walters*"),[31] and *United States v. Piggie* ("*Piggie*").[32] But, the legal frameworks under which these cases were argued were ill-suited towards prohibiting the targeted behavior.

Criminal Cases

In *Abernathy*,[33] a former sports agent entered into a contract with a college football player who continued to play for the university in violation of NCAA rules. The agent was charged under Alabama law with commercial bribery, unlawful trade practice, and tampering with a sports contest. After trial, a jury acquitted him of the first two charges, which were poor fits because entering into a contract with an athlete is not illegal. But, the jury found him guilty of tampering with a sports contest and Abernathy was sentenced to one year of imprisonment and fined $2,000.[34] On appeal, the court reversed the conviction, finding that Abernathy did not possess the requisite intent.[35] The court stated that a conviction for tampering with a sports contest required the intent to influence the outcome.[36] The court found that Abernathy's intent, at worst, was for Auburn to play with an ineligible player and, thus, Abernathy did not

29. Prosecutors had an interest in these early cases against agents because most of the schools affected by the NCAA sanctions were state institutions such as Auburn University; the University of California, Los Angeles; the University of Missouri; and Oklahoma State University.
30. Abernathy v. State, 545 So.2d 185 (Ala. Crim. App. 1988).
31. United States v. Walters, 997 F.2d 1219 (7th Cir. 1993).
32. United States v. Piggie, 303 F.3d 923 (8th Cir. 2002).
33. *Abernathy*, 545 So.2d at 186.
34. *Id.*
35. *Id.* at 191.
36. *Id.* at 188.

have criminal intent and the conviction warranted reversal.[37] Beyond this reason, however, the court determined, "The fundamental reason why Abernethy's conviction must be reversed is because the crime of tampering with a sports contest was obviously not intended to and does not, embrace the agent contract type of situation involved in this case."[38] The court gives the impression that this law is also not a good fit for situations involving typical agent agreements.[39]

Similarly, in *Walters*,[40] an agent provided student-athletes with money and cars in exchange for their signing a representation agreement with him, which he post-dated and promised to keep secret until the athletes' collegiate careers were over. But, when it came time for the athletes to acquire agents, many signed with other agents and kept the money and cars from Walters.[41] After becoming frustrated, Walters threatened to break one of the athlete's legs unless the athlete repaid Walters' firm and federal prosecutors charged him with conspiracy, RICO violations for extortion, and mail fraud.[42] Walters agreed to enter a conditional *Alford* plea, preserving his right to contest the sufficiency of the evidence against him, and plead guilty to mail fraud while the prosecutor dismissed the conspiracy and RICO charges.[43] The prosecutor argued that Walters was guilty of mail fraud because his scheme defrauded the schools of property, the

37. *Id.*
38. *Id.* at 190.
39. As an interesting side note, the Alabama Athlete Agents Regulatory Act of 1987 came into effect the same day Abernathy entered into the agreement with the student-athlete. *Abernathy*, 545 So.2d at 190. But, that act did not prohibit or make illegal entering into a sports contract with a student-athlete and prosecutors did not charge Abernathy under it. *Id.* The court did not consider whether Abernathy violated any provision of that act, but the prosecution's failure to bring any charge under it may indicate that entering into a sports contract with a student-athlete was actually not prohibited under it.
40. *Walters*, 997 F.2d 1219. For an excellent discussion of *Walters*, *see generally* Landis Cox, Note, *Targeting Sports Agents With The Mail Fraud Statute:* United States v. Norby Walters & Lloyd Bloom, 41 DUKE L.J. 1157 (April 1992). The note provides an in-depth examination of the trial, focusing on the four major parties relevant to the case: the agents, the student-athletes, the school, and the NCAA. *Id.* at 1160-90. The note also looks at how the mail fraud statute was stretched to its limits by the government's theory and provides policy considerations weighing against application of the statute. *Id.* at 1190-1209.
41. *Walters*, 997 F.2d at 1221.
42. *Id.*
43. *Id.* at 1221-22.

scholarships wrongfully given to the ineligible athletes, - through use of the mail, since the schools mailed falsified eligibility forms to the NCAA.[44] The court disagreed with the prosecution because the use of the mail was not foreseeable by Walters and he had not sought to obtain property from the schools, only from the athletes in the future.[45] Accordingly, the court held that "only a scheme to obtain money or other property from the victim by fraud," would sustain a conviction for mail fraud.[46] Once again, the courts were unwilling to stretch existing statutes to cover this type of agent behavior.

Conversely, in *Piggie*,[47] the Eighth Circuit found that the federal mail and wire fraud statute was applicable. There, defendant Piggie ran a traveling Amateur American Union ("AAU") basketball team and devised a scheme to attract top high school players to his team by paying them.[48] Four of the athletes Piggie paid committed to play college basketball at various schools and used the U.S. Postal Service to deliver their signed letters of intent, which falsely asserted their eligibility. When Piggie's payments to the athletes were discovered, the NCAA penalized all the athletes, their colleges, and their high schools.[49] Consequently, Piggie plead guilty to conspiracy to commit mail and wire fraud and was sentenced to thirty-seven months in jail, three years of supervised release, and ordered to pay $324,279.87 in restitution.[50] The court affirmed that Piggie's scheme fell within the definition of mail and wire fraud because his actions deprived the schools of the services of the athletes, caused the schools loss of scholarships due to NCAA penalties, and forced the school to incur investigative and other costs.[51] But, the court made no mention of the use of the mail to perpetrate the fraud other than to state that the athletes mailed their letters of intent.[52] The majority of the court's opinion was focused on an analysis of the appropriate amount

44. *Id.* at 1223-24.
45. *Id.*
46. *Id.* at 1227.
47. *Piggie*, 303 F.3d 923.
48. *Id.* at 924.
49. *Id.* at 924-26.
50. *Id.* at 926.
51. *Id.*
52. *Id.* at 925.

of damages, which was ultimately determined to be the greater of actual or intended losses.[53] This decision's conflict with that reached in *Walters* exhibits the major concern with states' regulation of agent behavior at that time: the lack of uniformity between jurisdictions. It was this unpredictability that eventually led to the UAAA's promulgation.

Civil Cases

Actions against agents were not limited to the criminal law, but aggrieved parties did not bring many civil actions. Further, those that were initiated were settled without much publicity, eliminating any deterrent effect the litigation might have possessed. An example of this is an action brought by USC against lawyer-agent, Robert Caron ("Caron"). In 1995, Caron paid money and gave airline tickets and other items to three USC football players.[54] The NCAA began an investigation into the transactions and USC decided to bring suit against Caron. The suit alleged interference with contractual relationships and prospective business advantages.[55] Before the case was litigated, however, Caron settled with USC, agreeing to pay $50,000.[56] While this may not have been the first case where a school brought a civil action against an agent, the NCAA director of enforcement at that time, David Berst, did not believe such a suit had occurred before.[57] Thus, the success in this case should have really started a trend for civil litigation as a solution to agent misconduct, but perhaps the lack of publicity that a trial would have generated prevented such a trend from starting.

The UAAA

In response to the concerns over jurisdictional uniformity as well as the need for significant reform of sports agent regulation, the National Conference of Commissioners on

53. *Piggie*, 303 F.3d at 927.
54. Elliott Almond, *USC Will File Suit Against Agent Caron*, L.A. TIMES, Oct. 6, 1995, http://articles.latimes.com/1995-10-06/sports/sp-53971_1_sports-agent.
55. *Id.*
56. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 429 n. v (West ed., 3d ed. 2004).
57. Almond, *supra* note 54.

Uniform State Laws ("NCCUSL") developed the UAAA in 2000.[58] The NCCUSL's purpose for the UAAA states:

> This act provides for the uniform registration, certification, and background check of sports agents seeking to represent student athletes who are or may be eligible to participate in intercollegiate sports. The act also imposes specified contract terms on these agreements to the benefit of student athletes, and provides educations institutions with a right to notice along with a civil cause of action for damages resulting from a breach of specified duties.[59]

The UAAA has been adopted by forty states as well as the District of Columbia and the U.S. Virgin Islands.[60]

A major focus of the UAAA is sports agent registration. Under the UAAA, individuals may not act as agents unless they have registered with the appropriate state and if any person enters into an agent contract without being registered, that contract is void and any consideration received under it must be returned.[61] The UAAA also provides the requirements to register as an agent,[62] factors states may consider when deciding to approve a registration application,[63] and the process for suspension or revocation of an individual's registration.[64] Further, the UAAA provides language that must be included in an agent contract,[65] requires notice of agent contracts to educational institutions,[66] and permits student athletes to cancel any agent contract within fourteen days of signing it.[67] But, while all of the provisions mentioned to this point are significant, and necessary, the most important provisions of the UAAA

58. *A Few Facts About the Uniform Athlete Agent Act*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aaa.asp (last visited Oct. 28, 2010).

59. *Id.*

60. *Id.*; *Athlete Agents Act*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org/Update/ActSearchResults.aspx (last visited Oct. 28, 2010).

61. UNIF. ATHLETE AGENT ACT § 4.

62. *Id.* § 5.

63. *Id.* § 6.

64. *Id.* § 7.

65. *Id.* § 10.

66. *Id.* § 11.

67. UNIF. ATHLETE AGENT ACT § 12.

provide a comprehensive list of prohibited conduct,[68] criminal penalties,[69] and civil remedies.[70] Significantly, the civil remedies recoverable by a school may include "lost television revenues, lost ticket sales from regular season athletic events, lost revenues from not qualifying for postseason athletic events such as football bowl games and NCAA tournaments, and possibly the value of the athlete's scholarship."[71]

SPARTA

After the promulgation of the UAAA and the realization that existing federal law was insufficient to control agent misconduct, Congress passed SPARTA, which became law in 2004.[72] SPARTA is intended, "to designate certain conduct by sports agents relating to the signing of contracts with student athletes as unfair and deceptive acts or practices to be regulated by the Federal Trade Commission."[73] It is not intended to displace state laws, but rather, to supplement them.[74] But, in SPARTA, Congress encourages states to adopt the UAAA as it was promulgated by the NCCUSL in 2000,[75] further demonstrating the concern for jurisdictional uniformity.

68. *Id.* § 14. "An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, may not: (1) give any materially false or misleading information or make a materially false promise or representation; (2) furnish anything of value to a student-athlete before the student-athlete enters into the agency contract; or (3) furnish anything of value to any individual other than the student-athlete or another registered athlete agent." *Id.* § 14(a)(1)-(3). "An athlete agent may not intentionally: (1) initiate contact with a student-athlete unless registered under this [Act]; (2) refuse or fail to retain or permit inspection of the records required to be retained by Section 13; (3) fail to register when required by Section 4; (4) provide materially false or misleading information in an application for registration or renewal of registration; (5) predate or postdate an agency contract; or (6) fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport." *Id.* § 14(b)(1)-(6).

69. *Id.* § 15.

70. *Id.* § 16.

71. Weiler, *supra* note 56, at 429.

72. 15 U.S.C. § 7805; *H.R. 361: Sports Agent Responsibility and Trust Act*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h108-361 (last visited Oct. 28, 2010).

73. 15 U.S.C. § 7805.

74. *Id.* § 7806.

75. *Id.* § 7807.

Unlike the UAAA, SPARTA does not focus on sports agent registration. SPARTA starts by providing the prohibited conduct and what the agent is required to disclose to the athlete.[76] SPARTA next states that any violation will be treated as a violation of the Federal Trade Commission Act, giving the Federal Trade Commission ("FTC") the power to enforce it.[77] SPARTA goes on to give state attorneys general the power to bring a civil action against any agent who causes harm to residents by violating SPARTA and to provide for the protection of the schools.[78] While SPARTA has been criticized for not providing a stronger deterrent than already existed under federal law,[79] this view overlooks the messages Congress sent through SPARTA. First, Congress makes clear that this type of agent behavior is completely unacceptable, is taken seriously by the government, and will no longer be tolerated. Second, Congress has sent a message to the FTC and state attorneys general that violations of SPARTA should not be overlooked and action should be taken whenever such violations occur. Finally, Congress has made clear that, even if the FTC or attorneys general do not bring an action, whether for lack of resources or otherwise, violations of this act should not go unpunished and those harmed the most, the schools, should protect themselves through civil litigation.

PREVIOUSLY PROFFERED SOLUTIONS

Agents disregarding and breaking NCAA rules is not a new phenomenon,[80] even if it does seem to get much more

76. *Id.* § 7802.
77. *Id.* § 7803.
78. *Id.* §§ 7804, 7805. SPARTA provides for the protection of schools in two ways. First, agents are required to provide written notice to the person responsible for the school's athletic programs within seventy two hours of entering into the contract or before the next sporting event, whichever comes first. *Id.* § 7805(a). Second, schools have a right of action against agents for damages caused by violations of SPARTA. *Id.* § 7805(b)(1). Damages include actual losses sustained by schools due to a violation of SPARTA as well as those caused by penalties from the NCAA, conferences, or the institution itself. *Id.* § 7805(b)(2). Significantly, prevailing schools may recover costs and attorneys' fees and schools' rights, remedies, and defenses under law or equity are not restricted by SPARTA. *Id.* §§ 7805 (b)(3), (4).
79. Willenbacher, *supra* note 5, at 1235.
80. *See* Patrick Hruby, *College football, agents go way back*, ESPN, Oct. 21, 2010, http://sports.espn.go.com/espn/commentary/news/story?id=5710346. Hruby discusses two individuals, future NFL commissioner Pete Rozelle and the future owner of the

media coverage than in the past. As a result, the NCAA and many others have tried to devise ways to force agents to comply with NCAA rules. While, clearly, none have been entirely successful to this point, these ideas have laid the foundation for current legislation, like the UAAA and SPARTA, to put us within reach of an ultimate solution. This section will explore three main solutions that have been offered as a way to reach that end point, but would ultimately be unsuccessful for various reasons.

More Regulation of the Sports Agent Industry

Despite the fairly recent passage of the UAAA in most states and SPARTA at the federal level, some individuals feel that more regulation is needed to solve the problem of agents breaking NCAA rules.[81] Some call for regulation in the form of a national licensing or registration program for agents,[82] while others call for a requirement that agents possess a law degree, thus allowing the Bar to police this type of conduct.[83] Legislators in some states have also endorsed this solution.[84] To truly consider this option, however, one needs to look at the nature and enforcement of current regulations.

Of the forty-two states that have passed sports agent laws,

Tennessee Titans, Bud Adams, inducing Heisman Trophy winner Billy Cannon to sign contracts with them by providing him with unbelievable gifts. Rozelle paid Cannon $10,500 to sign with him while Adams paid Cannon $20,000, gave him ownership of five gas stations, a half-interest in an oil company, and a Cadillac for his father. *Id.* While Rozelle and Adams were not agents, they still acted in contravention of NCAA rules, demonstrating that this type of behavior has existed for longer than many would imagine.

81. *See* Willenbacher, *supra* note 5, at 1249-53; *Oregon legislation would crack down on sports agents' influence on college athletes*, THE OREGONIAN, Oct. 13, 2010, http://www.oregonlive.com/collegefootball/index.ssf/2010/10/oregon_legislation_would_crack.html.

82. Willenbacher, *supra* note 5, at 1249-53.

83. Stacey M. Nahrwold, *Are Professional Athletes Better Served by a Lawyer-Representative Than An Agent? Ask Grant Hill*, 9 SETON HALL J. SPORTS L. 431 (1999).

84. *See Oregon legislation would crack down on sports agents' influence on college athletes*, THE OREGONIAN, Oct. 13, 2010, http://www.oregonlive.com/collegefootball/index.ssf/2010/10/oregon_legislation_would_crack.html. Oregon has passed the UAAA, but Senator Courtney will propose to strengthen the statute by broadening the definition of sports agent, requiring agents to register with an official at each school they intend to contact student-athletes, protect athletes at elementary and high schools, and add a prohibition of providing benefits to athletes through friends or family. *Id.*

more than half have yet to invoke penalties of any sort on violating agents.[85] Further, the FTC has received very few complaints about agents violating SPARTA and has not yet taken any enforcement actions.[86] There are numerous reasons for this, but the primary ones seem to be a lack of resources,[87] lack of priority by enforcement agencies,[88] and a general belief that any actions will be useless as agents may simply move their activities to a different state.[89] While the relative merits of these reasons may be questionable, their existence is not and there is no reason to believe that passing more regulations would eliminate them. More regulations would not increase the amount of resources enforcement agencies are able to dedicate to pursuing actions against violating agents and would certainly not change the beliefs of those responsible for enforcing the laws.

A more reasonable solution may be to simply tweak the existing statutes, such as adding a national sports agent registry requirement to SPARTA.[90] But, even this solution overlooks the problems with SPARTA as it now exists. The addition of a national sports agent registry requirement would not provide additional motivation to schools to report agents who violate SPARTA and would not increase the FTC's ability or motivation to pursue actions against such agents. Schools, athletes, and agents know who the violating agents are, yet there have been very few complaints to the FTC and it has taken no enforcement actions.[91] Further, identifying the violating agents will serve no purpose and will not deter agents from engaging in improper conduct.

85. Alan Scher Zagier, *Laws On Sports Agents Rarely Enforced*, THE HUFFINGTON POST, Aug. 17, 2010, http://www.huffingtonpost.com/2010/08/17/laws-on-sports-agents-rar_n_685000.html.

86. *Id.*

87. Liz Proctor, spokeswoman for the North Carolina Secretary of State's office, stated that when the UAAA was passed it came with no funding, so there were no resources dedicated for its enforcement. *Id.*

88. As an example, Kenneth Shropshire, director of the Wharton Sports Business Initiative at the University of Pennsylvania's business school, has said, "If you've got bank robbers and rapists, white-collar crime – how many agent issues should be raised to the top of some prosecutor's desk?" *Id.*

89. *Id.*

90. Willenbacher, *supra* note 5, at 1249-53.

91. Zagier, *supra* note 85.

NCAA Elimination of its Amateurism Requirement

The NCAA has received a lot of criticism for the preservation of its amateurism requirement in an era where its operating revenue equals $710 million.[92] A particularly critical analysis of the NCAA's stance on amateurism states that but for NCAA rules, an agent entering into a contract with a student-athlete for their future representation would not cause harm to the athlete or school.[93] Also, the NCAA rules place states in a no-win situation where they have to sit by and allow athletes and schools to suffer harsh penalties or punish the agents who cause such penalties to occur.[94] Further, while the NCAA requires amateurism in an attempt to secure the integrity of competition, its integrity has already been compromised by the inherent unfairness of athletic rankings and recruiting.[95] Lastly, the NCAA rules permit schools and coaches to take advantage of the student-athletes by parlaying the student-athlete's successes into larger coaching contracts and increased financial resources for the schools.[96]

But, aside from the extremely remote chance of the NCAA eliminating its amateurism requirement making this solution impractical, there are also valid responses to the criticisms. In response to the assertion that student-athletes should be paid because schools are generating revenues and the student-athletes are doing the work, the NCAA emphasizes that the revenues do not go to owners or shareholders, but to providing increased opportunities for all student-athletes.[97] Further, student-athletes are not university employees, but are among the fortunate few that are able to continue their

92. *Revised Budget for Fiscal Year Ended August 31, 2010*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Aug. 31, 2010, http://www.ncaa.org/wps/wcm/connect/6d3874004e51aadc96e0d622cf56f2f3/2009-10+Budget+Breakdown_ALL.pdf?MOD=AJPERES&CACHEID=6d3874004e51aadc96e0d622cf56f2f3.

93. Sudia, *supra* note 7, at 76-77.

94. *Id.* at 77-78.

95. *Id.* at 79.

96. *Id.* at 79-80.

97. *Behind the Blue Disk: Why Don't You Pay Student-Athletes?*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Mar. 27, 2008, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/Behind+the+Blue+Disk+-+Why+Dont+You+Pay+Student-Athletes.

development in both sports and academics.[98] To the contention that the schools are generating revenue and can easily afford to pay the student athletes, the NCAA responds that more than ninety percent of NCAA schools consistently lose money on their athletics programs and, in Division I, only thirty percent of football and twenty six percent of men's basketball programs make money.[99] Finally, in response to the notion that student-athletes are being exploited, the NCAA notes that most current and former student-athletes appreciate the educational and athletic opportunities that college presents, that student-athletes graduate at a higher rate than the general student body, and that the average full-ride scholarship at a public school is worth more than $100,000, resulting in Division I and II institutions cumulatively awarding $1.5 billion in athletics scholarships each year.[100]

Professional Players Associations Should Take A More Active Role in the Regulation of Agent Conduct

Players associations are in a unique position to regulate agent conduct. Without players association certification, agents cannot represent the member-athletes.[101] Consequently, players associations hold significant leverage to force agents to follow the players associations' rules. The main focuses of the players associations' regulations are on agents' competence and ethics and on competition between agents.[102] Clearly, agents' interactions with student-athletes fall into the latter category. What has been seen as a positive attribute of players associations, and the NFL Players Association ("NFLPA") in particular, is the willingness to amend its regulations to better protect its members' interests.[103] This has been demonstrated in the past,[104] as

98. *Id.*
99. *Id.*
100. *Id.*
101. Davis, *supra* note 6, at 816.
102. *Id.* at 817-20.
103. *Id.* at 820-26.
104. In 2002, the NFLPA adopted a one-in-three rule, requiring agents to negotiate at least one contract every three years to remain certified, in order to reduce the number of agents in the market. *Id.* at 820. Also, in 2004, the NFLPA amended its regulations to require agents to disclose all payments they make to runners. *Id.* at 820-

well as the present, with the recent focus being on improper agent behavior.[105] Due to players associations' unique position of authority over agents and players associations' willingness to amend their regulations when needed, some individuals have called for players associations to take action against agents who violate NCAA rules.[106] This argument, however, ignores the fact that players associations' main concerns are its members and that by entering into the conflict between agents and the NCAA, players associations may be acting in contravention of their members' best interests.

By suspending or, in an extreme case, banning an agent from representing its members due to improper conduct, players associations would be depriving members of their chosen representation. Even if only one member of the players association would be forced to find new representation, this has historically been a major concern for the players associations,[107] making it unlikely to occur. Further, former agent Luchs has stated that the NFLPA is undermanned to police agent behavior.[108] Luchs has called the NFLPA's regulations of agent conduct ineffective and stated that the NFLPA only pursues cases that fall into its lap.[109] The lack of investigation and active pursuit of cases against agents who violate NCAA rules has long been the status quo and is not likely to change unless the NFLPA would receive something significant in exchange for changing its approach. Since the players associations' main concern is the welfare and happiness of its members and the agents' conduct is not directly harming the student-athletes, and future players association members, the players associations may not be too motivated to take action to change the agents' conduct. While student-athletes are unquestionably harmed

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105. NFLPA officials are part of a twenty-person panel considering solutions to the problem of agents improperly interacting with student-athletes. Joe Schad, *Financial penalties for players possible*, ESPN, Oct. 26, 2010, http://sports.espn.go.com/ncf/news/story?id=5725836.

106. *See* Pat Forde, *Josh Luchs' story only helps agent issue*, ESPN, Oct. 13, 2010, http://sports.espn.go.com/ncf/columns/story?columnist=forde_pat&id=5681728.

107. Davis, *supra* note 6, at 820-26.

108. Interview by Mike Golic & Mike Greenberg with Josh Luchs, former sports agent, on ESPN Radio (Oct. 13, 2010).

109. *Id.*

through NCAA penalties, student-athletes also benefit from agents providing them with money and gifts. Thus, since the number of players association members who received such benefits without penalty is without question greater than those who were caught by the NCAA,[110] players associations may view this type of agent behavior as having an overall positive effect for its members and be hesitant to prevent it in the future.

SCHOOLS THAT ARE HARMED BY AN AGENT'S CONDUCT SHOULD BRING A CIVIL ACTION AGAINST THE AGENT

All of the aforementioned solutions, aside from being improbable, require further action by an entity as part of the solution. But, these proffered solutions overlook the existence of a more moderate solution, for which the framework is already in place. Both statutes and the common law support the option of schools bringing civil actions against agents who cause them harm. Thus, there is no need for extensive overhauls of NCAA rules or the existing statutes and there is no further action needed by legislators or the NCAA before schools can solve the problem of agent misconduct.

Statutory Civil Action

The UAAA authorizes a civil action for schools against agents for damages caused by agent violations.[111] The UAAA states that schools have a right of action against either agents or student-athletes who cause the school damages by violating the UAAA.[112] Under the UAAA, damages may include losses schools suffer because of penalties from the NCAA or conferences, or self-imposed penalties, as well as those resulting from violations of the UAAA.[113] As previously

110. As an example of the large number of student-athletes who received benefits from agents without being caught, Josh Luchs claims to have paid at least thirty-three current and former NFL players and was never discovered by the NCAA or any other entity. Dohrmann, *supra* note 20. Luchs was only recently decertified by the NFLPA, *NFLPA decertifies Josh Luchs*, ESPN, Oct. 21, 2010, http://sports.espn.go.com/nfl/news/story?id=5712065, demonstrating another instance of the NFLPA dealing with a case that fell into its lap.

111. UNIF. ATHLETE AGENT ACT § 16.

112. *Id.* § 16(a).

113. *Id.* § 16(b).

mentioned, these losses may include, "lost television revenues, lost ticket sales from regular season athletic events, lost revenues from not qualifying for postseason athletic events such as football bowl games and NCAA tournaments, and possibly the value of the athlete's scholarship."[114] The UAAA further states that rights of action do not accrue until the school has, or reasonably should have, discovered the violation and that liability in such a right of action is several, not joint.[115] Thus, by providing a right of action for any damages caused by NCAA penalties and a wide range of recoverable damages, the UAAA envisions civil actions by schools as a major deterrent of improper agent conduct and, possibly, as the overall solution.

Similarly, SPARTA provides schools with a right of action for any damages caused by violations thereof.[116] This is significant due to the breadth of prohibited conduct under SPARTA, which includes directly, or indirectly, recruiting or soliciting a student-athlete to enter into a contract by giving any false or misleading information or making a false promise or representation.[117] Further, an agent is prohibited from providing anything of value to a student-athlete or person associated with the student-athlete before entering into an agency contract, including any consideration in the form of a loan, or acting in the capacity of a guarantor or co-guarantor for any debt.[118] Finally, it is prohibited to enter into a contract with a student-athlete without providing them with the required disclosures,[119] or to predate or postdate an agency contract.[120] If an agent engages in any of the prohibited conduct under SPARTA or causes a school to be penalized by the NCAA, a conference, or itself, resulting in actual losses or expenses, then the school may recover those damages under SPARTA.[121] SPARTA also allows a school to recover costs and reasonable attorney fees if it prevails in an

114. Weiler, *supra* note 56, at 429.
115. UNIF. ATHLETE AGENT ACT §§ 16(c), (d).
116. 15 U.S.C. § 7805(b).
117. *Id.* § 7802(a)(1)(A).
118. *Id.* § 7802(a)(1)(B).
119. *Id.* § 7802(a)(2).
120. *Id.* § 7802(a)(3).
121. *Id.* § 7805(b)(2).

action.[122] This shows that Congress, as with the NCCUSL in its drafting and promotion of the UAAA, intended to encourage civil actions by schools as a primary means of combating agent misconduct.

For those states that have not passed the UAAA, but have athlete agent legislation on the books, there are similarities with the UAAA and SPARTA. An example of this is the law in California,[123] which will be examined because of the number of high profile universities in that state and the recent NCAA rules violations at, and subsequent penalization of, USC.[124] The California law is known as the Miller-Ayala Athlete Agents Act ("Miller-Ayala Act"),[125] and is an excellent example of an overly complicated statute, whose goals would benefit from the simplicity and clarity of the UAAA. The Miller-Ayala Act prohibits much the same behavior of the UAAA and SPARTA including postdating contracts and offering or providing money or other benefits to student-athletes.[126] Also, the Miller-Ayala Act requires agents to provide notice to the appropriate school when they enter into a contract with a student-athlete and provides for language that must be contained in every agent contract.[127] The Miller-Ayala Act states that schools may bring a civil action for recovery of damages from an agent if the school is adversely affected by the acts of the agent or their representative.[128] Schools are deemed adversely affected if they or one or more of their student-athletes are suspended or disqualified from competition by the NCAA or other regulatory entity.[129] If a school is deemed to be adversely affected, then its recoverable damages include the greater of $50,000 or actual damages and it may also recover punitive damages, court costs, and reasonable attorneys fees. Additionally, violating agents forfeit any right of repayment for benefits provided to student-athletes and must refund any consideration paid by

122. 15 U.S.C. § 7805(b)(3).
123. CAL. BUS. & PROF. CODE §§ 18895-97.97 (2004).
124. *See generally NCAA delivers postseason ban*, ESPN, June 11, 2010, http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615.
125. CAL. BUS. & PROF. CODE § 18895.
126. *Id.* §§ 18897.5, 18897.6.
127. *Id.* §§ 18897.7, 18897.73.
128. *Id.* § 18897.8(a).
129. *Id.*

the student-athlete or on behalf of the student-athlete.[130] Agents also face criminal penalties of up to one year in jail, a fine of up to $50,000, or both as well as the possible suspension or revocation of their ability to engage in the business of an athlete agent.[131] Finally, in the Miller-Ayala Act, the legislature stated its intent to encourage enforcement of the Miller-Ayala Act through private civil actions.[132] Thus, as with Congress and the legislatures of the states that have passed the UAAA, civil actions by schools against agents that cause those schools damage are meant to be the primary solution to the problem of improper agent conduct.

Common Law Civil Action

In addition to any statutory claims a school may bring against an agent that has caused the school damage, schools may also bring common law claims against such agents. SPARTA and the UAAA expressly state that they do not restrict the remedies under existing law or equity.[133] Thus, based on current statutory language and the precedent of schools successfully bringing common law actions against agents that cause schools harm,[134] any school that has a statutory civil right of action against an agent should also pursue common law claims.

Tortious Interference with a Contractual Relation Claim

It is well established that a contractual relationship exists between a school and its student-athletes.[135] Thus, in a situation where a student-athlete has breached its contract with a school by entering into a contract with an agent and losing NCAA eligibility, the school will have a claim for tortious interference because, "one who intentionally and improperly interferes with the performance of a contract

130. *Id.* § 18897.8(b).
131. CAL. BUS. & PROF. CODE § 18897.93.
132. *Id.* § 18897.8(c).
133. 15 U.S.C. § 7806; UNIF. ATHLETE AGENT ACT § 16(e).
134. The claims in USC's suit against Caron were interference with contractual relationships and prospective business advantages. Almond, *supra* note 54.
135. *See, e.g.*, Taylor v. Wake Forest Univ., *16 N.C. App. 117 (N.C. Ct. App. 1972)*; Williams v. Univ. of Cincinnati, *112 Ohio Misc. 2d 36 (Ohio Ct. Claims 2001)*; Hendricks v. Clemson Univ., *578 S.E.2d 711 (S.C. 2003)*.

(except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."[136] The elements of a claim for tortious interference with a contract are that the conduct is intentional, the conduct interferes with the contract, the defendant knew of the existence of the contract, and the plaintiff suffered damages.[137] The first three elements are easily satisfied in any situation where an agent signs a student-athlete to a contract, but the damages element is more complex.

Aggrieved schools may recover the pecuniary loss of the benefits of the contract.[138] This includes television or advertising revenue, loss of ticket sales, and other lost income.[139] Schools may also recover consequential damages for losses that are caused by the interference.[140] This may include damages caused by NCAA penalties including forfeiture of victories and tournament winnings.[141] Significantly, schools are also permitted to recover for actual harm to their reputation, as long as the harm was reasonably foreseeable as a consequence of the interference.[142] While actual harm to reputation may be difficult to show, a sympathetic court and jury may be willing to accept arguments that this damage may not be discernible until future dates. Lastly, and importantly, schools may recover punitive damages under appropriate circumstances.[143] Thus, a school that brings a tortious interference with a contract claim against an agent should be able to prove the required elements with ease and may be able to recover considerable damages, deterring agents from engaging in such conduct with that school's student-athletes in the future.

136. RESTATEMENT (SECOND) OF TORTS § 766 (1979).
137. Willenbacher, *supra* note 5, at 1242.
138. RESTATEMENT, *supra* note 136, § 774A(1)(a).
139. Richard P. Woods & Michael R. Mills, *Tortious Interference with an Athletic Scholarship: A University's Remedy for the Unscrupulous Sports Agent*, 40 Ala. L. Rev. 141, 167 (1988-1989).
140. RESTATEMENT, *supra* note 136, § 774A(1)(b).
141. Woods, *supra* note 139, at 169.
142. RESTATEMENT, *supra* note 136, § 774A(1)(c).
143. RESTATEMENT, *supra* note 136, § 774A cmt. a.

Agent's Liability to Third Parties Claim

Generally, an agent only owes duties to their principal,[144] but in certain circumstances the duties owed by an agent extend to third parties. In the context of representation contracts between athletes and agents this would mean that the only duties owed by the agent are to the athlete. But, when the athlete in that situation is a student-athlete, the duties owed by the agent may extend out to the student-athlete's school, among others. Since "an agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal,"[145] one can definitely make this argument.

By competing in athletic events for their school, a student-athlete who is no longer eligible for such competition, by virtue of entering into a contract with an agent or receiving benefits from an agent, is committing fraud on the school.[146] So, the elements of this tort are easily established. The student-athlete is the principal and the agent is, well, the agent. The principal is committing a fraud by competing when they are ineligible. The agent knows the principal will be committing fraud and assists them in it by (1) making them ineligible and (2) not notifying the school that the student-athlete is no longer eligible. Therefore, schools should bring claims against an agent that provides improper benefits to a student-athlete or enters into a representation contract with a student-athlete since that agent would likely be found liable for fraud.

Viability of Civil Actions as the Solution to Agent Misconduct

Clearly, a school's ability to pursue a civil action against an agent that causes the school damage has been established through statutes and the common law. But, the existence of

144. *See* RESTATEMENT (SECOND) OF AGENCY § 13.
145. *Id.* § 348.
146. Fraud is intentional deception that causes a person or entity to give up property or some lawful right. *See* WEBSTER'S NEW WORLD DICTIONARY 555 (2d college ed. 1984).

such a right of action does not mean that it is automatically the solution to preventing agents from engaging in improper behavior. This section will consider whether civil action is a viable solution to the problem by considering criticisms of it and whether universities would actually pursue it as an option.

Criticisms of Civil Actions as the Solution to Agent Misconduct

One criticism of this solution asserts that universities make too much money from college sports to undertake publicized and damaging lawsuits.[147] This criticism cites the damaging information that may come out about the schools during the discovery process and the belief that universities want to keep NCAA violations out of the public eye.[148] But, this Comment does not contend that schools should sue whenever there is an NCAA violation. Rather, schools should sue when the NCAA violations and penalties are severe, such as at USC where there is a two-year bowl ban and a three-year reduction in scholarships.[149] When violations like that occur, they are already in the public eye and, since the NCAA publicizes its findings in relation to the penalties it delivers, there is not much that can come out in the discovery process that would harm the school any further.

Another criticism of civil actions as the solution is that some agents may be judgment-proof and the agents that schools would succeed in bringing claims against are not worth the expense of a lawsuit.[150] This criticism comes from the beliefs that some agents will not be deterred by the risk of any possible fine or penalty because the reward of signing a superstar athlete is much greater and that the agents that would be deterred are not the ones that pose the greatest threat to student-athletes and schools, so it is a waste of time and resources to pursue claims against them.[151] This criticism is lacking in both its bases. First, it ignores the possibility of how large a successful claim against an agent may be. If an

147. Willenbacher, *supra* note 5, at 1245-46.
148. *Id.* at 1246.
149. Zinser, *supra* note 3.
150. Willenbacher, *supra* note 5, at 1246.
151. *Id.*

agent is found fully liable for the damage a school suffers as a result of NCAA penalties, the school's recovery may be in the tens of millions of dollars. As demonstrated above, damages a school is entitled to recover under a statutory civil action could include "lost television revenues, lost ticket sales from regular season athletic events, lost revenues from not qualifying for postseason athletic events such as football bowl games and NCAA tournaments, and possibly the value of the athlete's scholarship."[152] If you add on to that amount the damages a school is entitled to under the common law for harm to reputation as well as punitive damages, the monetary judgment could be astronomical. Second, even if a particular agent does not possess enough assets to pay off an adverse judgment, the deterrent effect of a large damages award would not be lessened. Nevertheless, many of the major agents have significant assets and recovery of a judgment against those agents would be possible.

A third criticism of this solution is that bringing a civil action would harm the school's reputation.[153] This would make it harder to recruit student-athletes because it would be a logical choice for a student to choose a school without a propensity to sue people who cause NCAA violations.[154] Further, it would dissuade alumni and others from donating to the university if the school was being criticized in the media.[155] This criticism falters for several reasons. First, this solution does not call for schools to sue student-athletes who violate NCAA rules; it calls for action against those who induce the student-athletes into breaking the rules. Thus, a school choosing to pursue this solution will never harm a student-athlete. Second, this solution envisions every school that is harmed by agent misconduct bringing an action against those agents. If a school does not want to pursue such an action and chooses not to protect itself, then it does not deserve the protection of the law. Finally, rather than dissuade donors, this solution may persuade individuals to donate more, or at all. If an alumnus sees that its school will not stand by and let others harm it, then that alumnus may

152. Weiler, *supra* note 56, at 429.
153. Willenbacher, *supra* note 5, at 1246-47.
154. *Id.* at 1247.
155. *Id.*

be willing to contribute more to help the school's defense. Further, such an action may bring the school community together; pitting it against an opponent as if it were a football game in November or a basketball game in March, creating a surge of pride that would increase donations in both the present and future.

A final criticism of civil actions as a solution is that schools may be unable to bring successful claims because of their knowledge of the violations.[156] After all, the NCAA only delivers most serious penalties when a lack of institutional control on the part of the school is present along with the violations.[157] Paul Haagen, co-director of Duke University's Center for Sports Law and Policy, has said, "You're going to have this question about whether the harm was caused by the action or by the failure of the institution effectively to control … There would be a contributory negligence kind of thing there. That would be a difficulty."[158] While this criticism would be valid if the solution of schools bringing civil actions relied upon the recovery of full damages, it overlooks the fact that it is unnecessary for a school to recover all of its damages to be successful. Once a school has been hit with NCAA penalties it has two choices: (1) take the penalty and suffer all the damage, or (2) take the penalty and receive some relief from the agent who caused the penalty. Even if a school's penalty would result in $10 million in damages and they would only have a true recovery of one dollar from the agent,[159] they are still clearly better off financially. Further, the suit would still accomplish the goal of sending a message to agents that the school will not tolerate interference with its student-athletes and deter agents from engaging in improper conduct at that school in the future. Therefore, the civil action would still be successful even if the school were unable to recover the full amount of its damages.

Schools Would Consider Civil Actions as a Viable Option

There are only two ways to know if schools would consider

156. *Id.* at 1248.
157. Ken Tysiac, *N.C. State's Yow warns agents*, THE NEWS & OBSERVER, Aug. 6, 2010, http://www.newsobserver.com/2010/08/06/616770/yow-warns-agents.html.
158. *Id.*
159. True recovery equaling the full amount of the award less all costs.

civil actions against agents who cause the school harm as a viable option: (1) schools have done it in the past, or (2) schools have said they will do it in the future. There have been instances of both of these possibilities. First, USC filed a civil action against Caron when it suffered NCAA penalties in 1995.[160] This was one of the first instances of a school pursuing an action against an agent and,[161] while it has not become a popular option, demonstrates that in the right circumstances schools will pursue civil actions against agents. Second, Debbie Yow ("Yow"), the athletic director at North Carolina State University ("N.C. State"), has said that if agents break any laws while recruiting N.C. State student-athletes, the university will take action against the agents.[162] Yow has sent a letter to all registered agents in North Carolina stating as much, something she also did when she was the athletic director at the University of Maryland.[163] Thus, while the opportunity to pursue a civil action against an agent has not arisen for her, Yow has made it clear to the agents in two states that improper conduct will not be tolerated and that she is willing to pursue civil actions to protect her university. Finally, Mike Garrett ("Garrett"), former athletic director of USC, has stated his support for civil actions against agents that interfere with student-athletes.[164] Garrett has suggested that the NCAA institute a tax on its members to fund mandatory civil actions against such agents and stated that the benefits of this solution include not only the recovery of damages, but also the access to information the NCAA would gain through court proceedings.[165] Clearly, this demonstrates that civil actions against agents that cause schools harm is a viable option for schools to prevent agents from inducing their student-athletes into breaking NCAA rules.

160. Almond, *supra* note 54.
161. *Id.*
162. Tysiac, *supra* note 157.
163. *Id.*
164. Mike Garrett, *How to Keep Agents Off the Field*, N.Y. TIMES, Oct. 29, 2010, http://www.nytimes.com/2010/10/30/opinion/30garrett.html?_r=1.
165. *Id.*

Other Parties that may have Causes of Actions Against Agents

In addition to the civil actions that schools may bring against agents that cause the schools damage, there are other parties that may also have claims against those agents, which could serve as supplements to the civil actions brought by schools. Outside of the obvious possibility of the student-athlete bringing an action against an agent,[166] other parties that may have claims include other student-athletes at the school, coaches at the school, alumni and fans of the school, and other sports agents. One possibility is for these parties to bring a statutory action against the agent. While SPARTA and the UAAA do not provide for actions by other parties, instead focusing on actions by the schools,[167] the Miller-Ayala Act states that, in addition to athletes and schools, any other person who is adversely affected by acts of an agent that are in violation of the Miller-Ayala Act may bring a civil action to recover their damages.[168] Alternatively, if a person resides in a state that does not have a statutory right of action, they may bring a civil action under the common law, possibly claiming that the agent breached a duty owed to them by virtue of the agent's actions creating the risk of harm.[169] In either scenario, such a case would likely turn on the ability of the plaintiff to establish damages.

Other Student-Athletes' Claims Against Agents

Other student-athletes at schools harmed by agents, especially returning players on the team penalized by the NCAA, are left to pay the price for the mistakes of their

166. Athletes are able to bring actions against their agents through both contract and tort law, as with any other agency relationship. *See* UNIF. ATHLETE AGENT ACT § 16 cmt. Usually, these actions arise in situations involving financial mistakes. *See* Liz Mullen, *Judge orders Jones to pay Dishman $550K*, SPORTS BUS. J., Mar. 3, 2002, http://www.sportsbusinessjournal.com/article/29021; *Pippen wins $11 million lawsuit against financial advisor*, CBS BUS. NETWORK, Dec. 20, 2004, http://findarticles.com/p/articles/mi_m1355/is_25_106/ai_n8694084/. But, while possible, there has not been a claim brought by an athlete against an agent on the basis of the agent's actions causing the athlete loss of NCAA eligibility.

167. 15 U.S.C. § 7805; UNIF. ATHLETE AGENT ACT § 16.

168. CAL. BUS. & PROF. CODE § 18897.8(a).

169. An actor is negligent with respect to another if his conduct creates a recognizable risk of harm to the other individually, or as a member of a class of persons. *See* RESTATEMENT, *supra* note 136, § 281 cmt. on Clause (b).

former teammates and are harmed by the NCAA rules violations of agents in various ways. First, if there is a scholarship reduction, then there are fewer players on the team. This increases the amount of playing and practice time per player and makes players more susceptible to fatigue and injuries, possibly reducing or ending players' careers. This is why USC did not have any contact in their preseason practices in 2010.[170] Second, if the school is prohibited from playing in bowl games, then the players have less opportunity to practice and play games to increase their experience and skills and to showcase their talents in front of nationwide audiences.[171] Finally, if the school is hit with serious penalties by the NCAA, such as a reduction in television time or scholarships, it will likely make the team less successful,[172] which would decrease the number of professional scouts at the games and also prevent students from competing on television, which further decreases their opportunity to be discovered. Therefore, these student-athletes definitely suffer damages as a result of an agent's NCAA rules violations and, if they are able to establish a concrete dollar amount, would likely be able to recover against such an agent.

Coaches' Claims Against Agents

Coaches are also harmed by the NCAA rules violations of agents in a variety of ways. First, the coach may be fired from his position at the school as a result of the NCAA

170. *See Lane Kiffin: no more tackling*, ESPN, Aug. 12, 2010, http://espn.go.com/blog/los-angeles/usc/post/_/id/2705/lane-kiffin-no-more-tackling; Josh Jovanelly, *Practice isn't the fix for USC's tackling woes*, DAILY TROJAN, Oct. 4, 2010, http://dailytrojan.com/2010/10/04/practice-isn%E2%80%99t-the-fix-for-usc%E2%80%99s-tackling-woes/ ("Sanctions equal fewer players, which means a team that has less tolerance for injuries that don't happen on game day.").

171. Some coaches place importance on qualifying for bowl games just for the additional fifteen practices it permits, enabling the coaches to further develop their players. *See* Erick Smith, *Notre Dame coach Brian Kelly wants Irish in a bowl game, any bowl game*, USA TODAY, Oct. 26, 2010, http://content.usatoday.com/communities/campusrivalry/post/2010/10/notre-dame-coach-brian-kelly-wants-irish-in-a-bowl-game-any-bowl-game/1.

172. After receiving NCAA discipline similar to that given to USC, in the five years after bowl bans were lifted Alabama's record was 21-14, Auburn University's record was 18-22, and the University of Oklahoma's record was 17-15-2. Rosenfield, *supra* note 3.

violations.[173] Second, if the coach keeps his job, it will tarnish his reputation, making it harder for him to attain employment in the future and also to recruit student-athletes at the present time.[174] Finally, if the school is required to decrease its scholarships, then it will make it much harder for the coach to perform his job and will likely result in unsuccessful seasons.[175] This lack of success could also lead to the coach's firing and make it harder for them to attain employment in the future. Thus, while it may be difficult to quantify the amount of harm, it is inarguable that coaches are harmed by the NCAA rules violations of agents.

Alumni and Fans' Claims Against Agents

Alumni are harmed by the NCAA rules violations of agents because such violations tarnish the name and reputation of their school. This may decrease the value of their education in the public's eye and make it harder for them to network or attain employment. Additionally, fans are harmed by the NCAA rules violations of agents because if those violations result in postseason or television bans, it will present fans fewer opportunities to watch their school's team. Moreover, if the rules violation is severe and the NCAA delivers it dreaded "death penalty,"[176] it will deprive fans of

173. It is common for schools to include termination for cause provisions in their coaches' contracts, enabling them to terminate the coach's employment if their program is found guilty of a major NCAA rules violation. *See* Adam Rittenberg, *RichRod gets win, still needs more on field*, ESPN, Nov. 4, 2010, http://espn.go.com/blog/bigten/post/_/id/19154/richrod-gets-win-still-needs-more-on-field.

174. Following the NCAA's announcement of USC's penalties, USC lost its commitment from one of the top high school offensive linemen in the country. *See AP: Seantrel Henderson chooses to play for Miami*, USA TODAY, July 13, 2010, http://www.usatoday.com/sports/college/football/acc/2010-07-09-henderson-miami_N.htm.

175. *See supra* note 172.

176. "The 'death penalty' is a phrase used by media to describe the most serious NCAA penalties possible. It is not a formal NCAA term. It applies only to repeat violators and can include eliminating the involved sport for at least one year, the elimination of athletics aid in that sport for two years and the school relinquishing its Association voting privileges for a four-year period. A school is a repeat violator if a second major violation occurs within five years of the start date of the penalty from the first case. The cases do not have to be in the same sport." *Glossary of terms*, NAT'L COLLEGIATE ATHLETIC ASS'N, 2010, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/Rules+Enforcement+glossary+of+terms. Southern Methodist University is the only school to receive the full extent of the NCAA's death

any opportunity to watch their school's team. Lastly, if the fan is a season ticket holder, it may cause a diminution in value to their investment, thus presenting a tangible, financial harm. Consequently, claims by fans and alumni against agents may have the best chance of success, especially if they are ticket holders, because they are the easiest in which to identify a quantifiable amount of damages.

Other Agents' Claims Against Agents

Other agents are harmed by the NCAA rules violations of agents because those violations create a negative public perception of the entire sports agent industry.[177] This may make it harder for them to attract clients, especially at schools that have already been harmed by agents.[178] Further, if they are part of the same firm or agency as an agent that has violated NCAA rules, it may make it harder for them to attract clients because they may be seen as unethical or untrustworthy to potential clients, essentially as guilty by association. Additionally, competing agents may be able to bring a claim for unfair competition against agents that violate NCAA rules. If an agent is losing out on clients because they are following the rules while others are not, then there is certainly tangible harm. But, despite the possibility of easily establishing damages, agents are reluctant to bring civil actions, or even file grievances with players associations, against other agents.[179] Thus, while agents could be successful in actions against agents who violate NCAA rules, the probability of such actions being initiated is not currently

penalty and its football team did not recover for over twenty years. *See generally* David Williams, *Overcoming the NCAA Death Penalty: Southern Methodist, 21 Years Later*, BLEACHER REPORT, http://bleacherreport.com/articles/16678-overcoming-the-ncaa-death-penalty-southern-methodist-21-years-later.

177. "Like serpents they infest the gardens and groves of American sport, poised to strike at the wealth professional athletes earn in such plenty. This, anyway, is the popular perception of sports agents, and it's a generalization based on a great many sordid and all-too-true particulars." Craig Neff, *Den of Vipers, A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED, Oct. 19, 1987, http://sportsillustrated.cnn.com/vault/article/magazine/MAG1066585/index.htm.

178. For example, agents are no longer allowed to attend practices at USC following the penalties the NCAA delivered. *See* Marcia C. Smith, *New feeling at USC practice: Keep out*, ORANGE COUNTY REGISTER, Aug. 10, 2010, http://www.ocregister.com/articles/practice-260770-usc-field.html.

179. *See* Davis, *supra* note 6, at 805.

high.

CONCLUSION

While there is near-universal consensus that something needs to be done to dissuade agents from violating NCAA rules and, consequently, causing damage to student-athletes and schools, there is not even near a plurality opinion on what that action should be. More regulation, elimination of the NCAA's amateurism requirement, and regulation by players associations have all been proffered as options, but they are either inherently flawed or impractical. The debate about the way forward assumes that we have already exhausted available options. That is simply not true. The solution to the problem should utilize the existing statutory and common law framework, making civil actions by schools against agents that cause those schools damage the best solution. In addition to allowing schools to recover some, if not all, of their damages, civil actions will serve as a major deterrent for improper agent conduct. If an agent knows that they may be held liable for tens of millions of dollars, then the risk will finally outweigh the reward of signing a superstar athlete and it will no longer make economic sense for agents to break NCAA rules to sign athletes. Moreover, this deterrent does not disappear in cases where agents will not be held liable for such large amounts. If a school brings a civil action against an agent and that agent is found liable, then even if the amount of damages awarded is minimal, such a finding would likely lead to punishment from players associations, resulting in the removal of the unscrupulous agent from the marketplace.[180] Therefore, civil actions by schools against agents who cause those schools damage is clearly the best solution because it provides relief to schools for past harms by such agents and dissuades agents from violating NCAA rules, at that school and others, in the future. Lastly, these tools have the advantage of existing already; they do not impose high costs for creation, development, or

180. The NFLPA decertified Luchs for admitting he violated NCAA rules to sign athletes. *See NFLPA decertifies Josh Luchs*, *supra* note 110. Thus, since such an admission leads to penalties from players associations, a finding by a court that an agent violated NCAA rules and caused damage to student-athletes and schools would also likely result in decertification or, at a minimum, suspension.

implementation.