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Agents, Compliance and Collective Bargaining

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CHAPTER 1: THE LEGAL RELATIONSHIP BETWEEN THE ATHLETE-AGENT AND THE CLIENT

The relationship between an agent and his client is governed by various state statutes and league regulations, as well as two separate but interrelated bodies of law: (1) the law of agency; and (2) contract law. Once an athlete-agent relationship has been established, an agent is considered a fiduciary of the athlete under the law of agency. The agent then has a set of legal obligations, called “fiduciary duties,” which compel him to put the interests of the athlete ahead of his own interests during business dealings. Against this general backdrop of agency law, which applies to all agent-athlete relationships, the athlete and agent also operate under a contract that is specific to their relationship. The contract may be based on an oral agreement or “handshake” deal, or it may be memorialized in a written document, called the representation agreement.

This chapter begins with an introduction to the fiduciary duties that apply to all agents in Section A. Section B then examines some particularly egregious examples of agents who breached their fiduciary duties. Section C details the resulting efforts of legislative bodies, the NCAA and players associations to address agent misconduct.

A. AN INTRODUCTION TO AGENCY LAW AND FIDUCIARY DUTY

The agent, as a fiduciary of the athlete, must act on behalf of the athlete “with respect to matters within the scope of his agency.”¹ While the law may vary slightly from state to state, a breach of fiduciary duty typically has three elements: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately

¹ § 13, Restatement (2d) of Agency.
from the breach.² Because of the breadth of the test, allegations that an agent breached his fiduciary duty may come in a wide variety of contexts.

The most common allegations of a breach of fiduciary duty involve three situations: (1) when an agent acts in a way that increases the compensation the agent receives, often at the expense of the athlete; (2) when an agent has a conflict of interest, such as another client competing for the same endorsement deal, or the agent’s own long-term business interest in referring a client to a particular financial advisor (that may incentivize the agent to consider his own or another party’s interests over the athlete’s); and (3) when an agent acts, or fails to act, negligently on the client’s behalf. These three common scenarios do not cover the most flagrant breaches of fiduciary duty, such as when an agent steals from his client. Such blatant agent misconduct—which potentially creates both criminal and civil liability—will be discussed in Section B.

The first major allegation of an agent breaching his fiduciary duty to his client in order to maximize his own compensation came against one of the first major sports agents—the late Bob Woolf. One of Woolf’s NHL clients, Andrew Brown, was weighing competing offers from his current team, the Pittsburgh Penguins, and the Indianapolis Racers of the upstart World Hockey League. The Penguins offered Brown a two-year contract, worth $80,000 per year, though the contract was not guaranteed. The Pacers countered with a five-year, guaranteed contract at $160,000 per season. Woolf advised Brown to accept the Racers offer—perhaps because Woolf was entitled to a five percent commission on any contract—and Brown followed his advice. Soon after Brown signed on with the Racers, however, the team encountered financial problems, which eventually led to bankruptcy.

² These are the elements in Ohio, for example, as stated in Heights Driving Sch. V. Motorists Ins. Co., 2003 Ohio 1737 (Ct. App. 2003).
In pre-bankruptcy negotiations with the financially-strapped squad, Brown alleged that he secured only $185,000 of the $800,000 guaranteed to him, while Woolf managed to recover his full $40,000 commission on the contract from the Racers. After the Racers defaulted on their obligations, Brown sued his agent on grounds of breach of fiduciary duty and material misrepresentation. In *Brown v. Woolf*, the court refused to grant summary judgment, finding instead that there was a “question of fact” as to whether or not there was constructive fraud due to “the making of a false statement, by the dominant party in a...fiduciary relationship...upon which the plaintiff reasonably relied to his detriment.” While the case was never resolved on the merits, the legal standard cited by the judge helps illuminate the high standard to which fiduciaries are held.

Another example of a conflict between an athlete and his agent’s financial interests came in *Jones v. Childers* and *Hernandez v. Childers*. In those cases, Gordon Jones (of the Tampa Bay Buccaneers) and Keith Hernandez (of the New York Mets) alleged that their agent John Childers breached his fiduciary duties when he counseled both athletes to invest high-risk, non-IRS approved tax shelters. The clients lost money on the investments, but Childers received a commission from the investment company and failed to disclose this income to his clients. In both cases, the courts found a breach of his fiduciary duty.

The second common type of case brought against agents for breach of fiduciary duty alleges that the agent failed to properly disclose a conflict of interests or allowed the conflict to interfere with his fiduciary duties. One particularly flagrant example is explained in the case of

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3 554 F. Supp. 1206 (S.D. Ind. 1983)
4 The court opinion suggests that Brown only supported his cause of action with the vague and incomplete set of facts that are set forth in this section. There is nothing in the opinion addressing whether or not Woolf made a factually incorrect statement to his client, or failed to disclose his commission.
5 18 F.3d 899 (11th Cir. 1994).
6 806 F. Supp. 1368 (N.D. Ill. 1992)
Detroit Lions & Billy Sims v. Jerry Argovitz. Billy Sims was a star running back for the Detroit Lions. His agent, Jerry Argovitz, had recently become a part owner of the Houston Gamblers of the USFL. When Sims’s contract expired, Argovitz—without notifying Sims as to the extent of his interest in the Gamblers—represented Sims in negotiations with both the Lions and the Gamblers. When the Lions refused to offer Sims a guaranteed contract, negotiations broke down. Sims “believed that the organization was not that interested in him and his pride was wounded.” The next week, Argovitz and Sims entered into face-to-face negotiations with the Gamblers, who topped the Lions’ financial offer and guaranteed the offer contract. Sims wanted to sign right away, but Argovitz told his client that the Lions would likely match the Gamblers financial package. Argovitz asked Sims if he should call the Lions for a final offer, and the client declined. Sims then agreed to the deal with the Gamblers. Based upon these facts, the court found:

“Argovitz irreparably breached his fiduciary duty. As agent for Sims, he had the duty to telephone the Lions, receive its final offer, and present the terms of both offers to Sims. Only then could it be said that Sims made an intelligent and knowing decision to accept the Gambler’s offer....Although it is generally true that an agent is not liable for losses occurring as a result of following his principal’s instructions, this rule of law is not applicable when the agent has placed himself in a position adverse to that of his principal.”

The court declared Sims’s contract with the Gamblers unenforceable. It also refused to enforce a waiver signed by Sims at the time of the contract, which waived any claims against

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8 Id.
Argovitz, because Sims did not “receive independent advise with regard to the wisdom of signing such a waiver.”

It is worth noting, however, that Argovitz went on to prevail in another case alleging conflict of interest. In that case, Argovitz represented Gary Anderson, whom he allegedly “channeled” to the USFL’s Tampa Bay Bandits instead of to an NFL franchise, because of his interests in the USFL. When Anderson later tried to back out of the contract, a Texas judge enjoined him from playing in the NFL, upholding the contract between Anderson and the Bandits despite Argovitz’s failure to disclose his financial interests in the USFL.

The conflicts of interest faced by sports agents continue to grow as the industry becomes more consolidated, with agencies often comprising just one part of a media conglomerate. In August of 2000, for example, Clear Channel Communications acquired SFX—the home of super agents David Falk and Arn Tellem, among others—for $4.4 billion, creating an immediate conflict of interest. The problem? Clear Channel’s vice chairman Tom Hicks owned both the Dallas Stars of the NHL and the Texas Rangers of the MLB. One of the Clear Channel’s major shareholders, Red McCombs, owned the Minnesota Vikings of the NFL. These unavoidable conflicts of interest necessitated a corporate restricting, with an autonomous division for negotiating player contracts. Other conflicts of interest arise when individual agents (like Argovitz) invest in teams or leagues. In 2007, for example, veteran NFL executive and player agent Michael Hyughue, whose client list included Adam “Pac Man” Jones, voluntarily relinquished his certification to represent NFL players when he accepted a position as the Commissioner of the upstart United Football League.

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9 At the time, Falk represented Michael Jordan and Tellem represented Kobe Bryant, among others.
An even murkier conflict of interest situation arises when an agent’s business relationship with one or more financial advisors calls into question the agent’s independence with respect to providing his or her client with advise regarding financial decisions. For example, after several NFL players lost up to $43.6 million on a failed casino investment, Yahoo! Sports reported that the NFLPA was investigating the relationship between the investment advisor who was responsible for bad investment, Jeff Rubin, and Drew Rosenhaus (arguably the most well-known and influential agent in professional football), the agent for several of the players who had used Rubin as a financial advisor. Although players with other agents also used Rubin as their financial advisor, Rosenhaus alone appeared to have an “extensive recruiting and referral relationship” with Rubin, sharing at least 26 clients.

At the very least, this relationship created some tension with Rosenhaus’s fiduciary duty to his clients. Athletes and other persons interviewed for the Yahoo! report indicated that Rosenhaus consistently pushed his athletes to other financial advisors that did not send his agency clients in return for Rosenhaus’s referrals. This behavior suggests the presence of a conflict of interest similar to that set out in the Childers and Argovitz cases: referring clients to Rubin was in Rosenhaus’s financial interests and may not have aligned with his clients’ best interests, even though his fiduciary duty compels him to put the interests of his athletes first.

The third and final common type of claim athletes bring against their agents alleges breach of fiduciary duty for negligently failing to perform the duties owed to the athlete. These

10 The NFLPA regulates the process by which an agent can be eligible to represent NFL player with respect to negotiating contracts with NFL teams. This is discussed, infra, at Section C of this chapter.
12 Former Miami Hurricane’s booster Nevin Shapiro provides another example of this conflict of interest. Shapiro served as a booster to the school—donating money and gaining substantial access to Miami football players—while co-owning a sports agency. Shapiro’s situation is discussed in detail in Section A of Chapter 2.
suits often also involve breach of contract claims, alleging that the agent did not carry out his obligations under the representation agreement. One particularly tragic example was the case of Len Bias, the No. 2 pick in the 1986 NBA Draft. When Bias died from an overdose of cocaine two days after the draft, his family brought suit against his agent Lee Fentress, alleging that he negligently failed to finalize agreements before Bias’s death. The court, however, found that the agent did not act negligently and that a reasonable person would not expect Fentress to finalize the contracts within two days of the draft. For further updates on these types of cases, see Darren Heitner’s Sports Agent Blog.

B. AGENT MISCONDUCT AND FUND MISMANAGEMENT

As discussed in the previous section, the interests of agents and athletes can oftentimes be at odds, creating incentives for agents to breach their fiduciary duties. Typically, this only results in civil or contractual liability or an equitable remedy, such as nullification of a contract. In some cases, however, an agent’s actions may be so flagrant that they result in criminal liability. Such actions are the subject of this section.

Most potentially criminal conduct by agents involves the mismanagement of their clients’ funds. Because some athletes are not sophisticated in financial matters, they rely heavily upon their agents to manage their funds. Such reliance has cost many athletes large portions of their fortunes, as agents have invested in extremely risky ventures and even flat out stolen funds.

Perhaps the most famous example was Don King’s representation of Mike Tyson, the former heavyweight boxing champion. From the outset of King and Tyson’s long-term relationship, Tyson relied heavily on King. After only three months of representation, Tyson granted King power of attorney privileges over his finances. “I authorized him to look out for

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me and my money and to make sure we don’t have any tax problems,” Tyson said. “I would do anything he told me to do.” In 1998, with his finances in ruin despite having earned some $300 million in purses during his career, Tyson commenced litigation against King, alleging breach of contract and fiduciary duty, seeking to recover $100 million in damages. King, according to several of his former employees, had billed Tyson for various personal and unauthorized expenses throughout the representation, including company holiday bonuses, limousine charges, political donations, traveling expenses and a Manhattan condominium. King countersued for $110 million, but after years of litigation and discovery, eventually settled the claims in 2004 by promising to pay Tyson $14 million. Tyson, who was by then in bankruptcy with $38 million in debt, never received the money, which went directly to his creditors. King has also been sued by several other prominent boxers with whom he had contractual relationships, including Lennox Lewis, Terry Norris, and Muhammad Ali.

While King has (thus far) managed to skirt criminal prosecution in relation to his management of client funds, other agents have not been as lucky. The two most infamous recent examples involve William “Tank” Black and the late Kirk Wright. Black—the head of the South Carolina-based agency, Professional Management, Inc.—represented mostly NFL players, along with NBA all-star Vince Carter. Black convinced two of his NFL clients, Fred Taylor and Ike Hilliard, to invest millions in two fraudulent investment schemes: (1) Black Americans Achievement, Inc. (of which Black was the president), which was producing a board game on the achievements of African-Americans; and (2) Cash 4 Titles, a company offering

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15 In 1967, King was convicted of second-degree murder for beating to death a man who owed him money. The judge reduced the sentence to manslaughter, and King served a three-and-a-half year sentence before being pardoned by Ohio governor James Rhodes. While he was later investigated for tax fraud, racketeering and conspiracy, King was never convicted. See http://sports.jrank.org/pages/2532/King-Don-Prison-Education.html.
high-interest car loans to customers with bad credit. The money earmarked for those investments, actually went to Black’s personal account in the Cayman Islands.

Taylor and Hilliard discovered the fraud and filed suit against Black, alleging breach of fiduciary duty and fraud. The players won, but were not able to recoup their losses, because at that time Black was judgment proof. Black, however, was not saved from criminal liability. In 2001, a federal judge sentenced Black to six years in prison on federal charges of money laundering. The next spring, Black was also sentenced to an additional five years in prison for defrauding Taylor and Hilliard, along with other clients.

In a strange legal twist, however, Black prevailed in separate litigation brought by Vince Carter, who argued that Black’s breach of fiduciary duty was grounds to retroactively terminate their 12-year representation agreement without penalty. The agreement, which was signed in 1999, required that either party pay the other $3 million to terminate the agreement before the term expired. When Black was first accused of swindling his NFL clients in 2000, Carter split up with Black and signed with International Management Group (IMG). After Black was convicted of money laundering and fraud, he came after Carter for breach of contract, suing him for $9 million in back-due commissions on endorsement deals Black had secured for Carter as well as $5 million in contractual damages. Carter countersued for monies lost in a shoe deal that fell apart during Black’s legal troubles, as well as the $3 million termination fee and monies lost due to Black’s fraudulent mismanagement of Carter’s funds. The federal court in South Carolina, however, relied on the strict language of the representation agreement to find in favor of Black, ordering Carter to pay Black $4.7 million in commissions owed under the contract.
This finding was in spite of the fact that the same jury also held that Black violated his fiduciary duties, and had to refund some $800,000 in monies borrowed from Carter.\textsuperscript{16}

Kirk Wright was an Atlanta-based hedge fund manager who managed investments of more than $150 million for wealthy individuals. Many of his clients were professional football players, including Terrell Davis, Steve Atwater, and Rod Smith. Over the course of seven years, his fund had reported average returns of over 27%, but in 2006 it became apparent that Wright was conducting a Ponzi scheme. In 2008, a federal jury found Wright guilty of mail and securities fraud, and money laundering. He committed suicide before sentencing, where he could have faced up to a $16 million dollar fine and 710 years in prison—in addition to the $20 million civil fine that the Securities and Exchange Commission has already levied.

King, Black, and Wright are only the most famous in a long line of agents or financial advisors who have taken financial advantage of their clients. In 1998, John Gillette of Pro Sports Management pled guilty to 37 counts of grand theft and one of forgery after swindling clients, including Darren Woodson, Eric Chavez, and the late Junior Seau, out of more than $11 million in investments. Gillette was sentenced to 10 years in a state prison. In the same year, Canadian Alan Eagleson, a former executive director of the NHLPA with some 150 NHL clients, was also convicted on federal charges. After being caught skimming money from players’ pension funds and disability payments, Eagleson pled guilty to three counts of mail fraud and three counts of fraud in Toronto, before serving six months in a Canadian prison.

Similarly, Richard Sorkin had his clients sign representation agreements providing that all of their endorsement earnings be sent directly to him. After losing almost $1 million of client

\textsuperscript{16} Negotiation of termination provisions will be discussed, \textit{infra}, in Chapter 3. That discussion focuses on the contract between an athlete and a potential sponsor, but is equally applicable to the representation agreement.
funds through the stock market and gambling debts, Sorkin pled guilty to seven counts of grand larceny.

C. THE REGULATION OF ATHLETE AGENTS

In response to the misconduct of agents, various bodies have implemented agent regulations. State legislatures, the NCAA, and the various players associations are among those groups that currently police the actions of agents. This section will focus mainly on the state legislatures and players associations.

1. Uniform Athlete Agent Act

California enacted the first state law regulating agents in 1982 as the “Athlete Agents Act.” The Athlete Agents Act broadly protected all athletes from various agent abuses, but subsequent state legislation focused far more on agents’ interactions with collegiate athletes. The Uniform Athlete Agent Act (UAAA), which was drafted by the National Conference of Commissioners on Uniform State Laws in 2000, focuses on the harm done to amateur athletes and their universities when athletes sign with agents before their eligibility has expired. Along with requiring that each agent be registered, the UAAA also regulated the interactions of agents with amateur athletes in several ways, including:

(1) requiring that all representation agreements be in writing, signed by both parties, and contain clear provisions specifying agent compensation;

(2) prohibiting agents from offering “anything of value to any person to induce a student athlete” to enter into a representation agreement;
(3) requiring that each representation agreement contain a bold legend, warning the student-athlete that signing the contract will make him ineligible for intercollegiate competition; and

(4) compelling the agent to notify the athlete’s school that a representation agreement has been signed within 72 hours or before the next game in which the athlete will compete.

The UAAA also gives student-athletes a 14-day grace period to change their mind and nullify a contract and creates a cause of action for any university damaged by the agent’s failure to notify it of an athlete’s ineligibility, allowing recovery for damages incurred due to NCAA sanctions. The UAAA—which had been adopted by 41 states\(^\text{17}\) and the District of Columbia as of 2013—arguably protects collegiate athletics and not individual athletes.

California—one of the nine states that has not adopted the UAAA-instead has the Miller-Ayala Athlete Agents Act. The rules that agents must abide by under this act are similar to the UAAA rules, but Miller-Ayala expands the range of actors who have standing to enforce its provisions and contains stiffer penalties for violations, relative to the UAAA. As a result, it serves as a more effective deterrent in preventing agents from engaging in questionable behavior. Athletes themselves (as well as institutions and leagues) can bring a civil action if they are suspended or disbanded from competition or if they suffer financial damages as a result of an agent’s acts. Under this provision, a plaintiff is entitled to recover either actual damages or $50,000, whichever is greater. Additionally, if a court finds that an agent violated the Miller-Ayala Act, it must revoke that agent’s privileges to “conduct the business of an athlete agent” for

\(^{17}\) An additional three states have their own sport agent-related bylaws. The only states that have not passed any law designed to regulate agent conduct are Alaska, Maine, Massachusetts, New Jersey, Vermont, and Virginia. The UAAA had been introduced in the New Jersey legislature but not yet been voted on as of 2013.
at least one year, and (in addition to any damages a plaintiff may recover) the agent must “disgorge all consideration received in connection with the violation.”

2. **Sport Agent Responsibility and Trust Act**

In 2004, Congress passed the Sport Agent Responsibility and Trust Act (“SPARTA”), which prohibits conduct similar to that barred under the UAAA and provides a federal enforcement mechanism against such conduct by agents. SPARTA makes it unlawful for an athlete’s agent to:

(1) give false information or make false promises in recruiting or soliciting a student athlete to enter into an agency contract;

(2) “[provide] anything of value to a student athlete or anyone associated with the student athlete before the student athlete enters into an agency contract”;

(3) enter into an agency contract without the student athlete signing a disclosure document that contains “a conspicuous notice in boldface type,” warning the athlete that an oral or written agreement with an agent forfeits NCAA eligibility; or

(4) “predate or postdate an agency contract.”

A SPARTA violation is “treated as a violation of a rule defining an unfair or deceptive act or practice” under the Federal Trade Commission Act, and accordingly the Federal Trade Commission can enforce the duties created under SPARTA. State Attorney Generals can also bring a civil action against a sports agent that threatens or adversely affects residents of their

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19 SPARTA requires that this disclosure document must contain the following exact language: “Warning to Student Athlete: If you agree orally or in writing to be represented by an agent now or in the future you may lose your eligibility to compete as a student athlete in your sport. Within 72 hours after entering into this contract or before the next athletic event in which you are eligible to participate, whichever occurs first, both you and the agent by whom you are agreeing to be represented must notify the athletic director of the educational institution at which you are enrolled, or other individual responsible for athletic programs at such educational institution, that you have entered into an agency contract.”
states, if the agent has engaged in a practice that violates SPARTA. Although this statute seemingly provides the framework to effectively deter unethical agent behavior, it should be noted that the FTC has not taken any action against an agent under SPARTA to date.20

3. Players Associations’ Regulation of Agents

The players associations’ regulations of agents, meanwhile, focus more on potential harm to individual athletes. The NFLPA first adopted a set of regulations for “contract advisors” in 1983, and with several variations, the NBPA (1985), the MLBPA (1987), and the NHLPA (1995) followed its lead in subsequent years. The unions’ authority to impose regulations on agents come from labor law, which provides that a union has exclusive authority to represent all of its members for purposes of collective bargaining. When it comes to individual bargaining over player salaries, the unions conditionally delegate their authority to represent the athletes to agents they approve of, and only those agents. This practice has withstood antitrust scrutiny, on the grounds that the regulation of agents falls under the non-statutory labor exemption.21 On this theory, the various unions compel registration of agents, impose restrictions on agent compensation (particularly on compensation for negotiating playing contracts), require agents to disclose certain conflicts of interest and prohibit certain types of conflicts of interest, and restrict what agents can offer prospective clients to induce them to sign a representation agreement. For example, the NFLPA prohibits agents from: (1) receiving any payments form teams; (2) “[p]roviding or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services” or to the player’s family members; (3) failing to “disclose in writing to any player...any fee paid or received by Contract Advisor to or

20 See Chris Deubert, What’s a “Clean” Agent to Do? The Case for a Cause of Action Against a Player’s Association, 18 VILL. Sports & ENT. L.J. 1, 12 (2011).
21 Collins v. NBPA & Grantham, 976 F.2d 740 (10th Cir. 1992).
from a third party in return for providing services to that player.” The NFLPA, and other unions, have separate rules and regulations governing financial advisors.

Two interesting legal issues surround the unions’ regulation of agents. First, how much discretion do the unions have in choosing whom to certify as an agent? And second, if the unions certify agents that later defraud athletes, can the unions be held accountable for negligence? The first question was addressed in an arbitration involving Barry Rona. The MLBPA had rejected Rona’s application to be an agent under a regulation barring anyone whose conduct “may adversely affect his credibility or integrity...to serve in a representative and/or fiduciary capacity on behalf of players.” The MLBPA reasoned that, because Rona could not be trusted to act as a fiduciary to the players he sought to represent. NYU law professor Daniel Collins, sitting as an arbitrator, held that the MLBPA’s refusal to certify Rona was “arbitrary and capricious” and therefore could be overturned.

After several particularly flagrant cases of agent misconduct, the injured athletes have alleged negligence by the unions in certifying the agents. In 1990, Dermontti Dawson and several other Pittsburgh Steelers sued the NFLPA for negligently certifying their agent and investment advisor, Joe Senkovich, Jr., who had mismanaged and stolen their funds. The court held that any state of law negligence claim against the union was preempted by federal labor law. In order to recover, the Court held that the players would have to show that the NFLPA had actual knowledge of Senkovich’s dishonesty and had failed to decertify nonetheless.

In 2006, several NFL players brought a similar suit against the NFLPA after investment manager Kirk Wright defrauded them (as part of the Ponzi scheme discussed supra) out of $20 million. The players claimed that Wright had multiple liens against him at the time the union

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22 See Rule 3(B) of the NFLPA’s “Regulations Governing Contract Advisors” for a complete list of prohibited actions.
certified him and that the NFLPA was therefore liable. The union argued that the list of registered financial advisors it provided to players did not endorse or recommend any of the advisors. The case was dismissed when the Eleventh Circuit held that the players’ state law claims—negligence, negligent misrepresentation and breach of fiduciary duty—were preempted by federal labor law.  

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23 Atwater v. Nat’l Football League Players Ass’n, 626 F.3d 1170, 1174 (11th Cir. 2010)