Plenary Session: Sports Roundup 2016 (Including NCAA Case Round-Up and Name, Image and Likeness Rights of NCAA Athletes)

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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 Gamblers 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\(^{10}\) 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.\(^{11}\) 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 lease, 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.\(^{12}\)

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.\textsuperscript{13} For further updates on these types of cases, see Darren Heitner’s Sports Agent Blog.\textsuperscript{14}

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


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\(^{17}\) 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 from 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.”22 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

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.\(^2\)

\(^{23}\) *Atwater v. Nat’l Football League Players Ass’n*, 626 F.3d 1170, 1174 (11th Cir. 2010)
CHAPTER 2: AGENTS & AMATEUR ATHLETES: UNDERSTANDING NCAA

ELIGIBILITY RULES

At first glance, it may seem odd to include a chapter on amateur eligibility in a book entitled “Representing the Professional Athlete.” In the United States, however, many successful professional athletes—including virtually all U.S.-born football and basketball players—use the NCAA as the jumping off point for a career in professional sports. Because many agents will attempt to cultivate relationships with these athletes during their NCAA careers, it is important that agents understand the relevant NCAA rules and regulations governing both the eligibility of their potential clients as well as the agents’ own actions.

In the previous chapter, we first introduced the unique issues agents face while recruiting collegiate athletes by summarizing the Uniform Athlete Agent Act (UAAA), which has been adopted by the majority of states to regulate agents’ interactions with college athletes. This chapter, however, will focus on the rules promulgated by the NCAA governing the eligibility of athletes to participate as amateurs, as well as how courts have reacted to agreement between agents and athletes that were in direct conflict with the eligibility rules.

This chapter will proceed in three sections. First, Section A will introduce the NCAA and its eligibility rules, including some of the more controversial applications of the rules. Section B will summarize some of the various legal challenges parties have made to the NCAA’s authority to promulgate rules, including eligibility rules. Finally, Section C will turn to how courts have reacted when athletes and agents collude to break NCAA rules.

A. The NCAA & Its Eligibility Rules

1 For readers seeking a more nuanced explanation of the NCAA and the inherent tensions between its stated values and operations, see Chapters 9 and 10 of “Sports and the Law” by Weiler.
From its humble origins over 100 years ago, the NCAA has grown into a behemoth organization with some 12,000 member institutions competing in an average of 18 sports each. Perhaps fittingly, given the organization’s current sources of revenue, the NCAA was first created to regulate the game of intercollegiate football. In 1906, intercollegiate football was responsible for some 15-20 deaths each year, and President Theodore Roosevelt (a former collegiate football player at Harvard) threatened to ban the game if university presidents did not come together and implement safety measures. The resulting organization of university presidents between the NCAA, and its first safety-promoting move was the introduction of football’s forward pass.

One of the organization’s first moves thereafter was to agree upon the principle of amateurism. Article I of the NCAA’s Constitution clearly states the organization’s amateurism ideal: “A basic purpose of this association it to maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate and professional sports.” In order to preserve this “clear line of demarcation,” the NCAA members have agreed upon a complex body of eligibility rules laid out in Article 12 of the NCAA Manual, which is updated and distributed each year to member institutions. The “General Principle” laid out in Section 12.01 is that “only an amateur student athlete is eligible for intercollegiate athletic participation in a particular sport.” Bylaw 12.1.2 then lists specific actions that will cause a student-athlete to lose his amateur states, including:

- Using his athletic skills for pay (directly or indirectly) in any form in the sport in which he competes (12.2.2(a));
• Accepting a promise of pay, even if such pay is to be received after completion of amateur eligibility (12.1.2(b));
• Signing a contract of any kind to play professional athletics, regardless of its enforceability or any consideration received (12.1.2(c));
• Entering into a professional draft after full-time enrollment at an NCAA institution (12.1.2(f)); and
• Entering into an agreement with an agent (12.1.2(g)).

Through a variety of other less-intuitive laws, in Article 12 and elsewhere, the NCAA also restricts the benefits a student-athlete may receive (both before enrolling at a member institution and during enrollment), the promotional activities a student-athlete may participate in, and the employment of student-athletes during their period of eligibility.

Even casual observers of the sports industry are familiar with the most basic of the amateur eligibility rules listed above: Rule 12.1.2(a), which requires that no student-athlete receive pay for performing in an NCAA sport. Perhaps the most famous violator of this rule was Chris Webber, a member of the University of Michigan’s “Fab Five” basketball freshmen class of 1991. Webber and his classmates—Jalen Rose, Juwan Howard, Ray Jackson, and Jimmy King—led the Wolverines to consecutive NCAA Championships games in 1992 and 1993, and the freshman phenom Webber was named an All-American. A decade later, however, on the heels of a federal investigation that found Michigan booster Ed Martin had paid Webber and three other players over $600,000 during high school and college, the University removed the Final Four banners from the rafters of the gymnasium. In self-imposed sanctions, Michigan forfeited all 112 victories in which Webber or the other paid players—Robert Traylor, Maurice
Taylor and Louis Bullock—played, promised to repay the NCAA over $400,000 in revenues received for participation in postseason play, and placed the program on strict probation.

More recently, former *Sports Illustrated* investigative reporter Don Yaeger has alleged, in his book *Tarnished Heisman*, that Reggie Bush, the Heisman-trophy winning tailback for the University of Southern California also violated Rule 12.1.2. Yaeger claims that Bush and his family accepted more than $291,000 in cash and gifts from Lloyd Lake, the financier of an aspiring sports marketing company, New Era Sports and Entertainment. Bush denied the allegations and, as of early 2009, the NCAA was still investigating the claims.

While there is a long-running debate over whether NCAA athletes should be allowed to accept pay for their services, the application of the “no pay for play” rule in situations like Webber’s is pretty straight-forward given the current rules. Far more controversial, however, is the NCAA’s strict application of rules to situations that could arguably be benign.

Consider for example NCAA rule 16.2.3, which bans “extra benefits” for student-athletes, which the NCAA defines as any benefits not “generally available to the institution’s students.” The logic of this rule was illustrated in the case of Dwayne Jarrett, a receiver at the University of Southern California. Jarrett shared an apartment with quarterback Matt Leinart during the 2005 football season, during which each player paid $650 month in rent to Leinart’s father, Bob. Bob Leinart paid the remainder of the $3,866/month owed on the lease. In June of 2006, the NCAA ruled that the rental arrangement was a violation of the extra benefits rules because Jarrett was receiving a benefit—a reduction in rent of some $1300 a month—that was not available more generally to USC’s student body. Prior to the 2006 season, the NCAA compelled Jarrett to pay $5,352 to the charity of his choice as restitution for the improper benefits in order to regain his eligibility.
USC dealt with a similar, though perhaps more sympathetic, situation in January of 2008, when freshman star basketball player O.J. Mayo accepted a pair of courtside tickets to an L.A. Lakers-Denver Nuggets game from long-time friend Carmelo Anthony, with whom Mayo had been friendly since middle school. The NCAA ruled the tickets to be an “extra benefit” and required Mayo to donate the $460 face value of the tickets to charity before he could regain his eligibility. The same rule prohibits student-athletes from accepting free school supplies or free use of telephones and fax machines, complimentary tickets for parents to awards banquets, and rides from a coach or school employee (even to practice). At the most sympathetic end of the spectrum, a former Utah basketball coach was cited for a minor rules violation by the NCAA for buying then-Utah forward Keith Van Horn a 3 a.m. meal at a local diner the night Van Horn’s father died in 1994. According to *Sports Illustrated*, Majerus bought the meal after delivering the news of the death to Van Horn, who then asked his coach to stay up with him until the player’s morning flight home for the funeral.2

Another of the NCAA’s controversial rules is found in Article 12.5.2 governing “Promotional Activities.” The rule declares ineligible any person who, after becoming a student-athlete, either: (1) “accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of any commercial product or service of any kind”; or (2) “receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.” The NCAA’s application of this rule has led to some odd restrictions, including the following:

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2 See Rick Reilly, *Corrupting Our Utes*, Sports Illustrated, Wednesday, Aug. 6, 2003. In this context, consider two highly publicized 2008 NCAA basketball recruiting investigations involving two head coaches: Indiana University’s Kelvin Sampson and Harvard University’s Tommy Amaker.
• In 1985, Indiana guard Steve Alford was spending for one game for appearing in a charity calendar put together by a school sorority.

• In 1994, Florida offensive linesman Anthony Ingrassi was told to stop penning a restaurant review column in the school newspaper, The Alligator, because it violated the rule.

• In 1996, Northwestern running back Darnell Autry, a theater major, was offered a non-paying role in the movie The 18th Angel. The NCAA initially ruled that if Autry performed, he would be in violation of one of the many rules falling under Article 12.5.2, in particular Rule 15.5.2.3.4, prohibiting the individual performance of a student-athlete in a commercial movie. After Autry won a preliminary injunction, the NCAA granted Autry a special waiver, based on his situation as a drama major, and allowed him to appear in the movie without threatening his eligibility.

• In 2002, the NCAA informed Colorado wide receiver Jeremy Bloom—who was also an Olympic moguls skier—that he would have to discontinue deals with ski manufacturers, a modeling contracting with Tommy Hilfiger, and a regular television spot on Nickelodeon. Bloom had secured the deals through his fame as a skier, and unlike Autry, was not a drama major in college. The NCAA refused to grant a waiver for Bloom, leading to the lawsuit discussed in Section B.

• In 2005, University of Southern California quarterback Matt Leinart temporarily had his eligibility revoked for telling the ESPN cameras “Sportscenter is next” during an on-field post-game interview. He was reinstated before missing any game time.
• In 2007, the University of Florida sent out hundreds of cease and desist letters to entrepreneurs creating and marketing merchandise bearing the name or likeness of its Heisman-Trophy winning quarterback Tim Tebow. The school wanted to ensure that Tebow’s eligibility would not be threatened by his name and likeness appearing on merchandise produced by third parties.3

B. Legal Challenges to the NCAA

So far, this chapter has focused on introducing the NCAA’s eligibility rules by providing real world anecdotes of their application. After reading through these anecdotes, most readers should not be surprised that the NCAA’s rules have created a large amount of controversy, with parties attacking the rules on a variety of legal grounds. This chapter focuses on the three main types of legal claims that have been brought against the NCAA: (1) constitutional equal protection and due process challenges; (2) antitrust challenges, (3) challenges based on the contractual relationships between the NCAA, its members and student-athletes.

Constitutional Claims

Several parties have alleged that the NCAA’s eligibility rules—which they argue arbitrarily treat similarly-situated athletes differently—violates the Fourteenth Amendment of the United States Constitution, which requires that no State shall “deny any person within its jurisdiction the equal protection of the laws.” In interpreting the Fourteenth Amendment, courts have held that private actors will be considered to be the same as a State for purposes of the

3 Ironically, the NCAA and the University of Florida were not worried whatsoever about Tebow’s eligibility or amateur status being affected by the officially-licensed No. 15 jerseys for sale in Florida’s stadium shops. The NCAA bylaws expressly allow the school to sell its players’ jerseys, so long as the players’ names do not appear—even though the NCAA has (curiously) chosen not to oppose the use of college players’ names in a 2008 EA video game.
Amendment if they are a “state actor.” A state actor is defined as an entity with power “possessed by virtue of state law and made possible only because [the State actor] is clothed with the authority of state law.” Examples of state actors include those persons employed by the government—such as sheriffs—or private companies that are very intertwined with the government and government-like work, such as privately-run prison companies or, as the Supreme Court recently held, state high school athletic associations. In order, therefore, to make out a Fourteenth Amendment claim against the NCAA, a plaintiff would have to successfully show two things: (1) that the NCAA is a “state actor”; and (2) that the NCAA denied persons equal protection under the laws.

In 1978, several Canadian-born hockey players for the University of Denver made this very claim. As Canadian amateurs, the hockey players had received room and board from their junior hockey teams, compensation similar to what “amateur” NCAA athletes receive. After the Denver squad—led by the Canadian-born players, won the 1973 NCAA title, the NCAA retroactively declared the players “professionals” due to their violations of rule 12.1.2(a) by receiving payment “in any form” for performance in their sport. The NCAA stripped Denver of its title and associated revenues, and barred the school from post-season play for several years. The school and the players filed suit in the District Court of Colorado, arguing that they were being denied “equal protection” under the laws, as players who could not have played junior hockey without accepting room and board due to their limited financial means. The court agreed that the NCAA was a state actor, but refused to find that here was an equal protection violation, reasoning that while “the court is not oblivious to the less advantageous position in which a

6 Colorado Seminary v. NCAA, 416 F.Supp. 865, aff’d, 570 F.2d 320 (10th Cir. 1978).
student-athlete without means may be placed by the effects of the NCAA regulations . . . neither the Equal Protection Clause of the Fourteenth Amendment [nor the Fifth Amendment counterpart] . . . guarantees “absolute equality or precisely equal advantages.”

Two years earlier, in Shelton v. NCAA, the Ninth Circuit also ruled that the NCAA’s eligibility rules did not violate the Fourteenth Amendment. After Lonnie Shelton had signed a contract to play for the American Basketball Association, the NCAA ruled that Shelton was ineligible to play for Oregon State University, under what is now Rule 12.1.2(c), discussed in Section A, supra. Shelton, however, argued that the contract was unenforceable, and therefore the NCAA penalizing him for signing the contract was a violation of his rights to equal protection. The court disagreed, reasoning that “reliance on a signed contract as an indication that a student’s amateur status has been compromised is rationally related to the goal of preserving amateurism in intercollegiate athletics.”

In Wiley v. NCAA, one of the NCAA’s sub-rules against “extra benefits”—which specifically caps the amount of scholarship money a student-athlete may receive—also came under attack for allegedly violating the Fourteenth Amendment. In 1976, Wiley was declared ineligible to participate for the University of Kansas because, in addition to accepting his athletic scholarship (valued at $2,621), Wiley applied for and received a Basic Education Opportunity Grant (EDOG) from the federal government. The BEOG—which is only available to desperately poor students—was valued at $1,400 per year. The district judge hearing the case ruled that the cap on aid violated Wiley’s equal protection rights because there was no rational relationship between the cap and the NCAA’s stated objective of preserving amateurism. On appeal, however, the 10th Circuit overruled, stating that “the case does not implicate the right to a college

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7 Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976).
education, or even to participate in intercollegiate athletics . . . unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with high school athletic associations or NCAA rules do not present substantial federal questions.8

While NCAA student athletes generally have not prevailed on due process claims, such a legal claim remained colorable—and student-athletes had a chance of winning—until the Supreme Court’s 1998 decision in *NCAA v. Tarkanian*. In the landmark case, the Court held that the NCAA is not a “state actor” for purposes of the Fourteenth Amendment, primarily because of its national reach and scope, as distinguished from state high school athletic associations. Since the decision, student-athletes have continued to try to make out quasi-equal protection arguments, but they have not prevailed. In 2001, for example, the NCAA declared Muhammed Lasege ineligible from participating as a member of the University of Louisville’s basketball team. Lasege, a Nigerian citizen, had come to the United States via Russia to play college basketball, but he had arrived with the help—financial and otherwise—of an agent and some semi-professional foreign clubs. The NCAA ruled that by accepting travel expenses, room and board from these professional clubs, Lasege had “exhibited a clear intent to professionalize,” despite that fact that Lasege had no other plausible way to obtain a visa to study in the United States. At the trial level, Lasege argued that the application of the NCAA rules was “arbitrary and capricious,” and secured a preliminary injunction that ordered Louisville to let him play, and more importantly, ordered the NCAA not to penalize the institution for doing so, regardless of how the legal proceedings played out. On appeal to the Kentucky Supreme Court, however, the NCAA prevailed, despite the Supreme Court’s odd assertion that “relief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously towards

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8 *Wiley v. NCAA*, 612 F.2d 473 (10th Cir. 1979).
student-athletes.” In support of its assertion, the Court cited a previous holding that a high school athletic association, as a state actor, was obliged not to act arbitrarily or capriciously. No mention was made of the Supreme Court’s ruling in *Tarkanian*. In subsequent cases, however, when a student-athlete attempted to rely on language from *Lasege*, courts have flatly stated that the standard laid out in *Lasege* is faulty.9

**Antitrust Challenges**

The NCAA—as even casual observers can observe—is a functional monopoly in most sports. Given its status, the NCAA is often subject to antitrust scrutiny and has proven to be vulnerable to legal challenges alleging Sherman Act violations. The Sherman Act, at its simplest, prohibits unreasonable restraints on trade. While there are multiple standards courts use to determine if a restraint is “unreasonable,” the NCAA’s actions are generally analyzed under the “rule of reason” standard. A restraint is considered unreasonable under the “rule of reason” analysis if its anticompetitive effects outweigh its procompetitive effects in a given product market.

Stated in the abstract, the test may seem difficult to understand for students who have not studied antitrust law. Therefore, consider the following example. Imagine that the United States had one very large digital cable provider, with something like 60 percent of the market share. Now imagine, that there were four other, much smaller cable service providers that comprised the rest of the “product market.” If two of the smaller companies wanted to merge, this would have anticompetitive effects, because there would be fewer competitors within an industry that already has a small number of players. However, there would also be procompetitive effects,

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9 For example, when Jeremy Bloom (whose case will be discussed shortly) claimed that the NCAA’s actions towards him were arbitrary and capricious—and cited the *Lasege* case for support—the argument was flatly rejected on grounds that the NCAA, post-*Tarkanian*, is not a state actor.
because the merged company would be better positioned to compete with the dominant company. More consumers would actually be better off, because the dominant player would be forced to respond to competitive pressure. Therefore, on the whole, the merger would enhance competition, and survive antitrust scrutiny.

As you will see, the analysis is more complex when examining the NCAA’s eligibility rules. Several NCAA practices have not withstood antitrust scrutiny, including restrictions on member schools negotiating television contracts\(^{10}\) and restraints on the salaries member schools could pay to assistant coaches.\(^{11}\) While restraints on the market for coaches and the market for television rights were considered unreasonable, the courts have been more sympathetic towards restraints on the market for players. While acknowledging that restrictions may have anticompetitive effects, the Courts have almost unanimously agreed that the procompetitive effects predominate. The two most important of these procompetitive effects is that the regulation supposedly “enhance competition among member schools” and preserve an amateur brand of athletics, which enhances consumer choice by providing an alternative to professional sports.\(^{12}\) As one appellate court reasoned when rejecting an argument that the eligibility rules violated antitrust law: “The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures.”\(^{13}\)

Perhaps the most famous antitrust challenge against the NCAA eligibility rules—and certainly most relevant to a casebook on representing professional athletes—was the case of

\(^{11}\) Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998). In this context please consider whether the NCAA’s BC’s “non-playoff” system should withstand antitrust scrutiny.
\(^{13}\) McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).
Braxton Banks. Banks played football at the University of Notre Dame, and after four injury-plagued years he decided to forfeit his redshirt season and declare himself eligible for the 1990 NFL draft. In preparation, Banks also signed with an agent, therefore automatically ending his eligibility under by-laws 12.1.2(f) and (g) discussed in Section A, supra. When Banks went undrafted, he attempted to return to Notre Dame, but the NCAA refused to grant him eligibility. With the help of Ralph Nader’s Public Citizens Litigation Group, Banks sued the NCAA, alleging that the rules unreasonable prevented players from receiving advice from an agent or declaring themselves eligible for professional drafts. The Seventh Circuit majority ruled for the NCAA on summary judgment, finding that Banks had failed to define any anti-competitive effect on a given market. In particular, the majority focused on the consumer market for fans of athletics and found that the eligibility rules enhanced competition by offering an alternative to professional sports. At the same time, the majority refused to concede that there was a competitive labor market for college players, or that NCAA members were “purchasers of labor,” as the dissent claimed. Instead, it reasoned that “None of the NCAA rules effecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players…”

Many observers of college football would beg to differ. At the beginning of the 2008 season, only four players on NFL rosters—Ben Graham, Michael Lewis, Say Rocca and Ulrich Winklder—did not play NCAA football, suggesting that the NCAA is indeed the only “minor

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14 Given the low graduation rates of student-athletes at the so-called college “football factories,” as well as the “clustering” of “cake courses” that virtually entire football teams take at such schools which was chronicled in a late-2008 series of articles in USA Today, the frequently revisited proposition that these college athletes, who help bring millions of dollars into their universities’ coffers, should be “paid to play,” may indeed finally gain some meaningful momentum within NCAA circles.
league training ground for future NFL players.” As major sports revenues have risen, some courts have grown more and more skeptical of the NCAA’s amateur brand, and have shown a willingness to view the NCAA with a more critical eye. The dissenting opinion in Banks, for example, not only considered NCAA members to be “purchasers of labor,” but also reasoned that the no-agent, no-draft rules allowed college to “squeeze out of their players one or two more years of services.” Perhaps it as out of fear of coming before a critical court that the NCAA settled its most recent antitrust lawsuit. In the class action suit of White v. NCAA, four former players challenged the same cap on financial aid that Wiley challenged on equal protection grounds. The players argued that their “athletic scholarships” did not actually cover the full costs of attending the member institutions, and that players coming from poor backgrounds were therefore forced to live below the poverty level while attending school. In January of 2008, the NCAA reached a monumental settlement estimated at $228 million, whereby the NCAA would provide back payment to effected football and basketball players, and provide future funding to member institutions to help close the gap between the maximum scholarship amount and the cost of attending an institution for poor athletes. While some have argued whether the settlement will truly benefit a significant number of athletes, the mere fact that the NCAA settled suggests a possible shift in the way courts—and the public—view antitrust challenges to the NCAA.

**Contract-Based Challenges**

Throughout our discussion of the constitutional and antitrust challenges against the NCAA, there was a consistent theme: courts have generally been reluctant to impose their judgment on the private, contractual relationship among the NCAA, its members, and student-

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15 As a counterargument, the NCAA estimates that less than 2% of senior football players at NCAA institutions (all divisions) will be drafted by the NFL, suggesting that the vast majority of NCAA football players are not pre-professionals.
athletes. By alleging a breach of those private contracts, student-athletes have provided a way for courts to overcome those concerns. Generally, there are two contracts that serve as the basis for the NCAA’s organization: (1) the contractual relationship between the member institutions of the NCAA, who obligate themselves to adhere to the NCAA rules and subject themselves to the NCAA’s regulation; and (2) the scholarship contract each athlete signs with a member institution, which among other things, subjects the athletes to the eligibility rules of the NCAA.

Easily the most famous recent contract-based claim was brought by Jeremy Bloom, the Olympic skier and Colorado football player mentioned in Section A, supra. In the spring of 2002, the NCAA ruled that Bloom would be ineligible to participate in intercollegiate football that fall, due to the various endorsement deals already discussed. Bloom challenged the NCAA’s ruling, alleging that the contract between the NCAA and its members allowed him to receive remuneration from a professional sport other than the amateur sport in which he participated. In particular, Bloom reasoned that if the NCAA rules permitted professional baseball players (like Drew Henson and Chris Weinke) to accept the traditional remuneration for participating in their sports (a signing bonus and a salary) and remain eligible in other sports, then he should be allowed to accept the traditional remuneration for athletes in his sport (endorsements from skiing companies). Crucially, he claimed that as a third-party beneficiary to that contract, he had legal grounds for a breach of contract claim.16

At trial, the court held that Bloom and other NCAA athletes were indeed third-party beneficiaries of the contractual relationship between the NCAA and its members (including the NCAA’s constitution, bylaws, and regulations). The court failed to find, however, that the

16 Bloom also argued that the application of the “promotional activities” rule was arbitrary and capricious (an argument that the court rejected out of hand, writing that since the Supreme Court’s ruling that the NCAA was not a state actor, adherence to the NCAA rules does not implicate the ‘state action’ necessary to trigger a civil rights claim) and that it was an unreasonable restraint on trade.
NCAA had breached the contract. On appeal, the majority agreed, reasoning that “in our view, when read together, the NCAA bylaws express a clear and unambiguous intent to prohibit the student-athletes from engaging in endorsements and paid media appearances.” The court went on to say that it could not “disregard the clear meaning of the by-laws imply because they may disproportionately affect those who participate in individual professional sports.” The decision suggested that courts will strictly interpret the NCAA eligibility rules going forward, particularly those prohibiting any commercial or promotional activities by student-athletes. Ironically, however, just three years after the Colorado Court of Appeals handed down its Bloom decision in 2004, the NCAA membership was considering allowing member schools to profit from the commercial use of its athletes name and likeness. Historically, the NCAA has not allowed commercial sponsors of member schools to use the name or likeness of any current student-athlete. Under Proposal 2007-26, however, sponsors would be able to use game footage, audio, and photos of current athletes in advertisements, with proceeds going to the member institution. It is unclear whether the adoption of such a rule would call into question the “unambiguous intent” of the NCAA to “prohibit student-athletes from engaging in endorsements” cited in Bloom.

C. Judicial Reactions to Controlling the Relationship Between Agents and NCAA Athletes

The previous sections have examined, in some detail, what happens to an athlete’s relationship with the NCAA when the athlete breaks the organization’s eligibility rules. This section turns to another question that is probably more important to agents: what happens to the legal relationship between an agent and an athlete, when their relationship causes an athlete to

break NCAA eligibility rules? The question can be restated more simply as “Is a contract between an agent and a student-athlete holding himself out as an amateur enforceable?” The answer, as this section will discuss, is “It depends.”

In the case of **Walters v. Fullwood**, for example, the District Court for the Southern District of New York refused to honor a post-dated representation agreement between Auburn running back Brent Fullwood and agents Norby Walters and Lloyd Bloom. Walters and Bloom had induced Fullwood to sign the contract while still an amateur by paying him $4,000 upon signing and $4,000 during the course of his final football season. Upon completing his eligibility, however, Fullwood refused to honor the contract and defected to another agent before the draft. Walters and Bloom sued Fullwood for breach of contract, seeking recovery of the commissions they would have earned on Fullwood’s first professional contract. The court refused, however, to enforce the contract on grounds that it was against public policy. In an opinion that generally lauded the amateurism ideals, the court reasoned that “the agreement reached by the parties here…represented not only a betrayal of the high ideals that sustain amateur athletic competition as a part of our national educational commitment; it also constituted a calculated fraud on the entire spectator public.”

Subsequent rulings on the same issue have struck a very different tone. For example, another “client” of Walters and Bloom was Ron Harmon of the University of Iowa. Harmon signed a post-dated representation with Walters and Bloom while still a student, and immediately received a $2,500 “loan” along with small monthly payments. When Harmon attempted to void the representation agreement on public policy grounds, the arbitrator John Culver reasoned that even though the contract violated the NCAA rules, that was not illegal, and therefore irrelevant.

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Culver did, however, go on to declare the contract void under some of the NFLPA regulations discussed in the previous chapters.
Introduction

- Two distinct legal regimes in United States for players in a sports league to exercise employment rights—labor laws & antitrust laws.
- Antitrust laws promote competition.
- Sherman Act, Section 1, 15 U.S.C. § 1: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”
- Federal labor laws are based upon collective employee action to reduce and regulate competition among employees.
- Collective bargaining—majority rules.
- Typical labor law mechanisms—lockouts, strikes, Unfair Labor Practice (ULP) charges before National Labor Relations Board (NLRB), arbitrations.
- Varying legal leverage reflected in labor & antitrust history of major professional sports leagues.
Major League Baseball (MLB)

- **Federal Baseball v. National League**, 259 U.S. 200 (1922). U.S. Supreme Court decision that the Sherman Act did not apply to Major League Baseball, on ground that the business of baseball was NOT "interstate commerce." Historical anachronism.

- **Flood v. Kuhn**, 407 U.S. 258 (1972). U.S. Supreme Court upheld baseball antitrust exemption on basis of "stare decisis"—settled law. Curt Flood, a St. Louis Cardinals player, was traded to the Philadelphia Phillies. Flood did not want to play for Philadelphia and believed he had a right to receive offers from other clubs. With the support of the MLBPA, Flood filed an antitrust suit against MLB's "Reserve Clause" which the owners claimed entitled a team to renew a player's contract after the last season of the contract—i.e., forever. As a result of the ruling, Flood could not assert antitrust rights against the Reserve Clause.

- **McNally/Messersmith**: *Kansas City Royals v. MLBPA*, 532 F.2d 615 (8th Cir. 1976). Exercise of contract/arbitration rights. MLB players union filed a grievance on behalf of two players who had been retained by their teams through the Reserve Clause, but neither had signed a new contract for the following year. The players argued that, as a matter of contract law, they could become free agents after that next year. The arbitration panel (Peter Seitz) ruled for the players, and the federal courts upheld the decision.

Free agency settlement and uneasy peace ensued, followed by multiple work stoppages, including 1981 split season.

- Owner collusion and suppression of the free agency market in mid-1980’s, resulting in collusion arbitration decisions against owners with massive damages payments.

- 1994 work stoppage, with cancellation of season and World Series.

- **Silverman v. Major League Baseball Player Relations Committee**, 880 F. Supp. 246 (S.D.N.Y. 1995). MLBPA filed NLRB unfair labor practice charge against MLB after owners threatened to eliminate salary arbitration for younger players, competitive bidding for certain free agents, and anti-collusion restrictions. The federal district court (Judge Sonia Sotomayor) issued an injunction against those actions and ordered the owners to negotiate in good faith. A settlement maintaining the free agency status quo quickly followed.


- Relative labor peace during past several decades with no further efforts to break MLB players. No salary cap, but "luxury tax" agreed to in negotiations.
National Basketball Association (NBA)

- NBA/ABA competition in late 1960’s and early 1970’s, with increased player salaries.
- *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975). Following announcement of planned merger between NBA and ABA, NBA players sued to enjoin the merger and address various restrictions on player movement that players alleged violated the Sherman Act, including NBA Reserve Clause. Court held that restrictions were subject to antitrust scrutiny, which led to an antitrust settlement and corresponding new CBA with expanded free agency.
- NBA salary cap agreed to as emergency measure in 1984 in response to severe financial distress of multiple NBA teams.
- *Bridgeman v. NBA*, 675 F. Supp. 960 (D.N.J. 1987). After prior CBA and antitrust settlement expired, players alleged that continuation of salary cap, college draft, and team right to retain any free agent indefinitely by matching offers from other teams violated the Sherman Act. Court ruled that restrictions were subject to antitrust scrutiny, which led to a revised CBA and settlement agreement.

National Basketball Association (NBA)

- 1995 lockout/union decertification election/Patrick Ewing antitrust litigation. Outcome was player vote against union decertification with union and players divided. Player concessions to owners as a result.
- 1998-99 lockout with shortened season, further revisions to salary cap/free agency system including rookie pay scale. Arbitration regarding whether players would receive pay during lockout under guaranteed contracts had significant impact on negotiations.
- 2011 lockout with NBA demands for fundamental change. Settlement quickly followed filing of antitrust lawsuit after union decertification. Basic system retained.
National Football League (NFL)

- **Mackey v. National Football League**, 543 F.2d 606, 614 (8th Cir. 1976). Player challenge to NFL “Rozelle Rule” that required any team signing a free agent to pay “compensation” to the player’s former team as determined by the NFL Commissioner, which effectively banned free agency. Court ruled Rozelle Rule subject to antitrust scrutiny, which was followed by a settlement and CBA. Settlement with revised compensation system did not lead to significant free agency.

- **Powell v. NFL**, 678 F. Supp. 777 (D. Minn. 1988). After failed strike in 1987, NFL players filed antitrust suit against continuation of NFL free agency restrictions without union consent. Eighth Circuit court of appeals held that “nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws,” and effectively required players to give up their union to assert antitrust rights. 930 F.2d 1293, 1303 (8th Cir. 1989).

- **McNeil v. NFL**. Players “disclaimed interest” in their labor law rights (i.e., gave up union status) to pursue antitrust rights. NFL had unilaterally imposed new free agency restrictions. At trial, a jury found that the owners’ “Plan B” free agency system—which provided each NFL team with first-refusal rights over 37 players—was an unlawful restraint under the Sherman Act. **McNeil v. NFL**, No. 4-90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992). Owners filed appeal.

- McNeil verdict was followed by **Reggie White v. NFL** class action antitrust litigation, and then settlement and corresponding CBA which gave players free agency rights for the first time in history, subject to a revenue-based salary cap system.

- Settlement and CBA then extended several times over next two decades, with explosive growth in NFL revenues, corresponding increases in salary cap, and increased fan interest.

- **Brady v. NFL**, 644 F.3d 661, 663 (8th Cir. 2011). Owners sought fundamental change to salary cap/free agency system with lockout in 2011. Players ended union and filed antitrust suit alleging that NFL lockout was illegal group boycott and price-fixing in violation of antitrust laws. Players won preliminary injunction but appeals court affirmed in part and reversed in part on technical grounds related to anti-injunction statute. Settlement was reached with some salary cap share adjustments, but with same basic free agency/salary cap model, along with substantial changes in player work rules, shortly before start of 2011 NFL regular season.