North Dakota Law Review

Volume 67 | Number 2 Article 3

1991

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NCAA-BASED AGENT REGULATION: WHO ARE WE PROTECTING?

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Over the last decade, the popular press has created a new villain: the sports agent. Wearing gold chains and white shoes, this villain has allegedly seduced the youth of our nation with suitcases full of money, or forced our local sports hero into bankruptcy because a shopping center deal went sour. We are regularly told that there are many "bad" agents and that "agent abuse" is second only to drug abuse as a national problem. In response, many states now attempt to regulate the athlete representation industry.[1]

There are two areas where the agent can harm an athlete. The first area involves the actual representation of the athlete. It encompasses incompetence or dishonesty in contract representation and in managing an athlete's finances. The typical scenario here may have an agent self-dealing, making bad investment decisions, or charging fees in a manner that results in the agent receiving the lion's share of the money actually paid to the athlete. While I do not believe that current state regulatory schemes can adequately deal with these problems,[2] the states' efforts are certainly laudable.

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1. Those states regulating the athlete representation industry are: Alabama: ALA. CODE §§ 8-26-1 to 8-26-41 (Supp. 1990); California: CAL. LAB. CODE §§ 1500 to 1547 (West 1989); Florida: FLA. STAT. ANN. §§ 468.451 to 468.457 (West Supp. 1991); Georgia: GA. CODE ANN. §§ 84-8101 to 84-8118 (Supp. 1989); Illinois: ILL. ANN. STAT. ch. 38 § 29-1 (Smith-Hurd 1977 & Supp. 1990); Indiana: IND. CODE ANN. §§ 35-46-4-1 to 35-46-4-4 (Burns Supp. 1990); Iowa: IOWA CODE ANN. §§ 9A.1 to 9A.12 (West 1989 & Supp. 1991); Kentucky: KY. REV. STAT. ANN. § 518.080 (Michie/Bobbs-Merrill 1990); Louisiana: LA. REV. STAT. ANN. §§ 4:421 to 4:430 (West 1987 & Supp. 1991); Maryland: MD. ANN. CODE art. 56, 632-40 (Supp. 1990); Michigan: MICH. COMP. LAWS ANN. § 750.411e (West 1991); Minnesota: MINN. STAT. ANN. § 325E.33 (West Supp. 1991); Mississippi: MISS. CODE ANN. §§ 73-41-1 to 73-41-23 (Supp. 1990); North Carolina: N.C. GEN. STAT. §§ 78C-71 to 78C-81 (1990); Ohio: OHIO REV. CODE ANN. §§ 4771.01 to 4771.99 (Anderson Supp. 1990); Oklahoma: OKLA. STAT. ANN. tit. 70, § 821.61-821.71 (West 1989); Pennsylvania: PA. CONS. STAT. ANN. § 7107 (Purdon 1989); South Carolina: S.C. CODE ANN. §§ 59-102-10 to 59-10-250 (Law. Co-op. Supp. 1990); Tennessee: TENN. CODE ANN. §§ 49-7-2101 to 49-7-2104 (1990); Texas: TEX. REV. CIV. STAT. ANN. art. 8871, 1-11 (Vernon Supp. 1991); Virginia: VA. CODE ANN. §§ 54.1-518 to 54.1-525 (Supp. 1990).

All of these have been adopted within the last decade. For a history of this legislation see generally Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701 (1987).

2. An analysis of the deficiencies of state regulation in dealing with incompetence and dishonesty is beyond the scope of this piece. For a discussion of the ineffectiveness and inadequacy of state regulation, see Ehrhardt and Rodgers, *Tightening the Defense Against Offensive Sports Agents*, 16 FLA. ST. U. L. REV. 633 (1988); Rodgers, *States Revamp Defense Against Agents*, 4 THE SPORTS LAWYER 1 (Winter 1988-89); Kohn, *Sports Agents*

The second area of agent abuse deals with the problems engendered in the creation of the athlete-agent relationship. Here the most significant consequence of an agent's action is the athlete's loss of National Collegiate Athletic Association[3] eligibility. But is this truly a problem for the athlete, or is it merely a problem for the colleges and the fans of the colleges' athletic teams?

This article will examine the regulatory schemes that are tied to NCAA eligibility. I will first review the current NCAA rules on permissible contact between an athlete and an agent. My premise is that the rules are not needed to protect "amateurism." Instead, they protect the schools at the expense of the athlete and leave the athlete at risk. I will then review state agent regulatory schemes which give these NCAA rules the force of law and bind the athlete (and the agent) to them. My conclusion is that this system of state-enforced NCAA regulation is harmful to the athlete and unreasonably restricts the athlete and agent from legitimately marketing the athlete's services. Instead of protecting the athlete, much of this legislation only serves to protect the colleges and universities.

NCAA ELIGIBILITY RULES

Because the statutes to be examined here are keyed to NCAA eligibility rules, it is first appropriate to review these rules. However, the focus will be limited. A complete analysis of the structure of the NCAA, its power, and whether it governs wisely when one considers the full spectrum of intercollegiate athletics, is beyond the scope of this piece. Instead, the focus is on major college football and basketball programs. These programs generate an enormous amount of revenue for the schools,[4] and also serve as farm systems for the NBA and the NFL.[5] In addition, the schools

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Representing Professional Athletes, Being Certified Means Never Having to Say You're Qualified, 6 THE ENT. & SPORTS LAWYER 1 (Winter 1988).

3. The National Collegiate Athletic Association is a voluntary association of approximately 1,000 members. Virtually all major colleges and universities are members of the NCAA. National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 183-84 (1988).

4. A few years ago, it was estimated that the 105 Division I football programs would raise and spend about a billion dollars. George Will, "*Our Schools for Scandal*," NEWSWEEK, Sept. 15, 1986. Recently, the College Football Association, representing approximately sixty schools, signed a $300 million contract with ABC. Wall St. J., Nov. 14, 1990, at B1.

It would be difficult to accurately estimate what any given program brings in to a particular school. Television revenue, of course, is a major component. But schools benefit in other ways that defy easy estimation. For example, a school with a successful athletic program may find it easier to recruit students and to obtain donations from alumni.

5. To a more limited extent they also function as supplements to the farm system for Major League Baseball.

in this group are the places where the agents to be regulated are actually plying their trade.[6]

Regardless of how much money is generated by a college team, the NCAA views these programs as amateur sports. In pursuit of its goal of furthering "amateur"[7] competition, the NCAA has adopted numerous rules that define and govern an athlete's amateur status.[8] Generally speaking, these rules prohibit an athlete from earning money by reason of his athletic skill, except for approved scholarships and expenses. In addition, the rules generally prohibit an athlete from competing on a professional team even if the athlete is not paid.[9] I suspect that many of the athletic directors and university presidents who wrote and currently support these rules are not motivated by the need to preserve some pure notion of "amateurism." Instead, they are concerned with how much it would cost their institutions if they had to competitively reward athletes for their skills. But even if these rules serve some higher purpose, the athletes who are restricted by them receive disfavored treatment when compared with students who do not participate in athletics.

For example, when I went to college, I participated in my school's music programs, performing in a variety of school sponsored music groups. One group even entered an intercollegiate competition where significant cash prizes were awarded. Yet there were no rules that prohibited me from using my musical ability to earn money on weekends and in the summer. Similarly, students who are given academic scholarships are not precluded from using their intelligence or education to supplement their scholarships and make their lives easier. If IBM wants to wine and dine a budding business major and hire her for the summer at an exorbitant salary, so as to improve its chances of recruiting that student for a permanent job after graduation, no one complains or

6. Nor do I purport to do a neutral analysis. I freely admit (and hope to demonstrate) that the current system of NCAA-ruled college athletics is exploitive and hypocritical. It is a system that allows athletes to enter with credentials that suggest an inability to do satisfactory high school work. As a result, many schools have appallingly low graduation rates.

7. According to its constitution, a "basic purpose" of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA CONST. art. 1, § 1.3.1. National Collegiate Athletic Association Manual 1991-92, at 1 [hereinafter referred to as NCAA MANUAL].

8. *See generally* BYLAW art. 12.1, NCAA MANUAL at 67 (general regulations).

9. *Id.* One exception involves golf and tennis, where mixed competition is allowed. *Id.* § 12.2.3.2, NCAA MANUAL at 70.

threatens her with the loss of her academic scholarship. Yet college athletes have these restrictions.

Even if one accepts the basic premise of amateurism and the need to regulate so as to keep the competition even, the rules go a few steps farther and severely restrict the extent to which an athlete can receive advice and plan for his future professional career. For example, one critical choice that an athlete must make is which college to attend. A highly talented high school athlete may be pursued by many schools. An athlete who may not have received much attention while in high school may want to market himself to colleges. Yet both are restricted in their ability to contract with an agent to assist in the process.[10] In theory, the athlete can get advice from his high school coach or members of his family. But there is no reason to assume that they have the expertise needed. Nor is there any reason why retaining an expert should be prohibited.

The need for advice and career counseling can be just as important to an athlete while he is in college. But NCAA rules clearly prohibit an athlete from entering into a contract with an agent for the future marketing of his services without immediately losing his amateur status.[11] The athlete loses his eligibility even if his representation agreement with an agent provides for representational services (such as negotiation with a professional team) to begin after he[12] has completed his college eligibility.[13] The rules do allow the schools to form a "career counseling panel" to assist the athlete.[14] But the members of the panel must be employees of the school,[15] so neutrality cannot be expected.

The athlete is also restricted in his ability to receive legal advice. He can only receive legal advice from an attorney, regarding a contract, if that attorney has not or is not going to represent him with regard to that contract.[16] Thus, the NCAA rules do not necessarily protect the athlete. Instead, they hamper his ability to get advice and protect himself. As a result, state enforcement cannot be justified by a need to protect the athlete.

Before reviewing state regulation, two more points need to be

10. *Id.* §§ 12.3.1 and 12.3.3, NCAA MANUAL at 71-72.
11. *Id.* § 12.1.1(f), NCAA MANUAL at 68.
12. With all due respect to the many fine female athletes competing at the college level, the problems dealt with here primarily arise in men's football and basketball.
13. BYLAW § 12.3.1, NCAA MANUAL at 72.
14. *Id.* § 12.3.4, NCAA MANUAL at 72.
15. *Id.* § 12.3.4.2, NCAA MANUAL at 72.
16. *Id.* § 12.3.2, NCAA MANUAL at 72.

made. First, neither the athlete nor the agent has the ability to promulgate, change or interpret NCAA rules.[17] Second, the NCAA is not currently viewed as a state actor.[18] As a result, providing for state enforcement further binds an athlete to a system that he can neither reform nor fight.

NCAA-BASED AGENT REGULATION

Of the twenty-one states that currently regulate agents, all but California have provisions that are in some way tied to NCAA rules on eligibility. Some of these are similar to ordinary consumer protection statutes and can easily be justified. For example, several states require that the contract between the athlete and the agent contain a written notice warning an athlete that he will lose his eligibility if he signs with the agent.[19] Other state statutes regulate fees.[20]

Similarly, some state statutes provide for a cooling off period, which allows the athlete to rescind the contract.[21] Although this will enable the athlete to get out of the contract, it might not prevent an athlete from losing his eligibility. According to NCAA rules, amateur status is lost when an athlete enters into an agreement with an agent.[22]

Under other state statutes, an agreement entered into

17. Under its constitution, membership in the NCAA is available to: "colleges, universities, athletic conferences or associations and other groups that are related to intercollegiate athletics . . . ." NCAA CONST. art. 3, § 3.1.1, NCAA MANUAL at 8. All governing legislation is adopted by the membership. NCAA CONST. art. 5, § 5.01.1, NCAA MANUAL, at 27.

18. National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 199 (1988).

19. For example, South Carolina requires that the following notice be printed in at least 10-point type that is bold faced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous:

> WARNING: IF YOU AS A STUDENT ATHLETE SIGN THIS CONTRACT, YOU MAY LOSE YOUR ELIGIBILITY TO COMPETE IN INTERCOLLEGIATE ATHLETICS. PURSUANT TO SOUTH CAROLINA LAW, YOU SHALL NOTIFY THE ATHLETIC DIRECTOR OR PRESIDENT OF YOUR COLLEGE OR UNIVERSITY AND THE ADMINISTRATOR OF THE DEPARTMENT OF CONSUMER AFFAIRS IN WRITING BEFORE PRACTICING FOR OR PARTICIPATING IN AN ATHLETIC EVENT ON BEHALF OF A COLLEGE OR UNIVERSITY OR WITHIN SEVENTY-TWO HOURS AFTER ENTERING INTO THIS CONTRACT, WHICHEVER OCCURS FIRST. FAILURE TO PROVIDE THIS NOTICE IS A CRIMINAL OFFENSE.

S.C. CODE ANN. § 59-102-30(D) (Law. Co-op. 1976 & Supp. 1990).

20. *See, e.g.*, OKLA. STAT. ANN. tit. 70 § 821.63 (West 1989).

21. *See, e.g.*, MD. ANN. CODE art. 56 § 635(d) (Supp. 1990) (Maryland gives an athlete the right to cancel a contract within 15 days after the date it is signed); TENN. CODE ANN. § 49-7-2108 (1990) (Tennessee gives an athlete 20 days); N.C. GEN. STAT. § 78C-75(d) (1990); S.C. CODE ANN. § 59-102-30(G) (Law. Co-op Supp. 1990); VA. CODE ANN. §§ 54.1-520E (Supp. 1990).

22. BYLAW § 12.1.1(f), NCAA MANUAL at 68.

between an athlete and an agent which violates the statutory scheme is void.[23] This might actually protect the athlete's eligibility. If the agreement is truly void, as opposed to merely voidable, the athlete could argue that it never existed and that he never violated the NCAA's eligibility rule.

Some state schemes go one step farther and provide for notification of the potential contract to the athlete's school.[24] South Carolina has passed a statute that requires both the agent and the athlete to notify the school and makes the failure to notify a criminal offense.[25] These provisions are also legitimate to the extent that notice allows the school to avoid being charged with an NCAA violation or prevents the athlete from continuing to accept scholarship aid that may no longer be owed.

Some state statutory schemes are designed to give notice to the university prior to the athlete's signing, so that the schools are given a chance to convince the athlete to change his mind before the athlete has irrevocably lost his eligibility.[26] Again, these statutes provide a measure of protection for the athlete by giving him a chance to think through his decision and get additional information from his school before making a very important decision. The school has a certain investment in an athlete and thus a legitimate interest in keeping that athlete in their program. If the school is notified in advance, the athlete will get to hear all of the arguments against signing the contract. This should enable him to make a more informed decision.

But a number of states have gone far beyond athlete protection. Ten states currently prohibit agents from signing agreements with college athletes prior to completion of their NCAA eligibility.[27] These state prohibitions are unconscionable and only

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23. *See, e.g.*, OHIO REV. CODE ANN. § 4771.04 (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 8871 § 8(c) (Vernon Supp. 1988); N.C. GEN. STAT. 78C-78(b) (1990); S.C. CODE ANN. § 59-102-30(E) (Law. Co-op Supp. 1990); VA. CODE ANN. § 54.1-522B (Supp. 1990).

24. *See, e.g.*, FLA. STAT. ANN. § 468.454(2) (West Supp. 1991); IND. CODE ANN. § 35-46-4-4 (West 1990); TENN CODE ANN. § 49-7-2104 (1990); TEX. REV. CIV. STAT. ANN. art. 8871 § 5(c) (Vernon Supp. 1990); VA. CODE ANN. § 54.1-520E (Supp. 1990).

25. S.C. CODE ANN. § 59-102-30(A) and (B) (Law. Co-op. Supp. 1990). But if the agent is an attorney, do we have a mandated breach of the normal attorney-client privilege?

26. Minnesota requires a written waiver of eligibility form to be filed with the secretary of state and sent to the school's athletic director, and provides that a contract may not be entered into prior to the filing of this waiver. MINN. STAT. ANN. §§ 325E.33(2) and (3) (West Supp. 1990). Similarly, Georgia's scheme requires notification and a thirty day waiting period prior to signing the athlete. GA. CODE ANN. § 84-8116 (Supp. 1989). Ohio requires a fourteen-day waiting period. OHIO REV. CODE ANN. § 4771.02(B) (Anderson Supp. 1990).

27. IOWA CODE ANN. § 9A.8 (West 1989); KY. REV. STAT. ANN. § 518.080 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. tit. 4 § 4:424(8) (West 1990); MD. ANN. CODE art. 56, § 636(b)(5) (Supp. 1990); MICH. COMP. LAWS ANN. § 750.411(e) (1991); MISS.

serve to protect the colleges at the expense of the athletes.

If these prohibitions are based on the premise that it is always in an athlete's best interest to complete his eligibility prior to entering the pro draft, they are very misguided. There are a number of reasons why an athlete would be well-advised to start a professional career prior to completing his years of NCAA eligibility.

There is a risk that an athlete will suffer a career-ending injury prior to the completion of his eligibility. For example, a third year running back who wins a HeismanTrophy and cannot legitimately afford to get an insurance policy to protect his professional earning potential should seriously consider a decision to enter the draft after his junior year. Since the NCAA rules prevent an athlete from accepting such a policy without losing his eligibility,[28] only the athlete with independent financial resources can get protection. In this situation, a statute that prohibits an athlete from turning pro early works a severe hardship.

The vagaries of the professional draft systems may also lead to a need for an athlete to turn pro prior to completion of college eligibility. Under the current draft and reserve systems in professional football, basketball and baseball, an athlete who is drafted is bound to a particular club for a certain amount of time and cannot freely market his services. An athlete who has a preference as to which pro team he would like to play for (or an aversion to playing for one or more pro teams) may want to enter the draft in a year when he is in a better position to be drafted by a preferred team, or to avoid being drafted by a disfavored team. Why should the state, under the guise of athlete protection, prevent a player from using what little flexibility he has to avoid an oppressive (and perhaps illegal) draft system?

The abundance or lack of players in his skill category may also play a role in deciding when it is preferable for an athlete to enter the draft. For example, a center in basketball may have a higher market value in a year in which there are no other top centers available. Here, again, it may be in the athlete's best interest not to complete his college eligibility.

Another reason for turning pro sooner relates to whether the

CODE ANN. § 73-41-11(g) (1989); OKLA. STAT. ANN. tit. 70, § 821.64.8 (West 1989); 18 PA. CONS. STAT. ANN. § 7107(A)(10) (Purdon 1989); TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(5) (Vernon Supp. 1990); VA. CODE ANN. § 54-1-521(8) (Supp. 1990).

28. An athlete must pay for such a policy himself or borrow the money. BYLAW art. 12.1.2.1, NCAA MANUAL at 69.

athlete's school is in good standing with the NCAA. As a penalty for recruiting violations, the NCAA may prohibit a school from competing in post-season play.[29] If an athlete is not going to be able to compete in a post-season tournament in his last year because of his school's violation of NCAA rules, he should be allowed to turn pro a year earlier.[30]

These restrictions cannot be justified in terms of ensuring that athletes get an education, since the statutes are not keyed to graduation and do nothing to address the appallingly low graduation rates in big time football and basketball programs.[31] Many people drop out of college and return later on. An athlete who earns a substantial amount of money as a professional can easily afford to return to school for an education. Similarly, the statutes cannot be justified by a need to protect underage athletes. First, they are not written in terms of an athlete's age. Second, most athletes who are being recruited are of the age of majority and do not need special protection. Moreover, athletes are often "redshirted"[32] and kept in college for an extended period of time.

The antisigning provisions perpetuate a de facto and, perhaps, de jure system of involuntary servitude. A high school athlete who wants to be a professional basketball or football player must go to college to learn his trade. While there, the NCAA prevents him from earning money based on his athletic ability. The athlete is then turned over to professional leagues only after the colleges have received their four years' worth of services at very little cost. As a pro, the athlete is again restricted in his ability to freely market his services by reason of the draft and reserve systems.

Some states go beyond antisigning provisions and actually prevent the agent from speaking with an athlete. These statutes make it difficult for an athlete to make an intelligent choice. For example, Oklahoma makes it illegal for an agent to contact an athlete and discuss representation prior to the completion of NCAA eligibility.[33] Oklahoma does allow an agent to talk to an athlete at a college-sponsored information forum.[34] But this is not going to

29. *Id.* §§ 19.4.2.1(d) and (e), NCAA MANUAL at 334.

30. This is the situation that members of UNLV's basketball team faced last year. Many were surprised that Stacey Augmon did not enter the NBA draft as a junior.

31. According to a recent article, the graduation rates for Black athletes were 26.1% in football and 17.1% in basketball. Harvey, *Book Review*, L.A. Times, Dec. 30, 1990, at 1.

32. Redshirting is a practice that allows a college to stockpile an athlete who is not currently needed. An athlete who is redshirted is kept from traveling and playing for the team in competition although he is allowed to practice.

33. OKLA. STAT. ANN. tit. 70, § 821.64(8) (West Supp. 1990). *See also* N.C. GEN. STAT. § 78C-77 (1990) (requiring prior written notice before communication).

34. OKLA. STAT. ANN. tit. 70, § 821.65 (West Supp. 1990).

benefit an athlete who may need advice in his third year, because the forum must take place in the athlete's senior year.

The athlete is left with no legitimate means to acquire the crucial information he needs in order to make an intelligent career decision. One cannot assume that a coach or athletic director is going to give an athlete good advice. They have a vested financial interest in the athlete's continuing to compete at the college level. Even if they were able to be objective, they may not know the marketplace as well as experienced agents.

Another questionable provision found in these state statutes is a restriction on giving anything of value to an athlete. For example, Florida prohibits an agent from "offer[ing] anything of value to induce a student athlete to enter into an agreement by which the agent will represent the student athlete."[35] At first blush, this seems a proper way to prevent bribery. But the situation here does not really involve bribery, because it is not dealing with a public official or an attempt to corrupt our judicial system or any governmental process.[36]

Instead, the statute arbitrarily prohibits a transaction that is reasonable, and in most contexts, generally accepted—an investment. The athlete has a skill that may be worth money in the future. The agent, as an investor, is willing to take some risk and advance money. One can understand why the NCAA may say that an amateur athlete cannot accept money and remain an amateur, but why should this transaction be illegal?

Suppose, for example, that a college student on an academic scholarship has an idea for a better mousetrap but lacks the funds to patent, build, and successfully market that trap. It would not be illegal for an investor to advance money against future profits or to buy a share of the enterprise. Why can't an agent make the same investment decision with an athlete on an athletic scholarship? In fact, this kind of arrangement is common in professional golf. The average amateur golfer who wants to break into the pro tour usually cannot afford the money to compete while he attempts to win. In order to play, he will find a sponsor who will advance expenses against a share of the golfer's earnings.

As indicated, an athlete may be violating an NCAA eligibility

35. FLA. STAT. ANN. § 468.456(4) (West Supp. 1991). *See also* ILL. ANN. STAT. ch. 38 §§ 29-1(b) and (c) (Smith-Hurd Supp. 1990); MD. ANN. CODE art. 56, § 636(b) (Supp. 1990); MICH. COMP. LAWS ANN. § 750.411(e) (West 1991); TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(4) (Vernon Supp. 1990) (for similiar examples of statutes prohibiting bribes).

36. *See generally* ILL. ANN. STAT. ch. 38 art. 29 "Bribery in Contests" (Smith-Hurd Supp. 1990) (Illinois does, however, categorize this transaction as a bribe).

rule when he takes money from an agent. The athlete may also be breaching a contract with the school. But the NCAA and the school should be able to protect themselves. The state should not criminalize conduct that is neither immoral nor harmful to the athlete under the guise of protecting the athlete.

Yet that is exactly what these statutes do. Most states provide criminal penalties for violations of their regulatory schemes.[37] In some cases, the language is sweeping and raises some concerns as to how it will be interpreted and enforced. For example, under Iowa's statute, a person shall not:

> Engage in conduct which violates, or causes or contributes to causing a student or institution of higher education to violate, any rule or regulation adopted by the national collegiate athletic association governing student athletes and their relationship with athlete agents and institutions of higher education.[38]

The NCAA rules referred to here only relate to amateur status. Is such a rule "violated" when an athlete wants to relinquish amateur status? If an agent is charged, will he be bound by any findings or conclusions of the NCAA in its own investigation, or does that question get litigated in the criminal action? Has the state unlawfully delegated its legislative powers by criminalizing conduct based on the rules (and findings?) of a private association? Is the NCAA a state actor in Iowa, since it legislates for that state in this area?[39]

In addition, many states provide for civil penalties or damages for actions taken in violation of the statutes and rules. For example, Georgia's statute provides for a forfeiture of a $100,000 bond to the athlete's school if the agent fails to provide notification

37. ALA. CODE § 8-26-41 (Supp. 1990) (Class C felony); FLA. STAT. § 468.454(3) (1990) (felony of the third degree); ILL. ANN. STAT. ch. 38 § 29-1(b) (Smith-Hurd Supp.1990) (Class A misdemeanor); IND. CODE ANN. § 35-46-4-4 (West 1990) (Class D felony); IOWA CODE ANN. § 9A.11 (West 1990) ("serious misdemeanor"); KY. REV. STAT. ANN. § 518.080 (Michie/Bobbs-Merrill 1990) (Class D felony); LA. REV. STAT. ANN. § 4:426 (West 1990) (misdemeanor); MD. ANN. CODE art 56, § 639 (Supp. 1990) (misdemeanor); MICH. COMP. LAWS ANN. § 750.411e (West 1990) (misdemeanor); MISS. CODE ANN. § 73-41-15 (Supp. 1990) (undesignated, but penalty can be up to two years imprisonment); OKLA. STAT. ANN. tit. 70, § 821.66 (West 1989) (undesignated but penalty can be one year imprisonment); 18 PA. CONS. STAT. ANN. § 7107 (Purdon 1989) (misdemeanor of the first degree); TEX. REV. CIV. STAT. ANN. art. 8871, § 8(c) (Vernon Supp. 1991) (Class A misdemeanor).

38. IOWA CODE § 9A.8.2 (West 1990).

39. In *Tarkanian*, the Supreme Court rejected an analogy to Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), because the NCAA and UNLV were antagonists and not joint participants. National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179, 196 n. 16 (1988). The opposite conclusion might be reached where the state enforces NCAA rules.

thirty days prior to signing the athlete.[40] This forfeiture is not dependent on the athlete's losing college eligibility.

Florida's statute holds the student or agent liable in damages that result to the college from an athlete's subsequent ineligibility if the student or agent fails to notify the athletic director that the student has entered into a contract.[41] The school is also entitled to damages equal to three times the amount of scholarship awarded to the athlete.[42]

One could argue that allowing a university to recover scholarship costs is reasonable. The university that loses an athlete loses the benefit of its bargain. But awarding three times the amount seems extreme.

Mississippi also has a provision under which the school can recover the amount it incurred in providing the athlete with a scholarship from either the agent or the athlete.[43] But it goes one step farther and allows the university to recover "loss of revenue and other damages suffered by the institution as a direct result of such athlete's loss of eligibility."[44] The word "direct" may limit the potential here, but consider the situation where a school loses a bowl bid because a star became ineligible just before a critical game. Should the athlete or agent be liable for the million dollar bowl fee? If a school has a cause of action against an athlete who doesn't play, shouldn't the athlete have a cause of action if he is benched?

Tennessee's statute is the broadest and provides for damages to include "lost television revenues, lost ticket sales of regular season athletic events, and lost revenues from not qualifying for post season athletic events such as football bowl games and tournaments."[45] And, in a classic case of overkill, the statute also provides an additional amount equal to three times the value of the athlete's scholarship.[46]

Whatever merit there may be in compensating a university for losses sustained as a result of losing a star athlete, these statutes

40. GA. CODE ANN. § 43-4A-17 (1990).

41. FLA. STAT. § 468.454(6) (1990). Georgia requires that agents post a bond, which is then payable to any athletic association that "is aggrieved by any act" of the agent which violates the statute. GA. CODE ANN. § 43-4A-13 (1990).

42. FLA. STAT. § 468.454(6) (1991).

43. MISS. CODE ANN. § 73-41-23 (1972).

44. *Id.*

45. TENN. CODE ANN. § 49-7-2106 (1990).

46. TENN. CODE ANN. § 49-7-2107 (1990). *See also* TEX. CIV. PRAC. & REM. CODE §§ 131.005(b) & (c) (Vernon Supp. 1990) (providing for a cause of action in favor of the school and the Southwest Athletic Conference for damages suffered due to NCAA sanctions brought on by a rules violation. Damages may include lost television and ticket sales).

cannot be justified by an alleged need to protect the athlete. Instead, their *in terrorem* effect is to prevent the athlete from receiving valuable advice on how best to pursue his career or to prevent him from pursuing that career until after he has completed his NCAA servitude.

CONCLUSION

While I have been critical of NCAA-based regulations, I would not suggest massive deregulation of the industry. There are dishonest and incompetent agents who prey on young naive athletes, costing them an enormous amount of money. But we should be sure that the regulation focuses on those problems. Regulations that merely help the major colleges maintain lucrative sports programs and allow the professional leagues to continue to have a free farm system do nothing to deal with incompetence and dishonesty. Instead, these rules prevent athletes from getting information, from getting fair compensation for their services, and from protecting their future careers.

For reasons that have been discussed, I believe that many of the central features of states' NCAA-based agent regulations are neither necessary nor wise. What starts out as paternalistic legislation designed to protect the athlete may ultimately be another tie that binds the athlete into an exploitive peonage system which makes it difficult for the athlete to adequately protect or benefit from his one precious resource—athletic ability.