

**REGULATING THE ATHLETE-AGENT INDUSTRY:
INTENDED AND UNINTENDED CONSEQUENCES**

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I. INTRODUCTION

In 2005, prosecutors for the state bar of California charged an attorney, who was also an athlete-agent, with 18 counts of bilking more than \$2.2 million out of former Golden State Warriors basketball player Jason Caffey.¹ The state bar's investigation came in the aftermath of a lawsuit filed by Caffey against the agent.² Caffey alleged that the agent misappropriated, for the agent's personal and business expenses, money from a joint account the two had established.³ The agent resigned from the practice of law in California, but admitted no wrongdoing.⁴

The case involving Caffey's agent is illustrative of common types of misconduct perpetrated by agents, financial fraud and mismanagement.⁵ Indeed, concerns involving sports agents tend to fall within two broad categories, issues involving professional competence and ethics on the one hand, and issues involving overzealous competition for clients and recruiting improprieties on the other. As discussed below, the harm inflicted upon athletes as a result of such conduct underscores the need for effective means of regulating the athlete-agent industry.

A. Professional Competence and Ethics

Salient illustrations of agent malfeasance and ethical compromises include income mismanagement, missing deadlines in player contracts, and engaging in conduct that conflicts with the interests of their athlete clients. Financial mismanagement of athletes' assets is a particularly egregious form of agent misconduct due to its potentially harmful consequences.⁶ The Caffey case is one

1. Mike McKee, *Ramsey Resigns from Bar, Investigation Over*, THE RECORDER, Jul. 8, 2005, at 9.

2. *Id.*

3. Mike McKee, *Bar Goes After Former Deputy DA*, THE RECORDER, Jan. 26, 2005, at 1. The lawsuit was settled. *Id.*

4. McKee, *supra* note 1.

5. See *Symposium: The Uniform Athlete Agents Act*, 13 SETON HALL J. SPORT L. 345, 356 (2003) (describing financial mismanagement as the most serious problem confronting the athlete-agent industry).

6. Jamie P.A. Shulman, *The NHL Joins In: An Update on Sports Agent Regulation in*

in a long line of instances in which sports agents and financial advisors squandered the financial resources of athletes. A recent illustration of an agent or financial advisor not only providing bad investment advice, but also breaching his duty to avoid conflicts of interest involved former National Basketball Association (“NBA”) superstar Scottie Pippen. Pippen alleged that a financial advisor persuaded him to invest \$17 million in bad investments.⁷ More than \$7 million of the reported \$17 million that Pippen entrusted was steered by the advisor into real estate ventures with a developer with whom the advisor had a close connection.⁸ Pippen won an \$11.8 million judgment against the financial advisor in 2004.⁹

Financial impropriety is not restricted to professional basketball. A financial advisor, Don Lukens, allegedly defrauded 78 National Football League (“NFL”) players out of at least \$42 million between 1999 and 2002.¹⁰ The National Football League Players Association (“NFLPA”) reported that over a three year period, agents and financial advisors defrauded NFL players out of millions.¹¹ Agent Richard Sorkin was supposed to place money given to him by National Hockey League (“NHL”) players in trust.¹² Instead he lost the money in bad stock purchases and gambling.¹³ Following a guilty plea to seven counts of grand larceny, Sorkin was sentenced to three years in prison.¹⁴

The misconduct of agents can lead to financially disastrous

Professional Team Sports, 4 SPORTS LAW. J. 181, 187 (1997) (identifying financial mismanagement as the most salient problem caused by agents).

7. Geoffrey C. Arnold, *Players Can be Easy Money*, THE OREGONIAN, Feb. 14, 2005, at E6.

8. Geoff Dougherty, *Chicago Bulls' Scottie Pippen Wins Judgment Over Investment Advice*, CHI. TRIB., Nov. 24, 2004, at B1.

9. *Id.*

10. Russell Wild, *Thrown for a Loss: Professional Athletes Have Long Been Marks for Con Artists Posing as Financial Coaches*, FINANCIAL PLANNING, Jun. 1, 2004, at 2004 WLNR 205314. See Edward T. Pound & Douglas Pasternak, *Money Players (Pro Football Players Who Were Victims or Perpetrators of Fraud)*, U.S. NEWS & WORLD REPORT, Feb. 11, 2002, at 30, available at 2002 WLNR 9117755 (providing examples of instances where agents and financial advisors have defrauded professional athletes).

11. National Football League Players Association, Financial Advisor, *Frequently Asked Questions*, <http://www.nflpa.org/Financial/main.asp?subPage=Frequently+Asked+Questions#1> (last visited Apr. 10, 2006).

12. Shulman, *supra* note 6, at 187.

13. *Id.*

14. *Id.*

consequences for their clients. NFLPA certified agent Sean Jones was suspended by the NFLPA for two years (initially the NFLPA decertified Jones, but an arbitrator reduced his punishment to a two year suspension).¹⁵ The NFLPA's disciplinary action stemmed from "financial misdealings" involving two of Jones' former clients.¹⁶ An arbitrator found that Jones improperly used the money of NFL player Ebenezer Ekuban to "guarantee a \$1 million real estate loan on which Jones defaulted."¹⁷ The arbitrator also found that Jones used certificates of deposit purchased by Ekuban as collateral for loans to Jones' business. Additionally, Jones persuaded Ekuban to lend him \$300,000, which Jones failed to repay fully. As a result of Jones' conduct, Ekuban filed for bankruptcy.¹⁸ Ekuban signed a contract with the Dallas Cowboys worth a reported \$5.7 million during the time Jones represented him.¹⁹ In the aftermath of Jones' misconduct, however, Ekuban lamented, "I can't even rent a car because my credit is so bad, . . . I'm making good money and I can't rent a car."²⁰ In the other case, former NFL player Cris Dishman won a \$550,000 judgment²¹ against Jones who had involved Dishman in a high risk hedge fund without obtaining his permission.²²

One of the most celebrated cases of agent misconduct involved William "Tank" Black who was accused of misappropriating over \$14 million from his athlete clients.²³ Black's misconduct eventually resulted in his conviction on various federal and state criminal charges including money laundering.²⁴ He was also the unsuccessful defendant in lawsuits brought by his former athlete clients, including NBA and NFL stars such as Vince Carter, Sterling Sharp and Fred Taylor.²⁵

15. Bob Wolfley, *Jones' Career as an Agent Gets Thrown for Big Loss*, MILWAUKEE J. SENTINEL, Dec. 4, 2003, at 2C.

16. Bob McGinn, *Clifton Plot Thickens*, MILWAUKEE J. SENTINEL, Jan. 30, 2004, at 3C.

17. Wolfley, *supra* note 15.

18. *Id.*

19. Liz Mullen, *Ekuban: Deals with my Ex-Agent Ruined Credit*, SPORTS BUS. J., Feb. 17, 2003, at 4.

20. *Id.*

21. Liz Mullen, *Judge Orders Jones to Pay Dishman \$550K*, SPORTS BUS. J., Mar. 3, 2003, at 38.

22. McGinn, *supra* note 16.

23. *Special Report: The Money Pit*, SPORTS BUS. J., June 3, 2002, at 22.

24. *Id.*

25. See KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS* 68-70 (2003); MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & ROBERT

In addition to fraud and financial mismanagement, agents fall short in protecting athletes' contractual interests with their teams. An agent's admitted mistake resulted in NBA player, Anthony Carter's failure to exercise an option with the NBA's Miami Heat for \$4.1 million.²⁶ After the Heat cut Carter, he signed with another team but for an amount less than \$4.1 million.²⁷ Earlier this year, the NFLPA filed a complaint seeking disciplinary action against NFL certified agent, Carl Poston, for allegedly "signing an important contract for a client without fully reading it first"²⁸ The agent negotiated a contract between NFL player LaVar Arrington and the Washington Redskins that failed to include a \$6.5 million bonus to which the parties allegedly had orally agreed.²⁹ In March 2006, the NFLPA's Committee on Agent Regulation voted to suspend Poston for two years. Rather than seek arbitration of his suspension, Poston responded by filing a federal lawsuit seeking to overturn the NFLPA's complaint filed against him and its two year suspension of him.³⁰ The NFLPA suspended another agent for failing to give his client's team notice that the player was eligible for free agency.³¹

B. Fierce Competition for Clients and Recruiting Improprieties

The underlying source of conflicts between agents is the fierce competition for clients. Factors contributing "to the intense competition that breeds conflict amongst agents include the significant fees that are potentially available if an agent signs an athlete, the increase in the number of agents between the 1960s and 1990s, the relatively stable pool of potential athlete-clients, and the ease with which provisions in standard agent representation agreements allow athletes to terminate their contracts with agents."³²

C. BERRY, SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 682 (2005) (providing a detailed account of the improprieties that led to Tank Black's professional demise).

26. Liz Mullen, *Agent Duffy Makes it Right After Mistake Costs NBA Client Anthony Carter*, SPORTS BUS. J., Aug. 11, 2003, at 11.

27. *Id.*

28. Liz Mullen, *Source: NFLPA Files Complaint Against Arrington's Agent*, SPORTS BUS. J., Jan. 23, 2006, at 14.

29. *Id.*

30. Sports Lawyers Association, *Sports Agent Files Suit Against NFLPA Challenging Two Year Suspension*, SPORTS LAWYERS ASSOCIATION UPDATE, May 2006, at 2-3.

31. Liz Mullen, *NFLPA Committee Votes to Suspend Agents Jerome Stanley, Neil Cornrich*, SPORTS BUS. J., Jan. 10, 2005, at 13.

32. MITTEN, ET. AL., *supra* note 25, at 692; see National Conference of Commissioners

One agent described the following types of conduct as a product of agents' fierce competition for clients: "Some agents need that first client so badly they will waive their 3 percent commissions. They will steal players outright and dispense . . . 'trinkets,' such as arranging lines of credit and the purchase of expensive cars. Even the big boys do this."³³ Another agent stated, "[T]here is a player today who was taken in the seventh round . . . who I'm sure spent \$80,000 on a car and has a line of credit of \$50,000 and whose signing bonus will probably be \$25,000, before taxes. He gave his wish list to somebody, and they said, 'Fine.'" And now there's trouble brewing."³⁴

Those intimately involved in sports have acknowledged the magnitude of the problems spawned by the fierce competition by agents for clients. In 2005, Don Fehr, Major League Baseball Players Association (MLBPA) Executive Director, stated that the "number of complaints by agents about other agents is something which is significant and growing."³⁵ According to Fehr, complaints by agents against agents include "accusations of agents stealing clients, telling lies about other agents and giving players improper inducements."³⁶

1. *Client Stealing*

The practice of one agent trying to steal another agent's clients has reached record rates according to noted sports commentator, Liz Mullen.³⁷ Sports agent, Lon Babby, an attorney who charges his athlete clients an hourly rate, also believes that the "practice of interfering with and attempting to steal clients has reached epidemic proportions. I think it is corrupting the quality of representation. Clients are far better off when their representatives are expending energy on behalf of existing clients rather than on efforts to steal

on Uniform State Law, *Uniform Athlete Agents Act: Summary*, available at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-aaa.asp ("With the proliferation of professional sport franchises in the United States, and the immense sums now paid to athletes for commercial endorsement contracts, it is no surprise that the commercial marketplace in which athlete agents operate has become very competitive.").

33. Bob Cohen, *Few Jerry Maguires: Aspiring Sports Agents Find the Clients Scarce, the Glamour Nonexistent and the Going Tough*, WASH. TIMES, May 4, 2004, at C1.

34. *Id.*

35. Liz Mullen, *Fehr: Agents' Complaints About Peers Increase*, SPORTS BUS. J., May 30, 2005, at 12.

36. *Id.*

37. Liz Mullen, *Dirty Dealings Spark Debate*, SPORTS BUS. J., Apr. 19, 2004, at 23.

someone else's clients."³⁸ Others in the sports industry share Bobby's concern that when agents devote time and resources to trying to protect their client base from other agents, their attention is diverted from crucial services such as focusing on athletes' contracts.³⁹

Cases of client stealing have led to disciplinary action by players' unions against agents and grievances and lawsuits between agents. In 2003, the NFLPA's disciplinary committee suspended agent David Dunn for two years.⁴⁰ The committee based the suspension on testimony from a lawsuit in which Leigh Steinberg accused Dunn, a former member of his firm, of stealing clients. Fifty athletes, previously represented by Steinberg, Moorad & Dunn, Inc., signed agency contracts with Dunn who established his own athlete representation firm.⁴¹ The NFLPA's suspension of Dunn had been held in abeyance since Dunn filed for personal Chapter 11 bankruptcy in response to a \$44 million judgment entered on behalf of Steinberg in his lawsuit against Dunn.⁴² On March 1, 2006, however, a federal district court judge agreed with the NFLPA's argument that Dunn lost the right to retain his certification without the union's permission after he entered bankruptcy.⁴³ In a similar case, the court awarded agent

38. *Id.*

39. *Id.*

40. Liz Mullen, *NFLPA Hasn't Given up on Disciplining Dunn*, SPORTS BUS. J., Jan. 30, 2006, at 14.

41. *Id.* The suit alleged *inter alia* that Dunn breached the terms of a covenant not to compete when he persuaded clients of Steinberg's firm to sign representation agreements with Dunn's firm. *Steinberg Moorad & Dunn Inc. v. Dunn*, 136 Fed. Appx. 6 (9th Cir. 2005). The case received considerable notoriety in part due to the question of whether a covenant should be upheld if it restricts the ability of an athlete to select his agent of choice. The NFLPA filed a brief addressing the adverse impact of covenants not to compete on the ability of athletes to select agents. For a discussion of this issue see Jason Gershwin, Comment, *Will Professional Athletes Continue to Choose Their Representation Freely? An Examination of the Enforceability of Non-Compete Agreements Against Sports Agents*, 5 U. PA. J. LAB. & EMP. L. 585 (2003) (providing a detailed account of the Steinberg/Dunn litigation and the impact on athletes' ability to select their agents on the use of covenants not to compete in the athlete-agent industry).

42. Mullen, *supra* note 40. The appellate court reversed the breach of contract claim against Dunn due to the trial court's failure to instruct the jury that covenants not to compete are invalid unless the employee is found to be unique and irreplaceable. The court also noted that a finding that Dunn was unique and irreplaceable would have only provided the basis for injunctive relief. *Steinberg Moorad & Dunn Inc.*, 136 Fed. Appx. at 10-11.

43. Liz Mullen, *NFL Union Wins a Round in Fight to Discipline Agent Dunn*, SPORTS BUS. J., Mar. 13, 2006, at 14. The court also ruled, however, that it is within the jurisdiction of the bankruptcy court judge to determine whether and when to lift the stay so as to allow the NFLPA to proceed with disciplinary action against Dunn. Liz Mullen, *NFL Union Wins a Round in Fight to Discipline Agent Dunn*, SPORTS BUS. J., Mar. 13, 2006, at 14. In 2006, the

Eric Fleisher a \$4.6 million judgment against a former employee, Andy Miller, who took several clients, including NBA star Kevin Garnett, with him when he left Fleisher's firm.⁴⁴ Finally, Career Sports Management, headed by agent Lonnie Cooper filed a lawsuit alleging a former employee, Todd France, improperly solicited 16 of the firm's NFL clients when he left the firm.⁴⁵

The agent industry is continually beset with rumors of agents stealing other agents' clients. A 2002 NFL report found that thirty of the 259 players, 11.6%, drafted in 2002, had changed agents at least once.⁴⁶ In 2004, what is believed to be a record 39 NFL players terminated relationships with their agents to sign representation agreements with controversial agent Drew Rosenhaus.⁴⁷ As a result of conduct, including athletes terminating their agency contracts in order to sign with him, Rosenhaus has been described as the "most reviled agent among his peers."⁴⁸ Whether Rosenhaus acted improperly in attracting these and other athletes as clients is a matter of speculation. One agent, Ken Sarnoff, filed a grievance with the NFLPA alleging Rosenhaus, in persuading wide receiver Anquan Boldin to switch his representation from Sarnoff to Rosenhaus, violated NFLPA regulations prohibiting agents from soliciting athletes who are under contract with another agent.⁴⁹ Because marketing matters are not subject to NFLPA regulations, Sarnoff also filed a lawsuit alleging that Rosenhaus improperly lured Boldin to terminate his contract for marketing related services with Sarnoff's firm in order that he might sign with Rosenhaus.⁵⁰

NFLPA and Dunn reached a settlement that will allow the union to proceed with disciplinary action against him. Liz Mullen, *NFLPA Set to Resume Disciplinary Action Against Agent Dunn*, SPORTS BUS. J., May, 15, 2006, at 14.

44. Russell Adams, *Agent Fleisher Wins \$4.6M Judgment*, SPORTS BUS. J., Oct. 21, 2002, at 9.

45. Liz Mullen, *Agent Lawsuit: Ex-employee Raided My Firm*, SPORTS BUS. J., Oct. 27, 2003, at 7.

46. *NFLPA: Share of 2002 Class that Swapped Agents Topped 10%*, SPORTS BUS. J., Sept. 9, 2002, at 14.

47. Liz Mullen, *Rosenhaus Picks up Another 6-Pack of Players*, SPORTS BUS. J., Mar. 7, 2005, at 20.

48. Liz Mullen, *Rosenhaus Targeted by Lawsuit*, SPORTS BUS. J., Sept. 19-25, 2005, at 6.

49. *Id.*

50. *Id.*

2. *Disparagement*

Agents accuse other agents of trying to gain a competitive edge by disparaging their competence and character. In *Bauer v. The Interpublic Group of Companies, Inc.*,⁵¹ agent Francis Bauer asserted that agents associated with the sports representation division of Octagon “unlawfully convinced [NFL player David Carr] to terminate his contract with Bauer and sign with [Octagon].”⁵² Central to Bauer’s complaint were allegations that Octagon’s agents disseminated derogatory information to Carr about Bauer including newspaper articles regarding Bauer’s ex-partner’s indictment for murder.⁵³

In a pending case, African American agent Lamont Smith has asserted defamation and intentional interference with prospective contractual relationship claims against sports representation firm, IMG, and one of its former agents, Tom Condon. Smith alleges that Condon sought to dissuade Kenyatta Walker from signing a representation agreement with Smith’s firm prior to the 2001 NFL draft.⁵⁴ According to Smith, Condon stated that Smith “alienated the general managers of NFL clubs by ‘playing the race card’ during contract negotiations.”⁵⁵ Smith alleges Condon subsequently made similar comments to other potential clients.⁵⁶

3. *Improper Inducements*

Financial inducements to athletes to sign with agents pervade the agent industry. Inducements of money and other benefits to athletes with remaining intercollegiate eligibility have garnered particular attention because of the dire consequences that may result to athletes and the institutions for which they play. In 2004, the NHL Players Association initiated an investigation of an agent who allegedly paid \$50,000 to the family of a top NHL draft prospect.⁵⁷ In another matter, the NCAA Committee on Infractions found that an agent’s runner made cash payments to student-athletes enrolled at Fresno

51. 255 F. Supp.2d 1086 (N.D. Cal. 2003).

52. *Id.* at 1088.

53. *Id.* at 1092.

54. *Smith v. IMG Worldwide, Inc.*, 360 F. Supp.2d 681 (E.D. Penn. 2005).

55. *Id.* at 683.

56. *Id.*

57. Liz Mullen, *NHLPA Reviewing Alleged Payoff*, SPORTS BUS. J., May 17-23, 2004, at 14.

State University and to the athlete's grandparents.⁵⁸ The Committee also heard evidence that an agent paid \$1,500 for an academic advisor to arrange for course work to be prepared on behalf of two student-athletes enrolled at the university.⁵⁹

In a particularly interesting case, an agent, John Lounsbury, sued NBA player Marcus Camby and the sports representation firm, Proserve. Lounsbury asserted that when Camby signed an exclusive agency agreement with ProServe, he breached an agreement he had previously made to sign a representation agreement with Lounsbury.⁶⁰ As a part of his allegations, Lounsbury asserted that Camby agreed to hire him in exchange for Lounsbury providing Camby, his friends and family with money, gifts, gratuities and services.⁶¹

In anticipation of the 2006 NFL draft, rumors circulated widely that agents and their runners were offering larger cash inducements, which are illegal, and greater marketing guarantees, which are legal under NFLPA agent regulations, than ever before.⁶² With respect to runners, inducements often come to athletes from them rather than directly from agents. Their role is to solicit athlete clients on behalf of agents; runners begin this process by developing a relationship with an athlete, and an athlete's family and friends. Part of developing this relationship is through the use of gifts of money and other favors.⁶³ Some runners work exclusively for one agent, while others are independent and work for more than one agent.⁶⁴

Before discussing existing mechanisms that attempt to address the problems described above, the article provides a brief overview of the services provided by sports agents and the nature of the relationship between athletes and their agents. Part II then discusses factors that have contributed to agent misconduct. Part III turns to analysis of indirect means used to regulate and hold athlete agents

58. NCAA Division I Committee on Infractions, *California State University, Fresno Public Infractions Report*, Sept. 10, 2003, http://www1.ncaa.org/membership/governance/division_1/infractions/index.html (follow "Link to Major Infractions" then enter September 10, 2003 in database, then follow link to public report).

59. *Id.* at 8.

60. See generally SHROPSHIRE & DAVIS, *supra* note 25, at 54-55 (providing additional discussion of the events surrounding the relationship between Camby and Lounsbury).

61. SHROPSHIRE & DAVIS, *supra* note 25 at 3.

62. Liz Mullen, 'Big 3' Shake up the Agent Signing Process, *SPORTS BUS. J.*, Jan. 16, 2006, at 4.

63. Patrick Connors (symposium moderator), *Ethics and Sports: Agent Regulation*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 747, 762-63 (2004).

64. *Id.* at 763.

accountable such as civil and criminal lawsuits, ethical and professional standards governing attorneys, and NCAA rules and regulations. Part III also analyzes direct regulatory mechanisms, including state and federal legislation, and player association regulations. The article concludes with suggestions for regulating the agent industry.

II. OVERVIEW OF THE AGENT INDUSTRY

A. *Services Performed*

While an agent's role with an athlete often varies given factors such as the athlete's tenure in a league, agents perform functions that extend beyond negotiating a player's contract with his or her team. One commentator described the varied services provided by agents as follows:

Contract negotiations, tax planning, financial planning, money management, investments, estate planning, income tax preparation, incorporating the client, endorsements, sports medicine consultation, physical health consultation, post-career development, career and personal development and counseling, legal consultation and insurance matters.⁶⁵

The emergence of sports and athletes as components of the larger entertainment industry has influenced both the nature of the services agents provide and athletes' decisions in selecting agents. Increasingly athletes select relationships with agents and entities that provide specialized services. "Athletes are picking up on the fact that sports marketing, like everything else, is moving toward specialization. . . . Athletes are now saying, 'I'm going to find people who specialize in contracts, people who specialize in endorsements, people who specialize in charitable work,' and so on."⁶⁶ For instance, former University of Southern California quarterback, Matt Leinart, selected former IMG agent Tom Condon to handle his team/player contract negotiations.⁶⁷ On the other hand, Leinart retained the new firm with which Condon is associated, Creative Artists Agency, a literary and talent agency headquartered in Beverly Hills, California,

65. Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349, 351-52 (1997).

66. Rich Thomaselli, *Athlete Sign up Double Agents*, ADVERTISING AGE, Jan. 16, 2006, at 3, 23.

67. Liz Mullen, *supra* note 62.