CHAPTER 20
THE PLAYER AGENT AND SPORTS

I. Introduction

The introductory portions of Chapter 20 are devoted to providing students with backgrounds on the nature of a sports agent's duties and responsibilities, the most prevalent complaints regarding their failure adequately to fulfill such obligations, and the various responses that have been implemented to address many of these problems. It is strongly recommended that the students read this introductory portion carefully to gain a general understanding of, and to remove several misconceptions about, the role that the typical sports agent plays.

While many functions are incident to a traditional law practice and involve legal representation of clients, numerous aspects of the sports agent's daily routine have nothing to do with the practice of law. The introduction will provide students with a summary of the broad panoply of functions that the agent serves.

Of equal significance is the considerable criticism that has been visited upon sports agents over the past twenty years. As in many other professions, the activities of the most flamboyant and frequently unscrupulous participants receive the most publicity and provoke the most sensational litigation. The cases that follow in the text provide stark illustrations of the various types of agent abuses that have occurred in the past twenty-five years, and the judicial, as well as legislative, responses to such abuses.

IV. Agent Abuses and Related Litigation

Case: Zinn v. Parrish

Primary reason for inclusion: To illustrate the care that an agent must exercise in representing his or her client, including assurances that proper licenses and registrations have been secured depending upon the type of advice being provided. In this case, the agent was vindicated and was able to enforce his contract with the athlete; however, the case is worthwhile to expose an agent's potential vulnerability.

Points to emphasize:

1) Although the agent emerged victorious in this case, the lower court had concluded that his contract was void because he had served as an investment advisor without effecting the proper registration.

2) This court carefully differentiates ordinary business advice from securities advice. The court of appeals believed that the district court was far too expansive in its interpretation of the 1940 act, and that that legislation in no way was intended to govern the general relationship between an athlete and his manager or advisor. It is of considerable importance that the court found isolated transactions that may include some investment advice incident to the agent's principal purpose of negotiating players' contracts does not constitute the business of providing advice on investment securities that the act contemplates. Again, even though the agent escaped unscathed in this situation, the court did note that registration might be required even if the agent limited
his activities to screening the securities recommendations of others prior to passing them along to his clients.

3) With regard to the defense that the agent had failed to satisfy the conditions of his contract, the district court concluded that, because the agent did not procure employment, provide substantial investment advice, or secure any more than the most superficial tax consultation, among other things, the agent had failed to fulfill his obligations of the agreement and was entitled to no recompense. The court of appeals emphasized that the actual securing of employment was not required by the agreement but, rather, that the agent was simply obliged to exercise reasonable efforts. Interestingly, the court, at different points, defines the agent's obligations as "good faith" efforts and "reasonable" efforts. Students should be instructed to focus on the possible distinctions between these two terms because one might suggest a reasonable person/objective approach while the other may suggest a more subjective good faith approach. In any event, the court's opinion makes it abundantly clear that the agent's duty was not actually to succeed in his attempts to secure employment or lucrative endorsement contracts but, rather, to make every effort to do so.

Notes and Questions:

With regard to N&Q 1, it is certainly arguable that certain aspects of the agent's contract would seemingly render it illusory and lacking consideration. Yet, given the nature of the business and the indulgence that courts have shown toward termination clauses, it is likely that these contracts will continue to be enforced notwithstanding certain illusory aspects.

With respect to N&Q 2, students are sometimes troubled at the notion that the court would seemingly tolerate isolated advice regarding securities from an "unregistered" agent. The suggestion has been made that an unsophisticated advisor (such as one who does not meet certain registration requirements or, at the least, is not cloaked with some cosmetic legitimacy through the registration) may give poor advice costing his client a considerable sum of money, even though such advice may only be given in an isolated and limited fashion. It is at least arguable that the agent's good faith and the absence of any conflict of interest does not correct all the evils that the statute sought to rectify.

N&Q 3 is simply a reprise of the material breach/substantial performance discussion that was entertained in the Performance section of Chapter 4. The potential risks of refusing to perform a contract under the assumption that the other side has materially breached should be emphasized to students, with Professor Farnsworth's quote on page 1012 providing the most telling illustration.

N&Q 4 again points out the potential differentiation between "good faith" efforts and "reasonable" efforts. Although the term "good faith" has been employed, it is conceivable that in ascertaining whether or not the proper efforts have been made a court will probably look beyond a subjective judgment and consider what others in the similar position would have done.

Case: Brown v. Woolf

Primary reason for inclusion: To familiarize the students with the notion of constructive fraud and to make students aware that even the most reputable of sports agents may be vulnerable to an athlete's claim of inadequate representation.
Points to emphasize:

1) Agents have exercised considerable care in marketing the potential result that they will be able to achieve for a particular client. There is often a thin line between puffing that does not amount to a promise and an actual representation or "warranty" equivalent in which the agent's failure to perform will constitute a contract breach or, at the very least, will give rise to a finding of misrepresentation or fraud that permits the other party to rescind the agreement.

2) The notion of constructive fraud embraces both contracts and torts components. Certainly, to the extent that it is a tort, remedial limitations inherent in contract law (e.g., that the remedy primarily is limited to compensatory damages) might not apply. It is also worthwhile to emphasize that, given the confidential nature and the fiduciary relationship in the agent/athlete context, it is conceivable that constructive fraud could be perpetrated without a fraudulent intent.

3) The fact that this case was tailored as a summary judgment is extremely relevant here because the court found considerable questions of fact that were unresolved. For this reason, the court, confronted with deposition excerpts, affidavits and other documentary evidence, denied the motion for summary judgment.

Notes and Questions:

N&Qs 1 and 4 are related. That is, N&Q 1 requires an explanation of the factors that would establish the tort of constructive fraud and an assessment of whether or not it was likely that plaintiff demonstrated the existence of such facts. N&Q 4 poses the question as to what evidence plaintiff should introduce to establish a contract breach or fraud. Among the facts that require further elaboration are whether the defendant/agent in fact made material statements regarding guaranteed results of future negotiations, whether any monies due and owing were withheld, and whether recklessness or oppressive conduct justifying punitive damages can be demonstrated.

N&Qs 2 and 3 compel students to review the measure of damages that would be available in the context of torts and contract actions and also requires them to revisit the basic rudiments of a summary judgment motion. The final question at the end of N&Q 3 really is one that is essentially rhetorical in the sense that obviously a summary judgment would be appropriate if there had been no material issues of fact and if the affidavits had effectively responded to any factual questions. See Rule 56(c), Fed. Rule Civ. Pro.

Case: Sims v. Argovitz

Primary reason for inclusion: To provide a case that exposes the worst elements of agent representation and the types of activities that have resulted in a clarion call for legislative action and other institutional response.

Points to emphasize:

1) Although defendant/agent Argovitz had made some effort to advise his client that he had applied for and later secured an interest in a football team that would at some point be bidding for his client's services, the court concluded that the client was simply unable to comprehend (and Argovitz knew that the client would be unable to comprehend) the degree of Argovitz's involvement with the club. In essence, the agent as a prominent
owner negotiated a standard player contract on behalf of both the club and the player. A more egregious conflict is difficult to envision. As the court pointed out, the governing league constitution prohibited the owner of any interest in a member club from acting as the representative of a player.

2) Among Argovitz's defenses was that an agent is not responsible for losses stemming from the agents decision to follow his principle's instructions. However, this tenet has no applicability in this case, according to the court, because the agent consciously placed himself in a position adverse to that of the principal.

3) Students should consider carefully the court's elaborate exposition of the facts in this case. It is noteworthy that the court does not find Sims to be an entirely credible witness; however, the court found all other testimony to be so "unappealing" that it rendered Sims' testimony unnecessary.

4) The statements of law listed at various points on pages 1020 and 1021 illustrate that Argovitz assumed the position of fiduciary in his relationship with Sims and that such position carried a high degree of responsibility which the defendant flagrantly disregarded. Perhaps the most telling aspect of this entire decision is the listing of the many matters of which defendant failed to apprise plaintiff. It is difficult to contemplate a situation in which someone bearing a fiduciary responsibility could have withheld more pertinent facts. Fortunately, cases like this have provided the impetus for more extensive legislation and a more pointed judicial response to the problems of agent abuse.

Notes and Questions:

N&Qs 1 and 2 provide background on the interrelationships between individual agents and collective bargaining representatives.

N&Q 3 raises the potential antitrust liability of a league that attempts to regulate agent activity by reaching agreement with the players' collective bargaining representative on rules governing such conduct. It is conceivable that such agreement could run afoul of the antitrust laws unless it were rendered exempt through the non-statutory labor exemption. Given the expansive view of the labor exemption by the Supreme Court in the Brown case, there seems to be a reasonable likelihood that the incorporation of an agreement to govern agent activity into a collective bargaining agreement would likewise be exempt. Whether or not the Baseball exemption would insulate a similar agreement between Major League Baseball and its Players' Association is anyone's guess given recent interpretations of the exemption by cases such as Piazza and Butterworth, addressed in Chapter 8. To the extent that the Baseball exemption is limited to matters involving the reserve clause, then clearly such agreements would rest outside the exemption. However, such a narrow interpretation of the exemption is subject to some question as discussed in the Notes and Questions following the Piazza case in Chapter 8.

With regard to N&Q 4, it is conceivable that such state laws could be deemed intrusions upon the NLRB's jurisdiction. Essentially, matters that are arguably protected by Section 7 or prohibited by Section 8 of the NLRA would be deemed exempt. However, certain matters are so deeply rooted in state concerns as to warrant local legislation even though arguably protected or prohibited by the cited sections of the NLRA. In this situation, it is at least arguable that protecting one's citizens from unscrupulous agents is a matter so grounded in state concerns so as to warrant legislation that would be enforceable and not preempted by federal law.
With regard to N&Q 5, it seems as though the Players' Association Regulations prohibiting representation of individual players is wholly appropriate. Not only does such individual representation create the appearance of impropriety in an area that is already rife with concerns regarding appropriate representation, it also could involve actual conflicts in the context of salary caps and other devices that may establish a point of departure between the best interests of the collective as a whole and the interests of individual athletes.

N&Q 6 answers itself in the sense that relying on the fact that the principal is following his agent's instructions is counterintuitive when the agent is unaware that the principal is a potential adversary.

N&Q 7 requires a revisitation of basic remedies available in a tort and contract context. Plainly, the advantage of suing in tort is that the possibility of punitive damages may be enhanced, unlike a contract action which is limited generally to compensatory damages. One other potential advantage is that the limitations period for a tort and contract action may vary, and a longer limitation period for one or the other could salvage a claim that otherwise would be time barred.

N&Q 8 raises the question of whether a victim of duress, misrepresentation, or similar conduct can forfeit his or her right to disaffirm by expressly or tacitly ratifying the agreement. As N&Q 8 indicates, there can be no ratification until the offending conduct ceases to exist.

In N&Q 9, students should be asked whether a contract negotiated with "a gun to one's head" is any less voidable because it constitutes a great deal for the victim. In the context of agent misconduct, the court will likely look not only at the subject case, but also will want to send a message that such misconduct will not be tolerated, even where no serious harm has resulted.

Case: Walters v. Fullwood

Primary reason for inclusion: To illustrate the types of abuses that occur in the representation of amateur athletes and also to demonstrate a creative approach to reaching the untoward acts of agents.

Points to emphasize:

1) Typically, where an agent has engaged in improper conduct with a college athlete, the principle victims in terms of outside sanction are often the athlete and the university. That is, college eligibility could be compromised, victories could be forfeited, etc. As part of the penalty, the university may be required to surrender revenues derived from post-season tournament participation. Through various state legislation and NCAA regulation, there have been attempts to reach the offending agent and expand the range of punishment beyond the student-athlete and the university. However, as we have seen, these penalties have not been totally responsive to the problems of agent misuse of power vis-à-vis colleges and their athletes.

2) By characterizing the relationship between student and athlete as a contract, the agent's disruption of such relationship gives rise to an argument that such conduct constitutes tortious interference with a contractual relationship.

3) In this case, the court "punishes" both parties by refusing to enforce the contract against the "breaching" defendant player and by denying the defendant's request to stay
this action and to compel arbitration. The critical aspect of this case illustrates that inappropriate agent conduct may be penalized in a variety of ways. State legislation, NCAA Rules and Regulations, certification by the National Football League Players Association, and creative common law approaches suggest that agent conduct will be subject to greater scrutiny in the future.

4) It is noteworthy that the plaintiff, Walters, and another agent, Lloyd Bloom, were subsequently indicted for mail fraud occasioned at least in part by the types of relationships with college athletes that characterized the relationship between plaintiff and defendant in the subject case. See N&Q 4. Students should be asked to address the applicability and prudence of criminal sanctions to address the problems of sports agent abuse.

Notes and Questions:

The first N&Q reiterates the principle that the court will not enmesh itself in a dispute involving two parties who have engaged in conduct that is violative of public policy. While Walter's actions in this case precluded him from the type of relief that he requested, the critical aspect of this litigation, the viability of a tortious interference claim, bears the greatest emphasis. N&Q 1 makes it very clear that, given the settled status of an enforceable contractual relationship between student/athlete and university, the tortious interference claim is an omnipresent possibility whenever an agent has in some way disturbed the relationship between student and university through fraudulent conduct or other untoward activity.

N&Q 2 requires students to revisit the types of issues that arise when a party seeking injunctive relief has unclean hands. Again, a determination as to whether or not a party is in pari delicto or somehow precluded from gaining the benefits of equity will vary from judge to judge and jurisdiction to jurisdiction. Suffice it to say that the lessons learned from Weegham v. Killefer and Munchak Corp. v. Cunningham in Chapter 6 will have applicability in contexts such as the subject case in terms of the fluid standard that courts will apply to "illegal" conduct or other conduct that would jeopardize one party's ability to "gain equity."

In N&Q 3 the question raised is whether or not this case would have been stayed pending arbitration. In all likelihood, with the prevailing judicial predilection toward staying court action until the voluntary dispute adjustment mechanisms can be completed, and the overriding principles involving exhaustion of remedies, it is likely that the matter would have been stayed. Of course, here, that prevailing view may not have been as compelling given the fact that the mechanism was not voluntarily agreed upon (such as you might find in a typical collective bargaining agreement).

N&Qs 4 through 6 simply provide the readers with some "fly on the wall"-type information regarding other types of agent conduct that has resulted in criminal sanction and further civil sanctions. Unfortunately, it speaks to a critical situation that continues to exist with respect to representation of amateur athletes.

Case: George Foreman Associates, Ltd. v. Foreman

Primary reason for inclusion: To familiarize students with the notion of boxing promotion and management of individual sports participants.

Points to emphasize:
1) The definition of manager at page 1035 is the critical question because of the placement of the plaintiff within the jurisdiction of the California State Athletic Commission. The term "manager" is broadly defined in the California code and, given the considerable power bequeathed to the plaintiff, clearly would place him within the crosshairs of a "manager" definition.

2) In two respects, the court found that Associates was indeed a manager of defendant and subject to the jurisdiction of the state athletic commission. This conclusion sounded the death knell for plaintiff's case because in numerous aspects the contract fails to comply with pertinent rules and regulations. Therefore, the agreement was unenforceable.

3) It is also noteworthy that there was no California precedent governing this controversy, but the court borrowed liberally on New York law. Students should be made aware of this psychological "comity" between New York and California in the entertainment and sports context given the fact that both states are intimately connected with, and derive considerable revenues from, those industries.

4) The remedy in this case was extremely bizarre and one that students might not see replicated in many other decisions. In essence, a defendant's motions for summary judgment were granted because the contracts were deemed to be illegal and unenforceable. Yet, as part of its remedy, characterized as "equitable," the court required the defendants to reimburse plaintiffs for sums that had been advanced, including money under the agreements found to be unenforceable.

Notes and Questions:

With regard to N&Q 1, the court gave "manager" a broad definition because it seems as though such construction is consistent with the spirit of the California code. Moreover, in a close case, it is likely that a court would give the broadest possible scope to such definition so as to place the issue within the considered discretion of the California State Athletic Commission, the agency vested with the authority to interpret questions involving proper representation of athletes, among other things.

With regard to N&Q 2, the plaintiff argued persuasively that the Commission had limited jurisdiction, extending only to boxing matches held in California. It is arguable that the Commission's assertion of jurisdiction does overextend the statutory authority provided by the State of California. However, the court differentiated the regulation of boxing matches from regulation of managers. With regard to the latter point, nothing in the statute restricted the coverage of those rules to contracts affecting bouts held in California. Therefore, the court concluded that the Commission had not exceeded its statutory mandate by regulating such agreements. Moreover, it is a commonly held tenet of administrative law that an agency in the first instance has authority to determine its own jurisdiction. While a reviewing court may take issue with the agency's determination, considerable discretion has been given to agencies in terms of ascertaining its own authority. This point does not suggest, of course, that an agency palpably ranging beyond its jurisdiction may escape a finding that it has acted *ultra vires*.