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CREATE CIVIL LIABILITY FOR ATHLETE AGENTS

House Bill 5511 as enrolled
Public Act 432 of 1998
Sponsor: Rep. Kirk Profit

**House Committee: Colleges and
Universities**
Senate Committee: Judiciary

Third Analysis (1-12-99)

THE APPARENT PROBLEM:

Universities and colleges that belong to the National Collegiate Athletic Association (NCAA) voluntarily agree to abide by its rules and regulations. NCAA regulations prohibit student athletes from receiving cash, gifts, loans, or other favors from a sports agent or entering into a contract -- either orally or in writing -- with a sports agent for representation in marketing himself or herself. A similar situation exists with gifts and favors bestowed on athletes and their families by sports boosters. Such practices can result in sanctions being levied against the student athlete and possibly against the college or university the student attends. Often a student athlete loses his or her eligibility to play collegiate sports, either temporarily or permanently, and could also lose access to an education by losing his or her scholarship.

Even if NCAA sanctions are not levied against a college or university, the institution may still suffer as a result of a player's suspension. A recent example involved Pennsylvania State University. In December of 1997, a Penn State football player admitted to accepting a gift of clothes from a sports agent and then lying to the coach about the event. The coach suspended the player, who had 20 regular-season touchdowns and was the university's third-best rusher of all time, from participating in the New Year's Day Citrus Bowl. The Nittany Lions subsequently lost to Florida 21-6.

In another well-known example, a sports agent took several Florida State University football players to a Footlocker sporting goods store at closing time. Reportedly, the students were allowed to take any merchandise they wanted, with the agent footing the bill. The university subsequently suspended five players and hired a law firm to investigate the

incident. Though the NCAA did not find the university culpable and therefore did not levy additional sanctions against it, the investigation cost the university \$400,000. In yet another example, when it was discovered that a University of Massachusetts basketball player had signed a contract with an agent before his eligibility for college play had expired, under NCAA regulations, the university had to forfeit the games that the player had played in after signing the contract (once a contract is signed, the player is considered to be a professional and therefore ineligible for college play). The university had made it into the semifinal playoffs that year, but after a number of regular-season games were forfeited due to the player's ineligibility, the university was required to pay back its share of the "final four" tournament revenue because it "technically" no longer qualified to be in the tournament.

In an attempt to discourage athlete agents from inducing student athletes to violate NCAA rules, 27 states have enacted athlete agent legislation. The legislation varies greatly from state to state, with differences not only in definitions, but also registration requirements and penalties. Where most of the states, including Michigan, provide for criminal penalties for an agent who illegally entices a student athlete to sign a contract for representation, several states have included a civil penalty that allows colleges and universities to bring an action to recover damages that the institution incurred by an agent interfering, as it were, with student athletes.

At the federal level, H.R. 2171 was introduced in the House of Representatives in the 1997-1998 legislative session to prohibit athlete agents from initiating contact to solicit representation of student athletes who

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are subject to intercollegiate sports governing bodies, provide penalties for violations, and establish requirements for contracts between athlete agents and student athletes. In addition, recognizing that variations in state law make it difficult for agents to meet each state's requirements, the National Conference of Commissioners on Uniform State Laws (a 105-year-old organization that comprises representatives from every state) has formed a drafting committee to develop a uniform agent law. Reportedly a lengthy process, a final product may not be available to be brought before state legislatures until 2001.

Meanwhile, problems with athlete agents, sports boosters, and others persist in Michigan, despite existing state law. Currently, the Michigan Penal Code (MCL 750.411e) prohibits an athlete agent from inducing "a student athlete to enter into an agent contract or professional sport services contract before the student athlete's eligibility for collegiate athletics expires" or to give, offer, or promise anything of value to an employee of a college or university in return for the referral of a student athlete by that employee. Public Act 477 of 1988 (MCL 390.1501 et al.) has a similar prohibition that applies to other individuals and would include actions by a sports booster. A violator of either act is guilty of a misdemeanor. Fines can range from up to \$50,000 or three times the amount given, offered, or promised as an inducement to a student athlete, or three times the value of the agreement entered into with a college or university employee, whichever is greater, in addition to possible jail time of up to one year. However, since incidents continue to occur, some people believe that the current law falls short of providing a strong enough deterrent to illegal activities by athlete agents and boosters. Legislation has been proposed to allow colleges and universities to bring a civil suit against athlete agents or boosters to recoup damages incurred as a result of their actions.

THE CONTENT OF THE BILL:

The bill would amend Chapter 29 of the Revised Judicature Act, entitled "Provisions Concerning Specific Actions", to allow colleges and universities to bring a civil action against a person who gave or promised to give improper gifts or services to a student athlete, a prospective student athlete, or his or her immediate family if the action resulted in an injury to the college or university. A person would be liable for \$10,000 or the actual damages incurred, whichever was higher. In addition, the college or university

could recover actual attorney fees and actual costs that were incurred as a result of bringing the action. The bill would define "improper gift or service" as any gift or service that student athletes are prohibited from accepting according to the rules of the college or university. A "prospective student athlete" would mean an individual who was being recruited to be a student athlete. "Student athlete" and "immediate family" would be defined as they are under the Michigan Penal Code (MCL 750.411e).

MCL 600.2968

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would not have a fiscal impact on the state. However, the bill could result in an indeterminate increase in revenue for an affected college or university. (3-4-98)

ARGUMENTS:

For:

Hardly a sports season passes without a story surfacing of a college player being suspended either for signing a contract before his or her eligibility was up, or for accepting gifts, loans, or jobs from an agent or sports booster. Besides the consequences that the student athlete faces (e.g., game suspension, ineligibility, loss of a scholarship), the college or university the student attends can also suffer economic loss in the form of costly investigations of alleged infractions, loss of eligibility to compete in NCAA-sponsored tournaments or bowl games, and damage to the reputation of the school and its sports programs, which in turn affects a school's ability to recruit good players. Reportedly, some schools have paid in excess of half a million dollars to investigate infractions. One school even had to return its share of the final four basketball tournament revenue because it no longer qualified to compete in the semifinal after having to forfeit several regular-season games that a player had participated in after becoming ineligible for college play.

Even though athlete agents and boosters face criminal penalties under the Michigan Penal Code and Public Act 477 of 1988 for giving gifts to or inducing student athletes to sign contracts before their college eligibility is up, apparently the criminal penalties have not proven to be as strong as a deterrent as was hoped. House Bill 5511 is viewed as a proactive step to establish a consequence that should effectively discourage athlete agents and others from targeting student athletes in violation of NCAA or another

intercollegiate sports governing body's rules. A college or university suffering an injury from an agent's actions could recoup lost revenues. Being required to pay an institution the actual damages incurred from one's actions in regards to a student athlete should act as a strong incentive for agents and boosters to comply with NCAA rules in their dealings with college athletes.

Response:

The bill is problematic in several respects. First of all, the bill defines "improper gift or service" as those gifts and services that a student is prohibited from receiving according to the "rules of the institution of higher education". According to a representative from the NCAA, the individual schools do not make the rules, but rather voluntarily comply with the rules established by the NCAA or other intercollegiate sports governing bodies of which the school is a member. In this way, sports programs operate and compete nationally on a fair and equal basis. The bill should be amended to reflect this practice.

Further, the term "injury" is not defined adequately and could result in frivolous lawsuits, especially if a school attempts to sue for what it perceives as damage to its reputation. According to an article in the NCAA News ("Chaos the Rule With State Agent Laws", 8/18/97), Tennessee law specifies that "an institution is damaged when the institution or student is penalized or disqualified or suspended from participation in intercollegiate athletics by a national association or conference." Such a definition gives a benchmark in determining whether an injury has occurred, and also to what extent the school has been hurt by the penalty, as being penalized leads in turn to the school losing revenue from media coverage and ticket sales, the right to recruit an athlete, lost proceeds from postseason play, or forfeiting a competition.

Finally, the bill does not limit civil suits against agents only to those incidents in which the NCAA or other intercollegiate sports governing body finds the school not culpable in the infraction. There have been cases where, in addition to the actions of the agent, the college or university was cited by the NCAA for failing to deal adequately with suspected infractions (deemed a lack of institutional control over the athletic program). One example occurred several years ago when the University of Alabama was, among other penalties, placed on two years probation, barred from postseason bowl competition, and had the number of athletic scholarships the university was allowed to offer reduced for failing to properly investigate signs that a player had signed a contract with an agent.

There have also been cases where colleges and universities have misled the NCAA by submitting inaccurate reports. It would not be fair for an institution to go after an agent or other individual when it was also guilty of illegal practices in violation of NCAA rules. A college or university should only be permitted to bring a civil suit to recover damages when it has been cleared of any wrongdoing in the incident.

For:

The bill would serve to codify an action in common law in regards to interference with prospective advantage. Currently, under common law, an institution could bring a civil suit against an agent, but such an action is more difficult if not placed in statute. The bill therefore would give statutory authority to an institution to bring a civil suit if it suffered injury due to the actions of an athlete agent or other person.

Further, supporters of the bill believe that codifying this action may aid in investigations of alleged infractions. Committee testimony revealed that in a recent example, the University of Michigan paid a Chicago firm approximately \$250,000 to investigate a situation. However, it proved difficult to get the parties involved to talk or to give information. Under the bill, if an institution brought an action, then the laws of discovery would prevail and certain information could be obtained.

Response:

While there may not be anything wrong with codifying an action supportable under current case law, to use the bill's provisions to bring a civil suit in order to use discovery to enhance an investigation would be a misuse of the discovery process. An action should be brought when sufficient evidence exists to support it. Using an action as a means to use discovery to uncover evidence is generally frowned upon by the courts as a "fishing expedition" and could in turn subject an institution to an abuse of process suit, especially if the institution were wrong in its allegations against an agent.

A better approach would be to give a governmental agency subpoena power under the bill. Both Kansas and Texas law give the secretary of state authority to subpoena witnesses, records, and other material considered relevant to investigating alleged infractions by athlete agents. In this way, an institution could save money by avoiding costly legal and court fees incurred by filing a suit prematurely. It would also protect agents and others from acts of intimidation or other abuses on the part of colleges and universities.

Against:

Currently, 27 states (including Michigan) have laws prohibiting certain actions on the part of athlete agents toward college athletes. However, there is tremendous variation in the laws. Some states require registration, some require the posting of bonds, and bond amounts vary from state to state -- as do penalties. At least eight states permit an institution to sue an agent for lost revenue, and at least three states also allow the student athlete to be sued for accepting a gift or signing a contract. The point is, confusion is bound to happen with a plethora of differing state regulations. A better approach would be for states to enact a uniform state athlete agent law. Currently, the National Conference of Commissioners on Uniform State Laws is conducting meetings to draft such a uniform law.

Response:

Unfortunately, creation of a uniform state law is a lengthy process. Once a draft version is agreed upon, it would then have to be submitted before the various state legislatures for adoption. According to news reports by the NCAA, a final draft is not scheduled to be presented at the conference's annual meeting until the summer of 1999, and a finished product may not be available to take before state legislatures until the year 2000 or 2001. Meanwhile, both student athletes and the institutions that they attend must be protected from the relentless pressure from athlete agents in violation of association and conference rules. The bill is a good stopgap measure until such time that a uniform state athlete agent law is offered.

Against:

The bill is not necessary. For starters, Michigan already criminalizes the practices specified in the bill, and the current penalties are quite stiff (up to a \$50,000 fine or a year in jail, or both). Secondly, if the intent is to prevent infractions from occurring in the first place, there are alternative approaches. For example, according to information from an article in the Yale Law Journal ("Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes", Vol. 105: 1996, p.1616), both Duke and Temple universities have a program whereby student athletes are educated on such things as how to deal with sports agents, how to negotiate favorable terms, what actions constitute violations of NCAA rules, and also how to launch successful careers in athletics. It should not be difficult for Michigan's colleges and universities to establish similar programs. Such an approach truly would serve to protect college athletes from agents or

boosters, which in turn would afford the institutions the protection sought after under the bill.

Response:

According to the author of the article in the Yale Law Journal cited above, the entire nature of state laws that restrict athlete agent contact with student athletes may be invalid under provisions of the federal Sherman Antitrust Act (15 U.S.C. 1 et al.) because "states may not legally criminalize the acts of consenting adults seeking to execute mutually beneficial representation agreements simply because they violate the rules of the NCAA." Should such state laws be overturned by a federal court in the future, the bill's provisions would be more important than ever.

Against:

The likelihood of a college or university actually being able to collect the damages awarded in a lawsuit is minimal, especially considering that many of the investigations alone cost upwards of \$250,000. Even if an agent carried liability insurance, insurance policies do not cover for intentional actions. So, if it could be proved that an agent knew he or she was in violation of NCAA rules and state law, chances are that an insurance company would not pay. In addition, many policies put a limit on the amount of liability that would be covered. Further, the type of "injury" usually covered under liability insurance typically refers to personal or "bodily" injury incurred by an individual, not monetary damages suffered by an institution. Without the damages being covered by an insurance policy, it is unlikely that many agents would have sufficient resources to cover the judgment against them. Even if their businesses were liquidated, the amount would probably be insufficient for an institution to recoup its own losses.

Response:

If an agent would not be covered by liability insurance, and if he or she stood to lose his or her business, then the bill indeed should provide the sought after incentive for athlete agents to stop the practice of targeting college athletes in violation of association and conference rules. A clear message would be sent, and so should result in preventing problems from occurring.

Rebuttal:

The bill could be declared unconstitutional due to being punitive in nature.

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.