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Federal Regulation of Sports Agents: Sports Agents Responsibility and Trust Act (SPARTA)

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Summary

H.R. 361, the Sports Agent Responsibility and Trust Act (SPARTA), would make certain activities of alleged or actual sports agents -- providing gifts or cash, inducing a student athlete to sign an agent contract, or providing questionable information concerning the athlete's possible professional prospects -- unfair practices to be regulated by the Federal Trade Commission (FTC). Witnesses at hearings emphasized the far reaching consequences of frequently "unethical" or "unscrupulous" conduct of sports agents in pursuing and soliciting student athletes; such conduct can subject student athletes to penalties including loss of student eligibility and possible loss of scholarship money, and their colleges to sanctions (monetary penalties, forfeiture of games in which an ineligible athlete played, tarnished reputations). The agents involved, however, generally face no punishment for their offenses because, according to SPARTA's primary sponsor, only 35 states regulate agent conduct at all; of that number, 18 have statutes that are considered less than "tough": a federal law would, he says, provide a "uniform Federal backstop" to supplement the current patchwork of state laws, but "not supplant" them.¹ H.R. 361 was reported favorably by both the House Commerce and Judiciary Committees, and passed under suspension by the full House on June 4, 2003; it is currently pending in the Senate Commerce Committee. This report will be updated as necessary to reflect further Congressional action.

"The multimillion-dollar value of professional athlete salaries, signing bonuses, and endorsement contracts has resulted in a proliferation of unscrupulous practices by sports

¹ Representative Osborne, speech on House floor, May 1, 2003, CONGRESSIONAL RECORD, daily ed., May 1, 2003, H3621. The numbers vary from source to source, for either the total number of states having any, or stringent regulation of athlete-agent registration and conduct, or those which have enacted the Uniform Athlete Agents Act (UAAA), but all agree that they are low; some states have enacted the UAAA as substitutes for their own, existing statutes.

agents.”² That student athletes are frequently approached and treated unethically or unscrupulously by either genuine or would-be sports agents anxious to acquire clients was detailed by several witnesses before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary.³ Most often noted was the prevalence of instances in which the student athlete himself or members of his family⁴ are given either cash or gifts to induce the athlete to sign with an agent, who many times promises unrealistic or impossible results, including, *e.g.*, lucrative contracts with professional sports teams, or assurances of high draft picks.

Because the rules of the National Collegiate Athletic Association (NCAA) generally prohibit student athletes from signing agent contracts, or accepting the “impermissible” gratuities offered to solicit them, athletes who do accept the gratuities or sign the contracts lose their eligibility to participate in NCAA competition and possibly, any scholarship money provided by the athlete’s college; the penalties their colleges may face include repayment of any monies received from NCAA championship contests in which the ineligible athlete participated, forfeiture of those contests, loss of television revenue, other, specific monetary penalties, and/or tarnished reputations. But unless the agents’ conduct occurs in one of the few states which have meaningful statutory regulation of sports agent activities, they are largely free of any potential penalties.⁵

H.R. 361, “Sports Agent Responsibility and Trust Act ” (SPARTA), “to designate certain conduct by sports agents relating to the signing of contracts with student athletes as unfair and deceptive acts or practices to be regulated by the Federal Trade Commission,” was introduced jointly on January 27, 2003, by former college football coach, Representative Tom Osborne, and Representative Bart Gordon. Considered first by the House Energy and Commerce Committee, and reported favorably on March 5, the bill was considered and amended by the House Judiciary Committee and its Administrative and Commercial Law Subcommittee, and reported favorably on June 2. Many provisions of the proposed Act are identical to or track those of the Uniform Athlete Agents Act (UAAA);⁶ both include “endorsement contracts”⁷ signed by student athletes, which are deemed to be in the same category and subject to the same constraints as are “agency contracts.” The following actions in the “direct or indirect” solicitation of

² H.Rept. 108-24, pt. 1, at 2 (2003) (report of the House Committee on Energy and Commerce accompanying H.R. 361).

³ Witness testimony and Committee reports are currently available via the House Judiciary Committee’s web page, [<http://house.gov/judiciary>].

⁴ Presumably, those in a position to exercise influence over the student-athlete’s decisions.

⁵ Even if the college attended by the student athlete is located in a state with stringent laws, if the athlete is approached in his home state, and it has no or lax laws, the agent will likely not incur substantial (or any) liability.

⁶ The Uniform Law is available either via the website for the National Conference of Commissioners on Uniform State Laws, [<http://www.ncculc.org>], or directly, at [<http://www.law.upenn.edu/bll/ulc/uaaa/aaa1130.htm>].

⁷ Defined in § 2(5) as “agreement[s] under which a student athlete is employed or receives consideration for the use by the other party of that individual’s person, name, image, or likeness in the promotion of any product, service, or event” (all citations are to the bill as amended and reported by the House Committee on the Judiciary, June 2, 2003).

student athletes to enter into agency contracts would be considered violations of an FTC rule (presumably, although H.R. 361 does not so state, a rule to be promulgated in pursuance of the Commission's rulemaking authority,⁸ inasmuch as no FTC rule specifically directed at athlete-agent activities currently exists) defining unfair acts or practices:

- providing anything of value to a student athlete or anyone associated with the student athlete before the student athlete enters into an agency contract, including any consideration in the form of a loan, or acting in the capacity of a guarantor or co-guarantor (§ 3(a)(1)(B));
- giving any false or misleading information or making a false promise or representation to the student athlete (§ 3(a)(1)(A));
- entering into an agency contract with a student athlete without providing the statutorily prescribed disclosure statement (§ 3(a)(2));
- pre- or post-dating agency contracts (§ 3(a)(3)).

The required "disclosure document" would be "separate from and in addition to any disclosure which may be required under State law," and would have to contain, "conspicuously" (*i.e.*, near the student athlete's or guardian's signature), and "in boldface type," the following "Warning to Student Athlete":

If you agree orally or in writing to be represented now or in the future you may lose your eligibility to compete as a student athlete in your sport.⁹

Further, the disclosure document must warn that both the student athlete and the agent signing a representation contract "must" notify the student athlete's athletic director "or other individual responsible for [the college's] athletic programs" of that fact within 72 hours of such signing "or before the next athletic event in which [the student athlete] would be eligible to participate, whichever occurs first."¹⁰

SPARTA, which treats all violations of the Act as violations of "a rule defining an unfair act or practice prescribed" by the Commission pursuant to its rulemaking authority,¹¹ and incorporates "all applicable terms and provisions" of the Federal Trade Commission Act (15 U.S.C. § 41 *et seq.*), is to be enforced at the federal level by the

⁸ § 4(a). The FTC rulemaking authority is found at 15 U.S.C. § 57a(a)(1)(B); the Commission's general "unfairness" authority is found at 15 U.S.C. § 45, which declares "unfair acts or practices in or affecting commerce ... unlawful."

⁹ §§ 3(b)(1), (3).

¹⁰ *Id.*

¹¹ § 4(a); *see also*, note 8. However, as there is no mandate in SPARTA directing the Commission to promulgate a rule specifically concerning athlete-agent practices, nor any reference to any existing, applicable FTC unfairness rule (nor are we aware of any such rule), we assume that § 3 of SPARTA, which sets out the practices which constitute violations of the Act, is to be considered the equivalent of an FTC rule. As note 8 indicates, the FTC's general "unfairness" authority is found in § 5 of the FTC Act (15 U.S.C. § 45).

Commission.¹² State attorneys general may bring civil actions to enforce the mandates/prohibitions of SPARTA “if they have reason to believe that an interest of the residents of [their states] has been or is [being] adversely affected by” any practice that violates the Act, but must notify the FTC in writing before any action is filed, or simultaneously with the filing if prior notice is not possible;¹³ they are prohibited, however, from bringing actions against a defendant named in an FTC complaint “during the pendency of [a Commission] action.”¹⁴ The FTC is given the right to intervene in a state action, to be heard, and to appeal.¹⁵ State attorneys general are specifically not prevented from exercising any other rights granted to them by their respective states, to investigate, administer oaths, or subpoena witnesses or documents.¹⁶ Any action brought to enforce the Act’s prohibitions or mandates may be brought in federal district court, subject to the venue requirements of 28 U.S.C. § 1391.¹⁷ In other words, actions to enforce SPARTA may only be brought in the judicial districts which are authorized by the federal venue statute.

Educational institutions are given the right to bring civil actions against athlete agents “for damages caused by a[ny] violation of [the] Act,”¹⁸ but specifically are not restricted in the exercise of any other right or remedy “under law or equity.”¹⁹

The fact that the Act as introduced did not provide a right of legal action to student athletes was noted and questioned during Judiciary Subcommittee consideration of the Act, and a subsequent Subcommittee amendment clarified that student athletes retained their rights to take action (*i.e.*, seek damages from agents) under existing state laws; the

¹² § 4(b).

¹³ § 5(a)(1), (2). Absent this authority, state attorneys general would probably not be able to enforce SPARTA’s provisions, because nothing in the Federal Trade Commission Act may be enforced by any entity other than the Commission. *See* note 19, *infra*, which, although it speaks specifically to private enforcement of the FTC Act, is nevertheless instructive. We note that the FTC Act is not enforceable by the Department of Justice.

¹⁴ § 5(d).

¹⁵ § 5(b).

¹⁶ § 5(c).

¹⁷ 15 U.S.C. § 1391 reads, in pertinent part:

“(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may ... be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial portion of the events or omissions giving rise to the claim occurred ..., or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.”

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may ... [identical text as in (a)(1) and (a)(2) above], or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.”

¹⁸ § 6(b)(1); *but see* note 20, *infra*. The UAAA also authorizes actions by educational institutions against “student athletes” (§ 16(a)), recognizing that an educational institution should be able to recover any loss of revenue arising from a failure of either the agent or the athlete to timely notify it of a contract signing; § 16(c) specifies that a remedy under it -- a state law -- is not an educational institution’s exclusive remedy.

¹⁹ § 6(b)(4).

Act's sponsors had earlier indicated their belief that state contract law might provide adequate protection. A further amendment in the full Judiciary Committee purported to provide student athletes with the right to sue in federal courts, although the effect of that provision with respect to SPARTA is a matter of conjecture.²⁰ As H.R. 361 was passed by the House under suspension of its rules, it retained the language of the reported bill.

The final section of SPARTA is a "Sense of Congress" provision endorsing the UAAA: "It is the sense of Congress that States should enact the Uniform Athlete Agents Act of 2000 drafted by the National Conference of Commissioners on Uniform State Laws, to protect student athletes and the integrity of amateur sports from unscrupulous sports agents."²¹

²⁰ § 7 of the Act states: "Nothing in this Act shall be construed to prohibit an individual from seeking any remedies *available under existing Federal or State law or equity*" (emphasis added). Presumably, "an individual" includes an injured student athlete; whether, however, SPARTA is considered either (1) to direct the FTC to promulgate a rule embodying its substantive provisions, or (2) itself to be the equivalent of an FTC rule, student athletes, as private parties, likely could not, under existing law, sue absent some more clearly articulated Congressional language. It is well established that "[t]he Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions." (*Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974), quoted in *Federal Trade Commission v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 464 (6th Cir. 1988); *see also*, *Moore v. New York Cotton Exchange*, 270 U.S. 593, 603 (1925); *Holloway v. Bristol Myers Corp.*, 485 F.2d 986, 988-989 (DC Cir. 1973)). We note that the UAAA does not either, grant student athletes the right to sue under it, but inasmuch as it is to be adopted as *state* law, state-law rights and remedies (*e.g.*, contract law, any state "unfairness" law that allowed suits by private parties) would remain available. We note further that the provision in the UAAA retaining existing "rights, remedies, or defenses under law or equity" (§ 16(c)) appears in the section dealing with the right of educational institutions to sue, unlike the similar, but stand-alone provision in SPARTA, which, presumably, is meant to apply as well to the student athletes to be protected by the SPARTA.

²¹ § 8. According to the National Conference of Commissioners on Uniform State Laws, about ½ of the states have already enacted the UAAA (or are very close to enactment); it is in various legislative postures in the other states in which it was introduced. The current NCCUSL Legislative Fact Sheet for the UAAA lists the following state adoptions: Alabama, Arizona, Arkansas, Delaware, District of Columbia, Florida, Idaho, Indiana, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Montana, Nevada, North Dakota, Pennsylvania, U.S. Virgin Islands, Washington, West Virginia; the bill was introduced during 2003 in legislatures in Connecticut, Georgia, Illinois, Maine, Missouri, New Jersey, North Carolina, Oklahoma, Texas.

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