COMMERCIAL BRIBERY AS AN ENFORCEMENT MECHANISM FOR AGENT-TO-ATHLETE PAYMENTS

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I. INTRODUCTION

The expression that "culture eats strategy for lunch" is almost a truism in business management circles.[1] The strongest brands achieve both. FIFA, however, was devoured in May 2015 by its cultural sins. After the dust settled on the sweeping indictments and Zurich arrests, the global sports media attempted to make sense of how the governing body for the world's most popular sport could fall so dramatically from grace. Dozens of FIFA officials face charges of corruption, but at what defining moment were they actually corrupted? How, and when, could this ethical corrosion have been prevented? Admittedly, the answers to these questions are harder to capture in a headline than the police raid that prompted them, but it is something that all high-profile brands – sports and otherwise – should be giving careful consideration.

As observed by former *Grantland* columnist, Brian Phillips, "FIFA has been operating for so long in this bizarre twilight of consequence-free public wrongdoing that you started to believe that its members were as far above the law as they thought they were."[2] In the context of major U.S. sports leagues, a similar dynamic arises with sports agency recruitment of prospective athlete clients. Despite broad industry recognition that agent-to-athlete payments, gifts, and other inducements are commonplace, perhaps even closer to the rule than the exception for top talent,[3]

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[1] Shawn Par, *Culture Eats Strategy for Lunch*, FAST COMPANY (Jan. 24, 2012, 12:15 AM), http://www.fastcompany.com/1810674/culture-eats-strategy-lunch.

[2] Brian Phillips, *'Rampant, Systemic, and Deep Rooted': A Sting in Zurich Finally Targets FIFA Corruption*, GRANTLAND (May 29, 2015), http://grantland.com/the-triangle/fifa-corruption-scandal/.

[3] *See* Josh Luchs, *Confessions of an Agent*, SPORTS ILLUSTRATED, Oct. 18, 2010; Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 789-90 (2006) ("Financial inducements to athletes to sign with agents pervade the agent industry.").

neither law enforcement nor players associations have shown any motivation to police this practice in earnest.

With particular focus on professional basketball, this paper argues that when a sports agent pays a prospective or current NBA player to induce his signing as a client, the sports agent has committed the crime of commercial bribery and the player has committed the crime of commercial bribe receiving. Part II of this paper begins by briefly discussing several pertinent features of the Uniform Athlete Agents Act (UAAA) and Sports Agent Accountability and Trust Act (SPARTA). Without spilling more ink over the topic of reforming these laws, this paper explains how their shortcomings and inherent limitations may be addressed by recognizing commercial bribery as a supplemental legal tool. Part III.A proceeds by laying out the elements of commercial bribery, with specific focus on the linchpin that players themselves act as common law agents of the National Basketball Players Association (NBPA) with respect to hiring sports agents for individual contract negotiations. Part III.B concludes this paper by illustrating how agent-to-athlete payments satisfy the remaining elements of commercial bribery.

II. UAAA AND SPARTA: THE DEFAULT STATUTORY FRAMEWORK FOR SPORTS AGENTS

Adopted in some form by forty-three states since its introduction in 2000,[4] the UAAA's principal function is the implementation of an agent registration program, usually run through a small division of Secretary of State offices.[5] The often lengthy documents required for registration are filed separately from state-to-state, made more onerous by significant variance in the accompanying fees, surety bond requirements, and renewal periods. As a result of this emphasis on registration and reporting, the UAAA buries its *raison d'être* under a pile of

[4] *Athlete Agents Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Committee.aspx?title=Athlete%20Agents%20Act (last visited Mar. 10, 2016).
[5] REVISED UNIF. ATHLETE AGENTS ACT § 5 (2015).

paperwork. Of the twenty-two sections comprising the model legislation, only one directly addresses matters of substantive conduct, including a prohibition against "furnishing anything of value to a student-athlete" or an affiliated party "with the intent to induce a student-athlete to enter into an agency contract."[6]

Responding to concerns that individual states, and academic institutions within their borders, often lack the incentive and resources to investigate and prosecute violations of their UAAA progeny, Congress passed SPARTA in 2004.[7] SPARTA not only isolated substantive conduct issues apart from state registration, including "giving anything of benefit to a student-athlete," it extended jurisdiction for enforcement by the FTC.[8] However, it is important to note two respects in which SPARTA did not expand the UAAA's scope. First, neither Act imposes any legal risk for players in soliciting or accepting prohibited benefits from agents. Second, both Acts apply only to student-athletes, rather than the "poaching" of veterans already playing in professional leagues. These features make sense for legislation oriented toward the issue of amateurism, but they leave a legal gap when it comes to promoting clean competition in recruiting clients at the professional, as well as collegiate, level.

The specific concern of this paper is the widespread practice of NBA agents offering impermissible benefits to players, both collegiate and professional, to induce their signing as clients. While the NBPA prohibits this behavior,[9] there has historically been little internal pressure to make enforcement a priority, and the UAAA-SPARTA paradigm has proven largely toothless in supplying external pressure. Perhaps UAAA and SPARTA will be overhauled in the years ahead to remedy their shortcomings, but until such time I argue that the crime of

[6] *Id.* § 14 ("Prohibited Conduct").
[7] Sports Agent Accountability and Trust Act, 15 U.S.C. §§ 7801–7807 (2012).
[8] *Id.* §§ 7802 –7803.
[9] NBPA REGULATIONS GOVERNING PLAYER AGENTS § 3(B)(b) [hereinafter AGENT REGULATIONS].

commercial bribery can fill this role if interpreted to encompass agent-to-athlete payments. Commercial bribery overcomes several prosecutorial limitations of the UAAA and SPARTA by (1) addressing the recruitment of professional athletes as well as collegiate prospects, (2) imposing penalties with greater deterrent value on both agents and athletes themselves, and (3) giving U.S. District Attorneys the jurisdiction for investigating and prosecuting offenders under the Travel Act.

III. COMMERCIAL BRIBERY IN THE NBA-NBPA LABOR CONSTRUCT

The NBPA is headquartered in New York, one of at least thirty-seven states with laws prohibiting the practice of commercial bribery.[10] Specifically, the New York Penal Code sets forth a series of related offenses that proscribe the offering and receiving of benefits with the intent of influencing the recipient's conduct in relation to his or her "employer's *or principal's* affairs."[11] A special subcategory of this crime is recognized when the recipient is a "duly appointed representative of a labor organization."[12]

The threat of commercial bribery litigation is amplified in the United States by the fact that violations of state laws can be prosecuted in federal courts under the Travel Act if there is a sufficient interstate nexus.[13] This manner of Travel Act violation carries a maximum penalty of fines and imprisonment for a period of up to five years.[14] By way of comparison, the FTC is limited to imposing an $11,000 civil penalty for a violation of SPARTA.[15]

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[10] William T. Wilson, *A Version of Pay to Play for Businesses … Commercial Bribery*, LEXISNEXIS LEGAL NEWSROOM (Mar. 28, 2011, 4:13 PM), http://www.lexisnexis.com/legalnewsroom/corporate/b/business/archive/2011/03/28/a-version-of-quot-pay-to-play-quot-for-businesses-commercial-bribery.aspx.
[11] N.Y. PENAL LAW § 180.00–180.30 (Gould 2016).
[12] *Id.* § 180.10–180.30.
[13] Travel Act, 18 U.S.C. § 1952 (2012); *see also* Perrin v. United States, 444 U.S. 37 (deciding that Travel Act provides for federal prosecution of state commercial bribery laws).
[14] 18 U.S.C. § 1952.
[15] 15 U.S.C. § 7803(a).

The central argument of this paper is that when a sports agent pays a prospective or current NBA player to induce his signing as a client, the sports agent has committed the offense of commercial bribery and the player has committed the offense of commercial bribe receiving. Because the common law fiduciary duties of an agent to his principal serve as the foundation for these claims, Part A of this analysis develops the key premise that players themselves act as authorized agents – or "duly appointed representatives" – of the NBPA (as principal) within the scope of hiring professional sports agents. At first blush, this assertion may appear to invert the familiar industry usage of the term "agent." However, the Collective Bargaining Agreement (CBA) and NBPA Agent Regulations, as well as the larger bodies of labor and agency law, support this argument. After explaining the complicated web of agency connecting the NBPA, its players, and the professional sports agents it certifies, Part B concludes this argument by subjecting agent-to-athlete payments to the remaining elements of commercial bribery.

A. Players are common law agents of the NBPA to the extent that they negotiate their individual playing contracts or hire certified sports agents (as sub-agents) for such negotiation.

As a matter of common law, the elements of a principal-agent relationship are largely consistent from New York to any other jurisdiction. This relationship is formed when (1) a principal grants authority to an agent, and the agent accepts such authority, (2) to act on behalf of the principal within a specific or general scope, and (3) such action is subject to the principal's control.[16] The following subsections address these elements in turn as they relate to the NBA labor construct.

i. The NBPA has granted authority to players for the negotiation of individual contract terms, or the hiring of certified sports agents for the negotiation thereof.

[16] Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 542 (2011).

The NBPA is the "exclusive collective bargaining representative" for NBA players, present and future, pursuant to the CBA's Recognition Clause,[17] as well as the National Labor Relations Act (NLRA).[18] Under federal labor law, an employer and an exclusive bargaining entity not only *can* negotiate over wages, hours, and "other terms and conditions of employment," they *must* do so to reach a valid CBA.[19] Individual members of the bargaining unit retain no right to independently negotiate these employment terms directly with an employer.[20] In other words, the fact that NBA players and the agents they retain can and do negotiate individual compensation with teams means that the NBPA has delegated some measure of its exclusive authority back to the bargaining unit it serves.

This transmission of authority is effectuated by the CBA Recognition Clause, which provides that "[players] and NBA Teams may, on an individual basis, bargain with respect to and agree upon the provisions of Player Contracts, but only as and to the extent permitted by this Agreement."[21] To better understand this passage, it is worth consulting the Recognition Clause under previous iterations of the CBA.[22] The mechanics of the Recognition Clause were fundamentally the same prior to 2011, but explicitly contained the following edifying language: "The NBA and Players Association agree that…the Players Association has *delegated its authority* to individual employees…but only when they are acting on their own behalf or through agents certified by the Players Association."[23] Indeed, New York courts interpreting the state's commercial bribery laws have defined "representative" – in the context of a "duly appointed

[17] NBA COLLECTIVE BARGAINING AGREEMENT art. 34 (2017) [hereinafter CBA].
[18] National Labor Relations Act § 9, 29 U.S.C. § 159(a) (2012).
[19] *Id.* § 158(d).
[20] *See generally* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).
[21] CBA, *supra* note 17.
[22] *See id.*, art. 38, §2(b) ("Interpretation Clause") (permitting, by exclusion from the paragraph, past CBA iterations as reference sources for construction).
[23] NBA COLLECTIVE BARGAINING AGREEMENT art. 34 (2005) (emphasis added).

representative of a labor organization" – as "constituting the agent for another *especially through delegated authority*."[24] Through the words of the Recognition Clause, the NBPA and NBA acknowledge that players may negotiate individual compensation terms, or hire sports agents for that purpose, only because the NBPA has authorized them to do so pursuant to its legal status as the exclusive bargaining entity.

ii. Players are acting on behalf of the NBPA when they hire sports agents to negotiate individual contract provisions.

Section 1(B) of the NBPA Agent Regulations affirms that players and their agents are ultimately conducting individual contract negotiations on behalf of the NBPA. This provision articulates the scope of the Regulations in governing the activity of certified agents, including "any…conduct which directly bears upon the player agent's…ability to properly represent individual NBA players *and the NBPA* in individual contract negotiations."[25] In other words, when a player signs a Standard Player Agent Contract ("SPAC") with a sports agent, he is not only making the sports agent a fiduciary for himself, he is also using his delegated authority to make the sports agent a representative of the NBPA.[26] As explained by the Restatement (Second) of Agency, "[a]uthority is the power of the agent to *affect the legal relations* of the principal by acts done in accordance with the principal's manifestations of consent to him."[27] Without some scope of agency, players would not be able to act on behalf of, and contractually bind, the NBPA by hiring sub-agents (i.e., certified, professional sports agents) for individual negotiations.

iii. The NBPA exercises significant control over individual players and sports agents by defining their limited negotiating scope and imposing agent registration requirements.

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[24] *See* People v. Confoy, 441 N.Y.S.2d 941, 945 (N.Y. Sup. Ct. 1981) (quoting Webster's Third New International Dictionary) (internal quotation marks omitted).
[25] AGENT REGULATIONS, *supra* note 9, § 1(B) (emphasis added).
[26] STANDARD PLAYER AGENT CONTRACT § 2 ("[T]he Agent is the NBPA's delegated representative and is acting in a fiduciary capacity on behalf of the Player.")
[27] RESTATEMENT (SECOND) OF AGENCY § 7 (1958) (emphasis added).

In addition to being authorized to act on behalf of the NBPA, a player must also be subject to the NBPA's control over such activity for a principal-agent relationship to exist. This final element is as clearly satisfied as the first two because (1) the terms within a player's negotiating authority are cabined by the CBA and (2) the NBPA controls the pool of player agents by requiring their certification and compliance with NBPA regulations. The CBA reflects the terms agreed to by the NBPA in negotiation with the NBA, including the manner by which the league's salary cap is set, maximum and minimum compensation, annual raises, and virtually every other term representing the labor framework to which all individual contracts must adhere. Even the representation agreement consummating a relationship between a player and certified agent must conform to the NBPA's standard contract. In short, the authority granted to players for negotiating individual contract terms and hiring agents is controlled (and limited) by the NBPA at the institutional level of the CBA.

The NBPA's control is also manifested by CBA Article 36, pursuant to which the NBA may declare a playing contract void and fine the team responsible for its attempted execution if the player was represented by an agent without valid NBPA certification.[28] The certification program, outlined in the NBPA Agent Regulations, establishes baseline educational requirements for eligibility as well as the fees and conduct expectations to remain certified.[29] In theory, when conduct provisions are violated, such as Section 3(B)(b) prohibiting "monetary inducements" in client recruitment, the NBPA may levy punishment on the agent ranging from an informal order of reprimand to suspension or outright revocation of his certification.[30] These powers, from setting qualifications and maximum commission to certifying and terminating agents,

[28] CBA, *supra* note 17, art. 36 ("Player Agents").
[29] AGENT REGULATIONS, *supra* note 9, § 3.
[30] *Id.* § 6(D).

conclusively demonstrate that a player hires his agent not only on behalf of the NBPA, but subject to its control.

B. As common law agents of the NBPA, players and agents satisfy all remaining elements of criminal commercial bribery when money is exchanged to induce a representation agreement.

Once one recognizes the legitimacy of a limited principal-agent relationship between the NBPA and players in the hiring of sports agents, the remaining elements of commercial bribery fall quickly into place within the scope of such agency. Namely, the following basic elements spell out commercial bribery under New York law: (1) any benefit; (2) conferring, or offering or agreeing to confer, that benefit; (3) lack of consent by the agent's principal; and (4) intent to influence the agent's conduct in relation to the principal's affairs.[31]

With respect to the first element, "any benefit" is sufficiently broad to encompass bribes ranging from a lump cash payment to other, less obvious, offers such as promised employment for friends or family members. Second, it is worth noting that a sports agent runs afoul of the commercial bribery statute by "offering" a benefit. Unless a player has solicited that benefit, and until the player accepts that benefit, the sports agent is the only party susceptible to criminal liability. As a matter of policy in jurisprudence, this window is attractive by affording players the opportunity to consider the implications of their decision. Third, agent-to-athlete payments are clearly an attempt to influence the player's conduct in agent selection. Because agents become legal representatives of the NBPA in individual contract negotiations, this choice certainly relates to the NBPA's affairs.

Without acknowledging a principal-agent relationship with the NBPA, players have little to fear in accepting consideration from a sports agent because they are not the statutory targets of

[31] N.Y. PENAL LAW, *supra* note 11.

the UAAA or SPARTA. The theory introduced in this paper thus establishes a significant risk for players, as well as agents, by making acceptance a criminal offense carrying the prospect of a prison sentence. With immediate recognition of commercial bribery as a viable cause of action for agent-to-athlete payments, one hopes that the new cast of NBPA leadership will feel a sense of urgency in putting expanded compliance measures for NBPA Agent Regulation 3(B)(b) back on the agenda to mitigate potentially grave risks for its membership. In the meantime, the NBPA risks the further entrenchment of a culture in which sports agents succeed because of the depth of their pockets rather than the depth of their skill and client services. As illustrated by the FIFA saga, an attitude of permissiveness toward flagrant misconduct is itself a formidable enemy.