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**SFA**



**BILL ANALYSIS**

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House Bill 5511 (Substitute S-1 as passed by the Senate)  
Sponsor: Representative Kirk Profit  
House Committee: Colleges and Universities  
Senate Committee: Judiciary

Date Completed: 12-8-98

### **RATIONALE**

Universities and colleges that belong to the National Collegiate Athletic Association (NCAA) voluntarily agree to abide by its rules and regulations. These regulations prohibit student athletes from receiving cash, gifts, loans, or other favors from a sports agent or entering into a contract with a sports agent, either orally or in writing. A similar proscription applies to gifts and favors bestowed on athletes and their families by sports "boosters" (supporters of particular athletic programs). Violations of these NCAA policies can result in sanctions against the student athlete and/or the college or university that the student athlete attends. Often, a student athlete who accepts gifts, money, or favors, or who enters into a contract with an agent, loses his or her eligibility to play collegiate sports, either temporarily or permanently, and also may lose his or her scholarship. A school may forfeit the opportunity to play in postseason games or on television and can be required to forego some scholarship offers.

Problems with athlete agents, sports boosters, and others persist in Michigan, despite existing laws in this and other states that are aimed at deterring behavior that would endanger an athlete's eligibility and an institution's good standing with the NCAA. Currently, the Michigan Penal Code 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 entering "into an agreement whereby the athlete agent gives, offers, or promises anything of value to an employee of an institution of higher education in return for the referral of a student athlete by that employee" (MCL 750.411e). A violation is a misdemeanor, punishable by a maximum fine of \$50,000 or an amount equal to three times the amount given, offered, or promised or three times the value of the agreement entered into, whichever

is greater, and/or imprisonment for up to one year. Since agent interference with intercollegiate athletics apparently continues to occur, however, some people believe that the current law falls short of providing a strong enough deterrent to illegal activities by professional sports agents. Further, Michigan's existing law is directed strictly at the behavior of athlete agents and does not apply to the conduct of boosters, whose activities, though usually not motivated by financial gain, can be very problematic for universities. As a result, some people believe that colleges and universities should be statutorily authorized to bring a civil suit against athlete agents or boosters to recoup damages incurred as a result of their actions. (For further information on particular NCAA infractions and legislation relating to them, please see **BACKGROUND.**)

### **CONTENT**

The bill would amend the Revised Judicature Act to provide that a person would be liable to an institution of higher education for \$10,000 or actual damages incurred, whichever was greater, if he or she interfered with "the prospective advantage accorded the institution of higher education by virtue of its relationship with an intercollegiate athletics governing organization" by promising or providing any improper gift or service to a student athlete or prospective student athlete or the immediate family of such an athlete. The college or university also could recover actual attorney fees and actual costs incurred in bringing the action.

"Institution of higher education" would mean a public university, college, or community college located in this State. "Improper gift or service" would mean any gift or service that a student

athlete was prohibited from accepting under the rules of the college or university.

“Student athlete” would mean a person who engaged in, was eligible to engage in, or could be eligible to engage in any intercollegiate sporting event, contest, exhibition, or program. “Prospective student athlete” would mean a person who was being recruited to be a student athlete at an institution of higher education.

“Immediate family” would mean a person’s spouse, child, parent, stepparent, grandparent, grandchild, brother, sister, parent-in-law, brother- or sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse or guardian of any of those persons.

Proposed MCL 600.2968

## **BACKGROUND**

### NCAA Infractions

When a collegiate student athlete is compromised by a financial or other offer or arrangement from an agent or booster, the college or university that the athlete attends may suffer financially or in the form of a tarnished reputation. For instance, NCAA sanctions can result in foregone revenue and lost opportunities to offer scholarships to quality players.

Even if significant NCAA sanctions are not levied against a college or university, the institution might still suffer as a result of a player’s enticement by agents or boosters. A recent example involved Pennsylvania State University. In December 1997, a Penn State football player admitted to accepting a gift of clothing from a sports agent and then lying to the coach about the event. The coach suspended the player from participating in the New Year’s Day Citrus Bowl in Orlando, Florida. The Nittany Lions subsequently lost to Florida, 21-6.

In another well known example from recent years, a sports agent took several Florida State University football players to a Foot Locker athletic apparel store at closing time. Reportedly, the student athletes were allowed to take any merchandise they wanted, with the agent footing the bill. The university 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 sanctions against it, the investigation did cost the university \$400,000 to conduct.

When it was discovered that a former 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 participated in after signing the contract. (Once a contract is signed, the player is considered to be a professional and is ineligible for collegiate competition.) The university had advanced into the semi-final round of the NCAA basketball tournament 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 tournament revenue because it technically had not qualified to participate in the tournament.

Michigan universities also have suffered hardships due to actual or alleged agent or booster involvement in recent years. As a result of a series of media reports alleging wrongdoing on the part of former basketball players at the University of Michigan, and the provision of gifts or money to them by a booster of that program, the university hired a law firm to conduct an investigation into the matter. Although the allegations of cash payments to players could not be substantiated, the university reportedly incurred legal fees of approximately \$250,000. In another case at the University of Michigan, a football player was suspended for several games during the 1998 season for accepting favorable treatment from an agent at a concert in Ohio during the summer of 1998. In addition, Michigan State University paid a law firm several hundred thousand dollars to conduct an investigation into its football program, and was placed on probation and forced to forego some scholarship offers to football players partially because of the financial involvement of a Florida man with at least one member of the Spartan football squad.

### Athlete Agent Laws

In an attempt to discourage athlete agents from inducing student athletes to violate NCAA rules, 27 states reportedly have enacted athlete agent legislation. The laws vary greatly from state to state, with differences not only in definitions, but also in registration requirements and penalties. While most of these states, including Michigan, provide for criminal penalties for an agent who illegally entices a student athlete to sign a contract for representation, several states evidently also allow colleges and universities to bring a civil action to recover damages that the institution incurred as a result of an agent’s interfering with student athletes. At the Federal level, legislation reportedly

has been introduced in the House of Representatives to prohibit athlete agents from initiating contact to solicit representation of student athletes who are subject to intercollegiate sports governing bodies. Recognizing that variations in state laws make it difficult for agents to meet each state's requirements, the National Conference of Commissioners on Uniform State Laws has formed a drafting committee to develop a uniform state agent law. Since development of a uniform law can be a lengthy process, however, a final product may not be available to be brought before state legislatures until at least 2001.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Hardly a sports season passes without a story of a college player's suspension either for entering into an agreement with an agent before the player's eligibility had expired 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 also can 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 can in turn affect a school's ability to recruit quality athletes. 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 NCAA basketball tournament revenue for its "final four" appearance because it no longer qualified to compete after having to forfeit several regular season games in which a player had participated after entering into a contract with an agent.

Even though athlete agents face the possibility of criminal penalties under the Michigan Penal Code for giving gifts to student athletes or inducing them to agree to contracts before their college eligibility is up, the criminal penalties apparently have not proven to be as strong a deterrent as was hoped. The bill would establish a consequence that should effectively discourage athlete agents from targeting student athletes in violation of NCAA or other intercollegiate sports governing bodies' rules. Further, unlike current criminal penalties, the bill also would apply to sports boosters and other

individuals. A college or university suffering an injury due to an agent's or booster's actions could recoup lost revenues. Being required to pay an institution the actual damages incurred from actions regarding 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. The bill would define "improper gift or service" as a gift or service that a student was prohibited from receiving according to the "rules of the institution of higher education". Individual schools do not make the rules, however, but voluntarily comply with rules established by the NCAA or other intercollegiate sports 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 reflect this situation.

Further, the term "injury" is not defined adequately and could result in groundless lawsuits, especially if a school attempted to sue for what it perceived to be 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". That or a similar definition would provide a benchmark in determining whether an injury had occurred, and to what extent the school had been hurt by the penalty and could be compensated. For instance, a definition would help determine whether being penalized, in turn, led to the school's losing revenue from media coverage and ticket sales, the right to recruit an athlete, or proceeds from postseason play, and whether the school could recover damages for these injuries.

Finally, civil suits against agents should be limited to those incidents in which the NCAA or other intercollegiate sports governing body found the school not culpable of the infraction. There have been cases in which the college or university was cited by the NCAA for failing to deal adequately with suspected infractions (referred to as a lack of institutional control over the athletic program). One example occurred several years ago when the University of Alabama was placed on two years' probation and barred from postseason bowl competition, and lost some athletic scholarships the university was allowed to offer, for failing to investigate properly indications that a player had entered into an agreement with an agent. In other

cases, colleges and universities have misled the NCAA by submitting inaccurate reports. It would not be fair for an institution to be authorized to seek damages from an agent or other individual when the school also was guilty of violating NCAA rules. A college or university should be permitted to bring a civil suit to recover damages only when it had been cleared of any wrongdoing in the incident.

### **Supporting Argument**

The bill would serve to codify an action in common law regarding interference with a prospective advantage (in this case, good standing with the NCAA and all the benefits that come with it). An institution already may bring an action under this common law concept, but it would be much easier to pursue a case in which there was specific statutory authority. The bill would grant an institution of higher education the statutory authority to bring a civil suit if it suffered injury due to the actions of an athlete agent or sports booster.

In addition, codifying this legal provision could aid in investigations of alleged infractions. Reportedly, committee testimony in the House revealed that the University of Michigan paid a law firm approximately \$250,000 to investigate alleged payments to athletes by a booster. It apparently proved difficult, however, to get the parties involved to talk or to offer any information whatever. Under the bill, if an institution brought an action, then the discovery rules would apply and the information sought could be obtained.

**Response:** Bringing a civil suit under the bill in order to use discovery to enhance an investigation would be a misuse of the legal process. An action should be brought when sufficient evidence exists to support it, not for the purpose of uncovering evidence. Filing a legal action as a means to uncover evidence is generally frowned upon by the courts 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. Furthermore, discovery is already available if a suit is filed under the common law concept regarding interference with a prospective advantage.

A better approach might be to regulate athlete agents and give a governmental agency subpoena power. Both Kansas and Texas law reportedly 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 also would protect agents and others from acts of intimidation

or other abuses on the part of colleges and universities.

### **Opposing Argument**

Currently, at least 27 states (including Michigan) have laws prohibiting certain actions on the part of athlete agents toward college athletes. There is tremendous variation in those laws, however. 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 agents for lost revenue, and at least three states also allow the student athlete to be sued for accepting a gift or signing a contract. Confusion about the different requirements and prohibitions from state to state is bound to result, given the plethora of differing state regulations. A better approach would be for states to enact a uniform state athlete agent law. The National Conference of Commissioners on Uniform State Laws is in the process of developing a uniform law; perhaps Michigan should wait for that process to provide new legislation.

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

### **Opposing Argument**

The bill is not necessary. Michigan already criminalizes practices of agents with respect to collegiate athletes, and the current penalties are quite stiff (a fine of up to \$50,000 or three times the amount given, up to one year in jail, or both). Also, if the aim is to prevent infractions from occurring, alternative approaches may be preferable. For example, according to 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 in which student athletes are educated on such things as how to deal with sports agents, how to negotiate favorable terms when the time comes to enter into an agreement, what actions constitute violations of NCAA rules, and how to

launch successful careers in athletics. It should not be difficult for Michigan's colleges and universities to establish similar programs. This approach truly would serve to protect college athletes from agents, which in turn would afford the institutions the protections sought under the bill.

**Response:** The current law applies only to athlete agents; this bill would give institutions a means to deter the sometimes problematic behavior of sports boosters, as well. Also, according to the article in the Yale Law Journal cited above, state laws that penalize athlete agents' contact with student athletes may be invalid under provisions of the Federal Sherman Antitrust Act (15 USC 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." If those state laws were overturned by a Federal court in the future, the bill's civil remedy would be more important than ever.

Legislative Analyst: P. Affholter

#### **FISCAL IMPACT**

The bill would have no fiscal impact on State government. There could be additional revenue for community colleges (which are local units of government) and universities to the extent that violations occurred and damages were successfully collected.

Fiscal Analyst: E. Jeffries

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.