CHAPTER 7 · AGENTS

Introduction

Historically, anyone could be a sports agent. No special expertise or training was required. There are recorded instances of dentists, ministers, a wife and other assorted characters representing professional athletes from time to time. Today player unions and some states have undertaken to regulate sports agents and to set minimum standards of competence.

The professional team sports industry is unlike any other business venture. Players (employees) in all major team sports are represented by unions who have been designated as their exclusive bargaining agent. In theory, these unions could negotiate all the terms of the employment relation regarding wages, hours and terms and conditions of employment. In the typical collective bargaining contract outside sports, each employee is paid a uniform wage no matter what her or her level of skill, *e.g.*, an excellent welder and a mediocre welder would be paid the same hourly wage. In professional team sports, however, agents are permitted to represent individual players and negotiate employment contracts with salary and bonus provisions which are dictated by supply and demand for the particular talents of the individual player. In recent years unions have negotiated economic packages which have taken greater and greater share of team payrolls. The situation has been further complicated by salary caps which limit the total amount a team may spend on salaries. This in turn has put further pressure on individual bargaining since less money is available.

Several factors are responsible for the growth in agent representation of professional athletes. The rise of the labor movement in professional team sports is probably the single most important factor. Before the various players' unions gained strength, professional athletes were reserved to their respective teams for their entire playing careers. Without the ability to sell their services to the highest bidder through the mechanism of free agency, there was no need for an individual bargaining agent. Players were offered a salary by the team on a take it or leave it basis. If the player was dissatisfied, his only alternative was to retire. Even with the advent of free-agency, however, there was still little need for an agent, since team revenues were low. More money was needed to fuel the movement. With the advent of nation wide television broadcasting of professional sports events, came lucrative broadcasting contracts. For example, recently, the Fox network bid over a billion dollars for the right to broadcast NFL football. When the right to bargain at arm's length over salaries was combined with almost unlimited amounts of money the critical mass was reached and player salaries and benefits literally exploded.

Today, on a per capita basis, no other industry generates so many millionaires. National television also has spawned the "national sports celebrity." Not only do players command large salaries, they are also able to reap huge endorsement fees for selling almost every conceivable product.

Section 1: The Agency Relations: Rights and Duties of Principals and Agents

The Restatement (Second) of Agency gives the following definition of agency:

> Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. RESTATEMENT (SECOND) AGENCY, § 1 (1958).

ZINN v. PARRISH
644 F.2d 360 (7th Cir. 1981)

BARTELS, District Judge

Facts

For over two decades the appellant Zinn had been engaged in the business of managing professional athletes. He stated that he was a pioneer in bringing to the attention of various pro-football teams the availability of talented players at small black colleges in the South. In the Spring of 1970, Parrish's coach at Lincoln University approached Zinn and informed him that Parrish had been picked by the Cincinnati Bengals in the annual National Football League draft of college seniors, and asked him if he would help Parrish in negotiating the contract. After Zinn contacted Parrish, the latter signed a one-year "Professional Management Contract" with Zinn in the Spring of 1970, pursuant to which Zinn helped Parrish negotiate the terms of his rookie contract with the Bengals, receiving as his commission 10% of Parrish's $16,500 salary. On April 10, 1971 Parrish signed the contract at issue in this case, which differed from the 1970 contract only insofar as it was automatically renewed from year to year unless one of the parties terminated it by 30 days' written notice to the other party. There were no other restrictions placed on the power of either party to terminate the contract.

Under the 1971 contract, Zinn obligated himself to use "reasonable efforts" to procure pro-football employment for Parrish, and, at Parrish's request, to "act" in furtherance of Parrish's interest by: a) negotiating job contracts; b) furnishing advice on business investments; c) securing professional tax advice at no added cost; and d) obtaining endorsement contracts. It was further provided that Zinn's services would include, "at my request efforts to secure for me gainful off-season employment," for which Zinn would receive no additional compensation, "unless such employment (was) in the line of endorsements, marketing and the like," in which case Zinn would receive a 10% commission on the gross amount. If Parrish failed to pay Zinn amounts due under the contract, Parrish authorized "the club or clubs that are obligated to pay me to pay to you instead all monies and other considerations due me from which you can deduct your 10% and any other monies due you...."

Over the course of Parrish's tenure with the Bengals, Zinn negotiated base salaries for him of $18,500 in 1971; $27,000 in 1972; $35,000 in 1973 (plus a $6,500 signing bonus); and a $250,000 series of contracts covering the four seasons commencing in 1974 (plus a $30,000 signing bonus). The 1974-77 contracts with the Bengals were signed at a time when efforts were being made by the newly-formed World Football League to persuade players in the NFL to "jump" to the WFL to play on one of its teams. By the end of 1973 season Parrish had become recognized as one of the more valuable players in the NFL. He was twice selected for the Pro Bowl game, and named by Sporting News as one of the best cornerbacks in the league. Towards the end of the 1973 season, the Bengals approached Parrish with an offer of better contract terms than he had earlier been receiving. By way of exploring alternatives in the WFL, Zinn entered into preliminary discussions with the Jacksonville Sharks in early 1974, but decided not to pursue the matter once he ascertained that the Sharks were in a shaky financial position. In retrospect, Zinn's and Parrish's decision to continue negotiating and finally sign with the Bengals was a sound one, for the Sharks and the rest of the WFL with them folded in 1975 due to a lack of funds.

Shortly after signing the 1974 series of contracts, Parrish informed Zinn by telephone that he "no longer needed his services." By letter dated October 16, 1975 Parrish reiterated this position, and added that he had no intention of paying Zinn a 10% commission on those contracts. In view of its disposition of the case, the district court made no specific fact finding as to the amounts Parrish earned during the 1974-77 seasons. Zinn claims that the total was at least $304,500 including bonus and performance clauses. The 1971 contract by its terms entitled Zinn to 10% of the total amount as each

installment was paid, and Zinn claims that he has only received $4,300 of the amounts due him. Accordingly, this suit was filed to recover the balance, plus interest at the rate of 5% per annum for vexatious delay in payment, pursuant to ILL. REV. STAT., ch. 74, § 2.

In addition to negotiating the Bengals contracts, Zinn performed a number of other services at Parrish's request. In 1972 he assisted him in purchasing a residence as well as a four-unit apartment building to be used for rental income; he also helped to manage the apartment building. That same year Zinn negotiated an endorsement contract for Parrish with All-Pro Graphics, Inc., under which Parrish received a percentage from the sales of "Lemar Parrish" t-shirts, sweat-shirts, beach towels, key chains, etc. The record shows that Zinn made a number of unsuccessful efforts at obtaining similar endorsement income from stores with which Parrish did business in Ohio. He also tried, unsuccessfully, to obtain an appearance for Parrish on the Mike Douglas Show. Zinn arranged for Parrish's taxes to be prepared each year by H & R Block.

The evidence showed that, despite his efforts, Zinn was unable to obtain off-season employment for Parrish. In this connection, however, it was Zinn's advice to Parrish that he return to school during the off-season months in order to finish his college degree, against the time when he would no longer be able to play football. With respect to Zinn's obligation to provide Parrish with advice on "business investments," he complied first, by assisting in the purchase of the apartment building; and second, by forwarding to Parrish the stock purchase recommendations of certain other individuals, after screening the suggestions himself. There was no evidence that Zinn ever forwarded such recommendations to any of his other clients; he testified that he only did so for Parrish. In summing up Zinn's performance under the contract, Parrish testified as follows:

> Q: Did you ever ask Zinn to do anything for you, to your knowledge, that he didn't try to do?
>
> A: I shall say not, no.

Discussion

[The Circuit Court reversed the district court's decision that Zinn's contract was void under the 1940 Securities Act, which makes void any contract for investment advice made by an unregistered adviser, since Zinn was engaged in the business of negotiating contracts not in the business of giving investment advice.

Employment Procurement

Zinn's obligation under the 1971 Management Contract to procure employment for Parrish as a profootball player was limited to the use of "reasonable efforts." At the time the contract was signed, Parrish was already under contract with the Cincinnati Bengals for the 1970-71 season, with a one-year option clause for the 1971-72 season exercisable by the Bengals. Parrish could not, without being in breach of his Bengals contract, enter into negotiations with other teams for the 1971-72 season. The NFL's own rules prevented one team from negotiating with another team's player who had not yet attained the status of a "free agent". At no time relevant to this litigation did Parrish become a free agent. Thus, unless he decided to contract for future services for the year following the term of the option clause with the Canadian or World Football League, Parrish's only sensible course of action throughout the time Zinn managed him was to negotiate with the Bengals.

Parrish had no objection to Zinn's performance under the professional management contract for the first three years up to 1973, during which time Zinn negotiated football contracts for Parrish. A drastic change, however, took place in 1974 when a four-season contract was negotiated with the Bengals for a total of $250,000 plus a substantial signing bonus. At that time, the new World Football League came into existence and its teams, as well as the teams of the Canadian Football League, were offering good terms to professional football players as an inducement to jump over to their leagues from the NFL. In order to persuade Parrish to remain with the team, the Bengals club itself first

initiated the renegotiation of Parrish's contract with an offer of substantially increased compensation. This was not surprising.

Parrish claims, however, that Zinn should have obtained offers from the World Football League that would have placed him in a stronger negotiating position with the Bengals. This is a rather late claim. It was not mentioned in Parrish's letter of termination, and is entirely speculative. Given what Zinn accurately perceived as the unreliability of any offers he might have obtained from the WFL, his representation of Parrish during this period was more than reasonable. As the district court properly noted, prior to the signing of the 1974-77 series of football contracts the needs of the defendant, the services of the plaintiff, and the fees paid by the defendant for those services were all "relatively modest." We conclude that up to that point it is impossible to fault Zinn in the performance of his contract, nor can we find any basis for Parrish to complain of Zinn's efforts in 1974 with respect to procuring employment for him as a pro-football player.

Other Obligations

We focus next on the other obligations, all incidental to the main purpose of the contract. The first of these refers to "negotiating employment contracts with professional athletic organizations and others." Unless this is with respect to a professional football contract, it is difficult to understand to what "professional athletic organizations and others" refers. At all events, there is no claim that there was a failure to negotiate employment contracts with other athletic organizations. And the evidence clearly shows that Zinn performed substantial services in negotiating with the Bengals by letter, telephone, and in person when he and Parrish were flown at the Bengals' expense to Cincinnati for the final stage of negotiations on the 1974-77 series of contracts.

Zinn was further obligated to act in Parrish's professional interest by providing advice on tax and business matters, by "seek(ing) ... endorsement contracts," and by making "efforts" to obtain for Parrish gainful off-season employment. Each of these obligations was subject to an implied promise to make "good faith" efforts to obtain what he sought. *See, e.g., Bonner v. Westbound Records, Inc.*, 76 Ill. App. 3d 736, 31 Ill. Dec. 926, 394 N.E.2d 1303 (1979); *Van C. Argiris Co. v. Caine Steel Co.*, 20 Ill. App. 3d 315, 314 N.E.2d 361, 366 (1974). Under Illinois law, such efforts constitute full performance of the obligations. *Id.* Until Parrish terminated the contract, the evidence was clear that Zinn made consistent, good faith efforts to obtain off-season employment and endorsement contracts. Indeed the district court found that Zinn at all times acted in good faith, with a willingness "to provide assistance within his ability." The district court confused success with good faith efforts in concluding that Zinn's failure to obtain in many cases jobs or contracts for Parrish was a failure to perform. Moreover, Zinn did give business advice to Parrish on his real estate purchases, and he did secure tax advice for him.

Parrish fully accepted Zinn's performance for the years 1970, 1971, 1972, and 1973 by remitting the 10% due Zinn under the contract. Parrish was at all times free to discharge Zinn as his agent before a new season began. Instead, he waited until Zinn had negotiated a series of contracts worth a quarter of a million dollars for him before letting Zinn know over the phone that his services were no longer required. That call, coupled with Parrish's failure to make the 10% commission payments as they came due, was a breach of the 1971 contract. *Watson v. Auburn Iron Works, Inc.*, 23 Ill. App. 3d 265, 318 N.E.2d 508, 511 (1974). The district court was in error in considering Zinn's performance or non-performance during the period following that call, for Parrish by his own breach excused Zinn from any further duties under the contract. *Olsen v. Scholl*, 38 Ill. App. 3d 340, 347 N.E.2d 195, 198 (1976). Zinn had no obligations thereafter, and Parrish was estopped from asserting Zinn's non-performance as a defense to the suit on the commission fees due him. *Gamm Construction Co. v. Townsend*, 32 Ill. App. 3d 848, 336 N.E.2d 592, 594 (1975). Therefore Zinn has a right to recover a 10% commission on all amounts earned by Parrish under the 1974, 1975, 1976, and 1977 Bengals contracts.

We must disagree with the district court's interpretation of the terms of the contract, and Zinn's obligations thereunder, and also with its findings and conclusions concerning Zinn's performance. Insofar as the district court made any findings of fact which are inconsistent with the foregoing, we find them to be clearly erroneous. Consequently, judgment should be entered for Zinn. The decision of the district court is REVERSED, and the case REMANDED for further proceedings consistent with this opinion, including the calculation of damages and interest, if any, due Zinn.

Question

1. What standard of competence does the Court use in *Zinn*? How does this standard compare to the standard used in other professional malpractice cases, *e.g.*, attorneys or physicians?

BROWN v. WOOLF
554 F. Supp. 1206 (S.D. Indiana 1983)

STECKLER, District Judge

This matter comes before the Court on the motions of defendant, Robert G. Woolf, for partial summary judgment and for summary judgment. FED. R. CIV. P. 56.

The complaint in this diversity action seeks compensatory and punitive damages and the imposition of a trust on a fee defendant allegedly received, all stemming from defendant's alleged constructive fraud and breach of fiduciary duty in the negotiation of a contract for the 1974-75 hockey season for plaintiff who was a professional hockey player. Plaintiff alleges that prior to the 1973-74 season he had engaged the services of defendant, a well known sports attorney and agent, who represents many professional athletes, has authored a book, and has appeared in the media in connection with such representation, to negotiate a contract for him with the Pittsburgh Penguins of the National Hockey League. Plaintiff had a professionally successful season that year under the contract defendant negotiated for him and accordingly again engaged defendant's services prior to the 1974-75 season. During the negotiations in July 1974, the Penguins offered plaintiff a two-year contract at $80,000.00 per year but plaintiff rejected the offer allegedly because defendant asserted that he could obtain a better, long-term, no-cut contract with a deferred compensation feature with the Indianapolis Racers, which at the time was a new team in a new league. On July 31, 1974, plaintiff signed a five-year contract with the Racers. Thereafter, it is alleged the Racers began having financial difficulties. Plaintiff avers that Woolf continued to represent plaintiff and negotiated two reductions in plaintiff's compensation including the loss of a retirement fund at the same time defendant was attempting to get his own fee payment from the Racers. Ultimately the Racers' assets were seized and the organizers defaulted on their obligations to plaintiff. He avers that he received only $185,000.00 of the total $800,000.00 compensation under the Racer contract but that defendant received his full $40,000.00 fee (5% of the contract) from the Racers.

Plaintiff alleges that defendant made numerous material misrepresentations upon which he relied both during the negotiation of the Racer contract and at the time of the subsequent modifications. Plaintiff further avers that defendant breached his fiduciary duty to plaintiff by failing to conduct any investigation into the financial stability of the Racers, failing to investigate possible consequences of the deferred compensation package in the Racers' contract, failing to obtain guarantees or collateral, and by negotiating reductions in plaintiff's compensation from the Racers while insisting on receiving all of his own. Plaintiff theorizes that such conduct amounts to a prima

facie case of constructive fraud for which he should receive compensatory and punitive damages and have a trust impressed on the $40,000.00 fee defendant received from the Racers.

Defendant's motion for partial summary judgment attacks plaintiff's claim for punitive damages, contending that plaintiff has no evidence to support such an award and should not be allowed to rest on the allegations of his complaint. Further, he claims that punitive damages are unavailable as a matter of law in a constructive fraud case because no proof of fraudulent intent is required. By his motion for summary judgment, defendant attacks several aspects of plaintiff's claims against him. He argues (1) that plaintiff cannot recover on a breach of contract theory because Robert G. Woolf, the individual, was acting merely as the agent and employee of Robert Woolf Associates, Inc. (RWA), (2) that defendant's conduct could not amount to constructive fraud because (a) plaintiff alleges only negligent acts, (b) there is no evidence defendant deceived plaintiff or violated a position of trust, (c) there is no showing of harm to the public interest, and (d) there is no evidence that defendant obtained an unconscionable advantage at plaintiff's expense.

Turning first to the questions raised in the motion for partial summary judgment, the Court could find no Indiana case specifically discussing the availability of punitive damages in an action based upon the theory of constructive fraud. Cases from other jurisdictions reflect a division of authority. The Court concludes that Indiana courts would not adopt a per se rule prohibiting such damages in a constructive fraud action, but would rather consider the facts and circumstances of each case. If elements of recklessness, or oppressive conduct are demonstrated, punitive damages could be awarded. *See Young v. Goodyear Stores*, 244 S.C. 493, 137 S.E.2d 578 (1964) (if defendant recklessly or heedlessly makes false statements, fact he was unaware of falsity does not defeat claim for punitive damages).

Indiana cases contain several formulizations of the tort of constructive fraud. Generally it is characterized as acts or a course of conduct from which an unconscionable advantage is or may be derived, *Beecher v. City of Terre Haute*, 235 Ind. 180, 132 N.E.2d 141 (1956); *Hall v. Ind. Dept. of State Revenue*, 170 Ind. App. 77, 351 N.E.2d 35 (1976), or a breach of confidence coupled with an unjust enrichment which shocks the conscience, *Voelkel v. Tohulka*, 236 Ind. 588, 141 N.E.2d 344 (1957), or a breach of duty, including mistake, duress or undue influence, which the law declares fraudulent because of a tendency to deceive, injure the public interest or violate the public or private confidence, *Blaising v. Mills*, 176 Ind. App. 141, 374 N.E.2d 1166 (Ind. App. 1978). Another formulization found in the cases involves the making of a false statement, by the dominant party in a confidential or fiduciary relationship or by one who holds himself out as an expert, upon which the plaintiff reasonably relies to his detriment. The defendant need not know the statement is false nor make the false statement with fraudulent intent. *Coffey v. Wininger*, 156 Ind. App. 233, 296 N.E.2d 154 (1973); *Smart & Perry Ford Sales, Inc. v. Weaver*, 149 Ind. App. 693, 274 N.E.2d 718 (1971).

The Court believes that both formulizations are rife with questions of fact, inter alia, the existence or nonexistence of a confidential or fiduciary relationship, *Hall*, *supra*, 351 N.E.2d at 39, and the question of reliance on false representations, *Smart & Perry*, *supra*, 274 N.E.2d at 724, as well as questions of credibility.

Defendant argues that despite the customary existence of such fact questions in a constructive fraud case, judgment is appropriate in this instance because plaintiff has produced nothing to demonstrate the existence of fact questions. He makes a similar argument in the motion for partial summary judgment on the punitive damages issue.

* * *

In this case, defendant has offered affidavits, excerpts of depositions, and photocopies of various documents to support his motions. He contends that such materials demonstrate that reasonable minds could not conclude that defendant did the acts with which the complaint charges him. In response, plaintiff rather belatedly offered portions of plaintiff's depositions as well as arguing that

issues such as those raised by a complaint based on constructive fraud are inherently unsuited to resolution on a motion for summary judgment.

Having carefully considered the motions and briefs and having examined the evidentiary materials submitted, the Court concludes that summary judgment would not be appropriate in this action. The Court is not persuaded that there are no fact questions remaining unresolved in this controversy such that defendant is entitled to judgment as a matter of law.

* * *

By reason of the foregoing, defendant's motions for partial summary judgment and for summary judgment are hereby DENIED.

IT IS SO ORDERED.

Note and Question

The Alabama Code § 8-26-35 (*see* Appendix) prohibits an agent from dividing a fee with a professional sports league:

> **§ 8-26-35. Limit on athlete agent's fee where athlete fails to procure or be paid for employment**
>
> In the event that an athlete agent collects a fee or expenses from an athlete for obtaining employment, and the athlete fails to procure such employment, or the athlete fails to be paid for such employment, the athlete agent shall be limited as to the fee he shall collect from the athlete in the following manner:
>
> **(1)** The athlete agent shall receive reimbursement for all reasonable out-of-pocket expenses incurred by the athlete agent during the course of his representation of the athlete.
>
> **(2)** If the athlete received a bonus for the signing of a professional sports services contract, the athlete agent shall be entitled to a fee in an amount no more than the greater of 10 percent of such bonus or $1,000.

What is the purpose of this statute?

DETROIT LIONS, INC. AND BILLY SIMS v. JERRY A. ARGOVITZ

580 F. Supp. 542 (E.D. Mich. 1984)

DeMASCIO, District Judge

The plot for this Saturday afternoon serial began where Billy Sims, having signed a contract with the Houston Gamblers on July 1, 1983, signed a second contract with the Detroit Lions on December 16, 1983. On December 18, 1983, the Detroit Lions, Inc. (Lions) and Billy R. Sims filed a complaint in the Oakland County Circuit Court seeking a judicial determination that the July 1, 1983, contract between Sims and the Houston Gamblers, Inc. (Gamblers) is invalid because the defendant Jerry Argovitz (Argovitz) breached his fiduciary duty when negotiating the Gamblers' contract and because the contract was otherwise tainted by fraud and misrepresentation. Defendants promptly removed the action to this court based on our diversity of citizenship jurisdiction.

For the reasons that follow, we have concluded that Argovitz's breach of his fiduciary duty during negotiations for the Gamblers' contract was so pronounced, so egregious, that to deny recission

would be unconscionable.

Sometime in February or March 1983, Argovitz told Sims that he had applied for a Houston franchise in the newly formed United States Football League (USFL). In May 1983, Sims attended a press conference in Houston at which Argovitz announced that his application for a franchise had been approved. The evidence persuades us that Sims did not know the extent of Argovitz's interest in the Gamblers. He did not know the amount of Argovitz's original investment, or that Argovitz was obligated for 29 percent of a $1.5 million letter of credit, or that Argovitz was the president of the Gamblers Corporation at an annual salary of $275,000 and 5 percent of the yearly cash flow. The defendants could not justifiably expect Sims to comprehend the ramifications of Argovitz's interest in the Gamblers or the manner in which that interest would create an untenable conflict of interest, a conflict that would inevitably breach Argovitz's fiduciary duty to Sims. Argovitz knew, or should have known, that he could not act as Sims' agent under any circumstances when dealing with the Gamblers. Even the USFL Constitution itself prohibits a holder of any interest in a member club from acting "as the contracting agent or representative for any player."

Pending the approval of his application for a USFL franchise in Houston, Argovitz continued his negotiations with the Lions on behalf of Sims. On April 5, 1983, Argovitz offered Sims' services to the Lions for $6 million over a four-year period. The offer included a demand for a $1 million interest free loan to be repaid over 10 years, and for skill and injury guarantees for three years. The Lions quickly responded with a counter offer on April 7, 1983, in the face amount of $1.5 million over a five-year period with additional incentives not relevant here. The negotiating process was working. The Lions were trying to determine what Argovitz really believed the market value for Sims really was. On May 3, 1983, with his Gamblers franchise assured, Argovitz significantly reduced his offer to the Lions. He now offered Sims to the Lions for $3 million over a four-year period, one-half of the amount of his April 5, 1983 offer. Argovitz's May 3rd offer included a demand for $50,000 to permit Sims to purchase an annuity. Argovitz also dropped his previous demand for skill guarantees. The May 10, 1983 offer submitted by the Lions brought the parties much closer.

* * *

Apparently, in the midst of his negotiation with the Lions and with the Gamblers franchise in hand, Argovitz decided that he would seek an offer from the Gamblers. Mr. Bernard Lerner, one of Argovitz's partners in the Gamblers agreed to negotiate a contract with Sims. Since Lerner admitted that he had no knowledge whatsoever about football, we must infer that Argovitz signed Sims and further pressed upon Lerner the Gamblers' absolute need to obtain Sims' services. In the Gambler's organization, only Argovitz knew the value of Sims' services and how critical it was for the Gamblers to obtain Sims. In Argovitz's words, Sims would make the Gambler's franchise.

On June 29, 1983, at Lerner's behest, Sims and his wife went to Houston to negotiate with a team that was partially owned by his own agent. When Sims arrived in Houston, he believed that the Lions organization was not negotiating in good faith; that it was not really interested in his services. His ego was bruised and his emotional outlook toward the Lions was visible to Burrough and Argovitz. Clearly, virtually all the information that Sims had up to that date came from Argovitz. Sims and the Gamblers did not discuss a future contract on the night of June 29th. The negotiations began on the morning of June 30, 1983, and ended that afternoon. At the morning meeting, Lerner offered Sims a $3.5 million five-year contract, which included three years of skill and injury guarantees. The offer included a $500,000 loan at an interest rate of 1 percent over prime. It was from this loan that Argovitz planned to receive the $100,000 balance of his fee for acting as an agent in negotiating a contract with his own team. Burrough testified that Sims would have accepted that offer on the spot because he was finally receiving the guarantee that he had been requesting from the Lions, guarantees that Argovitz dropped without too much quarrel. Argovitz and Burrough took Sims and his wife into another room to discuss the offer. Argovitz did tell Sims that he thought the Lions would match the

Gamblers financial package and asked Sims whether he (Argovitz) should telephone the Lions. But, it is clear from the evidence that neither Sims nor Burrough believed that the Lions would match the offer. We find that Sims told Argovitz not to call the Lions for purely emotional reasons. As we have noted, Sims believed that the Lions' organization was not that interested in him and his pride was wounded. Burrough clearly admitted that he was aware of the emotional basis for Sims' decision not to have Argovitz phone the Lions, and we must conclude from the extremely close relationship between Argovitz and Sims that Argovitz knew it as well. Then Sims went back to Lerner's office, he agreed to become a Gambler on the terms offered. At that moment, Argovitz irreparably breached his fiduciary duty. As agent for Sims he had the duty to telephone the Lions, receive its final offer, and present the terms of both offers to Sims. Then and only then could it be said that Sims made an intelligent and knowing decision to accept the Gamblers offer.

During these negotiations at the Gamblers' office, Mr. Nash of the Lions telephoned Argovitz, but even though Argovitz was at his office, he declined to accept the telephone call. Argovitz tried to return Nash's call after Sims had accepted the Gambler's offer but it was after 5 p.m. and Nash had left for the July 4th weekend. When he declined to accept Mr. Nash's call Argovitz's breach of his fiduciary duty became even more pronounced. Following Nash's example, Argovitz left for his weekend trip, leaving his principal to sign the contracts with the Gamblers the next day, July 1, 1983. The defendants, in their supplemental trial brief, assert that neither Argovitz nor Burrough can be held responsible for following Sims' instruction not to contact the Lions on June 30, 1983. Although it is generally true that an agent is not liable for losses occurring as a result of not following his principal's instructions, the rule of law is not applicable when the agent has placed himself in a position adverse to that of his principal.

During the evening of June 30, 1983, Burrough struggled with the fact that they had not presented the Gamblers' offer to the Lions. He knew, as does the court, that Argovitz now had the wedge that he needed to bring finality to the Lions' negotiations. Burroughs was acutely aware of the fact that Sims' actions were emotionally motivated and realized that the responsibility for Sims' future rested with him. We view with some disdain the fact that Argovitz had, in effect, delegated his entire fiduciary responsibility on the eve of his principal's most important career decision. On July 1, 1983, it was Lerner who gave lip service to Argovitz's conspicuous conflict of interest. It was Lerner, not Argovitz, who advised Sims that Argovitz's position with the Gamblers presented a conflict of interest and that Sims could, if he wished, obtain an attorney or another agent. Argovitz, upon whom Sims had relied for the past four years, was not even there. Burrough, conscious of Sims' emotional responses, never advised Sims to wait until he had talked with Lions before making a final decision. Argovitz's conflict of interest and self dealing put him in the position where he would not even use the wedge he now had to negotiate with the Lions, a wedge that is the dream of every agent. Two expert witnesses testified that an agent should telephone a team that he has been negotiating with once he has an offer in hand. Mr. Woolf, plaintiff's expert, testified that an offer from another team is probably the most important factor in negotiations. Mr. Lustig, defendant's expert, believed that it was prudent for him to telephone the Buffalo Bills and inform that organization of the Gamblers' offer to Jim Kelly, despite the fact that he believed the Bills had already made its best offer to his principal. The evidence here convinces us that Argovitz's negotiations with the Lions were ongoing and it had not made its final offer. Argovitz did not follow the common practice described by both expert witnesses. He did not do this because he knew that the Lions would not leave Sims without a contract and he further knew that if he made that type of call Sims would be lost to the Gamblers, a team he owned.

On November 12, 1983, when Sims was in Houston for the Lions game with the Houston Oilers, Argovitz asked Sims to come to his home and sign certain papers. He represented to Sims that certain papers of his contract had been mistakenly overlooked and now needed to be signed. Included

among those papers he asked Sims to sign was a waiver of any claim that Sims might have against Argovitz for his blatant breach of his fiduciary duty brought on by his glaring conflict of interest. Sims did not receive independent advice with regard to the wisdom of signing such a waiver. Despite having sold his agency business in September, Argovitz did not even tell Sims' new agent of his intention to have Sims sign a waiver. Nevertheless, Sims, an unsophisticated young man, signed the waiver. This is another example of the questionable conduct on the part of Argovitz who still had business management obligations to Sims. In spite of his fiduciary relationship he had Sims sign a waiver without advising him to obtain independent counseling.

* * *

We are mindful that Sims was less than forthright when testifying before the court. However, we agree with plaintiff's counsel that the facts are presented through the testimony of other witnesses entirely. We remain persuaded that on balance, Argovitz's breach of his fiduciary duty was so egregious that a court of equity cannot permit him to benefit by his own wrongful breach. We conclude that Argovitz's conduct in negotiating Sims' contract with the Gamblers rendered it invalid.

Conclusions of Law

The relationship between a principal and agent is fiduciary in nature, and as such imposes a duty of loyalty, good faith, and fair and honest dealing on the agent. *Anderson v. Griffith*, 501 S.W.2d 695, 700 (Tex. Civ. App. 1973).

A fiduciary relationship arises not only from a formal principal-agent relationship, but also from informal relationships of trust an confidence. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Adickes v. Andreoli*, 600 S.W.2d 939, 945-46 (Tex. Civ. App. 1980).

In light of the express agency agreement, and the relationship between Sims and Argovitz, Argovitz clearly owed Sims the fiduciary duties of an agent at all times relevant to this lawsuit.

An agent's duty of loyalty requires that he not have a personal stake that conflicts with the principal's interest in a transaction in which he represents his principal. As stated in *Burleson v. Earnest*, 153 S.W.2d 869 (Tex. Civ. App. 1941):

> [T]he principal is entitled to the best efforts and unbiased judgment of his agent.... [T]he law denies the right of an agent to assume any relationship that is antagonistic to his duty to his principal, and it has many times been held that the agent cannot be both buyer and seller at the same time nor connect his own interests with the property involved in his dealings as an agent for another.
>
> * * *
>
> Where an agent has an interest adverse to that of his principal in a transaction in which he purports to act on behalf of his principal, the transaction is voidable by the principal unless the agent disclosed all material facts within the agent's knowledge that might affect the principal's judgment. *Burleson v. Earnest*, 153 S.W.2d at 874-75.

The mere fact that the contract is fair to the principal does not deny the principal the right to rescind the contract when it was negotiated by an agent in violation of the prohibition against self-dealing.

Argovitz clearly had a personal interest in signing Sims with the Gamblers that was adverse to Sims' interest — he had an ownership interest in the Gamblers and thus would profit if the Gamblers were profitable, and would incur substantial personal liabilities should the Gamblers not be financially successful. Since this showing has been made, fraud on Argovitz's part is presumed, and the Gamblers' contract must be rescinded unless Argovitz has shown by a preponderance of the evidence that he informed Sims of every material fact that might have influenced Sims' decision whether or not

to sign the Gamblers' contract.

As a court sitting in equity, we conclude that rescission is the appropriate remedy. We are dismayed by Argovitz's egregious conduct. The careless fashion in which Argovitz went about ascertaining the highest price of Sims' service convinces us of the wisdom of the maxim: no man can faithfully serve two masters whose interests are in conflict.

It is so ordered. Judgment will be entered for the plaintiffs rescinding the Gamblers contract with Sims.

WALTERS v. FULLWOOD

675 F. Supp. 155 (S.D.N.Y. 1987)

BRIEANT, Chief Judge

By motion fully submitted on October 5, 1987, in this diversity action, defendants Brent Fullwood and George Kickliter move (1) under 9 U.S.C. sec. 3, to stay, pending arbitration sought to be compelled by this Court pursuant to 9 U.S.C. sec. 4, the claims against Fullwood asserted by plaintiffs Norby Walters and Lloyd Bloom, doing business as World Sports and Entertainment, Inc. ("W. S. & E."); (2) under Rule 12(b)2, F[ED]. R. CIV. P., to dismiss plaintiffs' action in whole or in part for lack of personal jurisdiction over the defendants; (3) under Rule 12(b)3, F[ED]. R. CIV. P., to dismiss the action in whole or in part for improper venue or, alternatively, to transfer it to the Middle District of Alabama pursuant to 28 U.S.C. 1406(a); and (4) under Rule 12(b)6, F[ED]. R. CIV. P., to dismiss plaintiffs' fourth claim for failure to state a claim upon which relief can be granted.

The following facts are uncontroverted.

Defendant Brent Fullwood, a Florida resident, was an outstanding running back with the University of Auburn football team in Alabama. His success in the high competitive Southeastern Athletic Conference marked him as a top professional prospect. At an unspecified time during his senior year at Auburn, Fullwood entered into an agreement with W. S. & E., a New York corporation ("the W. S. & E. agreement"). The agreement was dated January 2, 1987, the day after the last game of Fullwood's college football career, and the first day he could sign such a contract without forfeiting his amateur status under sec. 3-1-(c) of the N.C.A.A. Constitution, quoted *infra*. The contract was arranged and signed for the corporation by plaintiff Bloom, and granted W. S. & E. the exclusive right to represent Fullwood as agent to negotiate with professional football teams after the spring draft of the National Football League ("N.F.L."). Walters and Bloom were the corporate officers and sole shareholders of W. S. & E. As a provisionally certified N.F.L. Players' Association ("N.F.L.P.A.") contract advisor, Bloom was subject to the regulations of that body governing agents ("N.F.L.P.A. Agents' Regulations"), which require the arbitration of most disputes between players and contract advisors.

On August 20, 1986, W. S. & E. paid $4,000 to Fullwood, who then executed a promissory note in plaintiffs' favor for that amount. The note was secured by a pledge of:

> [A] security interest in all of the players rights to receive payments under any existing and or future contract or other agreement ("Player Contract") to which the Player may become a party relating to the Players services to or on behalf of any professional football team, if, as, and when such payments shall become due, including any insurance proceeds to which player may become entitled.

August 20, 1986 promissory note, exh. D. to defendants' Notice of Motion. At various times throughout the 1986 season, plaintiffs sent to Fullwood or his family further payments that totaled

$4,038.

Reviewing substantially similar facts involving these same plaintiffs and a different defendant in an unrelated case, Justice Altman of the New York Supreme Court concluded,

> The underlying facts of the case reveal a pernicious practice of encouraging young college athletes to enter into deceptive agreements which are postdated so they can continue to play college football. The athletes thus act unethically and in violation of the rules of the National Collegiate Athletic Association ... and the National Football League....

Walters v. Harmon, 135 Misc. 2d 905, 516 N.Y.S.2d 874 (Sup. Ct., N.Y. Cty. 1987). While neither plaintiffs nor defendants have specifically admitted the W. S. & E. agency agreement was post dated, they have conspicuously avoided identifying the actual date it was signed. There is a powerful inference that the agreement was actually signed before or during the college football season, perhaps contemporaneously with the August 20 promisory note, and unethically postdated as in other cases involving these plaintiffs. No argument or evidence has been presented to dispel this inference, and the Court believes the parties deliberately postdated the contract January 2. Even if this likelihood is not accepted, it is conceded by all parties and proven by documentary evidence that a security interest was granted on Fullwood's future earnings from professional football, by the express terms of the promissory note of August 20, 1986.

At some point prior to the N.F.L. spring 1987 draft, Fullwood repudiated his agreement with W. S. & E., and chose to be represented by defendant George Kickliter, an attorney in Auburn, Alabama. As anticipated, Fullwood was taken early in the N.F.L. draft. The Green Bay Packers selected him as the fourth player in the first round; he signed a contract with them, and currently is playing in his rookie season in the N.F.L.

In March, 1987, Walters and Bloom brought suit, since removed from New York State Supreme Court, alleging (1) that Fullwood breached the W. S. & E. agency agreement, (2) that Fullwood owed them $8,038 as repayment for the funds he received during the autumn of 1986, which are now characterized as loans, (3) that Kickliter tortiously induced Fullwood's breach of the 1986 agreement, and (4) that Fullwood and Kickliter tortiously interfered with plaintiffs' contractual relations with other players by breaching or inducing the breach of the W. S. & E. agency agreement by Fullwood.

Jurisdiction

Walters and Bloom argue for the personal jurisdiction of this Court over Fullwood based on paragraph 10 of the W. S. & E. agency agreement, which reads, in relevant part:

> This agreement shall be governed and construed according to the laws of the State of New York. The parties hereto consent to the jurisdiction of the courts of the State of New York, and of any federal court located in such state, in connection with any action, or proceeding, arising out of or relating to this agreement.

Defendant Fullwood concedes that this language creates jurisdiction by consent for the breach of contract claim, but argues that this Court lacks the power to consider plaintiffs' other claims against him. This Court concludes that the language of paragraph 10 also consents to jurisdiction over Fullwood for the second claim, since the alleged loans from W. S. & E. were made in connection with the W. S. & E. agency agreement, and for the fourth claim, which alleges damages flowing from the breach of that agreement. Since plaintiffs have jurisdiction by consent for all their claims against Fullwood, there is no need to consider their dubious argument for jurisdiction under the New York Civil Practice Laws and Rules ("C.P.L.R.") sec. 302(a)1, based on a contention that Fullwood transacted business in New York by telephoning his requests for money into this state.

Plaintiffs argue for jurisdiction over defendant Kickliter, an Alabama resident, under New York C.P.L.R. secs. 302(a)3(i) and 302(a)3(ii). These subdivisions of the so-called New York "long arm statute" provide for personal jurisdiction by a New York court over a non-domiciliary who:

> [C]ommits a tortious act without the state *causing injury to person or property within the state* ... if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce" (emphasis supplied).

This section has been held to include commercial torts. *Sybron v. Wetzel*, 46 N.Y.2d 197, 413 N.Y.S.2d 127, 385 N.E.2d 1055 (1978). Because the alleged injury to plaintiffs did not occur in New York State for the purposes of C.P.L.R. sec. 302(a)3, neither (i) nor (ii) of that section confers jurisdiction.

The New York Court of Appeals has held that jurisdiction under C.P.L.R. sec. 302(a)3 requires "a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there." *Fantis Foods, Inc. v. Standard Importing*, 49 N.Y.2d 317, 326, 425 N.Y.S.2d 783, 787, 402 N.E.2d 122 (1980) (suit by New York Corporation for conversion of feta cheese by a foreign corporation dismissed for lack of jurisdiction over defendants, when conversion took place in Greece and no other defendant contacts with New York were established). Thus, while a New York plaintiff suffers a kind of injury whenever it is the victim of a tort by a non-domiciliary, the statute "looks to the imparting of the original injury within the State of New York and not resultant damage, in order that jurisdiction may be effectuated." *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 434 (2d Cir. 1971), *quoting*, *Black v. Oberle Rentals, Inc.*, 55 Misc. 2d 398, 400, 285 N.Y.S.2d 226, 229 (Sup. Ct. Onondaga Cty. 1967).

Plaintiffs assert that their injuries on the third and fourth claims occurred in New York because their offices are in New York City, and performance of the contract that Kickliter allegedly induced Fullwood to breach was anticipated there, through representation at the N.F.L. player draft. This Court rejects the contention that Fullwood's breach of contract thus occurred in New York so as to make Kickliter's inducement of that breach in Alabama an out-of-state tort causing a New York injury. Presence at the N.F.L. draft is just one step in the substantial process of representing a college athlete seeking a professional football contract. Far more important representation occurs before the draft, in the form of promotional services increasing the likelihood that the client will be selected by a team on the client's "preferred list", and after the draft, in negotiating a favorable contract with the team that selects him. Where, as here, a player from an Alabama school signed an agreement in Alabama with a New York corporation, and an Alabama resident with no significant New York contacts thereafter allegedly induced him in Alabama to breach that contract, neither case law nor common sense supports a finding that injuries from the inducement of the contractual breach occurred in New York for the purposes of C.P.L.R. [§] 302(a)3. *Cf. Fantis Foods, Inc.*, *supra*; *Patrician Equity Corp. v. Meadows*, 86 Civ. 5045 (MJL) (S.D.N.Y. 1987) (not yet reported) (Loss of customers in New York as a result of alleged conversion of customer list in California by a California defendant not injury in New York for purposes of the statute); *Smith v. Morris & Manning*, 647 F. Supp. 101 (S.D.N.Y. 1987) (No New York injury creating "long-arm" jurisdiction over defendant Georgia law firm for out-of-state malpractice causing increased tax liability for plaintiff in New York).

This court has personal jurisdiction over defendant Fullwood, but not over defendant Kickliter. The first and second claims, and that portion of the fourth claim directed to defendant Fullwood, therefore remain subject to our consideration; the third claim, and so much of the fourth

as relates to defendant Kickliter, are dismissed without prejudice and without costs.

Plaintiffs' Claim for "Interference with Business Relations"

The fourth claim asserted by Walters and Bloom alleges that, by breaching or inducing the breach of the W. S. & E. agency agreement, Fullwood and Kickliter caused W. S. & E. to lose other clients, and damaged their business reputation. Defendants seek to dismiss this claim under Rule 12(b)6, F[ED]. R. CIV. P., for failure to state a claim upon which relief can be granted. The Court grants the motion insofar as concerns Fullwood, with prejudice.

In order to state a claim for tortious interference with existing contractual relations, a plaintiff must allege (1) the existence of a valid contract between plaintiff and another contracting party; (2) defendant's knowledge of that contract (3) defendant's intentional procurement of a breach of that contract by the other party; and (4) damages. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956). Plaintiffs have alleged neither Fullwood's knowledge of other contracts, nor his intentional procurement of any breach. Thus, no claim is stated.

If plaintiffs wish to have their complaint construed as alleging tortious interference with prospective economic advantage, they fare no better. Such a claim requires that "the defendant's sole motive was to inflict injury and that the defendant employed unlawful means to do so ." *Nifty Foods Corp. v. Great Atlantic and Pacific Food Co., Inc.*, 614 F.2d 832 (2d Cir. 1980), *citing Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 203 (1923); *see also, Felsen v. Sol Cafe Mgmt. Corp.*, 24 N.Y.2d 682, 301 N.Y.S.2d 610, 249 N.E.2d 459 (1969). No New York case law has been advanced to or discovered by this Court establishing that the breach of a contract, standing alone, is sufficient to create liability for subsequent breaches by others of other contracts. Indeed such a proposition is frivolous on its face, and we decline to be first to so hold. Absent rational allegations that Fullwood breached the W. S. & E. agency agreement through wrongful means, specifically to damage plaintiffs' business relations with others, no claim is stated upon which relief can be granted.

Treatment of Defendants' Motion to Compel Arbitration, and Plaintiffs' Surviving Claims

> We are living in a time when college athletics are honeycombed with falsehood, and when the professions of amateurism are usually hypocrisy. No college team ever meets another today with actual faith in the other's eligibility.

— President William Faunce of Brown University, in a speech before the National Education Association, 1904. Quoted in J. BETTS, AMERICA'S SPORTING HERITAGE 1850-1950 216 (1974).

The N.C.A.A. was organized in 1906 largely to combat such evils. Its constitution provides in relevant part that:

> any individual who contracts or who has ever contracted orally or in writing to be represented by an agent in the marketing of the individual's athletic ability or reputation in a sport no longer shall be eligible for intercollegiate athletics in that sport."

N.C.A.A. Constitution, sec. 3-1-(c). Section 3-1-(a) prohibits any player from accepting pay in any form for participation in his college sport, with an exception for a player seeking, directly without the assistance of a third party, a loan from an accredited commercial lending institution against future earnings potential solely in order to purchase insurance against disabling injury.

This Court concludes that the August 1986 loan security agreement and the W. S. & E. agency agreement between Fullwood and the plaintiffs violated sections 3-1-(a) and 3-1-(c) of the N.C.A.A.Constitution, the observance of which is in the public interest of the citizens of New York State, and that the parties to those agreements knowingly betrayed an important, if perhaps naive, public trust. Viewing the parties as in pari delicto, we decline to serve as "paymaster of the wages of

crime, or referee between thieves". *Stone v. Freeman*, 298 N.Y. 268, 271, 82 N.E.2d 571 (1948), *quoting Schermerhorn v. Talman*, 14 N.Y. 93, 141 (1856). *See also In re Shopping Carts Antitrust Litigation*, 1984-1 Trade Cas. (CCH) para. 65,823 (Nov. 18, 1983); *Cf. Islamic Republic of Iran v. Pahlavi*, 94 A.D.2d 374, 382, 464 N.Y.S.2d 487, 498 (1st Dept. 1983), *aff'd* 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108, 83 L. Ed. 2d 778, 105 S. Ct. 783 (1985) (KUPFERMAN, J., concurring) (a "court should not lend its aid to a corrupt or evil design"). We consider both defendant Fullwood's arbitration rights under the N.F.L.P.A. Agents' Regulations, and plaintiffs' rights on their contract and promissory note with Fullwood, unenforceable as contrary to the public policy of New York. "The law `will not extend its aid to either of the parties' or `listen to their complaints against each other, but will leave them where their own acts have placed them.'" *Stone, supra*, 298 N.Y.2d at 271, 82 N.E.2d 571, *quoting, Schermerhorn, supra*, 14 N.Y. at 141.

Absent these overriding policy concerns, the parties would be subject to the arbitration provisions set forth in section seven of the N.F.L.P.A. Agents' Regulations,[1] and plaintiffs' rights under the contract and promissory note with Fullwood also would be arbitrable. *See, Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987); *Crawford v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 35 N.Y.2d 291, 361 N.Y.S.2d 140, 319 N.E.2d 408 (1974); *Willard Alexander, Inc. v. Glasser*, 31 N.Y.2d 270, 338 N.Y.S.2d 609, 290 N.E.2d 813 (1972), *cert. denied sub. nom. Glasser v. Willard Alexander, Inc.*, 410 U.S. 983, 36 L. Ed. 2d 179, 93 S. Ct. 1505 (1973); *Merrill Lynch v. Griesenbeck*, 28 A.D.2d 99, 281 N.Y.S.2d 580 (1st Dept.), *aff'd.* 21 N.Y.2d 688, 287 N.Y.S.2d 419, 234 N.E.2d 456 (1967); *Walters v. Harmon*, 135 Misc. 2d 905, 516 N.Y.S.2d 874 (Sup. Ct., N.Y. Cty. 1987). *Cf. Welch v. Carson Productions Group, Ltd.*, 791 F.2d 13 (2d Cir.), *cert. denied*, 479 U.S. 1007, 107 S. Ct. 647, 93 L. Ed. 2d 703 (1986). However, under the "public policy" exception to the duty to enforce otherwise-valid agreements, we should and do leave the parties where we find them.

It is well settled that a court should not enforce rights that arise under an illegal contract. *Stone v. Freeman, supra*, 298 N.Y. 268, 82 N.E.2d 571 (1948); *Flegenheimer v. Brogan*, 284 N.Y. 268, 30 N.E.2d 591 (1940); *accord, Rutkin v. Reinfeld*, 229 F.2d 244 (2d Cir. 1956); *Anabas Export, Ltd, v. Alper Indus., Inc.*, 603 F. Supp. 1275 (S.D.N.Y. 1985).

In *Flegenheimer, supra*, the widow and personal representative of the infamous gangster and bootlegger Arthur Flegenheimer (better known as Dutch Schultz) sought a money judgment, alleging that the defendant had acquired wrongfully the controlling stock interest in the Yonkers Brewery. Schultz had transferred the brewery stock to a straw man as part of a fraudulent scheme to evade federal and state liquor license regulations, which prevented a former bootlegger from dealing in beer. Defendant purchased the stock with knowledge from the nominee holder, after Schultz' death. The New York Court of Appeals concluded, "[w]e think those transactions [avoiding statutory restrictions] were so far against the public good as to disable the plaintiff from invoking the aid of the court in her endeavor to disengage herself (as administratrix) from the unlawfulness of the conduct of her intestate." *Flegenheimer, supra*, 284 N.Y. at 273, 30 N.E.2d 591.

This principle was reinforced by *Stone v. Freeman, supra*, in which the New York Court of

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[1] While defendants have sought to stay plaintiffs' action and compel arbitration of all claims under the Federal Arbitration Act ("F.A.A."), 9 U.S.C. secs. 3 and 4, both sides appear to have assumed that the arbitration agreement's effectiveness would be analyzed under the N.Y.C.P.L.R. 7501. There is authority suggesting that a federal district court sitting on a diversity matter should apply the F.A.A. as federal substantive law. *See, e.g., Management Recruiters of Albany, Inc. v. Management Recruiters Int'l. Inc.*, 643 F. Supp. 750, 752-53 (N.D.N.Y. 1986); *Sharp Electronics Corp. v. Branded Prod. Inc.*, 604 F. Supp. 239, 242-43 (S.D.N.Y. 1984); *Klein Sleep Products, Inc. v. Hillside Bedding Co.*, 563 F. Supp. 904 (S.D.N.Y. 1982. The Court's refusal to order arbitration, for the reasons stated in the text, renders consideration of this issue unnecessary.

Appeals refused to allow a clothing broker to recover payments that had been made to a vendor on the understanding, thereafter breached, that the vendor would pass them on as kickbacks, or bribes, to representatives of a customer, the French Purchasing Mission.

An agreement may be unenforceable in New York as contrary to public policy even in the absence of a direct violation of a criminal statute, if the sovereign has expressed a concern for the values underlying the policy implicated. In *In re Estate of Walker*, 64 N.Y.2d 354, 359, 486 N.Y.S.2d 899, 902, 476 N.E.2d 298 (1985), the Court of Appeals refused to enforce a bequest of adoption decrees to the testator's adopted daughters, concluding that such a bequest, though not criminal, was contrary to public policy. The court concluded, "`[W]hen we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes or judicial records'. Those sources express the public will and give definition to the term. A legacy is contrary to public policy, not only if it directly violates a statutory prohibition ... but also if it is contrary to the social judgment on the subject implemented by the statute." *Walker, supra*, 64 N.Y.2d at 359, 486 N.Y.S.2d at 902, 476 N.E.2d 298 (cites omitted). *See also, W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983); and *Muschany v. United States*, 324 U.S. 49, 66, 89 L. Ed. 744, 65 S. Ct. 442 (1945).

Even in the context of a non-criminal contract, "a prime and long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption." *McConnell v. Commonwealth Pictures, Corp.*, 7 N.Y.2d 465, 469, 199 N.Y.S.2d 483, 485, 166 N.E.2d 494 (1960). As Professor Walter Gellhorn wrote more than half a century ago, "where legislative materials are used as sources of information and as analogies, there need be no direct connection in t terms between statutes and the contract under judicial consideration." Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 692 (1935). *See also, Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73 (2d Cir. 1982) ("courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society").

The principles requiring non-enforcement of contracts on public policy grounds apply equally to arbitration agreements. *See, e.g., Durst v. Abrash*, 22 A.D.2d 39, 253 N.Y.S.2d 351 (1st Dept. 1964), *aff'd*, 17 N.Y.2d 445, 266 N.Y.S.2d 806, 213 N.E.2d 887 (1965) (declining to compel arbitration of a claim arising under a usurious agreement); *see also*, Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 483 (1981) ("Public policy should be invoked to prevent arbitration when at issue is a legislative expression or a basic case law principle designed for some purpose other than to foster justice between the parties to the dispute.")

The New York State legislature has spoken on the public policies involved in this case, by expressing a concern for the integrity of sporting events in general, and a particular concern for the status of amateur athletics. *See, e.g.*, NEW YORK TAX LAW sec. 1116(a)(4) (McKinney's supp. 1987) (granting tax exemption to any organization "organized and operating exclusively ... to foster national or international amateur sports competition); NEW YORK PENAL LAW secs. 180.35, 180.40 (McKinney's supp. 1987) (establishing criminal sanctions for sports bribery).

Even were we not convinced of the legislative concern for the values underlying sec. 3-1-(c) of the N.C.A.A. Constitution, New York case law prevents judicial enforcement of contracts the performance of which would provoke conduct established as wrongful by independent commitments undertaken by either party. In *Reiner v. North American Newspaper Alliance*, 259 N.Y. 250, 181 N.E. 561 (1932), a passenger on the transatlantic dirigible Graf Zeppelin agreed, in violation of his contract of carriage, to send messages from that airship to persons in the United States. When the passenger sought to assert his right to payment, the New York Court of Appeals found the contract unenforceable as a matter of public policy. Not all contracts inducing breaches of other agreements fall within this rule, but those requiring fraudulent conduct are unenforceable as contrary to the public policy of New

York. Particularly appropriate is the following language from the concurrence of Judge Crane in *Reiner*:

> While the law does not approve the defendant's conduct yet, being called upon to choose between two evils, it prefers to permit the defendant to retain the benefits of such an unlawful contract than to aid a plaintiff in enforcing it. As stated by Lord Mansfield in the case of *Holman v. Johnson* (1 Cowp. 341, 343): `The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy.... No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.... So if the plaintiff and defendant were to change sides, and the defendant was to bring this action against the plaintiff, the latter would then have the advantage of it.'

Reiner, supra, 259 N.Y. at 260, 181 N.E. 561. *See also, Contemporary Mission, Inc. v. Bonded Mailings, Inc.*, 671 F.2d 81, 86 (2d Cir. 1982) ("As a matter of public policy, fraud and deception practiced on a third party ... will invalidate a New York contract, at least where there is a `direct connection between the illegal transaction ... and the obligation sued upon'") (OAKES, C.J. concurring and dissenting), *quoting McConnell, supra*, 7 N.Y. at 471, 199 N.Y.S.2d at 487, 166 N.E.2d 497; and *Bankers Trust Co. v. Litton Systems*, 599 F.2d 488, 492 (2d Cir. 1979) (in action under the New York Uniform Commercial Code by a holder in due course of a negotiable instrument induced by bribery, "the court's concern is not with the position of the defendant; instead the question is whether the plaintiff should be denied recovery for the sake of public interests").

In the case before us, no party retains enforceable rights. To the extent plaintiffs seek to recover on the contract or promissory note signed by Fullwood, their wrongful conduct prevents recovery;[2] to the extent Fullwood seeks to compel arbitration, as provided for in the N.F.L.P.A. Agents' Regulations, his own wrongs preclude resort to this Court.

All parties to this action should recognize that they are the beneficiaries of a system built on the trust of millions of people who, with stubborn innocence, adhere to the Olympic ideal, viewing amateur sports as a commitment to competition for its own sake. Historically, amateur athletes have been perceived as pursuing excellence and perfection of their sport as a form of self-realization, indeed, originally, as a form of religious worship, with the ancient games presented as offerings to the gods. *See* R.J. HOPPER, THE EARLY GREEKS 214. In modern English, "Corinthian" is defined as "a gentleman amateur in sports". WEBSTER'S DELUXE UNABRIDGED DICTIONARY 406 (2d ed. 1979). By demanding the most from themselves, athletes were believed to approach the divine essence. C. BOARA, CLASSICAL GREECE 23. Through athletic success, the Greeks believed man could experience a king of immortality.[3]

There is also a modern, secular purpose served by secs. 3-1-(a) and 3-1-(c) of the N.C.A.A.

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[2] We note in passing that, as a provisionally certified N.F.L.P.A. agent, Bloom was bound by sec. 5(C)(1) of the N.F.L.P.A. Agents' Regulations, which forbids a contract advisor from "[p]roviding or offering to provide anything of significant value to a player in order to become the contract advisor for such player".

[3] As expressed by the classical poet Pindar of Thebes (518-438 B.C.):

> Creatures of a day/What is someone?/What is no one?/Man is merely a shadow's dream/But when god-given glory comes upon him in victory/A bright light shines on us and life is sweet/when the end comes the loss of flame brings darkness/But his glory is bright forever." C. BOARA, CLASSICAL GREECE, *supra*, at 23.

Constitution. Since the advent of intercollegiate sports in the late 19th century, American colleges have struggled, with varying degrees of vigor, to protect the integrity of higher education from sports-related evils such as gambling, recruitment violations, and the employment of mercenaries whose presence in college athletic programs will tend to preclude the participation of legitimate scholar-athletes.

Sections 3-1-(a) and 3-1-(c) of the N.C.A.A. Constitution were instituted to prevent college athletes from signing professional contracts while they are still playing for their schools. The provisions are rationally related to the commendable objective of protecting the academic integrity of N.C.A.A. member institutions. A college student already receiving payments from his agents, or with a large professional contract signed and ready to take effect upon his graduation, might well be less inclined to observe his academic obligations than a student, athlete or not, with uncertainties about his future career. Indeed, he might not play at his college sport with the same vigor and devotion.

The agreement reached by the parties here, whether or not unusual, represented not only a betrayal of the high ideals that sustain amateur athletic competition as a part of our national educational commitment; it also constituted a calculated fraud on the entire spectator public. Every honest amateur player who took the field with or against Fullwood during the 1986 college football season was cheated by being thrown in with a player who had lost his amateur standing.

In August 1986, Brent Fullwood was one of that select group of college athletes virtually assured of a lucrative professional sports contract immediately upon graduation, absent serious injury during his senior year. The fruits of the system by which amateur players become highly paid professionals, whatever its flaws, were soon to be his. That is precisely why plaintiffs sought him out. Both sides of the transaction knew exactly what they were doing, and they knew it was fraudulent and wrong. This Court and the public need not suffer such wilful conduct to taint a college amateur sports program.

Conclusion

Plaintiffs' claims against defendant Kickliter are dismissed under Rule 12(b)2, F[ED]. R. CIV. P., for lack of personal jurisdiction over that defendant. Plaintiffs' fourth claim is dismissed against defendant Fullwood under Rule 12(b)6, F[ED]. R. CIV. P. for failure to state a claim on which relief can be granted. The first and second claims against Fullwood are dismissed with prejudice, and Fullwood's requests to stay this action and compel arbitration are denied, as the underlying agreements violate the public policy of New York, and the parties are in pari delicto. The Clerk shall enter final judgment.

SO ORDERED.

Note:

Walters problems continued culminating to a federal mail fraud charge. Walters and his partner Lloyd Bloom were charged with mail fraud and other federal offenses. Walters signed contracts with 58 college football players while they were still participating in intercollegiate athletics. He offered theses athletes cars and money if they would agree to let him represent them in their professional careers. In an attempt to bypass NCAA regulations, Walters postdated the contracts to a date after their eligibility ended and locked them in a safe. Only 2 of the 58 player eventually signed with Walters, the remaining 56 kept the cars and money but signed with other agents. Walters responded with threats against these athletes. The government charged Walters and Bloom with mail fraud advancing a novel interpretation of the statute. It argued that the agent's plan of signing college athletes in violation of the NCAA rules constituted a scheme to defraud universities of their property

interests in the athletic scholarships. The mails were used in furtherance of this scheme when the players lied on the eligibility forms and later mailed them to the universities. Walters and Bloom were found guilty of defrauding two universities. The Seventh Circuit reversed the convictions and sent the case back for a new trial. It, however, did not address the challenge to the government's interpretation of the mail fraud statute. *United States v. Walters* 997 F2d 1219 (7th Cir. 1993)

Problem: Agents

As a recently admitted member in good standing of the Michigan Bar it has always been your life-long desire to be a "big time" sports agent. Your dream took a long step toward reality when Buba Jones, one of your long time high school friends, called you from Birmingham, Alabama and asked you to represent him in his upcoming contract negotiation with the Detroit Lions. Before you undertake his representation are there any steps you must take to qualify as a sports agent? Must you register to comply with any regulator schemes?