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**MLBPA REGULATIONS GOVERNING PLAYER AGENTS AND DISPUTE
RESOLUTION PROCEDURES**

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For the last several years I have been one of three (3) neutral arbitrators designated by the MLBPLA to hear disputes between Players and Agents in Baseball. I am going to discuss MLBPA regulations governing player agents, including their recent expansion to cover recruiters and providers of Client Management Services, and talk about the resolution of these disputes through the arbitration process.

Background of Regulations

In about 1985, baseball, hockey and basketball decided that they needed to regulate agents. Some egregious abusive behavior by certain agents towards players had come to light. Also, Agents were entering into agreements with players from which players could not withdraw from for a period of 3, 4 and 5 years. The Unions entered the picture to regulate Agents. The central principle of regulating player agents came to be to protect players by allowing them to end their relationships with any agent at any time – on the spot. At the same time, as a kind of quid pro quo, the

player would be obligated to pay the agent for any past services rendered, including fees for contracts which extended into the future.

From 1986 and to the present, plenty of loopholes arose. The unions' regulations have become increasingly comprehensive, as other agent abuses have arisen. Moreover the unions are concerned that the relatively low level of cases of Players challenging Agent behavior suggests that players are reluctant to come forward to complain of impermissible behavior in light of the close relationship that develops between Agents and Players.

What is the practical reason for why we have agents in the sports industry? Why don't the unions represent the players for pay and working conditions?

The problem for sports unions in representing their bargaining unit, as opposed to other labor organizations is that every player may wish to negotiate had different pay and other work conditions from other members of the team. The union couldn't negotiate individual contracts for every single player with every team. There would be obvious conflicts within and between teams. Today, major agents may have seven players on one team which can create its own conflicts. Imagine if the union were to negotiate the contracts for all players. There would be divisions and

conflict between players on every single team each with its own salary constraints. As Donald Fehr, former Executive Director of the MLBPA has said, "If we were to honestly bargain collectively on behalf of all players, not simply saying that we will arbitrarily define a four year shortstop as worth X dollars, you probably would have to collectively bargain each salary, player, by player, by player. The best guess is that you probably would not do the job as well as the individuals representing those players. That is why it is important to have agents around."

Legal Authority

What is the legal source of authority for union regulation of Agents?

The Agents are performing some of the representation functions held by the unions as the "exclusive representative of all the employees...for collective bargaining of such in respect to rates of pay, wages, hours of employment or other conditions of employment," under Section 9 (a) of the National Labor Relations Act. Under the NLRA, the teams "may not bargain with any agent other than one designated by the union and must bargain with the agent chosen by the union."

As the MLBPA Regulations note, "Labor organizations like the MLBPA are authorized to adopt and enforce reasonable rules and

regulations...that further these legitimate interests.” The parties’ collective-bargaining agreements provide that the union may regulate the conduct of player agents. The Basic Agreement between the MLBPA and the Clubs provides that:

“A player may designate an agent to conduct on his behalf...negotiations...with any club, provided such agent has been certified to the Clubs by the Association, as authorized to act as a Player Agent for such purposes.”

The MLBPA describes its role as one of “making judgments about whether ...to certify or continue to certify individuals to serve in a fiduciary role as player agents.”

However, the union can only guarantee that the agent is qualified to represent a player. The union does not however stand behind the agent or his actions in a particular case.

League Involvement

At first, the leagues approved of the unions performing this agent regulatory function. They liked the idea of regulating player agents. However the leagues wanted input into the process. The unions rejected the league’s involvement in reviewing or in any way determining the regulations. In fact, there are potential anti-trust problems if the Clubs were

involved with the regulation of Agents. The 8th Circuit has noted, in rejecting a challenge to the union's regulations of Agents, that the Union was engaged in unilateral action when it regulated Agents, as opposed to a "combination" under the anti-trust laws. The clear implication of that decision was that management had to stay out of the business of regulating the agents or they could face antitrust problems.

Elements of Regulation

There are four essential elements to the regulations:

1. The application form and approval process.
2. Standards of conduct including the duty of loyalty and fiduciary duties. These obligations are quite broadly defined in the Regulations.
3. A continuing duty to disclose information to the union.
4. A dispute-resolution process providing for due process.

Central to the protection of the players is that representation agreements must be in writing; that only agents who are certified may represent players; and that in each case a player must sign a player-agent designation form, duration of the Representation agreement (one year) and no limits on the size of the fee. If an agent is not certified to represent a particular player, any representation agreement is null and void ab initio.

There are legal issues related to the expansion of the Regulations to cover financial services or agent-agent disputes.

Dispute Resolution Process

The union would investigate applications. The union would determine if a player agent applicant is “not qualified”. If it made such a negative finding it would provide for a hearing and an impartial determination.

Similarly, if Agent B bamboozled a Player to leave Agent A, and the Player withheld Agent A’s negotiated fee, Agent A could file a grievance against the Player. The key to the dispute-resolution process is that the parties would not end up in court. Rather they would always go to impartial arbitration before qualified arbitrators. The underlying virtue of this was that it was inexpensive, faster than court, and that it was final and binding. There are no endless appeals.

The two main areas that can be brought to the arbitrators are:

1. Challenges to the MLBPLA to initially certify or subsequently decertify and other disciplinary decisions.
2. Disputes between Players and Agents (or Applicants)

3. Disputes between Agents and other Agents related to representation, the duty of loyalty (Section 4(L) (1) of the Regulations) or restrictive covenants.

Agent – Agent Disputes

With regard to Agent – Agent disputes (number 3 above) it is clear that the union can delegate its representation functions with regard to things like pay and add-ons. The question is whether the role of financial advisors to players and agent-agent disputes are legitimate extensions of MLBPA Regulations. Would those areas be included under Section 9(a) of the NLRA which empowers the union to represent players with respect to wages, hours and working conditions or are they too attenuated to be regulated? Could agents file antitrust actions if the union sought to regulate their actions beyond their 9(a) functions? The agents also raised other concerns, including that the union could be attempting to regulate attorneys, also beyond their 9(a) authority. But so long as these functions directly related or intertwined with typical agent representation functions, and relate to 9(a) issues, they are appropriate.

The agents play a role beyond their negotiated activities for players. They are very involved with the players and get to know them well. They are an important means of communication for the union. Thus the unions often will have meetings once or twice a year with the agents to communicate what is happening on for instance the collective-bargaining front. The players look to the agents based on their relationships to be advised what is happening in collective bargaining and what they should do should there be a strike or a lockout. And the unions are fully aware of this.

Amendments to Regulations

The MLBPA amended their regulations as of October 1, 2010. There were several new areas of regulation:

1. The regulations were “extended to regulate the conduct and to require the certification of individuals who, on behalf of Player Agents, Recruit players or provide Client Maintenance Services to players.” The Regulations explain that “20 years of experience under the Regulations have demonstrated that the recruitment of players for Player Agents and the providing of client maintenance services, to players for Player Agents are part and parcel of the representation process, with such individuals frequently being the

principle contact a player has with the agency representing him. These are, therefore, two areas where effective regulation of Player Agents requires broader and more effective controls....a players initial selection of an agent, or his subsequent decision to change agents, is often the result of Recruiting by someone other than the agent, and often the recruiter will not see himself as directly accountable to the Players as a collective whole, or the MLBPA on their behalf. Similarly, a Players continuation as a client of an agent is often the result of interaction with someone providing Client Management Services who is similarly lacking in direct accountability to Players or the MLBPA. That lack of accountability only serves to undermine the fiduciary obligations to Players that the regulation of Player Agents is designed to promote and monitor.” Thus Recruiters and Financial Services people must be certified by the MLBPA and must be designated by a Player.

2. The agents must now inform the union of any contacts with players who they do not represent. Section 5 (A) (11).

3. With regard to access to cases that have been in arbitration, generally they are confidential however if a player or agent has a case before the dispute-resolution procedure it may have access to prior arbitration cases. Section 7 (A) (18).

4. There are “non-compete” provisions in the regulations. These types of regulations may at one time have been unwelcome to the union, basically because the unions wanted players to have maximum freedom of choice in choosing their agent. However, now, if the non-compete agreement is “reasonable” and the MLBPA is informed of it, it may be enforced. These provisions are contained in Section 4L of the regulations. They are subject to the arbitration provisions of the Regulations.

Due Process

The kind of due process afforded by the MLB dispute-resolution procedures requires that there be a grievance filed, a notice of claim, that there be an answer, allowance of counter claims and replies by the Grievant, limited discovery, and the exchange of witness lists and exhibits prior to the hearing and arbitration before a neutral arbitrator..

As a general matter in baseball the hearing is kept somewhat informal. Nonetheless, opening arguments are given and there are witnesses who are examined and cross-examined; final arguments or briefs are given. Beyond this there is an attempt to keep the hearing informal. The arbitrator is experienced in litigation, unlike a jury, and is generally liberal with regard to the types of evidence admitted. Hearsay may be admitted although the arbitrator gives appropriate consideration to the fact that it was not live testimony subject to cross-examination. A court reporter and transcript are used. The arbitrator swears witnesses. Also, witnesses may testify by telephone.

Role of MLBPA in Cases

Importantly the MLBPA is a party to the proceeding in order to protect the interests of the entire bargaining unit of players. Although their role is somewhat limited the union has the right to examine and cross-examine witnesses, to call witnesses and to present other evidence and to file a brief. The sponsoring organization – union – in each sport may take a more active or less active approach. In baseball, the union is very helpful to the arbitrator in understanding the collective-bargaining agreement and the regulations. However the union is reluctant to play the role as advocate for either side, but at times will contribute their opinions.

Conclusion

I think the Agent regulations have been an effective mechanism for preventing and deterring abuse. The reporting requirements have expanded over time. Of course, for the unions to affirmatively police its regulations would take a lot of resources. Instead, the threat of decertification is probably the best deterrent to bad behavior, since it has such a devastating impact on the livelihood of agents. Nonetheless, there is a concern that relatively few cases are brought, and suspect a reluctance of players to bring actions against agents. The development of the regulatory scheme is thus a continuing and improving process.

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