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Liability Redefined: The Application of Agency Law to an Athletic Booster's Relationship with an NCAA Member Institution

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LIABILITY REDEFINED: THE APPLICATION OF AGENCY LAW TO AN ATHLETIC BOOSTER'S RELATIONSHIP WITH AN NCAA MEMBER INSTITUTION

Jennifer Lee*

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INTRODUCTION

The National Collegiate Athletic Association (NCAA) operates on a platform that draws a distinction between professional and collegiate athletics, also known as amateurism. For student athletes to maintain their amateurism status, the NCAA forbids student athletes from receiving

additional payments or benefits beyond education-related expenses, such as tuition, room and board, and cost of attendance. Athletic boosters are prevalent across college campuses nationwide and make generous contributions to university athletic programs. However, the affluent financial status of many of these boosters, as well as their close relationship with the university, often leads to manipulation of the system. Athletic boosters use their money and influence to sway universities in their hiring decisions and to persuade prospective student athletes, or current student athletes, to attend a particular institution. Third-party boosters are the most problematic because they are beyond the university's control.

This Article draws parallels between agency law and the role of athletic boosters in a university context. This Article suggests that universities should not be held liable for the actions of third-party boosters unless the university had knowledge of the booster's conduct or lacked an adequate system of internal controls.

The same conclusion is drawn in a criminal context, except the scope of liability is narrower. If either a booster affiliated with the university or a third-party booster engages in criminal activity, the booster subjects himself or herself to punishment individually under the criminal statutes of the state in which the university resides. Further, even if the university had knowledge of the criminal acts of a booster, there is no duty to report the booster so the university should still not be held liable. By contrast, for non-criminal behavior, the university should only be held liable for boosters affiliated with the institution, unless the knowledge requirement is met or the university has a flawed system of internal controls.

The ultimate issue then becomes whether a university should lose all athletic perks, such as post-season play and scholarship money? And should the answer change when a booster with a close relationship to the university is either successful or unsuccessful in soliciting benefits from student athletes without the university's knowledge? This Article also seeks to address the question of whether holding a university liable for the criminal acts of its employees under NCAA rules is the same as holding them liable for amateurism violations by boosters.

A major problem with third-party boosters is that the NCAA lacks subpoena power and does not have jurisdiction to charge boosters. The NCAA's only right to recourse is through the institution itself. This is an inefficient solution because the booster, the one that made the fake contract and is responsible for the sanctions, walks away without punishment and the innocent university is subject to sanctions. Public

policy dictates that it would be unfair to hold the university and all the innocent athletes liable for a third party's actions; these innocent individuals would suffer the consequences of misconduct, with which they had nothing to do. While some state laws attempted to regulate the unethical conduct of boosters, these laws are inadequate for resolving the issue of booster liability as a heavy burden on the university. These laws are also the subject of much critique because they allow the university to benefit twice. First, the university obtains valuable recruits from the booster's efforts, and second, gets to recover for the penalties imposed. However, the university does not completely recover because they will only get a monetary award which does not make up for harsh penalties, such as loss of post-season play. The university is also forced to incur more litigation which involves extensive time and money. Further, universities may be hesitant to sue a booster for fear of terminating that relationship because of the on-going benefits they provide. The best solution would be to sue the booster directly. The NCAA can obtain personal jurisdiction over the booster through the states' long-arm statutes or in the alternative, by suing the university but requiring mandatory joinder of the booster in the lawsuit based on Federal Rule of Civil Procedure 19(a), or state equivalent.

I. OVERVIEW OF THE NCAA AMATEURISM PLATFORM

The NCAA is an organization that regulates collegiate athletics. Member institutions must abide by the NCAA's regulations pertaining to the eligibility requirements of student-athletes, as well as subject themselves to the NCAA's rule enforcement policies.¹ Promoting amateurism is at the core of the NCAA's mission.² The NCAA seeks to maintain a clear distinction between intercollegiate athletics and professional sports in an effort to prevent the exploitation of student-

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¹ J. Winston Busby, *Playing For Love: Why the NCAA Rules Must Require a Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135, 145 (2012) ("Under NCAA rules, the student-athletes, the universities, university employees, and those 'representing the institution's athletics interests' must comply with the NCAA 'constitution, bylaws, and other legislation of the Association.'").

² 2019-2020 NCAA DIVISION I MANUAL const. art II, 10 (2019) ("Student-athletes shall be amateurs in an intercollegiate sport . . .").

athletes³ by professional organizations and to even the playing field among participating member institutions.⁴ As such, the NCAA forbids student athletes from accepting any form of additional benefits beyond the permitted scholarship which includes tuition, room, board, books, and cost of attendance.⁵ Athletes who accept such impermissible benefits run the risk of losing their amateurism status forever.⁶ The NCAA also strives to preclude unethical recruiting procedures. Boosters who provide these prohibited additional benefits to student athletes as a technique to persuade the student to attend a particular university is one example of many unethical recruiting practices.

In determining penalties when a violation of the NCAA bylaws occurs, the NCAA considers whether the university was involved or if the violation independently affected an individual student athlete.⁷ Examples of potential violations include distributing a salary, gift, or discounted services throughout the recruitment process or after a student athlete enrolls at the university.⁸ Once the NCAA investigates a potential violation and concludes that the violation did in fact transpire, the NCAA may penalize the institution by placing it on probation, ordering a reduction in the number of scholarships available, banning a sport from post-season play, striking wins from a sports team's record, or forbidding the university from televising competitions.⁹

³ *Id.* (“[S]tudent-athletes should be protected from exploitation by professional and commercial enterprises.”).

⁴ *Id.*

⁵ PAUL C. WEILER, ET AL., SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 720 (W. Acad., 6th ed. 2019) (explaining the NCAA’s opinion that these expenses are related to education and therefore, do not compromise amateurism).

⁶ *Id.* at 818 Note that losing one’s amateur status as a result of accepting additional benefits applies to all universities across the country. *Id.* For example, if a tennis player at Mississippi State accepts benefits, they will not only lose eligibility to play at Mississippi State, but they can also compromise their eligibility to compete at all other NCAA institutions across the U.S. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

II. ATHLETICS BOOSTERS' INFLUENCE ON COLLEGIATE SPORTS

A. THE ROLE OF ATHLETIC BOOSTERS

Athletic boosters generate significant contributions to collegiate athletic programs all across the country and exert a large amount of influence on the operation of these programs. For example, boosters provide monetary donations “to influence hiring decisions, to claim naming rights, or even to secure the opportunity to run on the field with their institution's football team.”¹⁰ Unfortunately, while athletic boosters do positively impact collegiate athletics, they frequently engage in unethical conduct that violates NCAA regulations and compromises the NCAA's objective of promoting amateurism in collegiate athletics. In accordance with the NCAA's amateurism platform, boosters cannot provide student athletes or prospective recruits with special treatment. Boosters have a unique relationship with the university, and their insider status puts them in a special position to abuse their “power” or influence, by persuading a university to violate NCAA rules.¹¹ It is human nature that when universities are presented with generous donations and special perks, the individuals in charge of the athletics operations easily succumb to the booster's demands.

The NCAA bylaws dictate that its member institutions “control and are responsible for the conduct of their intercollegiate athletics programs.”¹² As such, a university may be liable for the actions of an outside individual if that individual “promotes, assists, or enhances the athletics interests” of the university.¹³ Therefore, the NCAA mandates that member institutions take proactive steps to monitor and control the behavior of its “representatives of athletics interests.”¹⁴ While NCAA rules explicitly put universities in charge of boosters' conduct,¹⁵ theoretically it

¹⁰ Sean Sheridan, Comment, *Bite the Hand That Feeds: Holding Athletics Boosters Accountable for Violations of NCAA Bylaws*, 41 CAP. U. L. REV. 1065, 1076 (2013).

¹¹ *Id.*

¹² *Id.* at 1079.

¹³ *Id.*

¹⁴ *Id.* (“[A] representative of athletics interests’ can be an individual, independent agency, corporate entity, or other organization... once a party has been deemed a ‘representative of athletics interests,’ such party retains its status as a booster indefinitely.”).

¹⁵ *Id.* at 1079–80 (“Under the definition supplied by the NCAA, . . . [a]n institution is responsible for such a person or entity when a member of either the

is the boosters who often control the universities' conduct, using their financial status as leverage.

B. REGULATION OF BOOSTER CONTACTS WITH

PROSPECTIVE AND ENROLLED STUDENT ATHLETES

The NCAA bylaws mandate that “[r]epresentatives of an institution's athletics interests . . . are prohibited from making in-person, on- or off-campus recruiting contacts, or written or telephonic communications with a prospective student athlete or the prospective student athlete's relatives or legal guardians.”¹⁶ Additionally, representatives are prohibited from providing prospective student athletes or their friends or relatives with any benefit, unless the benefit is available to all of the university's prospective students and families.¹⁷

Current student athletes are also forbidden from accepting “any extra benefit,”¹⁸ which is defined as “any special arrangement by . . . a representative of the institution's athletic interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation.”¹⁹ Again, however, if there are benefits that are available to the university's entire student body, then student athletes are permitted to receive these benefits as well.²⁰

institution's executive athletics administration or athletics department knows or should know that such party: (a) Has participated in or is a member of an agency or organization . . . ; (b) Has made financial contributions to the athletics department or to an athletics booster organization of that institution; (c) Has been requested by the athletics department staff to assist in the recruitment of prospective student-athletes or is assisting in the recruitment of prospective student-athletes; (d) Has assisted or is assisting in providing benefits to enrolled student-athletes or their families; or (e) Is otherwise involved in promoting the institution's athletics program.” This definition indicates that knowledge is indeed a requirement for holding a university liable, as well as active participation in the misconduct by the university. Therefore, it follows that universities should not be held responsible for the conduct of third-party boosters of whom the university had no knowledge of and which behavior the university took no part in.).

¹⁶ *Id.* at 1080.

¹⁷ *Id.* at 1080–81.

¹⁸ *Id.* at 1081.

¹⁹ *Id.*

²⁰ *Id.*

C. PUNISHMENTS IMPOSED ON ATHLETIC BOOSTERS FOR
NCAA VIOLATIONS

Typically, state courts classify the relationship between a university and student athlete as contractual in nature.²¹ As such, NCAA member institutions are afforded a common law action for tortious interference with contract against a party who attempts to infringe upon the university's contracts with their student athletes.²² To successfully argue a tortious interference with contract claim, a university is required to prove that "the conduct is intentional, it interferes with the contract—usually, but not always, requiring that the defendant caused the party to break the contract—the defendant knew that the contract existed, and the plaintiff suffered some sort of pecuniary damages."²³ Most of the time, universities are able to sue a booster under this cause of action since boosters are aware that student athletes "are likely to have a scholarship, financial aid agreement, or national letter of intent with their university" and that meddling with that contract would culminate in a breach of contract.²⁴

A major violation²⁵ of NCAA rules typically culminates in pecuniary damages against an institution.²⁶ Major violations typically coincide with a lack of institutional control. Most offenses by boosters are considered major violations.²⁷ When boosters administer benefits to enrolled student athletes, they "interfer[e] with the student-athlete's

²¹ *Id.* at 1087.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ WEILER, ET AL., *supra* note **Error! Bookmark not defined.**, at 761. Examples of major violations include providing cash payments to prospective or current student-athletes and entertaining these athletes with strippers as an incentive to play for a certain university. *Id.*; *see also* Sheridan, *supra* note **Error! Bookmark not defined.**, at 1081–82 ("A major violation is any violation that is not a secondary violation, specifically including violations that result in 'an extensive recruiting or competitive advantage.'" Examples of penalties for major violations include: "a two-year probationary period, reduced recruiting activities and financial aid awards, institutional recertification, and mandatory disciplinary action taken against institutional staff members that knowingly violated or ratified a major violation.").

²⁶ Sheridan, *supra* note **Error! Bookmark not defined.**, at 1087.

²⁷ *Id.* at 1082 ("That is, boosters generally commit infractions by providing PSAs or current student-athletes with impermissible or extra benefits to directly or indirectly obtain a significant recruiting advantage.").

contract with the university and are subject to suit.”²⁸ However, the boosters, who are responsible for the NCAA violations, receive minimal punishments compared to the harsh penalties imposed on universities.²⁹

The NCAA also found a lack of institutional control when secondary violations³⁰ occurred, such as when a booster affiliated with University of Southern California’s (USC) athletic department provided several prospective student athletes with free meals and entertainment.³¹ The NCAA subsequently punished USC with a four-year probation, a two-year ban on football postseason play, and a significant reduction in the number of football scholarships. The NCAA also required USC to return money received from competing in post-season tournaments “and from Pacific-10 Conference revenue sharing from post-season competition.”³² In comparison, the booster only received a letter from USC criticizing his behavior and prohibiting him from providing future football recruits with meals at his restaurant.³³

Similarly, Ohio State University was charged with “failure to monitor its football program” when two boosters, including one affiliated with the university’s athletic department, furnished several of its football players with additional cash payments.³⁴ As a result, the NCAA enforced a three-year probation on Ohio State’s football program, decreased the number of scholarships, and banned the football team from post-season play for a year.³⁵ The booster, on the other hand, was only disassociated from Ohio State for ten years.³⁶

NCAA rules and state statutes fail to dissuade boosters from violating NCAA regulations. The NCAA is only authorized to punish boosters through disassociation from a university’s athletic program,

²⁸ *Id.* at 1087–88.

²⁹ *Id.* at 1091.

³⁰ *Id.* at 1081 (explaining that a secondary violation is “a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit”).

³¹ *Id.* at 1089.

³² *Id.* at 1090.

³³ *Id.*

³⁴ *Id.* at 1091.

³⁵ *Id.*

³⁶ *Id.* In other words, the booster could not provide nor accept any benefits to or from the university and is prohibited from contacting any students or employees. *Id.*

which one scholar notes is “arguably meaningless.”³⁷ Further, the NCAA lacks subpoena power.³⁸ Universities heavily depend upon booster donations and are, therefore, hesitant to sue these boosters for tortious interference with contract.³⁹ Even though the booster’s actions negatively impacted the university, universities believe that the risk of filing suit and losing loyal contributors outweighs the benefits received from a damages award.⁴⁰ The lack of consequences attributed to boosters for their unethical conduct fails to deter booster misconduct from recurring.

Additionally, most states are devoid of legislation imposing penalties on boosters who violate NCAA rules. However, a few states enacted laws that permit a university to bring a cause of action against someone who violates an NCAA regulation. For example, a Texas statute allows a university to sue an individual who violates an NCAA rule if: “(1) The person knew or reasonably should have known that a rule was violated; and (2) The violation of the rules is a contributing factor to disciplinary action taken by the national collegiate athletic association against the institution or a student at the institution.”⁴¹ This statute also authorizes a regional collegiate athletic association to bring an action against a person under similar criteria.⁴² Oklahoma also passed a bill permitting the state’s public universities to sue a third-party actor who “engages or conspires with another to engage in conduct in violation of the rules of the governing authority that causes the educational institution to incur sanctions by the governing authority or other economic penalties or losses.”⁴³

³⁷ *Id.* at 1093.

³⁸ *Id.* at 1095 (“[A]lthough the NCAA may require cooperation from student-athletes, coaches, athletics department staff, and institutional personnel, the NCAA cannot compel cooperation from outside individuals, including boosters.”).

³⁹ *Id.* at 1093.

⁴⁰ *Id.*

⁴¹ *Id.* at 1088.

⁴² *Id.* However, NCAA employees, employees of a regional collegiate athletic association, employees of a member institution of the regional collegiate athletic association, and students at a member institution of the regional collegiate athletic association are not held liable if they are the ones who commit the violation. *Id.*

⁴³ S. B. 425, 57th Sess. (Okla. 2019). This bill is often criticized for allowing universities to “double dip.” In other words, the university gets to enjoy all the benefits that a booster brings to its athletic program and then gets to sue that booster when he gets caught by the NCAA. *Id.*

III. OVERVIEW OF AGENCY LAW

“Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”⁴⁴ An agent is charged with either actual or apparent authority. An agent has is given actual authority when the principal explicitly authorizes the agent to “take action on the principal’s behalf.”⁴⁵ Apparent authority is where a principal indicates to a third party that the agent has the power to act on their behalf with legal ramifications, and the third party relies in good faith upon such authority.⁴⁶ In other words, the third party reasonably believes that the agent has such authority based on the representation the agent made to the third party. For example, a principal may give an agent business cards even though they have no authority to make decisions or contracts. A reasonable person would think that someone who produces a business card has the authority to act on behalf of the company.

The difference between an employee (agent) and an independent contractor hinges on the employer’s ability to control. At common law, a person is an employee if the employer had a right to “direct the manner of performance of the employee’s duties.”⁴⁷ In other words, the employer is able to direct what the employee does, as well as how it will be done. In contrast, an employer lacks this element of control over an independent

⁴⁴ RESTATEMENT (THIRD) OF AGENCY: AGENCY DEFINED § 1.01 (Westlaw 2006).

⁴⁵ RESTATEMENT (THIRD) OF AGENCY: CREATION OF ACTUAL AUTHORITY § 3.01 (Westlaw 2006). *See also*, RESTATEMENT (THIRD) OF AGENCY: ACTUAL AUTHORITY § 2.01 (Westlaw 2006). (“An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.”).

⁴⁶ RESTATEMENT (THIRD) OF AGENCY: APPARENT AUTHORITY § 2.03 (Westlaw 2006). Creation of Apparent Authority. Note that apparent authority renders a principal liable for its alleged agent’s actions, even though the agent was not authorized to act in such a way, provided the third party reasonably believed the agent did have the authority to act. *Id.* *See also*, RESTATEMENT (THIRD) OF AGENCY: APPARENT AUTHORITY § 2.03 (comment). While third party boosters are not agents, this definition applies to individuals who appear to be agents even though they are not. *Id.*

⁴⁷ Patricia Davidson, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 207 (1984).

contractor.⁴⁸ An employer can only direct the result of the independent contractor's work, "exercising little or no control over the execution of the job."⁴⁹

The relationship of a rogue booster to an NCAA institution is similar to an independent contractor–employer relationship. Unlike an employee, a rogue booster operates according to his own procedures; he runs an independent business enterprise. The rogue booster is not technically affiliated with the institution and functions as he pleases. Universities have no control over what the booster does, such as paying a prospective recruit cash money to attend a particular institution or inviting a recruit to elaborate parties, or how the booster goes about doing so, such as slipping the recruit money in a dark parking lot. However, universities can control the result of the booster's activities. For example, the university can report the booster's conduct to the NCAA or declare the recruit or student-athlete who accepted the benefits ineligible from competition.

According to the doctrine of *respondeat superior*, an employer is liable for the torts of its employees while they were "acting within the scope of their employment."⁵⁰ Rogue boosters should not be recognized as employees. Therefore, it follows that universities should not be held liable for the booster's tortious behavior. This is true even when both rogue boosters and boosters affiliated with the institution commit criminal acts because criminal behavior is not within the course and scope of employment. In other words, it is not part of a booster's job duties to engage in criminal conduct.

In contrast, boosters who maintain a close relationship with the university would be considered employees because the university has the ability to control what they do, how they do it, and the result of their actions. Thus, the doctrine of *respondeat superior* would apply in a situation in which the university booster commits tortious conduct.

Additionally, "[i]f a principal is unjustly enriched at the expense of another person by the action of an agent or a person who appears to be an agent, the principal is subject to a claim for restitution by that person."⁵¹ This concept is also applicable in the university-booster context. For example, university A is unjustly enriched at the expense of university B, such as obtaining a star athlete over university B due to the booster's impermissible influence, by the action of a person who appears to be an

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006).

⁵¹ RESTATEMENT (THIRD) OF AGENCY: RESTITUTION OF BENEFIT § 2.07 (AM. LAW INST. 2006).

agent, the booster. As a result, university B should be subject to a claim for restitution by the NCAA on behalf of university A.⁵² In the sports law framework, restitution would look a little different, however. The disadvantaged institution would not directly recover; instead, the NCAA would impose sanctions on the offending institution. This indirectly benefits the university who was injured because a post-season ban, loss in the number of scholarships available, athlete ineligibility, etc. would decrease the competition between the two institutions as well as dispose of any recruiting advantages. For example, suppose Mississippi State and Ole Miss competed for a prospective football recruit and the recruit chose Mississippi State due to additional cash payments he received from a university booster. This violation was discovered and the NCAA banned the Mississippi State football program from post-season play. If Mississippi State had a better record than Ole Miss but was banned from post-season play due to a recruiting violation, Ole Miss would then redeem their chance to play in a bowl game.

The justification for establishing vicarious liability hinged on the notion that “there are instances when the conduct of one person is so closely controlled by or related to another individual that it makes sense to link them for purposes of assessing liability.”⁵³ This is comparable to the public policy considerations behind why some states hold parents vicariously liable for the misconduct of their children, reasoning that it is the parents’ responsibility to supervise their child.⁵⁴ As discussed above,

⁵² In fact, this is the current NCAA procedure in place. When a booster commits a recruiting violation, the NCAA sanctions them, indirectly benefitting all other competing universities. Imposing sanctions on a university for booster misconduct is justified if the university had knowledge of the booster’s actions, participated in this misconduct/acted as an accomplice of the booster, failed to implement a monitoring and reporting system, or the booster was affiliated with the university, invoking employment status. However, “restitution” for institutions indirectly disadvantaged through NCAA sanctions on the offending institution should not be allowed when a third-party booster is responsible for the recruiting violation and the university was without knowledge but had established an adequate system of internal controls.

⁵³ *Three Conditions Required for Respondeat Superior*, THE LAW DICTIONARY, <https://thelawdictionary.org/article/three-conditions-required-respondeat-superior/> (last visited Nov. 22, 2019); *see also*, 27 AM. JUR. 2d Employment Relationship § 362 Intentional or Criminal Acts (“...an employer is generally vicariously liable for an employee’s intentional tort when the act, although not specifically authorized by the employer, is closely connected with the servant’s authorized duties”).

⁵⁴ THE LAW DICTIONARY, *supra* note 53.

independent contractors are not closely controlled by employers. In fact, employers have minimal control over what they do. Independent contractors work under their own direction and without supervision by the party who hired them.⁵⁵ Since vicarious liability is premised on the concept of control, a university should not be held liable for the actions of third-party boosters as a university maintains no control over what boosters do. They work under their own direction and without supervision by the university. They provide money and benefits to student-athletes out of pocket, not on behalf of the institution using university funds.

Further, third-party boosters do not have to show up to work at a certain time or for a certain number of days. They can choose to meet up with student-athletes according to their own schedule. The difficulty, or rather impossibility, of meeting the requirements for proving an employer is vicariously liable is further verification why universities should not be held liable for the conduct of third-party boosters.

The party suing an employer for the actions of its employee must prove that the individual was an employee when the harm ensued, the employee acted within the scope of his or her employment,⁵⁶ and the employee's actions benefitted the employer.⁵⁷ A third-party booster's actions benefit the university, but the first two prongs of the test cannot be satisfied. By law, independent contractors (third-party boosters) are not categorized as employees, and therefore, third-party boosters cannot act within the scope of their employment given their employment status is nonexistent.

Moreover,

[a] person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third

⁵⁵ *Id.* Independent contractors typically create their own schedules and provide their own equipment. *Id.*

⁵⁶ *Garnett v. Remedi Seniorcare of Va., LLC*, 892 F.3d 140 (4th Cir. 2018) (“As a general matter, an employer can only be held responsible for an employee's misconduct if that conduct falls within the scope of employment. An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control”); *see also*, 27 Am. Jur. 2d Employment Relationship § 362 Intentional or Criminal Acts (“To be within the scope of employment, a violent act must be committed within the scope of general authority of the employee, in furtherance of the employer's business, and for the accomplishment of an objective for which the employee was hired”).

⁵⁷ THE LAW DICTIONARY, *supra* note 53.

party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal, unless (1) the principal or purported principal ratifies the act as stated in § 4.01; or (2) the person who purports to make the contract, representation, or conveyance gives notice to the third party that no warranty of authority is given; or (3) the third party knows that the person who purports to make the contract, representation, or conveyance acts without actual authority.⁵⁸

Similarly, a rogue booster who acts without authority to act on behalf of the university to bind an athlete to a contract and forms a contract with a prospective recruit or student athlete “gives an implied warranty of authority” to the prospective recruit or student athlete.⁵⁹ As such, the rogue booster should be held liable to the prospective recruit or student athlete if they are declared ineligible for college athletics as a result. However, if the university authorizes the booster to engage in such behavior, the university should be held liable. If the booster gives the prospective recruit or student athlete notice that they are unauthorized to make the transaction, i.e. giving cash payments, the prospective recruit or student athlete assumes the risk of losing eligibility.

Furthermore, the Supreme Court in *Burlington Industries, Inc. v. Ellerth* held that:

(1) [an] employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; (2) in those cases in which employee has suffered no tangible job consequences as result of supervisor's actions, employer may raise an affirmative defense to liability or damages; and (3) affirmative defense requires employer to show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive

⁵⁸ RESTATEMENT (THIRD) OF AGENCY: AGENT’S IMPLIED WARRANTY OF AUTHORITY § 6.10 (AM. LAW INST. 2006).

⁵⁹ *Id.*

or corrective opportunities provided or to avoid harm otherwise.⁶⁰

This situation is comparable to (1) a university being held vicariously liable for the actions of its boosters creating a “hostile” environment by engaging in unethical recruiting practices; (2) In situations where a prospective recruit or already enrolled student athlete does not actually accept the benefits, the university has suffered no consequences as a result of the booster’s actions since they were unsuccessful so sanctions cannot be imposed, and the university may raise a defense to liability or damages (sanctions being imposed); (3) The university’s defense would require them to show that it exercised reasonable care to prevent (through internal policies and procedures and a system of monitoring and reporting) and promptly correct any unethical recruiting behavior⁶¹ (duty to report to NCAA).

In the *Burlington*⁶² case, the court also held that an employer can be held “liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.”⁶³ The Court further stated that

although [the] supervisor's sexual harassment is outside the scope of employment because the conduct was for

⁶⁰ *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). The Supreme Court in *Burlington* also ruled that the employer has an affirmative defense to vicarious liability if the “employee has not suffered tangible job consequences.” *Id.* In a situation involving an NCAA violation by a third-party booster, the university would have an affirmative defense if they “exercise reasonable care to prevent and correct promptly” any unethical behavior. *Id.* In other words, the university could assert a defense that they had a reasonable monitoring and reporting system in place to catch behavior not in compliance with NCAA regulations. *Id.* Also, as seen in the Alabama case, whenever the university is cooperative and promptly corrects any misconduct, the NCAA is inclined to decrease the severity of the punishment. *Id.* Further, the university can assert a defense if the third-party booster also failed to avoid harm by abiding by NCAA rules and “failed to take advantage of any...corrective opportunities.” *Id.* Reporting the violation to the appropriate university staff member is an example of a corrective opportunity. *Id.* The university must have policies and procedures in place for reporting NCAA compliance issues. *Id.* As mentioned above, an adequate system of internal controls should relieve the university of liability for third-party booster’s actions, provided the university is without knowledge of the booster’s behavior. *Id.*

⁶¹ In situations where the university has promptly taken corrective action, such as in the Alabama case, sanctions were mitigated.

⁶² *Burlington Indus.*, 524 U.S. 742.

⁶³ *Id.* at 756.

personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.⁶⁴

To begin, a rogue booster is not an employee, so theoretically, the university would never be held liable. However, as the second part of the *Burlington* Court's opinion states, although the boosters' actions are outside the scope of employment, either because they are a third-party and thus, not employees or because despite the fact that they are affiliated with the university, their conduct was for the university's own benefit, the university can be liable if its own negligence (lack of institutional control) is the cause of an amateurism violation; the university is liable with respect to boosters if it knew or should have known, through an internal control system, about the conduct and failed to stop it.

IV. WHETHER UNIVERSITIES SHOULD BE HELD LIABLE FOR AMATEURISM VIOLATIONS BY BOOSTERS

Universities should be held vicariously liable for amateurism violations by boosters if the booster is affiliated with the university because they meet the legal definition of "employee."⁶⁵ Members of university booster clubs are affiliated with the university and indulge the university with generous donations and promotion of its athletic program.⁶⁶ Further, the university has the ability to control the boosters'

⁶⁴ *Id.* at 759.

⁶⁵ THE LAW DICTIONARY, *supra* note 53 ("An employee is a person who works in the service of another under express or implied contract for hire, under which the employer has the right to control details of work performance"). Boosters "work" for the university in the sense that they make financial contributions and diligently promote the institution's athletic program. The university has the right to control certain aspects of their work performance based on the NCAA bylaws. *Id.*

⁶⁶ NCAA, *Role of Boosters*, NCAA ENFORCEMENT, <https://www.ncaa.org/enforcement/role-boosters> (last visited "Month" "Day," "Year"). Depending on the severity of the punishment, public policy dictates, due to the nature of the relationship between the university and booster, that it is justifiable for the university to be held liable for tortious conduct on behalf of the employee (booster) because the university has deeper pockets. For example, in the Penn

work through the university athletic department's rules and regulations.⁶⁷ For example, Michigan Tech allows boosters to provide occasional meals for student athletes but restricts the boosters from giving out other additional benefits.⁶⁸ Boosters provide a benefit to the institution and internal controls should be installed to monitor them.⁶⁹

In contrast, universities should not be held liable for amateurism violations by rogue, third-party boosters unless they had knowledge of the booster's existence.⁷⁰ Holding otherwise would subject the university to an undue burden.⁷¹ Third-party boosters are analogous to independent

State case, the NCAA imposed a \$60 million fine on the institution. If damages against a university employee are expected to accumulate in such large amounts, the victim/s should be able to pursue a cause of action against the university since the university is responsible for maintaining oversight of its employees. However, if feasible, the individual responsible for the tort should be sought after first. Associated Press, *NCAA: State can keep Penn St. fine*, ESPN (Sept. 8, 2014), https://www.espn.com/college-football/story/_/id/11488374/ncaa-rules-state-keep-60-million-penn-state-fine.

⁶⁷ *Guidelines for Representatives of Athletic Interest*, NCAA BYLAWS, <https://www.ncaa.org/sites/default/files/Booster%20Guidelines%20with%20definitions.pdf> (last visited Apr. 12, 2020).

⁶⁸ Michigan Tech, *NCAA Rules and Regulations Guidebook*, <https://www.ncaa.org/sites/default/files/mf-f-michigan-tech-booster-club.pdf> (last visited Nov. 16, 2019).

⁶⁹ *Garland ISD Booster Club Guidelines*, GARLAND INDEP. SCH. DISTRICT, <https://www.garlandisd.net/file/10230> (last visited Apr. 12, 2020).

⁷⁰ NCAA DIVISION I MANUAL art. 6.4.1 (2019), <https://web3.ncaa.org/l/sdbi/reports/getReport/90008>. An institution's 'responsibility' for the conduct of its intercollegiate athletics program shall include responsibility for the acts of an independent agency, corporate entity (e.g. apparel or equipment manufacturer) or other organization when a member of the institution's executive or athletics administration, or an athletics department staff member, has *knowledge* that such agency, corporate entity or other organization is promoting the institution's intercollegiate athletics program. *Id.* at 43 (emphasis added).

Section 6.4.2 likewise applies this provision to individuals, subjecting the university to liability for the actions of all third parties who engage in contacts with a possible recruit. *Id.*

⁷¹ Sheridan, *supra* note **Error! Bookmark not defined.**, at 1094. A third-party's actions are beyond the university's control. As such, third-parties fall outside the legal definition of an "employee." Provided a reasonable monitoring and reporting system is in place at the university, there is no justification for holding the university liable because it is impossible to uncover every outside individual's unethical conduct, especially given the fact that most university compliance departments consist of 3.5 members as compared to 500 enrolled student athletes. The burden placed on universities to discover this behavior is too great compared to the potential consequences of failure to detect. The worst that

contractors, rather than employees. The work these boosters do is unregulated by the university because often the university is not even aware of their existence. Additionally, these boosters were not given express or implied authority to act on behalf of the university in their recruitment efforts. However, if the university had knowledge of the booster and his or her illegal activity, the university may be held liable for failure to report such action.

Every university should have an adequate system of internal controls to act as a safeguard to protect against potential NCAA violations.⁷² While a system of monitoring and reporting is not infallible,⁷³ the fact that such a system is in place and has a reasonable likelihood of detecting misconduct should be sufficient to avoid a penalty from the NCAA for failure to detect the violation.⁷⁴ A reasonable monitoring and

would happen is a prospective recruit chooses to attend the university the booster is advocating on behalf of. While another university lost out due to lack of similar resources (or failure to utilize such resources in an effort to comply with NCAA bylaws), public policy rationale dictates that this is just another form of competition. Perhaps the NCAA should encourage this type of competition and allow boosters to indulge athletes with additional benefits. However, that issue is beyond the scope of this comment.

⁷² NCAA DIVISION I MANUAL, *supra* note 67, at 3. The NCAA Constitution section 2.8.1 actually mandates that every university monitor its programs and report any NCAA violations to the NCAA. *Id.* An example of an adequate system of internal controls is a university compliance office that implements a monitoring system to track phone calls, expenses, meetings with potential recruits, and other recruitment practices by their coaches. The compliance department should also have a reporting system that highlights a hierarchy of whom to contact for what offenses and ensures an atmosphere of confidentiality. *Id.*; see also WEILER, ET AL., *supra* note **Error! Bookmark not defined.**, at 774 (noting that one issue in the Miami case was that the university had no formal policies or procedures for staff members to “seek guidance on compliance-related issues and report potential violations confidentially”). The University of Miami case is an example of how a lack of oversight led to a failure to detect telephone and text-messaging violations, which the NCAA attributed to lack of institutional control. However, a system that regularly compares phone logs and phone bills would prevent a situation like this from occurring.

⁷³ Sheridan, *supra* note 10, at 1094. The NCAA even confesses “that it is common for major investigations to uncover less than fifty percent of the actual cheating occurring at a given institution.” *Id.* Therefore, it is unrealistic for the NCAA to expect universities to uncover every single instance of booster misconduct.

⁷⁴ WEILER, ET AL., *supra* note 5, at 776. In fact, the NCAA implies this in the Miami case. The NCAA explained that the university is responsible for the

reporting system proved to protect the university from larger sanctions,⁷⁵ or rendered the university devoid of all sanctions in its entirety.⁷⁶ For example, the NCAA Committee on Infractions (COI) declined to issue the death penalty on Alabama for multiple violations, including paying football recruits, despite the fact that they were a repeat violator.⁷⁷ The COI held that Alabama had made “great strides” after the initial violation in creating “an environment of compliance.”⁷⁸ The COI even applauded Alabama for “its effective institutional control and proactive compliance,”⁷⁹ which is considered a mitigating factor when determining punishment.⁸⁰

In contrast, the NCAA imposed sanctions on the University of Miami due, in large part, to lack of institutional control, which is considered a Level I violation.⁸¹ This case involved a booster who was a “known representative of the institution’s athletics interests” and maintained a visible presence around the football and men’s basketball programs.⁸² In a situation like this, the NCAA would have a legitimate claim against the institution because they knowingly and intentionally

behavior of individuals in their athletics program if the university lacks adequate compliance measures, or if they do not educate the student athletes and coaches on compliance measures nor monitor the athletics program to protect against non-compliance. *Id.*

⁷⁵ *Id.* at 771. Universities are subject to further sanctions, in addition to the sanctions imposed for the violations themselves, if they are found at fault for failing to exert institutional control. *Id.*

⁷⁶ *Id.*

⁷⁷ Lisa Horne, *What the NCAA's "Improper Conduct" Means for USC and Its Sanctions*, BLEACHER REP. (Jan. 23, 2013), <https://www.bleacherreport.com/articles/1498955-what-the-ncaas-improper-conduct-means-for-usc-and-its-sanctions>.

⁷⁸ WEILER, ET AL., *supra* note 5, at 768.

⁷⁹ *Id.*

⁸⁰ *Id.* at 723. However, while demonstrating institutional control may lessen the punishment imposed on an institution, it has not always gotten the school off the hook. One example is the UNLV case. Even though the NCAA did not find a lack of institutional control, UNLV was still held liable for major violations of NCAA rules; the head basketball coach paid for a flight home for one of his players and arranged for a professor to give one of his other players a passing grade. The NCAA got it wrong in this case. The sound system of internal monitoring and control should have been enough to save UNLV from receiving sanctions. *Id.*

⁸¹ *Id.* at 781. In 2013, the NCAA began enforcing a new punishment structure that comprised of four categories of violations. Level I violations (Severe Breach of Contract), which includes a lack of institutional control, are considered the most severe.

⁸² *Id.* at 771.

turned the other cheek on this behavior.⁸³ Further, two former assistant football coaches (also former employees) were involved in providing the extra inducements.⁸⁴ The close relationship of these individuals to the university,⁸⁵ as well as their extremely visible presence at athletic events, signaled a failure of the university to monitor its athletic programs⁸⁶ and the conduct of its boosters. Therefore, the NCAA imposed sanctions on the University of Miami for a lack of institutional control.⁸⁷ The NCAA also imposed sanctions on the University of Arkansas⁸⁸ and the University of Central Florida⁸⁹ for a lack of institutional control, again, involving “insider boosters,” which are individuals who have a relationship with the university and are involved in promoting its athletic agenda.⁹⁰

Monitoring programs is also a good way to evaluate compliance because the programs address, although still fail to completely resolve, the proof problem. It is often difficult to prove whether someone truly had

⁸³ *Id.* at 776. The NCAA maintains the position that universities are responsible for the conduct of their athletics programs, which includes the behavior of staff and individuals who represent the university’s athletic interests. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 778. The University of Miami named a student lounge after this booster and granted him special access to it. He clearly did not “fly under the radar.”

⁸⁶ *Id.* at 773. The University of Miami took no measures to monitor text messages and telephone calls, and none of the eight coaches or approximately 30 student athletes who committed these violations reported the misconduct. The university also persuaded the booster to form a relationship with the football and men’s basketball programs yet provided no oversight to ensure the booster was in compliance with NCAA regulations.

⁸⁷ “In assessing whether a member lacks institutional control, the committee considers whether adequate compliance measures exist; whether those compliance measures were appropriately conveyed to those who need to be aware of them; whether the compliance measures are monitored to ensure they are followed; and whether upon learning that a violation may have occurred, the institution takes timely and appropriate action.” WEILER, ET AL., *supra* note **Error! Bookmark not defined.**, at 773–74.

⁸⁸ *University of Arkansas*, Case No. M183 (Apr. 17, 2003).

⁸⁹ *University of Central Florida*, Case No. M361 (July 31, 2012).

⁹⁰ The NCAA Committee on Infractions has noted that a booster’s insider status creates a “greater university responsibility for any misconduct in which they engage.” WEILER, ET AL., *supra* note 5, at 768. Thus, universities should be held to a higher standard when boosters affiliated with the university commit recruiting violations rather than when those violations are committed by third-party boosters who are not under the university’s watchful eye at all times.

knowledge of a situation. However, if there is a system in place that monitors phone calls, for example, a university cannot feign ignorance because the unethical behavior is documented.

In the Miami case, the COI said that “[b]ecause the institution lacked an adequate monitoring system and had policies that were disregarded or *not communicated*, it failed to establish a proper internal monitoring system.”⁹¹ Communication is key. Even if there are policies and procedures in place, these policies must also be communicated to everyone in the university’s athletics department to be adequate.⁹² The COI also said, however, that “[t]he committee has consistently concluded that rules education alone is not enough.”⁹³ In sum, a university needs to both communicate the rules and provide training on how to recognize and report misconduct, as well as have a monitoring system in place.

*A. ANALYSIS OF THE NCAA’S RESPONSE TO AMATEURISM
VIOLATIONS BY BOOSTERS*

Cam Newton was a quarterback at Auburn.⁹⁴ It was later discovered that Newton’s father had asked Mississippi State University boosters for money when Mississippi State, a competitor, attempted to recruit Newton.⁹⁵ Newton, however, maintained his eligibility and status as an amateur student athlete because he did not actually receive any benefits from the boosters and there was not enough proof to indicate that Newton or anyone from Auburn had knowledge of, or engaged in, the

⁹¹ WEILER, ET AL., *supra* note 5.

⁹² Universities should implement a training program for its athletic staff similar to the process of attorneys receiving CLE credit for staying current with the state of the law. The university should instruct all new athletics hires on NCAA rules and the potential consequences for rules violations. The training could include real world examples of situations in which universities were held liable for the actions of its boosters and for turning a blind eye to the misconduct, as well as hypotheticals, and proper solutions for how to best handle those types of situations. The training should also include an ethics component, as one may anticipate difficulty in having to report an NCAA violation and jeopardize the athlete’s eligibility and the reputation of the university in the public eye. One may also fear a deteriorating relationship with the university for deciding to report the misconduct and subject the university to sanctions. Thus, a strong ethics training program is essential. Finally, the training should include instructions on how to report a violation, whom to report the violation to, and what types of conduct constitute violations.

⁹³ WEILER, ET AL., *supra* note **Error! Bookmark not defined.**, at 774.

⁹⁴ Busby, *supra* note 1, at 136.

⁹⁵ *Id.*

solicitation by Newton's father.⁹⁶ The NCAA later clarified that "a student-athlete cannot escape amateurism-eligibility violations simply by claiming a lack of knowledge if impermissible benefits were actually exchanged."⁹⁷ In other words, the fact that neither Newton's father nor a third party actually received any money was really the deciding factor in choosing to reinstate Newton's eligibility.⁹⁸ As one scholar argued, a third party's unsuccessful attempt to solicit money without the student athlete's knowledge or consent should not result in the student athlete losing amateur status or NCAA sanctions on the student athlete.⁹⁹ This scholar reasoned that:

The punishment—declaring a student-athlete ineligible to compete—when the NCAA lacks the necessary evidence to prove the student-athlete knowingly participated in a violation compromises the organization's rules and is an affront to the NCAA's mission. Punishing the student-athlete in this situation rips the principle of competing for fun apart, unfairly punishes the athlete, and fails to further the goals of combining fair play, scholarship, and athletics.¹⁰⁰

This argument is also applicable to the university,¹⁰¹ as it would be unfair to punish a university for a third party's actions without sufficient evidence that the university knew about the illegal transaction.

While the above scholar did not address the issue of liability when a student athlete actually accepts the benefits, the NCAA made clear that accepting benefits will result in a loss of eligibility, regardless of knowledge.¹⁰² Yet, the NCAA's reasoning is faulty when it comes to holding the university liable. Even if a student athlete accepts payment or

⁹⁶ *Id.* at 165.

⁹⁷ *Id.* at 139.

⁹⁸ The NCAA held that "[p]ut simply, had Cam Newton's father or a third party actually received money or benefits for his recruitment, Cam Newton would have been declared ineligible regardless of his lack of knowledge." *Id.*

⁹⁹ Busby, *supra* note **Error! Bookmark not defined.**, at 171.

¹⁰⁰ *Id.*

¹⁰¹ Similar to how Cam Newton was determined eligible because neither him nor anyone from Auburn was aware of, or participated in, the unethical conduct, a university should be off the hook for liability, if no one at the university was aware of, or participated in, the third-party booster's conduct.

¹⁰² Busby, *supra* note **Error! Bookmark not defined.**, at 139.

other benefits, if the university is without knowledge, the university should not be held liable; only the individual student athlete should be punished by loss of eligibility.¹⁰³ The NCAA considers a series of mitigating factors when determining whether to reinstate an athlete's eligibility, including "the assessed culpability of the student, the source of the benefits, and whether benefits were actually received by the student."¹⁰⁴ The NCAA should assess these factors in a university-booster context to determine whether the university should be held liable. For instance, the NCAA should consider whether there is evidence that the university had knowledge of the booster's activities, whether the benefits came from a representative of the university's athletic interests or a third-party booster, and whether the benefits were actually received by the student. However, while the determination of whether benefits were actually received by the student is a factor to consider before making a decision to impose punishment on an institution, that factor alone should not render an institution liable when the university had no knowledge of the misconduct and the misconduct was not committed by one of its agents.

In the University of Southern California case, Reggie Bush and his family received thousands of dollars in additional benefits from sports agents.¹⁰⁵ The NCAA Committee on Infractions uncovered that an assistant football coach was aware of the violations, yet still allowed Reggie to continue to compete despite breaking the rules.¹⁰⁶ The NCAA held that universities must put forth diligent efforts to detect potential NCAA rule violations; they "cannot simply 'hide their heads in the sand.'"¹⁰⁷ The fact that the assistant football coach, acting as an agent of

¹⁰³ While this technically is a punishment for the university because now one of their sports programs is losing a star player, it is not unfairly punishing the school and all other innocent athletes as a whole for the conduct of one single person. Further, the university technically has a breach of contract cause of action against the offending student athlete. However, suing a student is typically frowned upon/unpopular because the "fallout could adversely affect the institution's reputation." Sheridan, *supra* note **Error! Bookmark not defined.**, at 1084.

¹⁰⁴ Busby, *supra* note **Error! Bookmark not defined.**, at 148.

¹⁰⁵ Although sports agents play a different role than boosters, their relationship to the university is comparable, and the purpose of this example is to demonstrate how a university's knowledge of NCAA violations contributes to a finding of fault. See Kyle Bonagura, *What to Know About Todd McNair vs. the NCAA*, ESPN (Apr. 17, 2018), https://www.espn.com/collegefootball/story/_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq.

¹⁰⁶ *Id.*

¹⁰⁷ Busby, *supra* note **Error! Bookmark not defined.**, at 146.

the university, knew about the violations led the NCAA to conclude that USC “failed to maintain ‘institutional control.’”¹⁰⁸

The situation at USC differs from Cam Newton’s case because, there, the coach had a blatant disregard for the rules and had knowledge of the violations, yet let it slide.¹⁰⁹ However, a rules violation committed by a rogue booster and student athlete should not automatically draw the conclusion that there was a lack of institutional control because, practically speaking, it is impossible to detect everything. As long as the university installs a reasonable monitoring system and reporting policies and procedures, thereby making an effort, the university should not be held liable for overlooking a violation, especially if it was committed by an outside third-party that the university has no reason to know of and has no presence on campus. An institution’s culpability should be determined based on whether it had knowledge of the offense and/or the intent to commit the offense and cover it up. Even if a university representative is not involved, a violation committed solely by the student athlete that is brought to the university’s attention should still trigger liability, if the university fails to report the offense to the NCAA.¹¹⁰

Further, the university runs the risk of falling prey to the death penalty, if repeat violations by boosters go undetected, as in the SMU case.¹¹¹ Although in this case the boosters were affiliated with SMU, since universities are supposedly also liable for rogue boosters under current NCAA doctrine, the same result-death penalty-would technically occur. The NCAA should amend its policy for handing out the death penalty when the repeat violator is a third-party booster committing such violations without the university’s knowledge. The NCAA needs to draw a clear distinction between university-affiliated boosters and third-party boosters, as well as adopt a knowledge requirement, when determining punishment for a university.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; see also Bonagura, *supra* note 105.

¹¹⁰ The NCAA constitution actually requires that each university monitor its programs to ensure compliance and to identify and report to the NCAA any instances where compliance has not been achieved. WEILER, ET AL., *supra* note **Error! Bookmark not defined.**, at 773.

¹¹¹ WEILER, ET AL., *supra* note **Error! Bookmark not defined.**, at 761.

*I. SOLUTION FOR HOLDING BOOSTERS ACCOUNTABLE**FOR AMATEURISM VIOLATIONS*

If the university had knowledge¹¹² of the booster's illegal activities, the NCAA is justified in imposing sanctions on the university, but the NCAA is without authority to sue the booster individually.¹¹³ The NCAA's lack of jurisdiction over boosters is especially problematic in situations involving third-party boosters who violated NCAA rules without the university's knowledge. However, the NCAA will be able to establish specific personal jurisdiction over the booster according to the state's long-arm statute.¹¹⁴ This prevents the booster from evading

¹¹² Busby, *supra* note 1, at 174 (stating that knowledge includes having an awareness that the activity is going on but refusing to intervene and stop the misconduct from occurring, as well as "knowledgeable participation" which "means, but is not limited to, acting in concert with any individual in a scheme or plan to actively solicit compensation in exchange for an athletics scholarship").

¹¹³ *Id.* at 172 ("The NCAA does not have the authority to punish an independent third party—the actual rule violator—for selling or attempting to sell a student-athlete to a university. Thus, the NCAA's only recourse is to punish the school or the student-athlete.").

¹¹⁴ All states have a long-arm statute which allows the state to obtain personal jurisdiction over an out-of-state defendant. While these statutes vary slightly by state, most states have adopted the Uniform Interstate and International Procedure Act, 13 U.L.A. § 1.03 (1980), verbatim. *See, e.g.*, 13 D.C. Code § 13-423 (1973). Although this Uniform Act was withdrawn from recommendation for enactment by the National Conference of Commissioners on Uniform State Laws in 1977 due to it being obsolete, many states have still incorporated its language into their state statutes. This Act provides that:

[A] court may exercise jurisdiction over a person, who acts directly or by agent, as to a cause of action or claim for relief arising from the person's causing tortious injury in (1) transacting any business in the state; (2) contracting to supply services or things in the state; (3) causing tortious injury in the state by an act or omission outside the state if the person 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 (4) having an interest in using, or possessing real property in this state; or (5) contracting to insure any person, property, or risk located within the state at the time of contracting.

States that have not adopted the language of this Act verbatim modeled their statutes off of it and have similar criteria, such as permitting jurisdiction to arise when an out-of-state defendant commits a tort within the state. Further, courts have been fairly lenient with the long-arm statutes. *See, e.g., Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961), where the court held that the Illinois long-arm statute extended to cover a nonresident defendant with no connection to the state other than that he acted negligently out of state, which caused injury within the state.

As applied to a third-party booster, the state can utilize its long-arm statute when:

[T]he tortious act or omission takes place without the state but the injury occurs within the state and there is some other reasonable connection between the state and the defendant. A sufficient nexus exists if (a) the defendant regularly advertises his products or services in the state or (b) carries on some other continuous course of activity there or (c) derives substantial revenue from goods used or consumed or from services rendered in the state. *It is not necessary that this activity amount to the doing of business.* . . . [T]he regular solicitation of business or the persistent course of conduct required by section 1.03(a)(4) need have no relationship to the act or failure to act that caused the injury.

Waters v. Deutz Corp., 479 A.2d 273, 275 (Del. 1984). So, if the booster lives in Mississippi but provides payment to a football player at The University of Alabama, the tortious interference with contract took place in Alabama. Thus, the booster can be sued in Alabama state court. Similar to a court's assertion of personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state, a court should be able to exercise personal jurisdiction over a booster who serves the market for intercollegiate athletics by soliciting athletes across the country with the expectation that these prospective student-athletes will accept the benefits and attend the booster's institution of choice in the forum state. Once the court determines that the long-arm statute satisfies personal jurisdiction according to the particular facts of the case, the court must consider whether the exercise of jurisdiction violates due process. "Due process requires that 'if (a defendant) be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Transportes Aereos de Angola v. Ronair, Inc.*, 544 F. Supp. 858, 865 (D. Del. 1982) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Obtaining jurisdiction over a booster through the use of a long-arm statute satisfies due process because the booster would have minimum contacts with the state in that the booster attempted

punishment. Using a state's long-arm statute to sue a third-party booster is the preferred method for holding these boosters accountable because that would allow the NCAA to sue the booster directly and avoid involving the innocent university.

In the event the university is deemed to have had knowledge of the recruiting violations or the violations were the result of conduct by a university-affiliated booster, the booster can be brought into the NCAA's lawsuit against the university pursuant to Rule 19(a) of the Federal Rules of Civil Procedure (or state equivalent). This rule requires joinder of parties if one party's absence prevent complete relief among the existing parties or that party has an interest in the subject matter of the suit.¹¹⁵ Another option to hold the booster accountable in this scenario would be

to, or in fact actually did, form a contract with either a prospective or current student athlete. Therefore, the booster, who purposely availed himself of the benefits and protections of the state should expect that he could potentially be subject to suit in such state in which he solicits payments or other benefits to athletes. "[I]t is reasonable and just to require him to litigate a dispute arising therefrom in that state." 544 F. Supp. at 865. The booster committed a tort—tortious interference with contract—in the forum state. Thus, the NCAA can get jurisdiction over the booster based on the state's long-arm statute (committed a tort within the state) and due process is preserved due to minimum contacts with the state.

¹¹⁵ FED. R. CIV. P. 19(a)(1).

A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Id. See also, Who Must Be Joined in Action as Person "Needed for Just Adjudication" Under Rule 19(a), Federal Rules of Civil Procedure, 22 A.L.R. Fed. 765 ("The joinder of tortfeasors does not present a problem under [Federal Rule of Civil Procedure] Rule 19(a), because the Rule does not change the established principle that joint tortfeasors are jointly and severally liable, and that any one may be sued alone."). Therefore, the booster, who committed a tort by interfering with the university, should be joined.

for the university to file a crossclaim.¹¹⁶ Filing a crossclaim against the booster is not ideal, however, as it allows the university to profit twice from the booster's illegal actions.¹¹⁷ First, the university obtains a star athlete for its athletic program thanks to the booster's persuasive techniques. Not only does the university win the athlete, but potential monetary damages from the booster if it triumphs on its crossclaim. In essence, the university is reimbursed for the money it paid the NCAA, which appears to defeat the purpose of the punishment. However, that is not exactly the case.

When the NCAA finds a university liable for an amateurism violation, it imposes a range of penalties depending on the severity of the violation and whether it was a first-time offense. Potential penalties include post-season bans and limits on the number of scholarships a certain sports team may give out per year. These penalties cannot be redeemed from money alone; they often "have long-term, adverse effects on athletic programs"¹¹⁸ and damage the university's reputation. While the university's opportunity to sue the booster technically gives "no punishment" to the university since it gains the star athlete and gets to recover from the booster, monetary damages cannot undo post-season ban or loss of eligibility damage,¹¹⁹ so technically the university still does lose. This situation is comparable to a wrongful death suit. While it is significant that the decedent's family receives money as compensation for the loss of their loved one's life, money does not bring the decedent back to life—it

¹¹⁶ FED. R. CIV. P. 22(a)(2) ("A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.").

¹¹⁷ Some states, such as Arkansas and Oklahoma, already have laws providing the university with a cause of action against boosters. A common critique of these laws is that they allow the university to benefit twice—the university gets the star recruit from the booster's efforts and also gets reimbursed for the NCAA penalties imposed on the institution. However, as mentioned above, if the university gets paid in damages for non-monetary penalties, such as a post-season ban, that money does not make up for the implications resulting from a post-season ban such as loss of recruits and publicity; technically, the university still is not made whole.

¹¹⁸ Sheridan, *supra* note 10, at 1098 (quoting UNIF. ATHLETE AGENTS ACT prefatory note, 7 Part IB U.L.A. 55 (2000)).

¹¹⁹ Post-season bans hurt the publicity of the university because it loses media attention and the potential to win money if it competes well. Such a ban also has the potential to dissuade future students and student-athletes from coming to the university because they know in advance that they will be ineligible for post-season play. Finally, if a star athlete loses eligibility, the team may start losing games and bad records cannot be undone.

is not the same. This is the same scenario for boosters. While it is beneficial that the university gets money damages, that does not allow its team to play in a bowl game. The university has still not fully recovered. In sum, whether it be through a long-arm statute, joinder rules, or by crossclaim, the booster will be held accountable to the NCAA or university in some respect.

2. *WHAT HAPPENS WHEN BOOSTERS COMMIT CRIMES*

If a booster commits a criminal act, the university should still not be held liable for the booster's actions, even if the university had knowledge of the misconduct and failed to intervene to prevent the conduct from occurring. The victims would have a state law cause of action against the booster¹²⁰ pursuant to its criminal statutes. Similar to how a Walmart employee may be charged with a crime yet the company as a whole is not sanctioned, it is best to rely on the criminal justice system to impose punishment solely on the booster. The justification for leaving the university out of the criminal proceedings stems from the doctrine of *respondeat superior*, which only applies to an employee's tortious conduct. Thus, the university should not be held liable for the criminal behavior of boosters, regardless of whether they are affiliated with the university or not.¹²¹

On the other hand, if the university was somehow involved in the illegal activity or sought to cover up a booster's illegal conduct, the university should be held liable as an accomplice or co-conspirator. The NCAA should still not be allowed to impose sanctions, however; the university should instead be subject to the criminal statutes of the state in which the university resides. For example, the NCAA discovered that a

¹²⁰ Sheridan, *supra* note 10, at 1078 (quoting UNIF. ATHLETE AGENTS ACT prefatory note, 7 Part IB U.L.A. 55 (2000)). This applies to both boosters affiliated with the university and third parties.

¹²¹ RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006). If the booster is affiliated with the university, he or she is an employee. However, the doctrine of *respondeat superior* only applies to tortious behavior. For a third-party booster, the doctrine of *respondeat superior* does not apply at all, and the university is never held liable for their behavior (unless the university had knowledge of the behavior), whether it be tortious or criminal. Although the doctrine of *respondeat superior* still does not apply when a university has knowledge of a third-party booster's misconduct (knowledge does not suddenly make boosters employees), the university can be held liable. At that point, the university is not in compliance with NCAA bylaws which mandate a duty to report NCAA violations. Technically, the university itself has then committed a violation, and therefore the NCAA is justified in imposing sanctions.

former Penn State assistant football coach had sexually molested young boys.¹²² Upon further investigation, evidence that some Penn State employees were aware of this criminal conduct, yet neglected to disclose any information pertaining to the sexual abuse, was also uncovered.¹²³ In this situation, the NCAA did impose sanctions upon Penn State. A better way to resolve this disturbing and tragic state of affairs would have been to charge the individual university employees who had knowledge of the abuse with criminal punishment pursuant to the Pennsylvania criminal code.

3. POTENTIAL CRITICISMS OF THIS PROPOSAL

Critics of this proposal may argue that in the event the NCAA is without authority to sue an independent booster, universities should have a cause of action against those boosters for the harm caused to the institution as a result of the booster's actions. Scholars argued that permitting the university to bring a cause of action against a booster would discourage universities from suing student athletes.¹²⁴ This solution is far from ideal since the university is permitted to reap the benefits of the booster's misconduct and receive compensation if the booster gets caught. However, by requiring mandatory joinder of the booster through Federal Rule of Civil Procedure 19(a), the NCAA would be able to sue the third-party booster along with the university. This eliminates the need for a cause of action against the booster by the university, thus circumventing the double-dipping mentality.

Mandatory joinder through Federal Rule of Civil Procedure 19(a) also bypasses the issue of university reluctance to sue a booster in the hopes of retaining their benefits in the future because the booster is now required to join the lawsuit irrespective of the university's desire to bring them in or not. Mandatory joinder is a way to ensure the booster is held accountable yet avoid making the university look like the bad guy. In situations with third-party boosters, the courts can get jurisdiction over them through the state's long-arm statute and thus the NCAA sues them directly. This promotes equity—it would avoid involving the university in actions by boosters, of which it had no control over and no knowledge.

¹²² WEILER ET AL., *supra* note **Error! Bookmark not defined.**, at 782.

¹²³ *Id.* at 783.

¹²⁴ See Sheridan, *supra* note 10, at 1084 (asserting that suing student-athletes is frowned upon).

Another potential criticism of this proposal is that by the time the lawsuit gets resolved or the booster's identity is even discovered, the athlete who received the improper benefits may have already completed his or her eligibility and may no longer be a student at the university. In this situation, the athlete suffers no consequences, but the booster will still be held liable through mandatory joinder if the NCAA sues the university for failure to comply with NCAA rules and regulations based on that booster's conduct if the booster is a repeat offender. If the booster is not a repeat offender, whether the booster can be sued would depend on the state's statute of limitations.

CONCLUSION

The NCAA should consider the university's culpability before imposing punishment. A knowledge or intent element should be required before liability attaches. Universities must knowingly violate amateurism rules in order to be held liable by the NCAA. Even if it is not directly involved in the recruitment scheme, a university knowingly violates this rule if it is aware of a third-party booster's bribery and fails to take action, which would therefore hold it liable to the NCAA. By turning the other cheek, the university submits to acceptance of the unethical behavior. This situation parallels the concept of willful blindness¹²⁵ in a criminal case. For example, if a defendant has reason to suspect that the package the defendant is delivering contains drugs, the defendant cannot be relieved of liability based on the defense of "I never opened the box so I had no idea what its contents were."

On the other hand, if the university did not know about the booster and the university's reasonable diligence failed to uncover the booster,¹²⁶ then the university should be exempt from liability for the booster's actions. However, the NCAA currently does not have authority to punish the booster; its only right to recourse is through the university, but it would not be fair to punish the university and innocent athletes for the wrongdoing of a third-party. Federal Rule of Civil Procedure 19(a) and long-arm statutes resolve this problem by dragging the rogue booster into litigation.

¹²⁵ Jonathan L. Marcus, Model Penal Code Section 2.02(7) and Willful Blindness, 102 Yale L. J. 2231, 2235 (June 1993). Willful blindness is a term of art in criminal law that allows the court to find a *mens rea* of "knowing" even though the offender was merely being reckless. *Id.*

¹²⁶ Every university should have a monitoring and reporting system in place to detect unethical and illegal behavior by university employees, as well as from outside threats, such as rogue boosters.

To prevent the rogue booster from walking away without consequence, the universities' oversight and monitoring programs should be comprised of an internal policy for how they will handle third parties and punish them. Since rogue boosters provide a benefit for the university by bringing it star athletes, universities will be reluctant to sue them. If the boosters face no consequences, they will continue to operate unethically.¹²⁷ The universities' internal policies detailing what to do when a rogue booster is discovered will act as an initial, though arguably weak, safeguard against this problem.

Another safeguard in place is the undesirability of both potential outcomes. The university is aware of the rogue booster but decides to take the risk of avoiding detection and eventually is discovered by the NCAA, subjecting the university to sanctions. Federal Rule of Civil Procedure 19(a) would then mandate that the booster be brought into the lawsuit. Or, the university is unaware of the booster's existence but the student athlete who accepted additional benefits loses eligibility to compete. In this situation, the university has a state law cause of action against the rogue booster for tortious interference with contract. Both of these outcomes serve to deter booster misconduct.

¹²⁷ Sheridan, *supra* note **Error! Bookmark not defined.**, at 1095 (The booster in the University of Miami case stated, "I did it because I could. . . . And because nobody stepped in to stop me") (quoting Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011), <https://sports.yahoo.com/news/renegade-miami-football-booster-spells-213700753--spt.html>).