

Hundred-Dollar Handshakes, Million-Dollar Lawsuits: Act 1324—Providing a Civil Right of Action by Arkansas Universities for Losses Resulting from NCAA Violations *

I. INTRODUCTION

Amateur athletics has become a professional business.¹ College football programs competing at the highest level in the National Collegiate Athletic Association (NCAA),² the Football Bowl Subdivision (FBS),³ earned over \$55 million on average in 2012.⁴ However, this figure pales in comparison to revenues generated by the most lucrative institutions in college football.⁵ For example, schools like

* The author thanks Pamela Vesilind, Visiting Assistant Professor of Law, University of Arkansas School of Law, for her thoughtful advice and guidance throughout the writing process. The author also thanks Mark James Chaney, J.D. 2014, University of Arkansas School of Law, for his assistance in the selection of this note's topic and title.

1. The National Collegiate Athletic Association would likely disagree because less than 7% of athletic departments at NCAA Division I institutions operated profitably during the 2010 fiscal year. *See* NCAA, DIVISION I FBS ATHLETICS REVENUES AND EXPENSES 1 (2011) [hereinafter 2011 REVENUE REPORT]. However, this figure fails to recognize: (1) the large and widening disparity among Division I institutions in terms of revenue generated by intercollegiate athletics; and (2) the fact that over 50% of FBS football and men's basketball programs generate greater revenue than expenses. *See id.*

2. The NCAA is a non-profit entity comprised of over 1200 member institutions that administers intercollegiate athletics at the national level. GLENN M. WONG, ESSENTIALS OF SPORTS LAW 17 (4th ed. 2010).

3. NCAA Division I football is divided into two separate classifications known as the Football Bowl Subdivision and the Football Championship Subdivision. *See* NCAA, DIVISION I MANUAL 335 (2014) [hereinafter NCAA DIVISION I MANUAL], available at <http://www.ncaapublications.com/productdownloads/D114jan.pdf>. FBS member schools are the most lucrative institutions, including the three that are the focus of this note. *See id.*

4. NCAA, REVENUES & EXPENSES: 2004 – 2012: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAM REPORT 17 (2013) [hereinafter 2012 REVENUE REPORT], available at <http://www.ncaapublications.com/productdownloads/2012RevExp.pdf>.

5. The athletic departments at these institutions are consistently profitable. *See USA Today Sports' College Athletics Finances*, USA TODAY, <http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1> (last updated on May 16, 2012) [hereinafter

the University of North Carolina, Ohio State University, and the University of Southern California consistently generate revenue well in excess of the 2012 FBS average.⁶

This rise in profitability of intercollegiate athletics has coincided with a rash of widely covered scandals that have plagued the NCAA and its member institutions. Impermissible relationships and academic fraud within the University of North Carolina's athletic program threatened the school's prestigious academic reputation.⁷ A rogue "booster"⁸ at Ohio State paid football players for "no show" jobs, and a myriad of NCAA rule violations at the University resulted in crippling sanctions, forcing its revered football coach to resign.⁹ At USC, a star football player accepted cash, gifts, and other benefits from unscrupulous agents, triggering a NCAA response that led to the swift demise of the once-dominant Trojan football program.¹⁰ But what happens to this money when the NCAA determines that an institution violated its rules and places the program on probation or the eligibility of athletes is affected? Predictably, the cash flow dries up, costing the institution millions in lost revenue.

USA Today College Athletics Finances]. In 2010, only twenty-two colleges and universities made a profit. See 2011 REVENUE REPORT, *supra* note 1; see also WONG, *supra* note 2, at 16-26 (discussing the general background on the economics and structure of the NCAA and its member institutions).

6. See *USA Today College Athletics Finances*, *supra* note 5. For example, the University of Southern California's 2011 fiscal-year report indicates that the University realized athletic revenue in excess of \$66 million. See UNIVERSITY OF SOUTHERN CALIFORNIA, 2011 FINANCIAL REPORT 40 (2011), available at <http://about.usc.edu/files/2011/07/USCFR.2011.pdf>.

7. Jonathan Jones, *Turmoil From NCAA Investigation Too Much: N. Carolina Fires Davis*, SI.COM (July 27, 2011, 6:21 PM), <http://sportsillustrated.cnn.com/2011/football/ncaa/07/27/butch-davis-fired>.

8. The term "booster" is what the NCAA calls a "representative of the institution's athletics interests." NCAA DIVISION I MANUAL, *supra* note 3, at 77. Simply stated, a "booster" is an individual or organization that is known, or should be known, to the athletic department to be a member of any organization promoting the institution's athletic interests. *Id.* This would include those who make financial contributions to the athletic program, assist in the recruitment of prospective student-athletes, provide benefits to student-athletes or their families, and those who "[h]ave been involved otherwise in promoting the institution's athletics program." *Id.*

9. George Dohrmann & David Epstein, *The Fall of Jim Tressel*, SPORTS ILLUSTRATED, June 6, 2011, at 40, 42.

10. Charles Robinson & Jason Cole, *Cash and Carry*, YAHOO! SPORTS (Sept. 15, 2006, 2:59 AM), <http://sports.yahoo.com/ncaa/football/news?slug=ys-bushprobe>.

The University of Arkansas is no stranger to high-profile intercollegiate athletic revenue and scandal. The state's flagship institution reported athletic revenue of \$75.6 million in 2012¹¹ and has committed two major NCAA violations since 2000.¹² During the 2013 legislative session, the Arkansas General Assembly crafted Act 1324 as a remedy for Arkansas's colleges and universities harmed by NCAA sanctions.¹³ Act 1324 provides aggrieved schools a civil cause of action against any individual who knowingly causes the institution to be sanctioned by organizations such as the NCAA.¹⁴ By allowing an institution to recoup for lost revenue resulting from such sanctions, the legislation nobly attempts to deter opportunists and fans from inducing student-athletes to violate amateurism rules.¹⁵ However, no Arkansas college or university is likely to employ Act 1324 in its current form. Two major problems plague the statute: (1) it subjects an individual to outrageous levels of liability without regard to his or her culpability; and (2) modern NCAA scandals are often too complicated to apportion fault adequately among various culpable parties.

Part II of this note discusses the modern financial and regulatory landscape of college football's highest level, providing context for the potentially dramatic financial effects of a successful action under Act 1324. Part III explores the Act's legislative history and how it and similar state laws might be used by universities sanctioned for

11. UNIV. OF ARK. ATHLETIC DEP'T, 2012/2013 ARKANSAS RAZORBACKS ATHLETICS ANNUAL REPORT 11 (2013) [hereinafter ARKANSAS ATHLETICS REVENUE REPORT], *available at* http://www.arkansasrazorbacks.com/files/6100/annual-report/2012-13/pdfs/UA_2012_13_AnnualReport.pdf.

12. Doug Lederman, *Half of Big-Time NCAA Programs Had Major Violations*, USA TODAY (Feb. 7, 2011, 10:48 PM), http://usatoday30.usatoday.com/sports/college/2011-02-07-ncaa-infractions_N.htm.

13. *See* Act 1324, 2013 Ark. Acts 5509, 5510 (codified at ARK. CODE ANN. § 16-118-110 (Supp. 2013)).

14. *See* Act 1324, 2013 Ark. Acts 5509, 5512 (codified at ARK. CODE ANN. § 16-118-110(b) (Supp. 2013)). The NCAA is not the only governing body that may sanction an institution, but it is the most significant and will be the only such body discussed in this note. Other governing bodies include individual athletic conferences within each of the three divisions of the NCAA, such as the Southeastern Conference, as well as non-NCAA intercollegiate athletic associations such as the National Association of Intercollegiate Athletics (NAIA).

15. Act 1324, 2013 Ark. Acts 5509, 5510.

NCAA violations. Part IV introduces recent scandals within NCAA member institutions and applies Act 1324 to these scandals to demonstrate the potential damages a prevailing college or university may recover. Finally, Part V recommends revisions to Act 1324 that the Arkansas General Assembly may implement so the Act can accomplish its intended goals.

II. MODERN LANDSCAPE OF NCAA DIVISION I ATHLETICS

A. Financial Impact of Athletics at the Most Lucrative FBS Institutions

In 2012, the typical FBS football program earned roughly \$55 million for its respective school.¹⁶ This is twice what the same school might have earned less than a decade ago.¹⁷ The institution most responsible for this meteoric rise is the University of Texas, whose athletic revenue for 2011 was over \$150 million.¹⁸ Of this amount, only \$60 million came in the form of ticket sales—historically an athletic department’s primary stream of revenue.¹⁹ The other \$90 million entered the coffers of the Longhorn athletic department from media rights and licensing (\$42.2 million);²⁰ private contributions (\$37.3 million);²¹ and other revenue (\$9.5 million),²² such as the program’s apparel contract with sporting-goods giant Nike.²³ Although Texas currently earns

16. See 2012 REVENUE REPORT, *supra* note 4.

17. In 2004, the median total revenue among FBS institutions was \$28.2 million. *Id.*

18. Steve Wieberg et al., *Texas Athletics Overwhelm Rivals in Revenue and Spending*, USA TODAY (May 15, 2012, 1:58 PM), <http://usatoday30.usatoday.com/sports/college/story/2012-05-15/texas-athletics-spending-revenue/54960210/1>.

19. See *USA Today College Athletics Finances*, *supra* note 5.

20. *Id.* This figure, the highest among any FBS institution, can be attributed to the University’s: (1) realization of an 86% increase in licensing fees and royalties following the Longhorns’ 2005 BCS National Championship victory; and (2) an unprecedented twenty-year, \$247.5 million contract with the cable-sports network ESPN to launch the Longhorn Network, a twenty-four hour cable-television network devoted to University of Texas athletics. Wieberg et al., *supra* note 18.

21. See *USA Today College Athletics Finances*, *supra* note 5.

22. *Id.*

23. See Josh Mitelman, *University of Houston’s Nike Contract Dwarfed by Other Major Programs*, HOUS. BUS. J. (Jan. 6, 2014, 6:30 AM),

the most revenue in FBS athletics, many institutions feature similarly diversified revenue streams.²⁴ Large portions of these revenue streams depend upon a school's compliance with NCAA rules.

In 2011, the University of North Carolina earned athletic revenue of \$75.6 million.²⁵ A media rights deal between UNC's conference, the Atlantic Coast Conference, and ESPN contributed \$17 million of these funds.²⁶ This revenue also included a \$250,000 annual cash payment to UNC from a ten-year, \$37.7 million contract with Nike.²⁷ When the two parties entered into a similar apparel deal in 1997, then UNC Chancellor Michael Hooker stated:

Nike is interested in the University of North Carolina at Chapel Hill because of what we stand for in integrity and excellence on and off the playing field. I am particularly delighted that this contract will benefit not only our athletic program, but also academics at Carolina.²⁸

The current contract allows Nike to reduce its payment to UNC, in the event of a postseason ban in football, by 35%, or \$87,500.²⁹

Second only to the University of Texas, Ohio State University generated athletic revenue of nearly \$132 million in 2011. That year, OSU sold over \$50 million in tickets³⁰ and then experienced a rise in football attendance in 2012.³¹

<http://www.bizjournals.com/houston/news/2014/01/03/university-of-houstons-nike-contract.html>.

24. Wieberg et al., *supra* note 18.

25. *Id.*

26. Brett McMurphy, *Media Deal OK'd to Solidify ACC*, ESPN (Apr. 24, 2013, 10:35 AM), http://espn.go.com/college-football/story/_/id/9200081/acc-media-rights-deal-lock-schools-okd-presidents.

27. Melvin Backman, *Nike, Learfield Could Put Athletics in Debt*, THE DAILY TAR HEEL (Chapel Hill, N.C.), Mar. 16, 2012, at 1, available at http://www.dailytarheel.com/article/2012/03/nike_leareld_could_put_athletics_in_debt.

28. *UNC-CH Agrees to \$7.1 Million Contract With Nike*, UNIV. OF N.C. NEWS SERVS. (July 9, 1997), <http://www.unc.edu/news/archives/jul97/nike1.html>.

29. Backman, *supra* note 27.

30. *Id.*

31. Patrick Cooley, *Ohio State Bucks Dwindling Football Attendance Trend*, LANTERN (Feb. 4, 2013), <http://thelantern.com/2013/02/ohio-state-football-bucks-dwindling-football-attendance-trend>. The figure is significant because the attendance increase at Ohio State football games, and the corresponding increase in revenue,

Furthermore, similar schools in lucrative FBS conferences generate massive revenue in the form of large payouts from postseason games.³² For example, an appearance in the Big Ten's championship game in 2012 allowed each participant to sell approximately 15,000 tickets.³³ The payouts to institutions following college football's bowl season are even more enticing.³⁴ Two appearances in Bowl Championship Series (BCS)³⁵ games netted the Big Ten \$28.4 million following the 2011–2012 season, resulting in a payout of over \$2 million to each Conference member.³⁶ However, the Conference failed to land a team in the 2013 BCS National Championship Game, the most prestigious and lucrative game of all. Instead, the University of Alabama's appearance netted \$23.6 million for its conference, and

came during a season in which the Buckeye football team was ineligible for postseason competition. *See infra* note 132 and accompanying text.

32. *See* Tom Dienhart, *The Monetary Impact of One BCS Team*, BIG TEN NETWORK (Oct. 31, 2012, 4:01 PM), <http://btn.com/2012/10/31/dienhart-the-monetary-impact-of-one-bcs-team>.

33. *Big Ten Championship Game Tickets on Sale*, HUSKER EXTRA (Nov. 23, 2012, 3:07 PM), http://journalstar.com/sports/huskers/football/2012/big-ten-championship/big-ten-championship-game-tickets-on-sale/article_b7eedfb8-aea1-5ca6-be60-ffe2d5afc964.html. The face value of the tickets provided to participating schools start at \$80 per ticket, which would result in minimum revenue for the University of \$1.2 million if the entire allotment were sold. *See id.*

34. At the conclusion of the regular season, FBS teams with a record of 6–6 or better may be invited to participate in one of thirty-five bowl games, and each bowl pays a varying amount to its participating teams. Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012–13 Bowls*, AL.COM (Dec. 11, 2013, 5:12 AM), http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html. The Big Ten Conference, like many other conferences, pools these payouts and distributes them evenly to all its member institutions, regardless of participation in postseason games. *See* Dienhart, *supra* note 32.

35. The BCS consisted of the five most prestigious and lucrative postseason bowl games—the Rose, Sugar, Fiesta, Orange, and BCS National Championship Game. George F. Will, *Saving College Football From the BCS*, COURANT (Dec. 14, 2009), http://articles.courant.com/2009-12-14/news/hc-will-bcs-law-football.artdec14_1_bcs-football-game-bowl-championship-series. Beginning with the 2014–2015 season, the College Football Playoff will replace the BCS. *First National Championship Game of College Football Playoff Will Be Held in Arlington, TX*, COLLEGE FOOTBALL PLAYOFF (Apr. 24, 2013), <http://www.collegefootballplayoff.com/story?id=9209410>.

36. Dienhart, *supra* note 32.

unaffiliated Notre Dame pocketed \$6.2 million for its participation.³⁷

Following the 2011–2012 academic year, the University of Southern California reported total athletic revenue of \$84.2 million.³⁸ USC enjoyed more success during the first decade of the 2000s than any other college football program, competing in seven consecutive BCS games from 2002–2008.³⁹ In addition to possessing one of college football's most favorable television deals,⁴⁰ the Trojans' success prompted the University's construction of a \$70 million football facility.⁴¹ Despite the money flowing into the program, the team failed to duplicate the success of decades past. The team finished the 2012–2013 season with a loss to middling Georgia Tech in the Sun Bowl⁴² after starting the season ranked atop national polls.⁴³ Ultimately, USC fired third-year head coach Lane Kiffin⁴⁴ five games into the 2013–

37. Chris Smith, *The Money Behind the BCS National Championship*, FORBES (Jan. 7, 2013, 4:09 PM), <http://www.forbes.com/sites/chris-smith/2013/01/07/the-money-behind-the-bcs-national-championship>. Although the game featured two non-Big Ten institutions, the payout figures represent the revenue the Big Ten might have earned had the Buckeyes not been disqualified from postseason play.

38. Scott M. Reid, *USC Posts Record Athletic-Related Revenue*, ORANGE CNTY. REG., Oct. 15, 2012, at 8, available at <http://www.ocregister.com/articles/million-374645-year-revenues.html>. Unlike other successful programs, this figure represents an increase of only \$4 million compared to the 2008–2009 fiscal year—the pinnacle of the Trojans' success on the field. Jonathan Kendrick, *Sanctions Won't Kill Trojans Financially*, DAILY TROJAN (Aug. 26, 2010, 11:00 PM), <http://dailytrojan.com/2010/08/26/sanctions-won-t-kill-trojans-financially>.

39. Gary Klein, *Bush Beleaguered*, L.A. TIMES, June 22, 2011, at C1.

40. The deal with the Pacific Twelve Conference reportedly pays each member institution \$21 million annually. *Id.*

41. *Id.*

42. The Sun Bowl is played annually in El Paso, Texas, and is not considered among the prestigious postseason bowl games in college football. See STEWART MANDEL, *BOWLS, POLLS & TATTERED SOULS: TACKLING THE CHAOS AND CONTROVERSY THAT REIGN OVER COLLEGE FOOTBALL* 206 (2008) (“[T]here [is] no question that the national prestige and importance of longstanding games like the . . . Sun Bowl [have] been greatly diminished by the advent of the BCS . . .”). The fact that USC was defeated by Georgia Tech, a team that needed a waiver from the NCAA just to compete in the game after a loss in their conference championship game dropped their record to 6–7, added to the frustration among Trojan supporters. Gary Klein, *A Razin' in the Sun: USC's Stunning Fall From No. 1 to Nowhere Finishes with One Last Dismal Loss*, L.A. TIMES, Jan. 1, 2013, at C1.

43. Klein, *supra* note 42.

44. Kiffin reportedly entered into a five-year, \$20 million contract with USC in 2010. Arash Markazi, *Pat Haden Backs Lane Kiffin to Fullest*, ESPN LA (July 26, 2013, 10:01 PM), <http://espn.go.com/los-angeles/college->

2014 season.⁴⁵ For USC, the decision to terminate Kiffin carried with it a hefty price tag—estimated at \$10 million.⁴⁶

B. Institutional Compliance and the NCAA Enforcement System

NCAA member institutions must comply with the organization's rules and regulations.⁴⁷ These rules form a regulatory structure indicative of the high-stakes finances at the FBS level.⁴⁸ Violations include academic fraud; unpermitted financial aid; and unethical conduct, which encompasses behaviors such as refusing to comply with the NCAA during an investigation.⁴⁹ A student-athlete may violate his or her amateur status with the NCAA in a number of ways, including by accepting payment for athletic competition or by entering into an agreement with an agent.⁵⁰ The NCAA also holds the head coach of a program responsible for all employees or coaches who report to him or her.⁵¹ Systemic violations by head coaches or senior athletic administrators might result in a finding of a “lack of institutional control” by the NCAA—a serious NCAA infraction.⁵² However, self-reported violations, such as contacting a recruit at a time not permitted by the NCAA or exceeding allotted practice times, commonly occur and are for less serious infractions.⁵³

football/story/_id/9510789/usc-trojans-pat-haden-says-lane-kiffin-not-hot-seat. These contracts typically contain boilerplate “buyout” clauses, which require the institution to continue paying a terminated coach if he is fired without cause. Jodi Balsam, *Firing the \$20 Million Man: Lane Kiffin's Rights Under His USC Coaching Contract*, OFFICIAL REV. (Sept. 29, 2013), <http://www.theofficialreview.com/firing-the-20-million-man-lane-kiffin>.

45. Gary Klein, *USC Displays Fire Power*, L.A. TIMES, Sept. 30, 2013, at A1.

46. Pete Thamel, *USC's Lane Kiffin Entering Make-Or-Break Season*, SI.COM (Aug. 1, 2013, 1:32 PM), <http://sportsillustrated.cnn.com/college-football/news/20130801/lane-kiffin-usc>.

47. WONG, *supra* note 2, at 165. The NCAA's rules and regulations are published in the Division I Manual. See NCAA DIVISION I MANUAL, *supra* note 3, at 7.

48. WONG, *supra* note 2, at 185.

49. NCAA DIVISION I MANUAL, *supra* note 3, at 311-12.

50. *Id.* at 59.

51. *Id.* at 47.

52. See *id.* at 311.

53. These largely unpublicized “secondary” violations provide “only a limited recruiting or competitive advantage and [are] isolated or inadvertent in nature.” Rich

The NCAA enforcement program is designed to “uphold integrity and fair play . . . and to prescribe appropriate and fair penalties if violations occur.”⁵⁴ The NCAA’s Committee on Infractions investigates alleged violations to determine whether an NCAA infraction occurred.⁵⁵ If the Committee finds a violation occurred, it can impose the appropriate sanctions.⁵⁶ Minor infractions may result in trivial penalties such as public reprimand, institutional probation, suspension of coaching staff, and fines.⁵⁷ Sanctions for more severe violations vary greatly and might include a loss of scholarships, vacation of past wins, restriction on postseason competition,⁵⁸ or even the termination of the offending program.⁵⁹ As member institutions clearly have reason to comply with NCAA rules, these schools have an interest in deterring individuals outside the school from interfering with student-athletes.

III. ACT 1324

In response to the professionalization of amateur athletics, widespread scandals, and the bloated regulatory structure of modern college football, the Arkansas General Assembly enacted legislation that appears to offer schools some relief from NCAA sanctions caused by third parties.⁶⁰

Evans, *Violations Common in NCAA*, DESERET NEWS (Salt Lake City, Utah), Sept. 11, 2001, at D1, available at <http://www.deseretnews.com/article/863340/Violations-common-in-NCAA.html?pg=all>.

54. NCAA DIVISION I MANUAL, *supra* note 3, at 311.

55. WONG, *supra* note 2, at 186.

56. There are currently four categories of violations. See NCAA DIVISION I MANUAL, *supra* note 3, at 311-12. Aggravating factors, such as a lack of institutional control or interfering with an investigation, and mitigating factors, such as cooperation and self-disclosure of violations, also affect the penalties levied by the NCAA. *Id.* at 321-22. The institution is notified of the penalties through an “Infractions Decision,” following an often lengthy administrative process. See *id.* at 311-21 (providing a detailed account of this process).

57. *Id.* at 324.

58. *Id.* at 322-24.

59. *Id.* at 315. Termination of the program, commonly known as the “death penalty,” is the NCAA’s most severe sanction. WONG, *supra* note 2, at 186. The penalty has been used only twice in Division I, most notably on the football program at Southern Methodist University in 1987. *Id.* at 186-87.

60. See Act 1324, 2013 Ark. Acts 5509 (codified at ARK. CODE ANN. § 16-118-110 (Supp. 2013)).

This Part explores the enactment and pertinent features of Act 1324, as well as similar statutes from other jurisdictions.

A. Legislative History and Intent

Senate Bill 1037 was filed on March 11, 2013,⁶¹ and the General Assembly quickly passed it without a single objection.⁶² Less than six weeks later, Governor Beebe signed the bill into law.⁶³ The passage of Act 1324 received little fanfare and appeared to be an afterthought of the 2013 legislative session.⁶⁴

According to Act 1324, it “is necessary to deter conduct by persons seeking to violate athletic association or conference regulations or persons seeking to induce a student athlete to violate athletic association or conference regulations.”⁶⁵ The General Assembly placed great emphasis on those negatively affected by the violations, including student-athletes, other students at the institution, the institution itself, and “the community as a whole.”⁶⁶ While the legislation notes that violations of NCAA rules and regulations “impact the competitiveness and viability of intercollegiate athletic programs,” the Act’s legislative intent fails to mention ticket revenue, lucrative media-rights deals, or apparel contracts, which could also be negatively impacted.⁶⁷

B. Conduct Declared Unlawful and Remedies Under Act 1324

Act 1324 allows the institution to sue for an all-encompassing range of activities. Under the statute, an academic institution may bring a civil action against the following actors: (1) an agent in violation of the Uniform

61. S.B. 1037, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

62. See *SB1037: Bill Tracking History*, ARK. GEN. ASSEMBLY (2013), <http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillStatusHistory.aspx?measureno=SB1037>.

63. See *id.*

64. The author could not locate any media reports or other information discussing the enactment of Act 1324, other than the legislative history on the Arkansas General Assembly’s website.

65. Act 1324, 2013 Ark. Acts 5509, 5010.

66. Act 1324, 2013 Ark. Acts 5509, 5010.

67. Act 1324, 2013 Ark. Acts 5509, 5010.

Athlete Agent Act; or (2) “[a] person who knowingly induces or otherwise knowingly causes a student-athlete to take actions that result in damages caused by violations of athletic association or conference regulations.”⁶⁸ In this context, “damages” means: (1) the institution or a student-athlete is declared ineligible to compete in an intercollegiate competition; or (2) the institution is placed on probationary status by the governing organization.⁶⁹

Additionally, the damages must result in at least one of six statutorily enumerated events to be actionable.⁷⁰ The first five are common sanctions levied by the NCAA, leaving much of the fact-finding to the NCAA and its Committee on Infractions.⁷¹ The sixth event is more intriguing and may trigger the statute’s use if the school “[s]uffers an adverse financial impact, including without limitation lost revenue from media coverage of athletic events or lost revenue from ticket sales.”⁷² The statute’s use of broad language—such as “adverse financial impact” and “without limitation”—expands its applicability in the complicated economic landscape of college athletics.

A prevailing college or university in an action brought pursuant to Act 1324 may recover both compensatory and punitive damages.⁷³ Although the Act reads like many other statutory causes of action, it features two potentially significant shortcomings. The statute fails to mention

68. Act 1324, 2013 Ark. Acts 5509, 5512 (codified at ARK. CODE ANN. § 16-118-110(b) (Supp. 2013)).

69. Act 1324, 2013 Ark. Acts 5509, 5511 (codified at ARK. CODE ANN. § 16-118-110(a)(2)(A) (Supp. 2013)).

70. See Act 1324, 2013 Ark. Acts 5509, 5511 (codified at ARK. CODE ANN. § 16-118-110(a)(2)(B) (Supp. 2013)).

71. These five events are: (1) the loss of an athletic scholarship; (2) the loss of the ability to recruit a prospective student-athlete; (3) the institution’s loss of eligibility to participate in intercollegiate competition; (4) the institution’s loss of eligibility to participate in postseason intercollegiate competition; and (5) the forfeiture of an athletic contest. Act 1324, 2013 Ark. Acts 5509, 5511 (codified at ARK. CODE ANN. § 16-118-110(a)(2)(B)(i)–(v) (Supp. 2013)); NCAA DIVISION I MANUAL, *supra* note 3, at 324.

72. Act 1324, 2013 Ark. Acts 5509, 5511 (codified at ARK. CODE ANN. § 16-118-110(a)(2)(B)(vi) (Supp. 2013)).

73. Act 1324, 2013 Ark. Acts 5509, 5512 (codified at ARK. CODE ANN. § 16-118-110(c)(1)–(2) (Supp. 2013)). The statute also allows for the recovery of costs and fees as well as equitable relief against the responsible individual. Act 1324, 2013 Ark. Acts 5509, 5512 (codified at ARK. CODE ANN. § 16-118-110(c)(1) (Supp. 2013)).

varying levels of culpability of an individual at the time of a violation and its applicability to multiple potentially responsible parties.⁷⁴ Given the nature of most modern NCAA scandals, these shortcomings make appropriate application of the statute difficult.

C. Other States with Similar Adopted or Proposed Statutes

At least two states, Georgia and Texas, have statutes similar to Act 1324.⁷⁵ Additionally, two other states have proposed similar laws in the last year.⁷⁶ The timing and legislative intent of the Texas law suggests that crippling NCAA sanctions levied on Southern Methodist University triggered the enactment.⁷⁷ Even in 1987, opponents of the Texas legislation were cognizant of its potential ramifications—namely the liability imposed for acts in violation of the new law that had otherwise become accepted conduct in intercollegiate athletics,⁷⁸ the negative impact on

74. A culpable party, in the context of the complicated NCAA enforcement processes, might include the injured institution itself. *See, e.g.*, Adrian Wojnarowski & Dan Wetzel, *Probe: UConn Violated NCAA Rules*, YAHOO! SPORTS (Mar. 25, 2009), <http://sports.yahoo.com/ncaa/basketball/news?slug=ys-uconnphone032509> (“Under NCAA rules, UConn is culpable for contact and benefits provided by any representative of its athletic interests regardless of the school’s knowledge.”).

75. *See* GA. CODE ANN. § 20-2-318(b) (West 2013); TEX. CIV. PRAC. & REM. § 131.004 (West 2013).

76. Both states, Oregon and Ohio, proposed the legislation in response to NCAA investigations at the University of Oregon and Ohio State University. *See* Jeff Bell, *Ohio State vs. Tressel? Lawmaker Wants to Allow Schools to Sue*, COLUMBUS BIZ INSIDER (Dec. 22, 2011, 11:41 AM), <http://www.bizjournals.com/columbus/blog/2011/12/ohio-state-vs-tressel-lawmaker-wants.html>; Jonathan J. Cooper & Lauren Gambino, *Ore. Lawmaker: Rule-Breaking College Coaches Should Pay*, KATU.COM, (May 16, 2013, 10:54 PM), <http://www.katu.com/politics/Ore-lawmaker-Rule-breaking-college-coaches-should-pay-207669301.html>.

77. LEGISLATIVE REFERENCE LIBRARY OF TEX., HOUSE RESEARCH ORGANIZATION BILL ANALYSIS: S.B. 643, at 2 (1987), *available at* <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/70-0/SB643.pdf> (“More than half the Texas members of the Southwest Conference are either serving some form of NCAA-mandated probation or have been the subject of NCAA investigations during the past year. . . . Those punishments have ranged from simple warnings or reprimands to the ‘death penalty’ for SMU, cancelling its entire football season.”).

78. *Id.* at 3 (“This bill would go too far in exposing loyal ex-students and patrons of the [Southwest Conference] and Texas colleges and universities to liability for offenses that have become, for better or worse, an accepted part of the nation’s amateur athletic system.”).

contributions to the university,⁷⁹ the unascertainable measure of damages,⁸⁰ and the comparative fault of the institution.⁸¹ Both the Georgia and Texas statutes confer a cause of action to an institution, but no college or university in either state has used this remedy.⁸²

IV. THE SCANDALS

The following three NCAA scandals have been documented and analyzed in excruciating detail. This Part focuses on the relative culpability and consequent liability of these individuals by applying Arkansas Act 1324 to high-profile NCAA investigations at the University of North Carolina, Ohio State University, and the University of Southern California. Application of Arkansas's legislative solution to each scandal illustrates the problems with Act 1324, namely that it produces extraordinary damages without regard to culpability and fails to account for the difficulty of apportioning fault amongst various responsible parties.⁸³

A. The Amoral Academic Advisor

Jennifer Thompson,⁸⁴ then a junior at the University of North Carolina, began tutoring student-athletes at the

79. *Id.* (“The bill may also have a chilling effect upon legal contributions from these alumni or boosters, as they attempt to avoid even the appearance or hint of improper conduct.”).

80. *Id.* (“The part of the bill that would assess damages from lost ticket sales would seem to contain a very imprecise measure of damages.”).

81. *Id.* (“[T]here should be some policy preventing a regional association from awarding a portion of the damages to a member school whose actions or inaction contributed to the violation of this statute by boosters or alumni.”).

82. The author could not locate any federal or state decisions discussing either statute.

83. How Arkansas's comparative-fault statute might operate to reduce or eliminate recovery is unclear, which is significant because major NCAA violations typically include some fault chargeable to the institution. That statute provides: “In all actions for damages . . . in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to the claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.” ARK. CODE ANN. § 16-64-122(a) (Repl. 2005). Act 1324 failed to address this issue. *See* Act 1324, 2013 Ark. Acts 5509, 5510 (codified at ARK. CODE ANN. § 16-118-110 (Supp. 2013)).

84. Thompson is not identified by name in the NCAA Public Infractions Report, but her involvement in the scandal has been widely reported, and news outlets

school in August 2007.⁸⁵ According to the NCAA, during her employment within the athletic department, Thompson engaged in academic fraud with at least three players by writing and editing papers and composing bibliographies.⁸⁶ Thompson continued to work as a tutor for several months after graduating in May 2009, but the University declined to renew her contract because she fraternized with student-athletes outside of work, a violation of the program's policies.⁸⁷

In the following months, Thompson continued to violate NCAA rules through actions the organization declared "must be seen as those of a booster."⁸⁸ She provided tutoring to football players free of charge,⁸⁹ paid a student-athlete's delinquent parking balance of \$1789,⁹⁰ and paid an airline change fee of \$150 so that the same player could return to campus early from a trip.⁹¹ The most serious allegation against Thompson involved UNC football star Greg Little,⁹² who was courted by a sports agent while still enrolled at Chapel Hill.⁹³ Thompson allegedly served as an intermediary, or "runner," between Little and the agent, who sent money to Thompson for her to disperse to Little.⁹⁴

identified her by name following the unsealing of an indictment that brought criminal charges against her in connection with the scandal. See Anne Blythe, *Former UNC Tutor Connected to Football Scandal Charged With Violating NC Sports Agent Laws*, NEWSOBSERVER.COM (Oct. 3, 2013), <http://www.newsobserver.com/2013/10/03/3250242/former-unc-tutor-connected-to.html>.

85. NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT 3 (2012) [hereinafter UNC PUBLIC INFRACTIONS REPORT], available at <http://chronicle.com/blogs/ticker/files/2012/03/UNC.pdf>.

86. *Id.* at 3-5.

87. *Id.* at 5.

88. Blythe, *supra* note 84.

89. The value of this tutoring was alleged to be \$2134, and NCAA rules require student-athletes to pay the fair-market value for these services. UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 6.

90. *Id.* at 5-6.

91. *Id.* at 5.

92. The NCAA deemed Little permanently ineligible following the investigation, and he signed a four-year, \$3.3 million contract with the National Football League's Cleveland Browns in July 2011. Blythe, *supra* note 84.

93. *Id.*

94. *Id.* Little was allegedly paid over \$20,000 during his time at UNC, and those involved in Little's solicitation are currently the subject of a criminal investigation. *Id.*; UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 8.

However, the NCAA declined to include this allegation in its report.⁹⁵ Nonetheless, following its investigation, the NCAA heavily sanctioned the University. The penalties included three years of probation, a loss of fifteen scholarships, a \$50,000 fine, and a ban from the 2012–2013 postseason.⁹⁶

In addition to the violations committed by Thompson and others, the NCAA found UNC responsible for failing to monitor its student-athletes in accordance with NCAA rules.⁹⁷ In response, the University fired head football coach Butch Davis.⁹⁸ After terminating Davis, UNC Chancellor Holden Thorpe acknowledged that “[w]hat started as a purely athletic issue has begun to chip away at [the] University’s reputation.”⁹⁹ To help restore its sullied reputation, UNC spent \$941,000 on accounting services¹⁰⁰ and more than \$500,000 on public relations.¹⁰¹

Thompson’s dealings were undoubtedly improper, but her conduct can only be characterized as minimally culpable within the broad landscape of NCAA scandals. According to the NCAA, her most egregious offenses were paying a delinquent parking balance and an airline change fee for a UNC football player.¹⁰²

95. See generally UNC PUBLIC INFRACTIONS REPORT, *supra* note 85 (making no mention of this allegation).

96. *Id.* at 22-24.

97. *Id.* at 9-12.

98. Jones, *supra* note 7.

99. *Id.* The importance of the University’s reputation is particularly notable in the case of UNC. The School has been consistently ranked among the top public institutions in the country. See Jason deBruyn, *U.S. News Ranks Duke 7th and UNC 30th in Top Universities List*, TRIANGLE BIZBLOG (Sept. 10, 2013, 9:06 AM), <http://www.bizjournals.com/triangle/blog/2013/09/us-news-ranks-duke-6th-and-unc-30th.html?page=all>. The scandal involving academic fraud triggered a dramatic response by the institution, suggesting that UNC might have been a ripe candidate to use a cause of action like the one established in Act 1324, if the school had such an option.

100. Dan Kane, *Baker Tilly’s Work on UNC Academic Fraud Scandal Tops \$900k*, NEWSOBSERVER.COM (June 13, 2013), <http://www.newsobserver.com/2013/06/13/2961950/baker-tillys-work-on-unc-academic.html>.

101. Dan Kane, *UNC Spent More Than \$500k for PR Help in Academic Fraud Scandal*, NEWSOBSERVER.COM (June 8, 2013), <http://www.newsobserver.com/2013/06/08/2948376/unc-spent-more-than-500k-for-pr.html>.

102. UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 5-6.

However, Thompson's limited culpability would not be considered under Arkansas Law. Focusing only on the statute's award of compensatory damages, Thompson's liability would be extraordinary.¹⁰³ First, Thompson would almost certainly be responsible for the \$50,000 fine levied by the NCAA as part of the organization's sanctions against the University.¹⁰⁴ Furthermore the School's 2012–2013 postseason ban¹⁰⁵ could have also triggered a reduction of Nike's cash payment to the University by \$87,500.¹⁰⁶ Her potential liability for the \$941,000 spent by UNC on accounting services following the scandal appears more speculative, but since Thompson and others provided cash benefits to players such as Greg Little, an accounting was likely in order. Money paid to the public-relations firm in an attempt to restore the School's tarnished image also appears compensable because the University needed the services to restore it to the same position of academic repute it held prior to the scandal.¹⁰⁷ Thus, Thompson would be liable to the tune of an additional \$500,000 to restore this position. Totaling these damages, Thompson's minimum liability under Act 1324 would be a staggering \$1.58 million.¹⁰⁸ A

103. Arkansas law precludes Thompson, as a defendant and party responsible for injuring the institution, to apportion fault to some nonparty. *See* St. Vincent Infirmary Med. Ctr. v. Shelton, 2013 Ark. 38, at 6, __ S.W.3d __, __; *see also* Samuel T. Waddell, Comment, *Examining the Evolution of Nonparty Fault Apportionment in Arkansas: Must a Defendant Pay More Than Its Fair Share?*, 66 ARK. L. REV. 485 (2013).

104. *See* UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 1, 23.

105. *See supra* note 96 and accompanying text.

106. *See supra* notes 27-29 and accompanying text. Nike had the option to reduce its cash payment as a result of the postseason ban. Backman, *supra* note 27. Although such an option would naturally cause Thompson's liability for the reduction to be speculative, it is within the realm of possibility that Nike would have exercised the option because its relationship with UNC was predicated, in the words of the then university Chancellor, on the school's "integrity." *See supra* note 28 and accompanying text.

107. A problem with the sums paid to the public-relations firm is the unascertainable figure of damages caused by the tarnishing of UNC's "image." The University remained one of the country's finest public institutions, even after the scandal. deBruyn, *supra* note 99. The effect of the \$500,000 spent to restore this public perception is largely unknown. *See Kane, supra* note 100.

108. This total reflects only Thompson's potential liability to the University of North Carolina under Arkansas's Act 1324 with respect to NCAA fines, penalty clauses in the school's apparel contract, and payments for accounting and public-relations services.

seven-figure sum for academic dishonesty, free tutoring, and payment of a player's parking tickets and an airline fee certainly appears excessive.¹⁰⁹

However, application of the Act also presents several problematic issues for the University. The NCAA found UNC failed to adequately monitor its student-athletes connected to professional sports agents.¹¹⁰ The Committee on Infractions felt the violations might not have occurred if the University had properly tracked the travel and social-networking activities of its student-athletes.¹¹¹

Additionally, Thompson was not the only individual implicated in the scandal. The NCAA found assistant football coach John Blake responsible for unethical conduct and failing to comply with the investigation.¹¹² Blake, head coach Butch Davis's "right-hand man,"¹¹³ refused to cooperate with the NCAA after UNC terminated his employment amid allegations of a \$45,000 deposit into his checking account at a bank frequented by a professional agent.¹¹⁴ Davis could also be responsible for these offenses because he hired Blake despite knowing of Blake's previous employment with a sports agency.¹¹⁵ Finally, several other individuals paid a total of \$27,544 to seven football players in violation of NCAA rules.¹¹⁶ The presence of UNC's inadequate institutional oversight and the role of these individuals, both within and outside of the University's

109. To make matters worse for Thompson, authorities indicted her on criminal charges, which carried a maximum sentence of fifteen-months imprisonment and fines of up to \$25,000. *See* Blythe, *supra* note 84.

110. UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 2, 8-9.

111. *Id.* at 10-11. Although there exists no blanket duty for NCAA member institutions to monitor its student-athletes' social-networking activities, the NCAA found such a duty might be imposed as a part of an institution's "heightened awareness." *Id.*

112. *Id.* at 12. Blake is identified in the Public Infractions Reports only as "the former assistant coach," *id.* at 12, but media reports identified him as the football coach guilty of the NCAA violations at UNC. *See* Lenox Rawlings, *Total Cost of UNC Football Scandal Is Still Unknown*, WINSTON-SALEM J. (July 26, 2011, 1:32 AM), http://www.journalnow.com/sports/columnists/lenox_rawlings/article_840fd424-7a35-5c46-a624-2a70a6c22530.html.

113. Rawlings, *supra* note 112.

114. UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 12-13.

115. Rawlings, *supra* note 112.

116. UNC PUBLIC INFRACTIONS REPORT, *supra* note 85, at 8.

athletic program, complicate proper apportionment of damages. Certainly, Thompson should not bear over \$1.5 million in liability by herself, but Act 1324 is silent as to apportionment.¹¹⁷ Comparative-fault principles prove similarly problematic because of the wide-ranging conduct of many individuals that led to a single set of one-size-fits-all sanctions from the NCAA.

B. The Rogue Booster

Robert “Bobby D” DiGeronimo associated himself with Ohio State football long before coming under scrutiny by NCAA investigators.¹¹⁸ DiGeronimo made his fortune in the construction business and spent a great deal of money supporting the Buckeye football program.¹¹⁹ This generosity earned him a great deal of access to the team and its players, including visits inside the locker room before and after games and trips with the team to away games.¹²⁰

Predictably, many players viewed “Bobby D” as a man whom they could approach if they needed something.¹²¹ Between 2009 and 2011, DiGeronimo employed at least five Ohio State football players at his various businesses.¹²² The players and DiGeronimo were required to disclose this employment to the athletic department’s compliance personnel,¹²³ and DiGeronimo reportedly did so.¹²⁴ However, he failed to comply with NCAA compensation rules when investigators found that DiGeronimo overpaid

117. See Act 1324, 2013 Ark. Acts 5509 (codified at ARK. CODE ANN. §16-118-110 (Supp. 2013)). See also *supra* note 103 (discussing nonparty-fault apportionment in Arkansas).

118. JEFF BENEDICT & ARMEN KETEYIAN, *THE SYSTEM: THE GLORY AND SCANDAL OF BIG-TIME COLLEGE FOOTBALL* 230 (2013).

119. *Id.* at 229-30.

120. *Id.* at 223.

121. *Id.* at 230.

122. NCAA, *THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT 11* (Dec. 20, 2011) [hereinafter *OSU PUBLIC INFRACTIONS REPORT*], available at http://espn.go.com/photo/preview!/pdfs/111220/ohio_state_report.pdf. DiGeronimo is not identified by name as the “representative” employing the OSU players. However, the report references the representative donating large sums of money to the OSU program and visiting the locker room on game days—activities in which DiGeronimo partook. *Id.*; BENEDICT & KETEYIAN, *supra* note 118, at 223, 230.

123. OSU PUBLIC INFRACTIONS REPORT, *supra* note 122, at 14.

124. BENEDICT & KETEYIAN, *supra* note 118, at 233.

five players by a total of \$1605¹²⁵ and gave them \$200 each to attend a charity event in Columbus.¹²⁶ One of the players implicated in the scandal was star wide receiver DeVier Posey.¹²⁷ Posey has disputed the accuracy of the NCAA's accounting of his overpayment, asserting that he was overpaid by a mere \$3.07, not \$727.50.¹²⁸ This amount, in any instance, was inconsequential within the NCAA's all-or-nothing enforcement scheme.

The NCAA released its Public Infractions Report on December 20, 2011,¹²⁹ in which it declared that OSU failed to monitor DiGeronimo's interactions with and employment of the University's student-athletes.¹³⁰ The sanctions included three years of probation, loss of scholarships, a postseason ban following the 2012–2013 regular season, and forfeiture of \$338,811 the University received for its appearance in the 2011 Sugar Bowl.¹³¹ Head coach Jim Tressel¹³² resigned shortly after the release of the Report, which also revealed that he had failed to disclose that some players were involved in unrelated NCAA violations with the owner of a Columbus-area tattoo parlor.¹³³

Robert DiGeronimo is undoubtedly more culpable than Thompson. However, the degree of "Bobby D's" indiscretions was relatively minor in terms of the monetary

125. OSU PUBLIC INFRACTIONS REPORT, *supra* note 122, at 11. NCAA rules mandate that compensation paid to a student-athlete can only be for "work actually performed." NCAA DIVISION I MANUAL, *supra* note 3, at 67.

126. OSU PUBLIC INFRACTIONS REPORT, *supra* note 122, at 11.

127. BENEDICT & KETEYIAN, *supra* note 118, at 216. Posey was selected in the third round of the 2012 NFL Draft by the Houston Texans and signed a four-year, \$2.96 million contract. John McClain, *Texans Reach 4-Year Contract with Rookie WR DeVier Posey*, ULTIMATE TEXANS (July 23, 2012, 4:24 PM), <http://blog.chron.com/ultimatetexans/2012/07/texans-reach-4-year-contract-with-rookie-wr-devier-posey>.

128. BENEDICT & KETEYIAN, *supra* note 118, at 219, 221.

129. *See* OSU PUBLIC INFRACTIONS REPORT, *supra* note 122, at 1.

130. *Id.* at 15. Specifically, the Committee on Infractions found OSU: (1) did not properly oversee DiGeronimo's practice of employing student-athletes; (2) failed to monitor his personal relationships with the student-athletes; and (3) failed to educate football players about DiGeronimo and advise them to cease contact with the booster. *Id.* at 15-16.

131. *Id.* at 19-20.

132. Tressel was one of the winningest coaches in Ohio State history, having led the Buckeyes to three BCS bowl games and the 2002 BCS National Championship. *See* Dohrmann & Epstein, *supra* note 9, at 42.

133. *Id.*

value of the impermissible benefits.¹³⁴ The value of the benefits, although disputed, was of no consequence to the NCAA and, therefore, would permit recovery under Act 1324.

DiGeronimo is surely liable under the statute for OSU's forfeiture of \$338,811 from its 2011 Sugar Bowl appearance.¹³⁵ Greater uncertainty results from the potential liability caused by the postseason ban imposed by the NCAA following the 2012–2013 season. Ohio State finished that season as one of only two undefeated teams and, if not for the ban, almost certainly would have reaped a financial windfall from postseason competition.¹³⁶

First, OSU would have appeared in the 2012 Big Ten Championship Game by virtue of winning its division with a perfect conference record.¹³⁷ The University could have sold an allotment of 15,000 tickets to the game at a minimum of \$80 each—\$1.2 million in potential revenue.¹³⁸ Instead, Wisconsin appeared in the game, defeated Nebraska for the Conference championship, and participated in the Rose Bowl.¹³⁹

Although Arkansas law only allows for the recovery of damages that can be reasonably anticipated from the tortious conduct,¹⁴⁰ Ohio State would have been heavily favored in the Big Ten Championship Game. An Ohio State appearance and win would have launched the Buckeyes to even greater levels—the BCS National Championship Game. Even if OSU lost, the Conference likely would have still sent two teams to BCS bowl games, as they did in the 2011–2012 postseason, which led to \$28.4 million in Conference revenue.¹⁴¹ Instead, the Conference realized

134. According to the NCAA, the total paid by DiGeronimo to the players in impermissible benefits was \$2605. OSU PUBLIC INFRACTIONS REPORT, *supra* note 123, at 11.

135. See OSU PUBLIC INFRACTIONS REPORT, *supra* note 123, at 19–20.

136. See *Ohio State Buckeyes Schedule-2012*, ESPN, http://espn.go.com/college-football/team/schedule/_id/194/ohio-state-buckeyes (last visited Mar. 17, 2014).

137. See *id.*

138. See *supra* note 34 and accompanying text.

139. Teddy Greenstein, *Wisconsin Wallops Nebraska 70-31*, CHI. TRIB. (Dec. 1, 2012), http://articles.chicagotribune.com/2012-12-01/sports/ct-spt-1202-big-ten-championship--20121202_1_bo-pelini-legends-division-taylor-martinez.

140. HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 4:3 (5th ed. 2004).

141. See *supra* notes 36–37 and accompanying text.

only \$17 million in revenue from the BCS—a loss of \$950,000 after distributions to each of the twelve member institutions.¹⁴² An Ohio State appearance in the BCS National Championship Game would have been even more lucrative. One-loss Alabama’s appearance in place of OSU netted the Southeastern Conference \$23.6 million.¹⁴³ Adding that figure to the payout for Wisconsin’s Rose Bowl berth would have resulted in a payout of \$1.97 million to OSU.

Under Arkansas law, DiGeronimo would be liable at least for \$2.5 million and, had the university appeared in the BCS National Championship Game, for a total of \$3.5 million in potential damages.¹⁴⁴ These figures are wildly speculative, however, because they are predicated on Ohio State winning additional games. Act 1324 fails to address this issue in subjecting a booster, such as DiGeronimo, to millions of dollars in potential liability, and the scandal presents additional issues concerning the proper apportionment of damages.

The OSU athletic department was responsible for monitoring the booster given his significant ties with the football program, but it failed to do so. Also, DiGeronimo’s involvement in the scandal was largely ignored because of the more widely publicized conduct of a local tattoo-parlor owner and former head coach Jim Tressel.¹⁴⁵ Their responsibility, in what infamously became known as “Tattoo-Gate,”¹⁴⁶ was the subject of the same Public Infractions Report as DiGeronimo’s violations.¹⁴⁷ Unrelated

142. See Lewis Kamb, *UW Won’t Get Big Payout for Bowl Game Appearance*, SEATTLE TIMES (Dec. 26, 2013, 11:32 PM), http://seattletimes.com/html/localnews/2022539441_uwbowlxml.html.

143. See *supra* note 38 and accompanying text.

144. Again, these figures are not comprehensive. This note focuses solely on DiGeronimo’s potential liability, under Act 1324, as a result of Ohio State’s postseason ban following the 2012 season. In addition to the lost payouts, the University would have reaped untold millions of dollars in exposure from a BCS appearance, especially in the title game and, if victorious, would logically have seen merchandise royalty revenue increase significantly.

145. See Dohrmann & Epstein, *supra* note 9, at 42-48.

146. Roger Groves, *Top 10 Lessons from Ohio State’s Tattoo-Gate*, FORBES (Dec. 21, 2011, 12:45 PM), <http://www.forbes.com/sites/sportsmoney/2011/12/21/top-10-lessons-from-ohio-states-tattoo-gate>.

147. See OSU PUBLIC INFRACTIONS REPORT, *supra* note 122, at 1.

to DiGeronimo, the NCAA found that eight Ohio State football players sold thousands of dollars in memorabilia to, or otherwise received free tattoos from, the owner of a Columbus-area tattoo parlor.¹⁴⁸ Fully aware of the situation, Tressel failed to take action and allowed the players to compete in the 2011 Sugar Bowl.¹⁴⁹ The benefits provided by the tattoo-parlor owner resulted in the NCAA retroactively declaring the players ineligible and charging Tressel with unethical conduct.¹⁵⁰ Many view Tressel and the tattoo-parlor owner as the most responsible for the NCAA's harsh response and feel Ohio State designated DiGeronimo as the "fall guy."¹⁵¹ However, Act 1324 fails to account for this and seemingly allows an institution to pick and choose who may be liable—in this case DiGeronimo—for millions of dollars in damages as a result of a few thousand dollars in impermissible benefits.

C. The Unscrupulous Agents

Reggie Bush's¹⁵² three seasons at the University of Southern California electrified college football. The star running back won the Heisman Trophy¹⁵³ in 2005 and led the Trojans to within seconds of a second consecutive BCS National Championship during the 2005–2006 season.¹⁵⁴ In the months and years that followed, however, Bush's relationship with agents Lloyd Lake and Michael Michaels

148. *Id.* at 2-3.

149. *Id.* at 6.

150. *Id.*

151. See BENEDICT & KETEYAN, *supra* note 118, at 228 ("Longtime observers of college sports saw [Ohio State Athletic Director Gene] Smith's presser for what it was: a systemic attempt to turn [DiGeronimo] into the designated fall guy."); Dohrmann & Epstein, *supra* note 9, at 42-48.

152. Bush was drafted in the first round of the 2006 NFL Draft by the New Orleans Saints and signed a six-year contract that guaranteed him \$26.3 million. Robinson & Cole, *supra* note 10.

153. The Heisman Trophy is awarded annually to the country's most outstanding college football player. *Heisman Trust Mission Statement*, HEISMAN TROPHY, http://www.heisman.com/trust/mission_statement.php (last visited Jan. 20, 2014).

154. See Dale Robertson, *National Champions: Texas Stuns USC to Win Rose Bowl*, CHRON (Jan. 4, 2006), <http://www.chron.com/sports/college/article/NATIONAL-CHAMPIONS-Texas-stuns-USC-to-win-Rose-1906268.php>.

came to light, prompting the NCAA to investigate the USC football program.¹⁵⁵

Beginning in October 2004, the agents provided Bush and his family with a litany of impermissible benefits.¹⁵⁶ These benefits included airline tickets, free limousine service, a vehicle, free lodging in Las Vegas, and a rent-free home for his parents.¹⁵⁷ Lake and Michaels even made cash payments to Bush and his family.¹⁵⁸ The benefits totaled approximately \$300,000, according to a lawsuit filed against Bush by the agents after the star player declined to retain them as his representatives upon declaring for the NFL Draft.¹⁵⁹

“High-profile players merit high-profit enforcement,” stated Committee on Infractions Chair Paul Dee as the NCAA released the USC Public Infractions Report on June 10, 2010.¹⁶⁰ The NCAA imposed harsh penalties on USC for a “lack of institutional control.”¹⁶¹ The University was placed on four years of probation, lost a total of thirty scholarships, and was fined \$5000 for Bush’s amateurism violations.¹⁶² Additionally, the School vacated all wins during the time of Bush’s retroactive ineligibility and disassociated itself with the former player.¹⁶³ The impact of the violations at USC lingers to this day. The University’s significant scholarship reductions caused a decline in performance on the field that culminated with the firing of head coach Lane Kiffin in September 2013.¹⁶⁴ Kiffin blamed

155. See Robinson & Cole, *supra* note 10.

156. See NCAA, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT 4-6 (2010), [hereinafter USC PUBLIC INFRACTIONS REPORT], available at <http://i.usatoday.net/sports/college/2010-06-10-usc-ncaa-report.pdf>.

157. *Id.*

158. *Id.* at 6.

159. See *Bush, Family Sued by Sports Marketer for Nearly \$300,000 in Cash, Gifts*, ESPN (Nov. 1, 2007, 8:56 AM), <http://sports.espn.go.com/ncf/news/story?id=3087571>.

160. Stewart Mandel, *With Harsh USC Penalties, NCAA Sends Warning to All Elite Programs*, SI.COM (June 10, 2010, 8:44 PM), http://sportsillustrated.cnn.com/2010/writers/stewart_mandel/06/10/usc.penalties/index.html.

161. USC PUBLIC INFRACTIONS REPORT, *supra* note 156, at 45-46, 55-64.

162. *Id.* at 57-59.

163. *Id.* at 57.

164. See *supra* notes 42-46 and accompanying text.

his inability to succeed at the school primarily on the sanctions.¹⁶⁵

On a spectrum of culpability, professional sports agents Lloyd Lake and Michael Michaels are, without a doubt, the guiltiest. This note's estimated damages cannot begin to calculate the monetary losses associated with the Trojans' lack of success since the sanctions were levied in June 2010.¹⁶⁶ Other damages, however, are readily ascertainable. Notwithstanding the agents' almost certain liability under Act 1324 for their pursuit of Bush resulting in a \$5000 fine by the NCAA,¹⁶⁷ the pair might be liable for the costs of terminating Kiffin and hiring his replacement.

Should a jury find the requisite link between the sanctions and Kiffin's firing, which is possible given Kiffin's inability to win in Los Angeles, the agents might bear the incredible costs associated with finding and hiring a new coach in the modern age of college football. USC athletic director Pat Haden estimated the process would cost upwards of \$10 million.¹⁶⁸ This figure represents the costs of "buying out" the contracts of Kiffin and his staff, conducting a search for a new head coach, entering into a contract with the new coach and his staff, and "buying out" the contracts of the new coach and his staff at their previous institution.¹⁶⁹

In this situation, Act 1324 appears to function as intended. Lake and Michaels would be subjected to a great deal of liability—possibly the full \$10 million estimated by Haden.¹⁷⁰ This figure is proportionate to their culpability for

165. Thamel, *supra* note 46. Kiffin was fired at USC's private airport terminal upon the team's return from a devastating road loss at Arizona State. *Trojans Dismiss Coach Lane Kiffin*, ESPN LA (Sept. 30, 2013, 11:38 AM), http://espn.go.com/los-angeles/college-football/story/_/id/9742627/usc-trojans-fire-coach-lane-kiffin-3-2-start-blowout-loss.

166. USC PUBLIC INFRACTIONS REPORT, *supra* note 156, at 4-6.

167. USC PUBLIC INFRACTIONS REPORT, *supra* note 156, at 59.

168. See Thamel, *supra* note 46.

169. *Id.* USC hired University of Washington head coach Steve Sarkisian to replace Kiffin in December 2013. Greg Beacham, *Coach Steve Sarkisian Takes Over at USC*, YAHOO! SPORTS (Dec. 3, 2013, 12:49 AM), <http://sports.yahoo.com/news/ap-source-steve-sarkisian-accepts-193517681--ncaaf.html>. Sarkisian's contract reportedly required USC to pay \$1.5 million to the University of Washington and additional sums to buy out other members of Sarkisian's coaching staff. *Id.*

170. This figure represents only the agents' potential liability for the coaching change and does not represent other possible consequential damages such as lost

attempting to “buy” a college athlete’s pledge to retain them as representatives upon entering the NFL. The agents knowingly violated NCAA rules with hopes of realizing great return on their \$300,000 investment from commissions on Bush’s NFL contract. Arkansas’s legislatively crafted response would discourage, and hopefully curb, such behavior through severe liability, but it fails to account for a possibly diminished recovery.

As part of the sanctions, the NCAA found USC responsible for a “lack of institutional control,” possibly the organization’s most severe violation,¹⁷¹ due to the athletic department’s failure to “heed clear warning signs.”¹⁷² These signs, such as the purchase of Bush’s automobile and his employment by a sports marketing firm, compounded USC’s sanctions,¹⁷³ and would significantly reduce or bar any recovery against Lake and Michaels through comparative-fault principles. Bush and his family’s knowing and willful acceptance of the impermissible benefits could have the same effect. Furthermore, the Public Infractions Report included violations from within USC’s men’s basketball and women’s tennis programs,¹⁷⁴ factors that could also absolve Lake and Michaels from the total liability they seemingly deserve.

V. RECOMMENDATION AND CONCLUSION

As written, it is unlikely Act 1324 will ever be employed by an institution within the State of Arkansas. The state’s only school generating revenue in excess of the FBS average, the University of Arkansas, will be reluctant to bring an action against a booster, former student-athlete, or former coach. The negative publicity of such a lawsuit would not be worth the trouble in such a small, football-crazed state. The culpability problem and issue of damage apportionment also make an action brought by the University inherently

postseason payouts, damage to USC’s reputation, or costs associated with the vacation of any wins.

171. USC PUBLIC INFRACTIONS REPORT, *supra* note 156, at 46.

172. *Id.*

173. *Id.* at 47-48.

174. *Id.* at 1.

uncertain, thereby further diminishing the possibility of its use.

Act 1324 is well intended and could significantly deter those who might violate NCAA rules. The stakes are just as high at the University of Arkansas as they are at UNC, Ohio State, and USC. The University of Arkansas reported athletic revenue of \$75.6 million during the 2012–2013 academic year.¹⁷⁵ Razorback athletics also had an additional economic impact of an estimated \$153.6 million during that same period.¹⁷⁶ NCAA sanctions would have a crippling effect on those figures; and in such an event, Act 1324 would serve two purposes: (1) deterring those from engaging in conduct prohibited by the statute; and (2) compensating the University of Arkansas for revenue losses associated with the sanctions.

In order for Act 1324 to serve such purposes/accomplish its goals, the Arkansas General Assembly must first clarify the issue of culpability among responsible parties. An amoral academic advisor who completes assignments for football players or a rogue booster who overpays a player by \$3.07 should not be subjected to the same level of liability as unscrupulous agents who spend hundreds of thousands of dollars attempting to induce a student-athlete into retaining them at the professional level. The General Assembly should revise the statute to reflect the fact that multiple parties—including the institution itself—are often responsible for NCAA violations. Adequate apportionment of fault is critical to the successful implementation of Act 1324 in Arkansas courts. Finally, Act 1324, or its successors, must acknowledge the problems inherent within the NCAA and its enforcement process. Careful legislative debate must realize the following issues: (1) the NCAA often lacks the due-process principles core to the American judicial system;¹⁷⁷ (2) a Public Infractions Report could serve as the police, judge, and jury in an Arkansas court; and (3) the

175. See ARKANSAS ATHLETICS REVENUE REPORT, *supra* note 11.

176. *Id.* at 10.

177. See Aidan Middlemiss McCormack, Comment, *Seeking Procedural Due Process in NCAA Infractions Procedures: States Take Action*, 2 MARQ. SPORTS L.J. 261 (1992).

NCAA may retroactively amend or abrogate past sanctions.¹⁷⁸

With these considerations in mind, the Arkansas General Assembly should amend section 16-18-110 of the Arkansas Code by adding a subsection (e) with the following or similar language:

(e)(1) In its assessment of damages of harm resulting from the acts or omissions of a person under subdivisions (b)(1)–(3) of this section, a jury shall consider the relative culpability of the person found to have committed such an act or omission and the presence of acts or omissions by other culpable parties, including, but not limited to, the institution of higher education itself.

(2) If the jury finds other parties to be culpable for the harm caused to the institution of higher education, it shall reduce the damages awarded in accordance with Arkansas Code Annotated section 16-64-122.

(3) In no event shall the damages awarded against a single actor under this section exceed the amount of one million (1,000,000) dollars.

Careful legislative debate and revision of Act 1324 would avoid the pitfalls that currently plague the statute, allowing the law to function as a successful deterrent and means of recovery for violations of NCAA rules and regulations. With the addition of this language, the statute would no longer unjustly discriminate against minimally culpable actors and reward universities which choose to turn a “blind eye” to NCAA violations. Finally, an amended Act 1324 might serve as model legislation for other jurisdictions at a time when major college athletics are rife with impropriety. Perhaps subsequent promulgation would result in the anchors on SportsCenter talking less about the latest

178. For example, the NCAA amended its severe sanctions against Penn State University following the Jerry Sandusky scandal over a year after levying the penalties against the school. See Rachel Bachman, *Penn State Case Exposes NCAA's Muddled Mandate*, WALL ST. J. (Sept. 24, 2013, 7:44 PM), <http://online.wsj.com/news/articles/SB10001424052702303983904579095450089365642?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702303983904579095450089365642.html>.

college football scandals and more about upcoming college
football games.

GRAHAM C. TALLEY