

Honest Services Fraud: How a Little Known U.S. Statute is Battling Sport Corruption

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Aim

This legal research is prompted by the charges in the current NCAA basketball corruption scandal and the confusion surrounding criminal indictments for rules violations of a national sport governing body. Legal research questions answered include: 1) What is honest services fraud?; 2) How successfully has it been used in sport corruption cases?; and 3) Can it be an effective deterrent to corruption in college athletics?

Purpose and Background

Corruption in sport is omnipresent, as individuals will seek every advantage to win. While governing bodies are expected to act with integrity, sometimes an external entity is necessary to effectuate change when the internal controls of the organization fail. The US Department of Justice (DoJ) has taken this approach in prosecuting organizational officials in the 2002 Olympic Winter Games bid scandal and the 2015 FIFA corruption scandal. Currently, the DoJ is investigating corruption in NCAA college basketball, indicting Adidas officials and college basketball coaches for bribing recruits to attend Adidas-sponsored institutions.

Methodology

This legal research examined primary legal sources – the federal fraud statutes, past sport corruption cases, and the current legal indictments in the NCAA basketball corruption scandal. Keyword searches using the honest services fraud statute (18 U.S.C. §1346), corruption, bribery, fraud, and sport yielded the sport-related case law. These cases were evaluated based on legal theories presented, fact patterns, and convictions or acquittals. The data was compared with the facts alleged in the NCAA basketball corruption cases to determine the likelihood of success in utilizing this statute to address corruption in collegiate sport.

Findings and Discussion

The honest services claim stems from the mail and wire fraud statutes which prohibited schemes to defraud others of tangible property or financial interest, and of the intangible right to honest services. Through the 1970s and early 80s, public officials and private sector employees were charged when the US Mail or interstate wires were used to commit fraud. Sport cases such as *U.S. v. Bloom* (1990) were generally unsuccessful as the use of the mails was not a material element of the fraudulent scheme.

However, in 1988 Congress enacted 18 U.S.C. §1346 which expressly provided that the mail and wire fraud statutes includes a scheme to deprive another of the intangible right of honest services”, overruling the Supreme Court’s decision in *McNally v. United States* (1987). The elements of an honest services fraud claim include: 1) A breach of duty with harm to a person whom a duty is owed; 2) Economic harm caused by the conduct is actual or reasonably foreseeable; and 3) Omission or misrepresentation was material. Under the statute, as long as the organization would suffer considerable losses, including financial loss or damage to

reputation, federal prosecutors have wide discretion to criminalize conduct in private industry that may not otherwise be illegal.

The Honest Services Fraud claim was successfully prosecuted in *US v. Gray* (1996). Baylor University basketball coaches devised and executed a scheme to academically qualify students they recruited by providing them answers to exams were convicted of honest services fraud. Although this conduct constituted a violation of NCAA rules, and did not violate any laws, the court concluded the coaches had a duty to disclose their “cheating scheme” to the university, and the information was material because Baylor could have recruited other eligible, qualified students. Thus, the scheme itself and the failure to disclose it were both material as Baylor University could have altered its decisions had it been aware of the coaches’ actions.

Federal prosecutors were similarly successful in the prosecution of AAU basketball coach Myron Piggie for accepting payments to induce players to accept scholarships at specific schools and paying those players to play for his team in violation of NCAA rules (*U.S. v. Piggie*, 2002). However, they were not successful in prosecuting Tom Welch and Dave Johnson, members of the Salt Lake City Olympic Organizing Committee, for their role in bribing IOC officials for their votes to host the Winter Games. Results have been mixed for the 14 soccer officials indicted in the FIFA corruption scandal, with several cases still in progress.

Conclusion and Implications

While the media and general public expect the NCAA to control every aspect of college sport, it is actually quite limited in its ability to investigate allegations of rules violations. Unlike the government, which has subpoena power and can compel witnesses to testify, the NCAA relies on its members to follow the rules, to report when they have broken the rules, and to cooperate in infractions investigations. Penalties have a huge impact on the institution, but sometimes little impact on the rules violators who are long gone. Criminal prosecution for honest services fraud may be a way to deter cheaters from violating NCAA rules and provide recourse for the institutions that are harmed by their behavior.

References

- U.S. v. Bloom, 997 F.2d 1219 (7th Cir. 1993); 913 F.2d 388 (7th Cir. 1990).
- U.S. v. Evans complaint (filed Sept. 25, 2017, US Dist. Ct. S.D.N.Y.).
- U.S. v. Gatto complaint (filed Sept. 25, 2017, US Dist. Ct. S.D.N.Y.).
- US v. Gray, 96 F.3d 769 (5th Cir. 1996),
- U.S. v. Pearson complaint (filed Sept. 25, 2017, US Dist. Ct. S.D.N.Y.).
- United States v. Piggie, 303 F.3d 923 (8th Cir. 2002).