

APPLYING THE NON-PROFIT DUTY OF OBEDIENCE IN LITIGATION: PENN STATE, PATERNO, STUDENT-ATHLETES, & THE NCAA

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INTRODUCTION

“In theory there is no difference between theory and practice.
In practice there is.”

– *Yogi Berra*¹

“A formation is perfect . . . before the game. Everyone is in the
right place. The problem is that then the game starts and the
players ruin it by running around.”

– *Washington “Pulpo” Etchamendi*²

In the last few years, courts have dismissed many antitrust lawsuits filed against the NCAA.³ One current case, *O’Bannon v. NCAA*, has survived a number of dismissal hearings, but the case seems to be an exception to the majority of decisions ruling in favor of the NCAA on antitrust challenges.⁴

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² Gregory A. Petsko, *Everything I need to know about genomics, I learned from Yogi Berra*, 4 GENOME BIOL. 102.2 (2002), available at <http://genomebiology.com/2002/4/1/102>.

³ Rory Smith, *The More Things Change, the More they Stay the Same*, ESPN FC (Nov. 6, 2013, 10:18 AM), http://espnfc.com/blog/_name/tacticsandanalysis/id/2154?cc=5901 (indicating a quote by Washington “Puplo” Etchamendi, a former Uruguayan professional soccer coach known for his “quick wit and sharp tongue,” that describes the evolving nature of tactics in the sport of soccer).

⁴ See *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004).

⁵ See *In re Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013). See also Tom Farrey, *NCAA Motion Denied in Player Suit*, ESPN: OUTSIDE THE LINES (Nov. 5, 2013, 6:01 PM), http://espn.go.com/espn/otl/story/_i

Legal challenges against the NCAA over the past two decades have shared two main characteristics. First, the claims usually relate to antitrust law.⁵ Second, the NCAA has been able to successfully defend the claim, sometimes very early in litigation.⁶ Successful antitrust claims against the NCAA are rare. The case of *Pennsylvania v. NCAA*, for example, was brought by the former Governor of Pennsylvania, Tom Corbett, and was recently dismissed.⁷ At the time this Article was written, the *O'Bannon* case was progressing through dismissal challenges. Although the case may have the opportunity to succeed, the NCAA has ended its activities for which the *O'Bannon* plaintiffs originally sued.⁸ Even if the *O'Bannon* case breaks new ground for challenges to NCAA activities based on antitrust principles, plaintiffs seeking recourse for NCAA actions still must employ innovative legal theories with which to challenge NCAA leadership.

The fiduciary duty of obedience standard for non-profit leaders may offer a means to either externally challenge through litigation or internally refocus, through strategic realignment

d/9879455/judge-denies-motion-dismiss-ed-obannon-ncaa-lawsuit; Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, *SL.COM* (July 21, 2009, 6:12 PM), http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html.

⁵ Christine A. Burns, *Potential Game Changers Only Have Eligibility Left to Suit Up for a Different Kind of Court: Former Student-Athletes Bring Class Action Antitrust Lawsuit Against the NCAA*, 6 *J. BUS. & TECH. L.* 391, 403-4 (2011) (citing *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004) as an example of an unsuccessful antitrust claim against the NCAA by a former student-athlete who was required to discontinue his endorsement deals for snow skiing in order to participate in Division I football); see also Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 *Harv. L. Rev.* 1299 (listing the antitrust cases filed against the NCAA before 1992).

⁶ See Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 *LOY. L.A. L. REV.* 1213, 1230 (1993) (stating that prior to 1993 a student-athlete had not successfully won on an antitrust claim against the NCAA). See also Burns, *supra* note 5 (providing the example of *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004)). Recent NCAA cases with antitrust claims that were dismissed also include *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004) and *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

⁷ *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416 (M.D. Pa. 2013). Tom Corbett is also an ex officio member of the Board of Trustees at Penn State. See *Board of Trustees: Current Membership*, PENN STATE UNIVERSITY, <http://www.psu.edu/trustees/membership.html> (last visited May 26, 2014).

⁸ *NCAA Will Not Renew EA Sports Contract*, *NCAA* (July 17, 2013), <http://ncaa.org/about/resources/media-center/press-releases/ncaa-will-not-renew-ea-sports-contract>.

within the organization, the NCAA leadership's decision-making. As a tool in litigation, the duty of obedience standard has been used infrequently.⁹ Nevertheless, a duty of obedience claim, if brought by the proper party, can complement or enhance an antitrust claim. NCAA antitrust cases often consider whether the NCAA has promoted amateur intercollegiate athletic competition as described in the NCAA's mission statement or purpose.¹⁰ These arguments focus on the NCAA's mission statement and purpose. Since the mission statement is already a component of most antitrust claims against the NCAA, a duty of obedience argument is not an attempt to grasp at any legal straw, but a logical step in the ongoing challenge to the decisions of a non-profit organization's leadership.

This Article argues that any antitrust lawsuit against the NCAA should include a breach of fiduciary duty of obedience claim. The breach of the duty of obedience claim will enhance an antitrust claim because elements of each claim are legally similar.¹¹ Part I of this Article will provide a background on the

⁹ See Natalie Brown, Note, *The Principal Problem: Towards a More Limited Role For Fiduciary Law in the Nonprofit Sector*, 99 VA. L. REV. 879, 896-97 (2013) (quoting JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 142 (4th ed. 2010) (stating that "[t]here are very few reported judicial decisions involving breaches of fiduciary duty by nonprofit directors.")).

¹⁰ See, for example, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 96 (1984) (stating that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role...").

¹¹ This Article is not intended to attack the NCAA. I hope it will allow readers to expand their understanding of the NCAA's mission beyond the fact that it simply defends amateurism. Amateurism may or may not be the crucial component of the NCAA's mission statement, regardless of what some judicial decisions may have argued. There are various factors to consider when analyzing the importance of amateurism. If amateurism is defined as making college athletics secondary to collegiate academics, then it has a better chance of being an important component of the NCAA's mission statement. If amateurism is simply defined as not financially compensating collegiate athletic participants, then it has nothing to do with the NCAA's mission statement and deserves a place on the sideline in any conversation about the NCAA's true mission. The NCAA has prevailed against antitrust claims by arguing that amateurism is critical to the NCAA's existence. It is not a new argument to say that the NCAA's strict adherence to student-athletes as amateurs is somewhat beside the point. See Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2659 (1996) ("[I]t is not at all clear that college sports' great popularity is substantially greater because the athletes are paid only with in-kind 'academic services.'"). What needs to be considered more thoroughly is whether

key components of this analysis: a brief description of the NCAA, an overview of what has become known as the *Sandusky Scandal*, and a description of the Consent Decree between the NCAA and Pennsylvania State University (“Penn State”). Part II will set out the main arguments of two lawsuits related to the Sandusky scandal: *Pennsylvania v. NCAA*, mentioned earlier, and the lawsuit filed by representatives of former Penn State head football coach, Joe Paterno, and other interested parties.¹² Part III will describe, in detail, the non-profit duty of obedience. It will then show how a non-profit duty of obedience argument can be effectively formulated through an analysis of four NCAA antitrust opinions. Finally, Part IV will propose that both *Pennsylvania* and the Paterno suit should include a duty of obedience claim in order to avoid dismissal. This Article draws two main conclusions—first, a duty of obedience claim may be an effective litigation tool in future NCAA cases; second, the duty of obedience standard is a useful guide for the NCAA to refocus its decision-making process. The end result being the NCAA could properly focus on the student-athlete and their educational experience under this standard.

I. THE SANDUSKY SCANDAL, THE CONSENT DECREE, AND THE NCAA

A. *The History of the Penn State Sandusky Scandal*

For thirty-two years, Jerry Sandusky was employed as an assistant coach for Penn State’s football team.¹³ Following his retirement, Sandusky founded and operated The Second Mile, a non-profit organization that sponsored youth football camps.¹⁴ Penn State provided Sandusky and The Second Mile access to the

amateurism itself is the key to successfully fulfilling the stated mission of the NCAA, not whether the NCAA’s existence is in jeopardy if amateurism dies.

¹² Complaint, *Paterno v. NCAA*, No. 2013-2082, (C.P. Centre Cnty. Pa. May 30, 2013) [hereinafter *Paterno Complaint*], available at <http://www.paterno.com/Media-Release/2013-05-29.aspx>.

¹³ Sara Ganim, *Jerry Sandusky, Former Penn State Football Staffer, Subject of Grand Jury Investigation*, PENN LIVE (March 31, 2011, 8:00 AM), available at http://www.pennlive.com/midstate/index.ssf/2011/03/jerry_sandusky_former_penn_sta.html.

¹⁴ *Id.*

Penn State football facilities, including the locker rooms.¹⁵ Investigations and reports conducted between 2009 and 2011 concluded that Jerry Sandusky had inappropriate relationships with underage boys on Penn State property.¹⁶

Criminal charges were filed against Sandusky for suspected child sexual abuse and against two Penn State administrative officials for suspected perjury and failure to report suspected child sexual abuse.¹⁷ During the same month, both Joe Paterno and Penn State President, Graham Spanier, were removed from their respective university positions.¹⁸ Penn State then hired the private investigation firm of Freeh Sporkin & Sullivan, LLP (“Freeh Firm”), independent of the NCAA, to perform an internal investigation of the alleged child sexual abuse claims.¹⁹ The Freeh Report was released on July 12, 2012, claiming to make an independent assessment of all the parties involved.²⁰ It also provided recommendations to Penn State University regarding how to both remedy the Sandusky scandal and prevent similar situations from occurring in the future.²¹

On June 22, 2012, a jury convicted Jerry Sandusky of having committed forty-five counts of sexual abuse against children.²² In November 2012, the State of Pennsylvania’s Attorney General,

¹⁵ *Id.*

¹⁶ *Id.* A November 2011 grand jury report found that Jerry Sandusky engaged in sexual contact with eight different victims. *Penn State Names Former FBI Director Louis Freeh to Investigate Sex Abuse Scandal*, PENN LIVE (November 21, 2011, 10:19 AM), http://www.pennlive.com/midstate/index.ssf/2011/11/penn_state_names_former_fbi_di.html.

¹⁷ *Child Sex Charges Filed Against Jerry Sandusky; Two Top Penn State University Officials Charged with Perjury & Failure to Report Suspected Child Abuse*, PENNSYLVANIA ATTORNEY GENERAL (Nov. 5, 2011), <http://www.attorneygeneral.gov/press.aspx?id=6270>.

¹⁸ Complaint, *Paterno v. NCAA*, No. 2013-2082, at *14 (C.P. Centre Cnty. Pa. May 30, 2013) [hereinafter *Paterno Complaint*], *available at* <http://www.paterno.com/Media-Release/2013-05-29.aspx>.

¹⁹ *Id.*

²⁰ *See Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, FREEH SPORKIN & SULLIVAN, LLP (July 12, 2012), *available at* http://media.pennlive.com/midstate_impact/other/REPORT_FINAL_071212.pdf.

²¹ *Id.* at 127-44.

²² *Jerry Sandusky Verdict: Complete Breakdown of Charges*, PENN LIVE (June 22, 2012, 10:19 PM), http://www.pennlive.com/midstate/index.ssf/2012/06/jerry_sandusky_verdict_complet.html.

Linda Kelly, filed further charges of conspiracy, obstruction of justice, perjury, and child endangerment against the former Penn State President, Vice-President, and Athletic Director.²³

B. The Consent Decree: The NCAA Uses the Freeh Report to Sanction Penn State, Bypassing Its Own Bylaws and Raising Concerns About Its Leadership's Decision

On July 23, 2012, the NCAA executed a contract (the "Consent Decree") between the NCAA and Penn State, which concerned the Freeh Report and its recommended sanctions against the university.²⁴ The decision to use a consent decree raises questions as to whether the NCAA has violated its own rules, and thus whether the NCAA has gone beyond its stated purpose in order to sanction one of its member institutions in a highly publicized and tragic criminal case. Ultimately, the use of the Consent Decree calls into question the NCAA leadership's intent when entering into the decree.

A consent decree is not a unique legal tool, but it has a unique application in the Penn State case.²⁵ Historically, consent decrees have been used by federal courts to prescribe government behavior deemed unlawful.²⁶ For example, consent decrees have been used to address and further prevent racial discrimination in public schools,²⁷ to revamp or reorganize troubled organizations

²³ Sara Ganim, *Penn State Officials Conspired to Protect Themselves and Jerry Sandusky, AG Says*, PENN LIVE (Nov. 1, 2012, 1:05 PM), http://www.pennlive.com/midstate/index.ssf/2012/11/ag_sandusky_coverup_was_not_a.html.

²⁴ NCAA, *Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University* (July 23, 2012), available at <http://s3.amazonaws.com/ncaa/files/20120723/21207236PDF.pdf> [hereinafter CONSENT DECREE].

²⁵ See, e.g., C. Travis Hargrove, *Liability for Cost of Litigation That Accrue After Litigation Is Complete: Costs Associated with Monitoring Compliance with Established Consent Decree's Are Part of Litigation Costs: Sierra Club v. Hankinson*, 12 MO. ENVTL. L. & POL'Y REV. 68 (2004) (explaining how in *Sierra Club v. Hankinson*, 351 F.3d 1358 (11th Cir. 2003), the Environmental Protection Agency (EPA) and the Sierra Club entered into at least two consent decrees concerning an issue with the state of Georgia's failure to adhere to the Clean Water Act's filing requirements).

²⁶ Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1266-67 (1983).

²⁷ *Court Approves Consent Decree to Prevent and Address Racial Discrimination in Student Discipline in Meridian, Miss.*, U.S. DEPT. OF JUSTICE (May 30, 2013), <http://www.justice.gov/opa/pr/2013/May/13-crt-634.html>.

such as the Los Angeles Police Department,²⁸ and to limit a party's activities following a divorce.²⁹ State Attorneys General used consent decrees in an attempt to control hospital pricing both during and after hospital mergers.³⁰ Consent decrees are extensive and dictate the parties' entire course of conduct, often in detail, for many years.³¹ The Consent Decree between the NCAA and Penn State appears to be a private contract that permits the NCAA to avoid regular sanctioning processes, making the use of the term "Consent Decree" that much more troubling.

The Consent Decree relied upon the findings in the Freeh Report and concluded, "traditional investigative and administrative proceedings would be duplicative and unnecessary."³² This statement appears to be an attempt to justify the use of the Consent Decree outside of the established NCAA investigative process. The Consent Decree further states that an "expedited timetable" for remedying the violations benefits multiple members of the Penn State community.³³ Relying on the Freeh Report (and the "Criminal Jury"), the Consent Decree finds that Penn State "breached" the NCAA Constitution and Bylaws.³⁴ Such findings state that Penn State failed to: 1) "value and uphold institutional integrity," 2) "maintain minimal standards of appropriate and responsible conduct," and 3) adhere to "fundamental notions of individual integrity."³⁵ Outside of its own bylaws, the NCAA makes those same claims against Penn State by way of adoption.

The NCAA's reliance upon the Freeh Report—as opposed to conducting its own investigation—raises issues of procedure,

²⁸ Joel Rubin, *Federal Judge Lifts LAPD Consent Decree*, L.A. TIMES (May 16, 2013), <http://articles.latimes.com/2013/may/16/local/la-me-lapd-consent-decree-2013057>.

²⁹ *Burns v. Burns*, 560 S.E.2d 47, 48 (Ga. Ct. App. 2002) (upholding a consent decree preventing overnight stays for the mother who "cohabitated with or had overnight stays with any adult to whom that party was neither married or related within the second degree.").

³⁰ Toby G. Singer, *Antitrust Implications of the Affordable Care Act*, 6 J. HEALTH & LIFE SCI. L. 57, 78-9 (2013).

³¹ Horowitz, *supra* note 26, at 1267.

³² CONSENT DECREE, *supra* note 24, at 1.

³³ *Id.* It is interesting to note that the list of benefited community members fails to mention student-athletes, the only group specifically named in the NCAA's mission statement.

³⁴ *Id.* at 1-2.

³⁵ *Id.* at 2.

fairness, and institutional integrity.³⁶ After the Penn State sanctions were issued, journalist Craig Houtz noted that “[t]he NCAA appeared to be moving with unprecedented speed, and to be relying on Freeh’s findings instead of conducting its own investigation.”³⁷ Josephine Potuto, a former member of the NCAA infractions committee and current constitutional law professor, noted that the Penn State investigation “is being handled independent of [NCAA] enforcement/infractions processes.”³⁸ Ivan Maisel more recently stated that:

NCAA President Mark Emmert ignored NCAA procedure and rushed to the front of the parade of people who condemned the university. He depended on a rush job of a report by former FBI director Louis Freeh. The longer view has exposed Emmert’s rush to judgment as a textbook case of grandstanding.³⁹

President Mark Emmert has not calmed the criticisms of the Consent Decree. In 2012, President Emmert stated, “[t]he authority I used in the Penn State case is something I never plan to use again.”⁴⁰

C. The NCAA

To better understand the context of the Consent Decree and the Penn State lawsuits requires an understanding of the history,

³⁶ See Dan Vecellio, *BOT Supports Erickson and Moving Forward, Some Still Question NCAA*, SB NATION (Aug. 12, 2012, 7:54 PM), <http://www.blackshoediaries.com/2012/8/12/3238414/penn-state-trustees-consent-decree-ncaa-freeh-report>.

³⁷ Craig Houtz, *Penn State Facing Severe NCAA Sanctions, Removes Paterno Statue*, REUTERS (July 22, 2012, 6:29 PM), <http://www.reuters.com/article/2012/07/22/u-s-usa-pennstate-idUSBRE86L07F20120722>.

³⁸ *Id.*

³⁹ Ivan Maisel, *3-point Stance: Change Ahead in SEC*, ESPN: COLLEGE FOOTBALL NATION BLOG (May 30, 2013, 5:00 AM), http://espn.go.com/blog/ncfnation/post/_id/7920/9/3-point-stance-change-ahead-in-sec.

⁴⁰ Brad Wolverton, *NCAA President Tries to Assuage Worries Over Penn State Precedent*, CHRONICLE OF HIGHER EDUCATION (Sept. 24, 2012), http://oneafar.org/archive/2012_annual_meeting/miscellaneous/Penn_State.html (responding to a question at the 2012 annual meeting of Division I-A faculty athletics representatives and athletics directors).

structure, and purpose of the NCAA,⁴¹ Which was originally recognized by Justice White in 1984 in his dissenting opinion in *NCAA v. Board of Regents*.⁴² Current NCAA president Mark Emmert has reiterated this mission by stating that the NCAA “must be student-centered in all that we do.”⁴³

The NCAA mission statement specifically names student-athletes as the only group that is to benefit from the NCAA.⁴⁴ A beneficiary, in regard to non-profits, is considered a particular individual or group whom the non-profit intends to assist or work for. Based upon the mission statement, a particular non-profit may also specifically limit what type of work or assistance may be given. Thus, the NCAA’s status as a non-profit organization requires a stringent adherence to its mission statement. President Emmert echoes the NCAA’s central purpose: “We have to remind ourselves that this is about the young men and women we asked to come to our schools for a great educational experience . . .”⁴⁵ The NCAA leadership’s decisions in relation to the Sandusky scandal (the offer of the Consent Decree and the divergence from NCAA bylaws in relation to the judicial process) are excellent

⁴¹ See, e.g., Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000); Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 554 (2011); Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 173-78 (2012); Megan Fuller, *Where’s the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 N.Y.L. SCH. L. REV. 495, 499-500 (2010); *NCAA v. Smith*, 525 U.S. 459, 462-63 (1999); *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 957 (2004); *Bowers v. NCAA*, 475 F.3d 524, 529-30 (2007).

⁴² *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 121-22 (1984) (stating that “[t]he NCAA’s member institutions have designed their competitive athletic programs ‘to be a vital part of the educational system’” and that the purpose of the NCAA is “‘to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports.’” (citing the Constitution and Interpretations of the NCAA, Art. II, § 2(a) (1984))).

⁴³ NCAA, *Office of the President: On the Mark*, <http://www.ncaa.org/about/who-we-are/office-president/office-president-mark> (last visited May 26, 2014).

⁴⁴ *Id.* It is important to note that although the mission statement only concerns student-athletes, it is often the case that NCAA leadership refers to other constituents as the NCAA’s concern as well.

⁴⁵ *Id.*

studies into whether the NCAA leadership adhered to the non-profit duty of obedience.

II. THE PENN STATE LAWSUITS' ANTITRUST CLAIMS SHOULD HAVE BEEN COMPLEMENTED BY DUTY OF OBEDIENCE CLAIMS

The use of the Consent Decree raises questions as to whether the authority used by President Emmert in the Penn State Scandal was within the mission of the NCAA. Two lawsuits were filed in relation to the authority used by President Emmert and the NCAA in the Penn State Scandal. The two lawsuits filed were excellent opportunities to attempt a duty of obedience claim against the NCAA and its leadership. The following sections will explain the two Penn State lawsuits, the antitrust claims made, and why a duty of obedience claim against the NCAA may have been a positive addition to the antitrust claims.

A. *The Corbett Lawsuit*

On January 2, 2012, Pennsylvania Governor Tom Corbett, on behalf of the Commonwealth of Pennsylvania and in his capacity as governor of the state, filed a lawsuit against the NCAA (the "Corbett Complaint").⁴⁶ The lawsuit was strictly an antitrust attack upon the NCAA as a trade association claiming that the NCAA arbitrarily and without regard for its own procedures imposed sanctions upon Penn State in a way that prevents Penn State from fully competing within the NCAA rules.⁴⁷ The Complaint claimed that, at the direction of NCAA President Emmert, the NCAA's established disciplinary procedures were bypassed and the matter was directed to the NCAA's Executive Committee and the Division I Board of Directors.⁴⁸ Further, the Corbett Complaint states that the NCAA's sanctions have economically harmed the people of the Commonwealth of Pennsylvania.⁴⁹ Aside from the antitrust claim against the NCAA, no other claims for relief were made.

⁴⁶ Complaint, *Pennsylvania v. NCAA*, 1:13-cv-00006-WWC 416 (M.D. Pa. 2013) [hereinafter Corbett Complaint], available at <https://www.documentcloud.org/documents/550630-witf-corbetts-ncaa-complaint.html>.

⁴⁷ *Id.* at *3.

⁴⁸ *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 421 (M.D. Pa. 2013).

⁴⁹ Corbett Complaint, 1:13-cv-00006-WWC 416, at *3.

The legal issues addressed by the District Court in the Corbett Case asked whether “the alleged NCAA conspiracy to render Penn State’s football program less competitive by harshly sanctioning the school constitutes commercial activity under established law, or whether it evades antitrust scrutiny because it is a legitimate enforcement action relating to amateurism and fair play.”⁵⁰ Although a purely antitrust determination, the District Court did recognize an issue with non-profit duty of obedience elements—that issue being whether the NCAA sanctions against Penn State are a “legitimate enforcement action relating to amateurism and fair play.”⁵¹

The antitrust argument in Corbett was quickly and clearly rejected by the United States District Court,⁵² but a number of statements from the District Court’s dismissing opinion show the Court’s interest in the NCAA’s decisions in relation to its overall purpose. The dismissing opinion indicates that leadership failures may be able to be challenged under other legal theories. More specifically, a quote from the District Court’s decision in the Corbett Case sets the stage for a potential duty of obedience claim against the NCAA:

Citing the complete lack of authority by the NCAA President and its Executive Committee and Division I Board of Directors to involve themselves in disciplinary matters, and the unprecedented imposition of sanctions to address actions that did not directly affect student athletes or member competitiveness, the Governor condemns the NCAA’s sanctions as “arbitrary and capricious,” and personally motivated by a new NCAA President who was out to make a name for himself at Penn State’s expense.⁵³

Thus, the Court is aware that something with the leadership of the NCAA is amiss. It simply appears that legal challenges are unable to grasp what theory or claim can or should be made. Judge Yvette Kane’s opinion hints very subtly at some “important questions deserving public debate” which are “not antitrust questions.”⁵⁴ The District Court states that the Corbett Complaint

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Pennsylvania*, 948 F.Supp.2d at 423.

⁵⁴ *Id.* at 434.

“implicates the extraordinary power of a non-governmental entity to dictate the course of an iconic public institution, and raises serious questions about the indirect economic impact of NCAA sanctions on innocent parties.”⁵⁵ Judge Kane’s language addresses the implications of the Consent Decree upon the student-athlete, recognizing that the Decree has an adverse effect upon a party that was not necessarily represented by the Corbett lawsuit and did not quite have a voice.⁵⁶ And, since the student-athlete is the only named beneficiary in the NCAA’s mission statement, Judge Kane’s recognition of that point shows that Courts are hoping for fresh theories, beyond antitrust, when challenging the NCAA. The subsequently filed lawsuit by the Paterno family and other interested Penn State constituents suffer an identical problem—the lawsuits brought against the NCAA are almost certainly losing propositions because they feature nothing more than antitrust or simple contract claims. The addition of a duty of obedience claim would enhance the Paterno lawsuit as well.

B. The History and Status of the Paterno Lawsuit and Possible Duty of Obedience Claims

On May 30, 2013, several plaintiffs, including the Estate of Joe Paterno, members of the board of trustees of Penns State, two former Penn State football coaches, and two former Penn State players (collectively the “Paterno Plaintiffs”) filed a lawsuit against the NCAA, President Mark Emmert, and Edward Ray, the former Chairman of the Executive Committee (collectively referred to as the “Paterno Defendants”).⁵⁷ The Paterno Complaint claims that the NCAA’s use of the Freeh Report to sanction Penn State “did not comply with the NCAA’s rules and procedures.”⁵⁸ The complaint alleges that the Paterno Defendants engaged in “improper interference in and gross mishandling of a criminal matter that falls far outside the scope of their authority.”⁵⁹ During the decision-making process to impose penalties upon Penn State,

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Paterno Complaint, No. 2013-2082, (C.P. Centre Cnty. Pa. May 30, 2013), available at <http://www.paterno.com/Media-Release/2013-05-29.aspx>.

⁵⁸ *Id.* at *2.

⁵⁹ *Id.*

Emmert and Ray held two of the highest positions of leadership in the NCAA.⁶⁰

Doubts as to the viability of this lawsuit have been raised, and the NCAA is making a strong defense.⁶¹ John Infante, a respected former college athletic administrator and current commentator on intercollegiate athletics, recently stated that the Corbett lawsuit and the Paterno lawsuit are, legally, very similar and therefore face similar challenges.⁶² Infante states that although the recovery sought is different, the theories of both cases focus upon a “combination of antitrust and [the NCAA] ‘not following [its] own rules.’”⁶³ This language used by Infante (“not following [its] own rules”) could be a precursor to an argument based upon the NCAA model of intercollegiate athletics and putting the academic pursuits of the student-athletes first at all times, something that is reflected in the Paterno Complaint when the Plaintiffs state that “[t]he NCAA has no authority”⁶⁴

C. Important Language: “The NCAA has no Authority”

Because the Paterno Plaintiffs specifically state that “[t]he NCAA has no authority,” the lawsuit falls squarely within the theory that the NCAA leadership has not abided by the non-profit duty of obedience. A claim stating such could be included to enhance the lawsuit. In the initial filing, the Paterno Plaintiffs included six claims: two concerning a breach of contract (more specifically, a breach of the implied covenant of good faith and fair dealing), and one each involving intentional interference with contractual relations, injurious falsehood/commercial

⁶⁰ *Id.*

⁶¹ Charles Thompson, *Paterno Suit on NCAA’s Penn State Sanction Hearing Ends; Decision ‘in due course,’* PENN LIVE (OCT. 29, 2013, 3:30 PM), http://www.pennlive.com/midstate/index.ssf/2013/10/first_round_hearing_on_paterno.html#incart_most-read.

⁶² Ben Kercheval, *Does the Paterno Lawsuit Have Legs? A Q&A with NCAA Guru John Infante*, NBC SPORTS (May 30, 2013, 12:34 PM), <http://collegefootballtalk.nbcsports.com/2013/05/30/does-the-paterno-lawsuit-have-legs-a-qa-with-ncaa-guru-john-infante/>.

⁶³ *Id.* (stating, in reference to the Paterno Plaintiffs, that “[t]hey’re throwing some additional things in there because this is specifically involving Joe Paterno and a defamation claim, but it tracks similarly to the Corbett lawsuit.”).

⁶⁴ Paterno Complaint, No. 2013-2082, at *2 (C.P. Centre Cnty. Pa. May 30, 2013), available at <http://www.paterno.com/Media-Release/2013-05-29.aspx>.

disparagement, defamation, and civil conspiracy.⁶⁵ In two separate counts, the Paterno Plaintiffs make breach of contract claims.⁶⁶ The Paterno Plaintiffs argue that contracts between the NCAA and Penn State create third party beneficiary status to all of the Paterno Plaintiffs.⁶⁷ The Paterno Plaintiffs further argue that, as third party beneficiaries, the contract between the NCAA and Penn State contained an implied covenant of good faith and fair dealing applicable to the Paterno Plaintiffs.⁶⁸ The Paterno Plaintiffs claim that this implied covenant, based upon contract law, has been breached.⁶⁹

The introductory paragraphs of the Paterno Complaint refer to the NCAA's lack of authority to enter into the Consent Decree.⁷⁰ For example, the complaint uses the following statement to explain its main argument: "The NCAA has no authority to investigate or impose sanctions on member institutions for criminal matters unrelated to athletic competition at the collegiate level."⁷¹ This argument in support of breach of contract and conspiracy claims mirrors arguments that are or would be made in a non-profit duty of obedience claim. The Paterno Plaintiffs continued their argument that the NCAA has exceeded its own authority in a motion to dismiss hearing on October 29, 2013, where the plaintiffs' attorney stated that "there has never been a situation where the NCAA has been so egregious in violation of its own rules."⁷²

III. THE NON-PROFIT DUTY OF OBEDIENCE & ITS APPLICATION TO NON-PROFIT LEADERSHIP

Although non-profit organizations have taken on a number of characteristics of their for-profit counterparts, the legal

⁶⁵ *Id.*

⁶⁶ *Id.* at *29-33.

⁶⁷ *Id.* at *29, 32.

⁶⁸ *Id.* at *30, 33.

⁶⁹ *Id.* at *30, 33.

⁷⁰ *Id.* at *1. The first paragraph reads, "[t]his action challenges the unlawful conduct of the National Collegiate Athletic Association ('NCAA'), its President, and the former Chairman of its Executive Committee in connection with their improper interference in and gross mishandling of a criminal matter that falls far outside of the scope of their authority." *Id.*

⁷¹ *Id.* at 2.

⁷² Thompson, *supra* note 61.

obligations of non-profit leaders remains slightly different. Non-profit organizations are formed to fulfill a particular societal purpose, not simply to make a profit. The designated leadership, then, is expected to adhere to a non-profit's chosen purpose and to direct non-profit action towards that purpose, sometimes in conflict with the financial or fiscal health of the organization. The NCAA as a non-profit organization is no different, and thus an understanding of the non-profit duty of obedience and its interpretation by the courts is needed. The following section will explain the non-profit duty of obedience and summarize its application to the NCAA, particularly the NCAA's decisions regarding the Sandusky scandal.

A. The Non-Profit Duty of Obedience Explained

The non-profit sector is heavily woven into American society, allowing people the opportunity to serve areas of the public that may be ignored or otherwise exploited by private enterprise.⁷³ To this end, non-profit associations have been permitted significant flexibility in self-regulation. This flexibility creates a less-than-tidy means to police mismanagement and non-adherence to a respective mission statement.⁷⁴

Non-profit law is unique because it shares some common elements with the laws governing fiduciary relationships.⁷⁵ Courts and practicing attorneys alike have recognized legal fiduciary obligations in the non-profit sector, including the fiduciary duty of obedience.⁷⁶ Because non-profit organizations are created for

⁷³ Mark S. Blodgett, Linda J. Melconian, & Jason H. Peterson, *Evolving Corporate Governance Standards for Healthcare Nonprofits: Is Board of Director Compensation a Breach of Fiduciary Duty?*, 7 BROOK. J. CORP. FIN. & COM. L. 443, 444 (2013).

⁷⁴ See *id.* at 461 (citing PANEL ON THE NONPROFIT SECTOR, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE: A GUIDE FOR CHARITIES AND FOUNDATIONS (2007)).

⁷⁵ Brown, *supra* note 9, at 889 (arguing that, although some elements of nonprofit law and fiduciary law appear to be similar, fiduciary law is not an adequate fit for analyzing leadership decisions in the non-profit sector).

⁷⁶ See Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and the Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, n.211-13 (2012) (citing various websites of practitioners, one state bar association, and attorneys general who reference the duty of obedience in relation to materials concerning non-profit organizations). See also *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 715 N.Y.S.2d 575 (N.Y. 1999).

purposes other than purely profit making and serve some other valuable societal function, such as charity,⁷⁷ legally evaluating non-profit leadership decisions the same as for-profit leadership decisions is problematic. Fiduciary law, if applied appropriately, has the opportunity to rectify injustice in places and in ways that the laws of contract, tort, and unjust enrichment cannot. For this reason alone, it is a valuable component of the law of civil obligation.⁷⁸ It is now widely recognized that non-profit sector leadership is subject to certain fiduciary obligations and duties.⁷⁹ Some of the fiduciary duties are similar in name to those from the for-profit sector, such as the duty of care and the duty of loyalty. However, an evaluation of abiding by non-profit obligations differs from the for-profit sector because a non-profit leader's decisions are, or at least should be, guided by a particular mission statement.⁸⁰

The non-profit duty of obedience is one of three recognized fiduciary duties attributed to non-profit leadership.⁸¹ Non-profit scholars Thomas Lee Hazen and Lisa Love Hazen have stated that “[t]he duty of obedience is especially significant in the case of non-profit corporations. References to a duty of obedience capture the idea that a director is under an obligation to ensure that the corporation acts within its proper purpose and mission.”⁸² While acting or deciding on behalf of the non-profit organization, non-profit leaders must adhere to the organization's mission statement and stated purpose.⁸³ Board members and leaders of a non-profit organization do not have an unlimited set of choices when making

⁷⁷ See generally Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 *FORDHAM L. REV.* 893, 894 (2007).

⁷⁸ Leonard I. Rotman, *Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 *B.U. L. REV.* 921, 971 (2011).

⁷⁹ See Hazen & Hazen, *supra* note 76.

⁸⁰ Blodgett, et al., *supra* note 73, at 452-53 (arguing that the purpose of fiduciary duties for nonprofit leadership is “solely to fulfill the organization's charitable mission—a stakeholder-based purpose to benefit the public.”).

⁸¹ See generally Joseph M. Long, *A Contextual Study of the Non-Profit Duty of Obedience: The National Collegiate Athletic Association*, 23 *SETON HALL J. SPORTS & ENT. L.* 125 (2013). See also Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 *N.Y.L. SCH. L. REV.* 457, 467 (2010/11).

⁸² Hazen & Hazen, *supra* note 76, at 386-87.

⁸³ Long, *supra* note 81, at 136-7.

non-profit decisions.⁸⁴ The duty of obedience requires that the scope of the actions taken by non-profit leadership be limited by the non-profit's respective mission statement.⁸⁵ Non-profit leadership is charged with fulfilling the mission of its respective non-profit organization, often referred to as mission fulfillment.⁸⁶

B. A Fiduciary Relationship with Named Beneficiaries

Non-profit organizations do not necessarily have to name a specific beneficiary, but if an organization does, a duty of obedience claim against the non-profit organization is potentially easier to make. Very often, mission statements for non-profit organizations focus upon the actions of the organization and do not name specific individuals entitled to protection under said mission statement.⁸⁷ Non-profit mission statements often do, however, name a particular individual or set of individuals as its main focus. For example, the Boys & Girls Clubs of America states that "all young people" are its focus.⁸⁸ The non-profit leadership, in turn, becomes the fiduciary for the mentioned individual or group. Such is the case with the NCAA, whose mission statement specifically mentions the "student-athlete."⁸⁹ Because the NCAA has created a fiduciary relationship by specifically naming student-athletes, the fiduciary relationship requires more than an

⁸⁴ *Id.*

⁸⁵ Long, *supra* note 81, at 136. *See also*, Blodgett, et al. *supra* note 73, at 453-454 (stating that "The nonprofit [Board of Directors] **duty of obedience** may be distinguished from the duties of care and loyalty as it does not emanate from the nonprofit organization as an organization; rather, it arises from the organization's charitable purpose or mission as described in its articles of incorporation and bylaws. Commentators have suggested that limiting enforceable fiduciary duties to only care and loyalty will not sustain the public trust.").

⁸⁶ Long, *supra* note 81, at 135 (citing Peggy Sasso, *Searching for Trust in the Not-For-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability*, 50 UCLA L. REV. 1485, 1499 (2003)).

⁸⁷ *See, e.g., Vision, Mission, and Goals*, UNITED WAY, <http://www.unitedway.org/pages/mission-and-goals/> (last visited May 26, 2014) (stating as "Our Mission" that "United Way improves lives by mobilizing the caring power of communities around the world to advance the common good.").

⁸⁸ *Who We Are: Our Mission*, BOYS & GIRLS CLUBS OF AMERICA, <http://www.bgca.org/whoweare/pages/mission.aspx> (last visited May 26, 2014).

⁸⁹ Long, *supra* note 81, at 135.

adherence to basic legal standards; rather, a fiduciary relationship requires complete fidelity to a beneficiary's interest(s).⁹⁰

Furthermore, fiduciary obligations of the leaders are paired with fiduciary rights of the beneficiaries. As Professor Leonard Rotman of the University of Windsor stated:

[W]hile fiduciaries have a duty to act with honesty, integrity, fidelity, and in the utmost good faith toward their beneficiaries' best interests, beneficiaries have a correlative right to rely upon their fiduciaries' fulfillment of duty without having to inquire into or otherwise monitor the fiduciaries' activities. Where both the fiduciary and beneficiary act according to their respective responsibilities and entitlements, the integrity of the interaction is maintained.⁹¹

Professor Alan L. Feld draws a similar conclusion, stating that conflicts in the non-profit, mission-driven sector will arise when an organization "seeks to make changes that disappoint one or more of the trusting groups."⁹² A trusting group, in this context, would include specifically named beneficiaries of the non-profit organization.

Courts have addressed beneficiary (trusting groups') rights in the context of non-profit leadership decision-making. In *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, the court blocked the sale of a non-profit hospital and its physical assets because the sale clearly did not support the stated mission of the hospital as required by New York State law.⁹³ The Manhattan Eye leadership had proposed selling its hospital and land, discontinuing its acute care and specialty teaching and research components, and converting the hospital into a diagnostic and testing center only.⁹⁴ After making those decisions, the hospital board attempted to adjust the mission statement to match their decision of selling and

⁹⁰ Rotman, *supra* note 78, at 951.

⁹¹ *Id.* at 958-959.

⁹² Alan L. Feld, *Who Are the Beneficiaries of Fisk University's Stieglitz Collection?*, 91 B.U. L. REV. 873, 877 (2011).

⁹³ *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 715 N.Y.S.2d 575, 586 (N.Y. 1999) (holding that the hospital had not shown that "the purposes of the corporation . . . will be promoted" as required by § 511(d) of New York's Not-For-Profit Corporation Law).

⁹⁴ *Id.* at 595.

reorganizing the hospital.⁹⁵ The court concluded that it is “inescapable that the proposed use of the assets involves a new and fundamentally different corporate purpose” because the proposal did not include serving Manhattan Eye’s current beneficiaries.⁹⁶ The court also concluded that the sales price motivated the board’s decision, not the mission statement of the hospital.⁹⁷ The Court further held that, based upon its non-profit status, the mission statement of the hospital is supposed to drive the board’s decisions and cannot be adjusted to accommodate earlier decisions not within the scope of that mission statement.⁹⁸ Thus, *Manhattan Eye* holds that the burden of compliance with, or adherence to, a particular non-profit mission statement rests with the fiduciary (the non-profit leadership) and not with the non-profit’s beneficiary, and that the mission statement cannot be retroactively adjusted to meet a non-profit board’s decision that affects the non-profit organization.⁹⁹

For the NCAA, this means that all of its decisions must be influenced by the educational experience of its student-athletes and not retroactively justified. Based upon the wording of the NCAA mission statement, the educational experience of the student-athlete cannot be of secondary, or even equal, consideration in any NCAA decision. The challenge in this area of non-profit law will be, as discussed in the next session, the enforcement of a non-profit’s mission statement when leadership decisions appear to denigrate from its respective mission statement.

C. Enforcing a Non-Profit Mission Statement Through a Duty of Obedience Claim

One of the major problems with non-profit mission statement enforcement has been the lack of shareholders to directly monitor the directors.¹⁰⁰ State attorneys generally do have the authority to

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 596.

⁹⁸ *Id.* (“A careful evaluation of whether there was a basis for changing [Manhattan Eye’s] corporate purposes should have determined the need to sell, not vice versa.”).

⁹⁹ Rotman, *supra* note 78, at 959.

¹⁰⁰ Faith Rivers James, *Nonprofit Pluralism and the Public Trust: Constructing a Transparent, Accountable, and Culturally Competent Board Governance Paradigm*, 9

oversee non-profit activities within their respective states, but responses to questionable non-profit behavior have been slow.¹⁰¹ Further, the parties who may be interested in enforcing non-profit leadership duties often lack standing to do so.¹⁰² The NCAA student-athlete has a significant advantage in regards to standing and possible enforcement of the NCAA's mission statement.

The NCAA's mission statement is student-athlete-centric, directing the leadership of the NCAA to make decisions with the educational experience of the student-athlete as the most important concern. This clearly makes the student-athlete a direct beneficiary of the NCAA.

While a student-athlete is clearly a named beneficiary, there are potential significant drawbacks for student-athletes. The common law permits a special beneficiary of a non-profit organization to file suit to enforce mission statement compliance.¹⁰³ There is no doubt that current student-athletes would be beneficiaries, as they are specifically mentioned in the mission statement of the NCAA. However, there does exist a question as to whether a future or former student-athlete would be categorized as a beneficiary under the NCAA mission statement. Even so, current student-athletes should have standing to sue on a theory of breach of the duty of obedience.

A major concern with regards to raising a violation of the duty of obedience claim is finding a student-athlete who would be willing to publicly add his or her name to the list of plaintiffs. As pointed out in a *Sports Illustrated* article by Andy Staples, this issue has taken center stage in the antitrust lawsuit entitled *O'Bannon v. NCAA*.¹⁰⁴ In 2009, former UCLA basketball player Ed O'Bannon sued the NCAA over the use of his likeness as an NCAA

BERKELEY BUS. L.J. 94, 101 (2013); Ronald Chester, *Improving Enforcement Mechanisms in the Charitable Sector: Can Increased Disclosure of Information Be Utilized Effectively?* 40 NEW ENG. L. REV. 447, 457 (2006). See also Brown, *supra* note 9 (arguing that fiduciary enforcement in the non-profit sector is inappropriate).

¹⁰¹ James, *supra* note 98, at 99.

¹⁰² Brown, *supra* note 9, at 889.

¹⁰³ See *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 715 N.Y.S.2d 575, 586 (N.Y. 1999); see also *Shorter Coll., et al., v. Baptist Convention of Ga.*, 614 S.E.2d 37 (2005).

¹⁰⁴ Andy Staples, *Current College Athlete Set to Become Face of Ed O'Bannon v. NCAA?*, SI.COM (June 21, 2013, 11:39 AM), <http://sportsillustrated.cnn.com/college-football/news/20130621/ed-obannon-ncaa-current-athlete/>.

athlete.¹⁰⁵ Now O'Bannon and other former student-athletes seek compensation for the NCAA's use of the former players' likenesses without their permission.¹⁰⁶ The class certification hearing for O'Bannon indicates that the judge would also consider current student-athlete claims if a student-athlete would be willing to join the case as a plaintiff.¹⁰⁷ In the summer of 2013, current student-athletes were permitted to join the suit as plaintiffs, and as of this writing six have done so.¹⁰⁸

Of course, a current student-athlete joining or commencing a lawsuit against the NCAA raises concerns about possible retaliation, including—but not limited to—being barraged by the media, fans, coaches, administrators, and others.¹⁰⁹ Overt or covert political or social pressure on a plaintiff student-athlete, no matter the claims in the lawsuit, is also a concern. For example, in 2012 Metropolitan State University of Denver (“Metro State”) created a tuition category for undocumented Metro State students that was almost \$9,000 lower than the tuition rate for documented out-of-state students.¹¹⁰ In response, a former Colorado Congressman, Tom Tancredo, placed an ad in the September 20, 2012 edition of a Denver newspaper, *The Metropolitan*, seeking out-of-state students willing to serve as plaintiffs to challenge Metro State's new tuition scheme.¹¹¹ On December 5, 2012, Tancredo stated that he was having trouble finding plaintiffs based upon the “perceived retribution” that could possibly result

¹⁰⁵ Robert Wheel, *Ed O'Bannon v. the NCAA: The Antitrust Lawsuit Explained*, SB NATION (Jan. 31, 2013, 9:28 AM), <http://www.sbnation.com/college-football/2013/1/31/3934886/ncaa-lawsuit-ed-obannon/in/3885405>.

¹⁰⁶ *Id.*

¹⁰⁷ Staples, *supra* note 102.

¹⁰⁸ Andy Staples, *Current College Athletes Added to O'Bannon Suit Against NCAA*, SI.COM (July 18, 2013, 9:52 PM), <http://sportsillustrated.cnn.com/college-football/news/20130718/obannon-lawsuit-college-players-ncaa/>.

¹⁰⁹ Staples, *supra* note 102.

¹¹⁰ Patricia Calhoun, *Metro State College's Tuition Plan for Illegals Could Teach the Country a Lesson*, DENVER WESTWORD BLOGS (June 7, 2012, 6:50 AM), http://blogs.westword.com/latestword/2012/06/metro_state_tuition_plan_illegal_immigrants_undocumented.php.

¹¹¹ Michael Roberts, *Tom Tancredo's Metro State Ad Seeks Plaintiffs for Undocumented-Student Tuition Deal Lawsuit*, DENVER WESTWORD BLOGS (Sept. 19, 2012, 1:02 PM), http://blogs.westword.com/latestword/2012/09/tom_tancredo_metro_state_lawsuit_undocumented_students.php.

from the lawsuit.¹¹² Tancredo stated that the reason students are not willing to be a plaintiff is that there could possibly be problems related to both grades and professors.¹¹³ To the NCAA's credit, before current student-athletes were added to the *O'Bannon* lawsuit, top NCAA officials clearly stated that retaliation against any current-student athlete plaintiff would not be tolerated.¹¹⁴ Finding and adding current student-athletes to a lawsuit who can claim a duty of obedience violation by the NCAA is a critical step in the case. Hence, in the potential case of a violation of the duty of obedience claim brought against the NCAA, the real issue is finding current student-athletes who not only have standing, but are also willing to challenge the NCAA and its leadership. Only then can a duty of obedience claim be properly established.

D. NCAA Antitrust Precedent: A Guide for Evaluating the NCAA's Mission and Purpose Under a Duty of Obedience Claim

Antitrust precedent can be a useful guide to a duty of obedience claim against the NCAA. Although antitrust seems to be the current, popular litigation strategy by which the NCAA is challenged, the success rate of such challenges illustrates the need for a look at other, possibly more effective means to challenge NCAA decisions. It could be that the simplicity of filing an antitrust complaint is an attractive means by which to initiate litigation.¹¹⁵ Additionally, the *O'Bannon* lawsuit has shown that proper antitrust claims against the NCAA may be able to reach a jury.¹¹⁶ What is much more common, however, is for the court to decide antitrust claims in the NCAA's favor. When analyzing the antitrust elements, courts often take great pains to explain,

¹¹² *Media Omission: Tancredo Says Metro Lawsuit "probably going nowhere,"* BIGMEDIA.ORG (DEC. 5, 2012), <http://bigmedia.org/2012/12/05/media-omission-tancredo-says-metro-lawsuit-probably-going-nowhere/>.

¹¹³ *Id.*

¹¹⁴ Staples, *supra* note 102.

¹¹⁵ See Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543 (2012).

¹¹⁶ See Michael McCann, *Ed O'Bannon v. NCAA Class Certification Hearing Primer*, SI.COM (June 19, 2013), <http://sportsillustrated.cnn.com/college-football/news/20130619/ncaa-ed-obannon-hearing-primer/index.html>.

analyze, and draw conclusions regarding the mission statement of the NCAA.

The NCAA antitrust decisions evaluate the NCAA mission statement decisions similarly to the way that such respective decisions would be evaluated under a duty of obedience claim against the NCAA and its leadership. Addressing the NCAA's overall mission in antitrust litigation has become a common theme.

This point is illustrated by four antitrust cases: *NCAA v. Bd. of Regents of the Univ. of Okla.*,¹¹⁷ *Agnew v. NCAA*,¹¹⁸ *Banks v. NCAA*,¹¹⁹ and *Pocono Invitational Sports Camp, Inc. v. NCAA*.¹²⁰ These cases support the proposition that courts at various levels, including the U.S. Supreme Court and local Pennsylvania courts, may be willing to hear strong, well-crafted arguments in relation to the duty of obedience.

1. Bd. of Regents of the Univ. of Okla. v. NCAA

The United States Supreme Court case of *NCAA v. Bd. of Regents of the Univ. of Okla.* provides the initial example of a court discussing antitrust principles and addressing the NCAA's mission statement and purpose as significant components of the opinion.¹²¹ *Board of Regents* was filed as a challenge to a television plan ("TV Plan") the NCAA implemented that controlled the television appearances and compensation for all participating NCAA football members.¹²² The NCAA initially decided against televising college football games, but a recommendation from the NCAA Television Committee convinced the NCAA to eventually create and follow a television plan.¹²³ NCAA television plans have been used since 1951.¹²⁴

¹¹⁷ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

¹¹⁸ *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

¹¹⁹ *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

¹²⁰ *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004).

¹²¹ *Bd. of Regents*, 468 U.S. 85.

¹²² *Id.*

¹²³ *Id.* at 88-90. See also James S. Arico, *NCAA v. Board of Regents of the University of Oklahoma: Has the Supreme Court Abrogated the Per Se Rule of Antitrust Analysis?*, 19 LOY. L.A. L. REV. 437, 444-47 (1985).

¹²⁴ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 89-90 (1984).

Despite the broadcasters' ability to directly negotiate with the schools, the TV Plan at issue in *Board of Regents* required all fees for broadcast appearances to be set by a representative of the NCAA.¹²⁵ The TV Plan also made the fees set by the NCAA representative non-negotiable.¹²⁶ Further, NCAA membership schools were prohibited from selling television rights in any way other than those specified, and were limited to a set number of games per season that could be broadcast.¹²⁷ An NCAA interpretative statement of the TV Plan stated that:

The [National Collegiate Athletic] Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season The terms or principles of the control shall be set forth in a television plan . . . prepared by the Football Television Committee, approved by the NCAA . . . and approved by at least two-thirds of the members voting Any commitment by a member institution with respect to the television or cablecasting of its football games . . . necessarily would be subject to the terms of the NCAA Football Television Plan . . .

.¹²⁸

After the implementation of the TV Plan in 1981, NCAA football-participating schools went outside of the TV Plan and entered into a broadcasting agreement ("NBC Contract") with the National Broadcasting Company ("NBC").¹²⁹ In response, and before the NBC Contract was completely ratified by specific schools, the NCAA threatened sanctions against any school working with NBC under the NBC Contract.¹³⁰ The universities of Oklahoma and Georgia then filed a claim in federal district court against the NCAA, stating that the TV Plan violated Section 1 of the Sherman Antitrust Act.¹³¹ The district court, court of appeals,

¹²⁵ Arico, *supra* note 121, at 446.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at n.69 (quoting the NCAA's Official Interpretation of Bylaw 11-3-(aa)).

¹²⁹ Arico, *supra* note 121, at 446-477. This agreement with NBC provided a greater number of television appearances and greater revenues from the broadcasts for the schools party to the contract. *Id.*

¹³⁰ *Id.* at 447.

¹³¹ *Id.* at 437-38. The Sherman Act is intended to bolster a free market economy by maintaining competition. Section 1 makes illegal any unreasonable restraint on trade

and United States Supreme Court all agreed that the TV Plan violated the Sherman Act.¹³² In concluding that the TV Plan, as implemented, did violate the Sherman Act, the Supreme Court noted that the TV Plan did not serve any interest that would justify its existence under the Sherman Act. Through its antitrust evaluation of the TV Plan, the Court stated that it believed the NCAA's purpose to be closely related with the preservation of intercollegiate athletics and athletic amateurism.¹³³

The *Board of Regents* majority opinion identified the unique character and brand of collegiate football, but also recognized that all forms of NCAA sanctioned competition are unique.¹³⁴ The Supreme Court recognized that college football, and NCAA sports in general, are distinct from professional athletics by: 1) tying themselves to predominately academic institutions, and 2) ensuring and maintaining the amateur status of the student-athletes.¹³⁵ The Court further recognized the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports."¹³⁶ Claiming that, "the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics,"¹³⁷ the Court morbidly categorized the NCAA's role as being one that must "preserve a tradition [amateur intercollegiate athletics] that might otherwise die."¹³⁸

The language used by the Court in *Board of Regents* provides a critical component of analysis for a duty of obedience evaluation. Under a duty of obedience evaluation, a court would have to determine the central purpose of the NCAA. *Board of Regents* takes a significant amount of time analyzing just that. The U.S. Supreme Court itself draws a connection between an antitrust evaluation and one involving the duty of obedience. Lower court

as a result of conspiracy, combination, or contract among two or more entities that affects foreign or interstate commerce. 15 U.S.C. §§ 1 -7.

¹³² NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984). The district court referred to the NCAA's control of televising college football as a "classic cartel" that maintained "almost absolute control" over televised football. Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1300 (W.D. Okla. 1982).

¹³³ *Bd. of Regents*, 468 U.S. at 101-02.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 120.

¹³⁷ *Id.*

¹³⁸ *Id.*

decisions demonstrate this same connection as well, as will be discussed in the following section.

2. *Banks v. NCAA* and *Agnew v. NCAA*

Decided over two decades ago, *Banks v. NCAA* provides further evidence of the judicial trend of analyzing the NCAA's mission statement as a means to decide antitrust issues. *Banks* supports the idea that courts may be receptive to a duty of obedience claim because, in this matter, the court used a similar evaluation for an organization's mission statement.¹³⁹ The court in *Banks* considered an antitrust challenge to NCAA regulations that prohibited student-athletes from entering into professional drafts and having contact with pro agents. The *Banks* court stated that the purpose of the NCAA is "to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students."¹⁴⁰ This same analysis could also be used for duty of obedience evaluations. As detailed in *Banks*, the purpose of the non-profit organization is a critical component of a duty of obedience claim.

Twenty years following the decision in *Banks*, Judge Flaum's majority opinion in *Agnew v. NCAA* provided another example from the Seventh Circuit in which the NCAA's main purpose is analyzed in an antitrust context.¹⁴¹ It closely mirrors the language from *Banks v. NCAA* concerning the NCAA's mission and purpose.

In *Agnew*, two former NCAA Division I football players challenged NCAA's bylaws prohibiting multi-year athletic scholarships. These bylaws created a cap on the number of athletic scholarships that were allowed per team.¹⁴² The *Agnew* plaintiffs were two student-athletes who had been injured playing collegiate sports.¹⁴³ The NCAA regulations in place at the time these players were injured only allowed student-athletes one-year scholarship contracts. These athletes were seeking renewal of

¹³⁹ *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

¹⁴⁰ *Id.* at 1090. See also Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007) (discussing the juxtaposition of the NCAA's mission to preserve amateur athletics and "forms of regulation with a more economic purpose.").

¹⁴¹ *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

¹⁴² *Id.* at 332.

¹⁴³ *Id.*

their scholarship contract for subsequent years of attendance at their respective institutions.¹⁴⁴ NCAA rules, however, limited the total number and length of scholarships that membership schools could offer their student-athletes during the course of an academic year.¹⁴⁵ The plaintiffs claimed that such rules were anti-competitive and restrained the market for student-athlete labor.¹⁴⁶ The *Agnew* opinion adopts the conclusions from the U.S. Supreme Court's decision in *Board of Regents*, which held that the type of competition the NCAA "seeks to preserve" is amateur intercollegiate athletics and that a certain level of collusion is necessary to preserve that particular "product."¹⁴⁷

Moreover, the *Agnew* court specifically quotes the *Board of Regents* opinion in a manner complementing duty of obedience evaluations.¹⁴⁸ *Agnew* states that, "most [NCAA] regulations will be a 'justifiable means of fostering competition among amateur athletic teams'"¹⁴⁹ This language hints at what could be a duty of obedience analysis. Though the *Agnew* plaintiffs did not bring a duty of obedience challenge, the court's willingness to evaluate antitrust claims within the context of a particular mission statement supports the idea that a duty of obedience claim could be considered when a student-athlete is challenging NCAA decisions.

Thus, for antitrust purposes, *Agnew* reasoned that "the first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive."¹⁵⁰ Thus, the question raised is essentially whether a plaintiff can make an antitrust claim that persuasively argues that the NCAA is not "fostering competition among amateur athletics teams" in a

¹⁴⁴ *Id.* at 332-33.

¹⁴⁵ *Id.* at 333 (citing 2009-10 NCAA DIVISION I MANUAL, Bylaw 15.3.3.1, which prohibited NCAA member schools from offering scholarship contracts of more than one year to any potential student-athlete).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 342 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984)).

¹⁴⁸ *Id.* at 343.

¹⁴⁹ *Id.* at 341 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

¹⁵⁰ *Id.*

manner preserving the “product” of intercollegiate athletics dictated by the NCAA constitution.¹⁵¹ In other words, the issue is whether the NCAA is promoting intercollegiate competition as stated in its mission statement. Again, this approach to antitrust analysis by the court mirrors the first and most important question in a duty of obedience analysis.

The *Agnew* court’s holding resonates of language used to evaluate the NCAA under a duty of obedience claim. The only difference, like in *Board of Regents* as well as in *Banks*, is that the analysis will focus upon the NCAA leadership’s adherence to its mission statement and not upon the competitiveness of the NCAA decision. This type of analysis is also being used at the federal district court level, as demonstrated below.

3. Pocono Invitational Sports Camp, Inc. v. NCAA

To demonstrate how duty of obedience claims may easily complement and support antitrust challenges to the NCAA, consider the case of *Pocono Invitational Sports Camp, Inc. v. NCAA*.¹⁵² In *Pocono Camp*, the district court evaluated whether various private basketball camp companies have a valid antitrust claim against the NCAA for NCAA rule changes in relation to how basketball camp participation is regulated. The dismissal opinion in *Pennsylvania v. NCAA*, the action brought by Governor Corbett, notably cites to *Pocono Camp*.¹⁵³

In *Pocono Camp*, five for-profit basketball camp and event operators brought antitrust claims against the NCAA under the Sherman Act.¹⁵⁴ The camp operators claimed that three of the NCAA’s recruiting regulations, which restricted NCAA basketball coaches from 1) working at, 2) evaluating players during, and/or 3) remaining present at certain types of basketball camps or events, violated the Sherman Act.¹⁵⁵

The *Pocono Camp* plaintiffs specifically attacked NCAA measures requiring non-institutional member summer camps to

¹⁵¹ *Id.*

¹⁵² *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569 (E.D. Pa. 2004).

¹⁵³ *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 425 (M.D. Pa. 2013).

¹⁵⁴ *Pocono Camp*, 317 F. Supp. 2d at 571.

¹⁵⁵ *Id.* at 573.

be certified by the NCAA only through adherence to certain operational standards.¹⁵⁶ The standards for certification included: limiting the amount of apparel a camp attendee may retain without paying for the apparel,¹⁵⁷ restricting the event locations based upon whether betting on college athletics occurs or has occurred there,¹⁵⁸ preventing athletic company sponsorship of the summer camps,¹⁵⁹ and permitting awards to be given to camp attendees only if the cost of the award is included in the camp entry fee.¹⁶⁰

The court concluded that the *Pocono Camp* plaintiffs failed to prove their Sherman Act claims and granted summary judgment to the NCAA. Their judgment was based primarily on the plaintiffs' failure to prove a relevant market for basketball summer camps.¹⁶¹ The *Pocono Camp* opinion, however, also argues that the NCAA regulations concerning basketball summer camps "are in keeping with the NCAA principles of amateurism and recruiting that aim to *promote education and keep student athletics separate from professional sports.*"¹⁶²

The *Pocono Camp* court stated that the NCAA was "acting in a paternalistic capacity to promote amateurism and education."¹⁶³ The *Pocono Camp* decision relates to the conclusion Daniel Lazaroff of Loyola Law School, Los Angeles makes when he states that NCAA regulations concerning student-athlete academic performance are "less likely to create antitrust issues" for the NCAA.¹⁶⁴ Other regulations or decisions that are not related to academic performance may be challenged, however, either in theories related to antitrust or, possibly, based upon a breach of fiduciary duty, such as the duty of obedience.

¹⁵⁶ *Id.* at 573. Part of the motivation for the certification program was that "street agents taking advantage of prospects, the summer season hurting prospects by making them miss classes and tests, and a lack of parental involvement which exposed the prospects to exploitation." *Id.* at 577.

¹⁵⁷ *Id.* at 573-74.

¹⁵⁸ *Id.* at 574.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 586-87.

¹⁶² *Id.* at 584 (emphasis added).

¹⁶³ *Id.*

¹⁶⁴ Lazaroff, *supra* note 138, at 369.

These four cases, *Board of Regents*, *Banks*, *Agnew*, and *Pocono Camp*, show that the mission statement and the purpose of the NCAA have been and continue to be central themes in litigation that challenges the NCAA. If a proper plaintiff were to include a duty of obedience claim, a verdict against the NCAA on these antitrust issues is attainable.

E. Adding a Duty of Obedience Violation to the Consent Decree Challenges

The four antitrust cases above provide evidence that courts are willing to evaluate an organization's mission statement, particularly the NCAA's. They also show that a duty of obedience claim could have easily been added to the antitrust claims in the lawsuits concerning the Penn State scandal. As demonstrated by these cases, it can be argued that the Consent Decree may not be a complete defense for the NCAA, especially if the Consent Decree was challenged based upon the duty of obedience. A duty of obedience argument would assert that the leadership of the NCAA must be particularly careful when discharging its duties as a non-profit organization. The NCAA's leaders need to make sure in the course of their duties they are not skirting the organization's bylaws simply to reach desired results. In relation to the NCAA's mission statement, the duty of obedience evaluation requires a response to how the NCAA serves its student-athletes, who after all are the named beneficiaries of the non-profit organization.

Professor Jerry Parkinson, a member of the NCAA Committee on Infractions for over a decade has opined:

Plenty of people . . . think the scoundrels are at the NCAA and that they selectively enforce the rules, conduct poor investigations, impose ridiculous penalties, and engage in a variety of other nefarious deeds that undermine the fair administration of intercollegiate athletics. Well, actually they don't, they're just a bunch of dedicated folks trying to get it right—yes, occasionally failing, but not without a lot of hard work, diligence, and good-faith motives.¹⁶⁵

¹⁶⁵ Jerry R. Parkinson, Essay, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 221 (2012).

It would be interesting to pose to Professor Parkinson whether the Consent Decree is justified—whether it “undermine[s] the fair administration of intercollegiate athletics”¹⁶⁶—based upon his opinion. The strategy of the Consent Decree appears to place the findings and penalties imposed by the NCAA under contract law, outside the scope of normal NCAA sanction procedures. The question is whether the motive was to enhance the student-athletes’ educational experience, or to provide collegiate athletics as an avocation. Any number of duties of obedience questions related to the antitrust analyses already raised could be answered by crafting arguments from the antitrust precedent.

IV. A DUTY OF OBEDIENCE CLAIM ENHANCES AN ANTITRUST LAWSUIT AGAINST A NON-PROFIT ORGANIZATION AND COMPLEMENTS ANTITRUST ARGUMENTS

Antitrust lawsuits against non-profit organizations, including the NCAA, may be enhanced by adding duty of obedience violation claims. The Penn State lawsuits help us see how a duty of obedience claim is possible and potentially successful. The two Penn State lawsuits discussed above, *Corbett* and *Paterno*, only address antitrust issues. Since *Corbett* was quickly dismissed on those grounds, it is easy to assume that other legal arguments should have been used. One possible argument for both cases could have been that the NCAA leadership failed to abide by its duty of obedience in sanctioning Penn State University outside of its established sanctioning procedures.

Since an antitrust claim against a non-profit organization often may include arguments surrounding the organization’s mission statement, it would make strategic sense, then, to add a duty of obedience claim, utilizing much of the same evidence that would be used for antitrust cases. A duty of obedience argument in an NCAA antitrust case would merely shift a court’s focus from the elements set forth in the Sherman Act (commercial nature of the enterprise, anticompetitive motivation, existence of a relevant market) to decisions of the NCAA’s leadership. The court would

¹⁶⁶ *Id.*

review whether the leadership did in fact seek to fulfill the mission of the NCAA.

The *Corbett* and *Paterno* lawsuits were excellent opportunities to attempt a claim based upon the theory that the NCAA leadership had violated its non-profit duty of obedience. And, although the elements of a duty of obedience claim may be slightly different, each complaint's arguments are based upon the position that the NCAA went beyond its authority. These cases could have argued that the NCAA exceeded its stated purpose or diverged from its stated mission. These types of claims are the essence of a non-profit duty of obedience claim. Governor Corbett's lawsuit should have included a claim that the NCAA and its directors had breached the duty of obedience to its mission statement. The Paterno Plaintiffs, in an effort to reinforce their breach of contract claims, should have done the same.

CONCLUSION

In the relatively weak and disorganized environment of non-profit law, the duty of obedience claim could be a useful tool in the future. The fiduciary duty of obedience claim could provide clarity and consistency to cases where a particular beneficiary is specifically named in a non-profit's mission statement, as is the case with the NCAA.

When evaluating any non-profit organization's leadership decisions, the duty of obedience provides the proper framework. A court must consider the non-profit leaders' decisions, in relation to the non-profit's specific mission statement. Since the NCAA is incorporated as a non-profit organization, NCAA leadership decisions are subject to a duty of obedience evaluation. Antitrust litigation against the NCAA demonstrates the trend of courts at various levels, including the U.S. Supreme Court, to evaluate the mission statement and purpose of the NCAA.

The lawsuits filed in relation to the Penn State scandal bring only antitrust claims, but place particular pressure upon the courts to evaluate the NCAA's mission statement. A supplement to the antitrust claims could be a duty of obedience claim brought against the NCAA and its leadership.

More specifically, NCAA actions like the Consent Decree may create new administrative precedents for the NCAA leadership

that are outside of the NCAA bylaws. Simultaneously, the Consent Decree may serve to put the NCAA membership on notice that the egregious, unchecked, and unacceptable behavior that occurred at Penn State will be handled outside of the NCAA's constitution, bylaws, and normal investigative and enforcement processes. Because the NCAA is a non-profit organization, however, its leadership decisions, including those related to the Consent Decree, are subject to a duty of obedience analysis. If this is the case, then the decision to use the Consent Decree against Penn State may violate the fiduciary duty of obedience owed to its beneficiaries, the student-athletes. It is not an antitrust issue, but one relating to the fundamental organization of the NCAA as a non-profit entity. The courts have not addressed this issue as of yet. It would be interesting to see this theory put into practice, and how different, in practice, it may become.