Applying the Non-Profit Duty of Obedience in Litigation: Penn State, Paterno, Student-Athletes, & the NCAA

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“In theory, there is no difference between theory and practice. In practice, there is.”
– Yogi Berra

“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

I. INTRODUCTION

In the last few years, many antitrust lawsuits filed against the NCAA were dismissed. While one current case, O’Bannon v. NCAA, has survived a number of dismissal hearings, this case seems to be an exception to judicial decisions ruling that antitrust challenges to NCAA actions are decided in favor of the NCAA.

To succeed with legitimate legal challenges against the NCAA, new legal strategies must be explored and employed. Legal challenges against the NCAA over the last two decades have consisted of two main characteristics. First, the claims against the NCAA were usually based upon some component of antitrust law. Second, the NCAA was able to successfully defend the lawsuit, sometimes at a very early stage of the litigation. In fact, many of the challenges have had little noticeable effect upon the decision-making of the NCAA leadership. Successful anti-trust s claims against the NCAA are rare a , at best, including the recently dismissed Commonwealth of Pennsylvania v. NCAA (Corbett Case) brought by the former Governor of Pennsylvania, Tom Corbett, who is also an ex officio member of the Board of Trustees at Penn State. The O’Bannon case is progressing through dismissal challenges thus far, and may have the opportunity to succeed, but the NCAA recently decided to stop...
participating in the partnerships for which the O'Bannon plaintiffs have sued. Even if the O'Bannon case does break new ground for NCAA challenges based upon antitrust principles, plaintiffs seeking recourse for NCAA decisions must include new 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 or internally refocus the decision-making of the NCAA leadership. The duty of obedience standard, as a tool in litigation, has been infrequently used. Nevertheless, a duty of obedience claim, if brought by the proper party, can complement or enhance an antitrust claim. As this paper will show, NCAA antitrust arguments often consider whether the NCAA has promoted amateur intercollegiate athletic competition. These arguments focus upon the NCAA’s mission statement and purpose. Since the mission statement is already a component of the antitrust litigation, a duty of obedience argument is not an attempt to grasp any straw, but a logical step in this continuing saga of the NCAA and its student-athletes.

This paper will argue that a properly constructed breach of the fiduciary duty of obedience claim brought by a party with proper standing could either enhance an antitrust claim against the NCAA and the NCAA leadership or possibly work as a stand-alone lawsuit. First, the paper will provide a background on the 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 NCAA and Penn State Consent Decree. Second the paper will set out the main arguments of two lawsuits related to the Sandusky Scandal: the lawsuit filed by Governor Tom Corbett and the lawsuit filed by representatives of the Paterno family (the family of the former head football coach of Penn State) and other interested parties. The third section of this comment will describe in detail the non-profit duty of obedience. Following this description, the paper will use four NCAA antitrust opinions to explain how the respective opinions contain antitrust analysis that is strikingly similar to how a non-profit duty of obedience argument can effectively be formulated. Finally, this paper will propose that a duty of obedience claim should have been included in both the Corbett and Paterno lawsuits as attempts to avoid dismissal, as did happen in Corbett and is more than likely to happen in Paterno. The paper draws two main conclusions. First, the paper concludes that a duty of obedience claim may be either an effective litigation tool in future NCAA cases. Second, the paper states that the duty of obedience standard is a useful guide for NCAA leadership to refocus its decision-making process. The new

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9 This paper is not intended to be anti-NCAA. It is, I hope, a means by which we can expand the understanding of the NCAA’s mission beyond simply defending 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 a number of “if’s” related to a decision as to whether amateurism should actually matter. 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 paying collegiate athletic participants, then it has nothing to do with the NCAA’s mission statement and deserves a place on the sideline, or in the parking lot, in any conversations about the NCAA’s true mission. Antitrust litigation against the NCAA has been defended by arguing strongly 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, In Re NCAA Student-Athlete Name & Likeness Licensing Litigation, 2013 U.S. Dist Lexis 153730, n7 (N.D. Cal. 2013) (quoting Gary R. Roberts, The NCAA, Antitrust, and Consumer Welfare, 70 Tul. L. Rev. 2631 (1996) in that “it 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 amateurism itself is the key to successfully fulfilling the stated mission of the NCAA and not whether the NCAA’s existence is in jeopardy if amateurism dies.
decision-making focus would be upon the NCAA’s sole beneficiary, the student-athlete, and the higher educational experience of the student athlete.

II. THE NCAA, THE SANDUSKY SCANDAL, AND THE CONSENT DECREES

This section of the paper will provide some background information concerning the NCAA, the Sandusky Scandal, and the consent decree entered between the NCAA and Penn State University (“Consent Decree”) in an attempt to resolve the Sandusky Scandal and move forward. Separately, the history of the Sandusky Scandal, the Consent Decree and precedent for using consent decrees in other legal

This section will also provide a brief background on the non-profit organization known as the NCAA, its stated mission, its relationship to Penn State and other membership institutions, and the requirement.

a. The History of the Penn State Sandusky Scandal

For 32 years, Jerry Sandusky was employed as an assistant coach for Penn State’s football team. Following his retirement, Sandusky founded and was in charge of a non-profit organization called The Second Mile. The Second Mile provided football camps for youth. Penn State provided Sandusky and The Second Mile access to Penn State football facilities, including locker rooms. Subsequent investigations and reports conducted between 2008 and 2011 concluded that Jerry Sandusky had inappropriate relationships with minor boys on Penn State property, at least once in 1998 and again in 2001.

A grand jury report from November 2011 found that Jerry Sandusky engaged in sexual contact with eight different victims. Charges were filed against Jerry Sandusky for suspected child sexual abuse. Charges were also filed against two Penn State administrative officials for suspected perjury and failure to report suspected child sexual abuse. In the same month Joe Paterno and Penn State president Graham Spanier were both removed from their respective positions at Penn State. And, Penn State engaged a private investigation firm (Freeh Firm) to perform an internal investigation of the alleged sexual abuses against children that had transpired

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11 Id.
12 Id.
13 Id.
17 Paterno Complaint, supra note _____, at 14.
on Penn State’s Campus.\textsuperscript{18} The Freeh Firm was not engaged by the NCAA to investigate Penn State, but was to be an internal investigation by the university.\textsuperscript{19} The Freeh Report was released on July 12, 2012, making an independent assessment of all parties involved and providing recommendations to Penn State University concerning steps to both remedy the current situation and prevent similar situations from occurring in the future.\textsuperscript{20}

On June 22, 2012, a jury convicted Jerry Sandusky of having committed 45 counts of sexual abuse against children.\textsuperscript{21} In November 2012, the State of Pennsylvania’s Attorney General Linda Kelly filed further charges of conspiracy, obstruction of justice, perjury, and child endangerment against former President Graham Spanier, former Penn State Vice-President Gary Schultz, and former Penn State Athletic Director Tom Curley.\textsuperscript{22}

\textbf{b. The Consent Decree: NCAA Uses the Freeh Report to Sanction Penn State Bypassing Its Own Bylaws and Raising Concerns About Its Leadership’s Decision}

The NCAA and Penn State’s 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 to sanction one of its member institutions in a highly publicized and tragic criminal case. As explained below, the use of the Consent Decree raises questions related to the NCAA leaderships’ intent when entering the decree. An explanation of consent decrees in general, and the Penn State consent decree in particular follows.

On July 23, 2012, the NCAA released a contract, entitled a Consent Decree, between the NCAA and Penn State concerning the Freeh Report and sanctions against Penn State ("Consent Decree").\textsuperscript{23} A consent decree is not a unique legal tool, but it has been uniquely used in the Penn State case.\textsuperscript{24} Consent decrees were originally used by federal courts to prescribe behavior

\textsuperscript{19} \textit{Paterno Complaint}, supra note \_\_\_\_, at 14.
\textsuperscript{23} Binding Consent Decree Imposed by the National Collegiate Athletic Association and Accepted by The Pennsylvania State University, NCAA (July 23, 2012), http://s3.amazonaws.com/ncaa/files/20120723/21207236PDF.pdf.
\textsuperscript{24} See, for example, C. Travis Hargrove, \textit{Case Note: 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 filing requirements);
to federal government agencies. For example, consent decrees have been used to address and further prevent racial discrimination in public schools, to revamp or reorganize troubled organizations such as the Los Angeles Police Department, and to limit a divorcing party’s activities following a divorce. State Attorneys General used consent decrees to try to control hospital pricing both during and after hospital mergers. Consent decrees are extensive and dictate an entire course of conduct, often in detail, for many years.

The Consent Decree between the NCAA and Penn State is a private agreement that operates in a similar manner to those judicially sanctioned consent decrees, but is not, as other consent decrees are, sanctioned by a judicial body. In other words, it appears to be a private contract that permits the NCAA to avoid its regular sanctioning process.

In justifying itself, the Consent Decree relies upon the findings in the Freeh Report to conclude that “traditional investigative and administrative proceedings would be duplicative and unnecessary.” The Consent Decree further states that an “expedited timetable” for remedying the violations benefits multiple members of the Penn State community. Relying upon the Freeh Report and what is dubbed the “Criminal Jury”, the Consent Decree finds that Penn State “breached” both the NCAA constitution and certain bylaws. Such findings state that Penn State failed to “value and uphold institutional integrity,” failed to “maintain minimal standards of appropriate and responsible conduct,” and failed to adhere to “fundamental notions of individual integrity.”

The NCAA’s reliance upon the Freeh Report instead of conducting its own investigation raises questions about the sanctions imposed upon Penn State and its staff. After the sanctions were issued, journalist Craig Houtz wrote that, “The NCAA appeared to be moving with unprecedented speed and to be relying on Freeh's findings instead of conducting its own investigation.” Quoting a former member of the NCAA infractions committee and constitutional law professor, Josephine Potuto, the commentator goes on to say that the sanctions process against Penn State “is being handled independent of (NCAA) enforcement/infractions processes.” Another commentator, Ivan Maisel, more recently stated that, “NCAA President

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28 Burns v. Burns, 560 S.E.2d 47, 48 (Ga. Ct. App. 2002)(upholding a consent decree preventing overnight stays for the mother to whom the mother was neither married nor related in the second degree).
29 Toby G. Singer, Antitrust Implications of the Affordable Care Act, 6 J. HEALTH & LIFE SCI. L. 57, (2013).
30 Horowitz, supra note 35, at 1267.
31 Singer, supra note 40, at 1.
32 Id. It is interesting to note that in the list of benefitted community members, the Consent Decree does not mention the only group specifically named in the NCAA’s mission statement, i.e., the student-athlete.
33 Id.
34 Id. at 2.
37 Id.
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.38 President Mark Emmert has not calmed the criticisms about the Consent Decree. In 2012, President Emmert stated that, “The authority I used in the Penn State case is something I never plan to use again.”39

c. The NCAA: Briefly

To better understand the context for the Consent Decree and the Penn State Lawsuits, Numerous sources detail the history and structure of the NCAA, including the NCAA’s own website.40 The NCAA is organized as a non-profit entity that regulates competitive, amateur intercollegiate athletics for its membership.41 Its membership consists of colleges and universities who have voluntarily joined the NCAA and have agreed to abide by its constitution and bylaws.42 NCAA bylaws state that its “basic purpose” 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 intercollegiate athletics and professional sports.”43 This purpose was recognized by Justice White in his dissenting opinion in NCAA v. Board of Regents in 1984.44 Current NCAA president Mark Emmert has reiterated the stated mission and that the NCAA must be “student-centered in all that we do.”45

39 Bard Wolverton, NCAA President Tries to Assuage Worries Over Penn State Precedent, CHRONICLE OF HIGHER EDUCATION (September 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).
41 Long, supra note ______, at ______.
42 Long, supra note ______, at ______.
44 NCAA v. Board of Regents, 468 U.S. 85, 121- 22(1984)(stating that “‘The 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))).
The NCAA mission statement specifically, and only, names student-athletes as the group to be served by the NCAA.46 A beneficiary, in this regard, is considered a particular individual or group for whom the non-profit intends to assist or work. Based upon the mission statement, a particular non-profit may also specifically limit what type of work or assistance may be given. Current president of the NCAA, Mark Emmert, echoes this central purpose by stating, “We must be student-centered in all that we do. 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.”47 Thus, the NCAA’s status as a non-profit organization requires a stringent adherence to this very specific mission statement. Any decisions, no matter how well intended, outside the scope of the mission statement, could be. The NCAA leadership’s decisions in relation to the Sandusky Scandal (the offer of the Consent Decree, the divergence from NCAA bylaws in relation to the judicial process) are excellent studies into whether the NCAA leadership adhered to the non-profit duty of obedience.

III. 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 that “I never plan to use again” is authority 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 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 (“Corbett Complaint”).48 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.49 The Complaint claimed that, at the direction of NCAA President Dr. Mark 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.50 Further, the Corbett Complaint states that the NCAA’s sanctions have economically

46 Id.; It is important to note that although the mission statement only concerns student-athletes, it is often that case that NCAA leadership refers to other constituents as the NCAA’s concern as well.
49 Corbett Complaint, supra note 47 at 3.
harmed the people of the Commonwealth of Pennsylvania.\textsuperscript{51} Aside from an antitrust claim against the NCAA, no other claims for relief were made.

The crux of the Corbett complaint is that, at the direction of NCAA President Dr. Mark 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.\textsuperscript{52} 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.”\textsuperscript{53} Although a purely antitrust determination, the District Court did recognize an issue with non-profit duty of obedience elements that being whether the NCAA sanctions against Penn State are a “legitimate enforcement action relating to amateurism and fair play.”\textsuperscript{54}

The antitrust argument in Corbett was quickly and clearly rejected by the United States District Court\textsuperscript{55} 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. The District Court summarizes the Corbett complaint in relation to the NCAA leadership as:

“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.”\textsuperscript{56}

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.”\textsuperscript{57} The District Court states that the Corbett Complaint “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.”\textsuperscript{58} 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. And, sense 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

\textsuperscript{51} Corbett Complaint, supra note _____ at 3.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Commonwealth of Pennsylvania \textit{v.} NCAA, 2013 U.S. Dist. Lexis 79295
\textsuperscript{57} Id., at *44.
\textsuperscript{58} Id., at *44-45.
for fresh theories, beyond antitrust, with challenges to the NCAA. In the subsequently filed lawsuit by the Paterno family and other interested Penn State constituents, there is an identical problem, i.e., that lawsuits brought against the NCAA without more than antitrust or simple contract claims are almost certainly losing propositions. 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, some members of the board of trustees of the Pennsylvania State University, two former football coaches with Penn State, and two former players for Penn State (collectively “Paterno Plaintiffs”) filed a lawsuit against the NCAA, its President, Mark Emmert, and the former Chairman of the Executive Committee, Edward Ray (collectively referred to as “Paterno Defendants”).59 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.”60 The complaint states, “This 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 the scope of their authority.”.61 During the decision-making process to impose penalties upon Penn State, Emmert and Ray held two of the highest positions of leadership in the NCAA.62

Doubts as to the viability of this lawsuit have been raised, and the NCAA is making a strong defense.63 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.64 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.’”65 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-athlete first at all times, something that is reflected in the Paterno Complaint when the Plaintiffs state that “The NCAA has no Authority.”66

60 Paterno Complaint, supra note ______ at 16.
61 Id.
62 Id.
65 Id. (stating in the article interview that “They’re [Paterno Plaintiffs] 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.”)
66 Paterno Complaint,
c. Important Language: The Paterno Plaintiffs state that “The NCAA has no Authority”

Because the Paterno Plaintiffs specifically state that “The 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 have 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 disparagement, defamation, and civil conspiracy. In two separate counts, the Paterno Plaintiffs make breach of contract claims. The Paterno Plaintiffs argue that contracts between the NCAA and Penn State create third party beneficiary status to all of the Paterno Plaintiffs. 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. The Paterno Plaintiffs claim that this implied covenant, based upon contract law, has been breached. Although most of the claims are contract claims.

The introductory paragraphs of the Paterno Plaintiffs’ Complaint refer to the NCAA’s lack of authority to enter the Consent Decree. The most troublesome aspect of the introductory statements in the Paterno Complaint is that there is little support for the broad introductory statements within the claims themselves. For example, the complaint uses the following statement to explain its main argument: Nevertheless, this strategic argument mirrors arguments that are or would be made in a non-profit duty of obedience claim. The Plaintiffs continued their argument that the NCAA has exceeded its own authority in a Motion to Dismiss hearing on October 29, 2013, where the attorney for the Plaintiffs stated that “there has never been a situation where the NCAA has been so egregious in violating its own rules.”

I. THE NON-PROFIT DUTY OF OBEDIENCE: A BRIEF EXPLANATION

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

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67 Paterno Complaint, supra note ____.
68 Paterno Complaint, supra note ____.
69 Paterno Complaint, supra note ____., at paragraphs 105 – 121.
70 Paterno Complaint, supra note ____., paragraphs 108 & 117.
71 Paterno Complaint, supra note ____., paragraphs 109 & 118
72 Paterno Complaint, supra note ____., paragraphs 110 & 119.
73 Paragraph 1 reads, “This action challenges the unlawful conduct of the National Collegiate Athletic Association (“NCAA”), its President, and the former Chairman of the Executive Committee in connect with their improper interference in a gross mishandling of a criminal matter that falls far outside of the scope of its authority.”
enterprise. 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.

Non-profit law is unique because it shares some common elements with the laws governing fiduciary relationships. Courts and practicing attorneys alike have recognized legal fiduciary obligations in the non-profit sector, including the fiduciary duty of obedience. Because non-profit organizations are created for purposes other than purely profit-making and serve some other valuable societal function, like charity, 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 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. It is now widely recognized that non-profit sector leadership is subject to certain fiduciary obligations (duties). 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.

The non-profit duty of obedience is one of three recognized fiduciary duties attributed to non-profit leadership. Non-profit scholars Thomas Hazen & Lisa Love Hazen have stated that, “The 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

77 Natalie Brown, Note, The Principle Problem: Towards a More Limited Role For Fiduciary Law in the Nonprofit Sector, 99 VA. L. REV. 879, 889 (2013) (arguing that, although some elements of nonprofit law and fiduciary law appear the same, fiduciary law is not, in fact, an adequate fit for analyzing leadership decisions in the non-profit sector).
82 Blodgett, et al., supra note ____, at 452-53. (arguing that the purpose fiduciary duties for nonprofit leadership is “solely to fulfill the organization’s charitable mission – a stakeholder-based purpose to benefit the public.”)
under an obligation to ensure that the corporation acts within its proper purpose and mission.”

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. Board members and leaders of a non-profit organization do not have an unlimited set of choices when making non-profit decisions. The duty of obedience requires that the scope of actions by non-profit leadership be limited by the non-profit’s respective mission statement. Non-profit leadership is charged with fulfilling the mission of its respective non-profit organization often referred to as mission fulfillment.

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. 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. However, non-profit mission statements do often name a particular individual or set of individuals as its main focus. For example, the Boys & Girls Club of America states that “all young people” are its focus. 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.” Because the NCAA has created a fiduciary relationship by specifically naming student-athletes. A fiduciary relationship requires more than an adherence to basic legal standards; rather, a fiduciary relationship requires complete fidelity to a beneficiary’s interest(s).

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

“While 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

85 Long, supra note ______, at ; See also, Blodgett, et al. supra note ______ (state that “The nonprofit BOD 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 Joseph M. Long, at 135 (citing Peggy Sasso, Searching for Truth in the Not-For-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability, 50 U.C.L.A. L. REV. 1485, 1518 (2003))(Sasso’s theory has been adopted by at least one ______.)
87 See, for example, United Way, Vision, Mission, and Goals, UNITED WAY.
88 Boys & Girls Club of America, WHO WE ARE: Our Mission, BOYS & GIRLS CLUB OF AMERICA, 2013,
89 Long, supra note ______ at .
both the fiduciary and beneficiary act according to their respective responsibilities and entitlements, the integrity of the interaction is maintained.”

Prof. 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.” 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 Hospital v. Spitzer*, the Court blocked the sale of a non-profit hospital and its physical assets based upon the fact that the sale clearly did not support the stated mission of the hospital as required by New York State law. 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 to a diagnostic and testing center (D& T Center) only. After making those decisions, the hospital board attempted to adjust the mission statement to match their decision of selling and reorganizing the hospital. 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.

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. Thus, *Manhattan Eye* holds that the burden of compliance with, or adherence to, a particular 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.

What this means for the NCAA is that all of their decisions must be focused upon 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 the non-

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93 715 N.Y.S.2d 575 (N.Y. App. Div. 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, NY CLS N-PCL § 511 (2013)).
94 Id. at 595.
95 Id.
96 Id.
97 Id. at 596
98 Id. (stating that, “A careful evaluation of whether there was a basis for changing the corporate [Manhattan Eye’s] purpose should have determined the need to sell, not vice versa.”)
profit 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

The ability to enforce a non-profit mission statement is difficult, but a duty of obedience claim by the proper beneficiary provides an additional channel to the antitrust strategies. non-profit

One of the major problems with non-profit mission enforcement has been the lack of shareholders to directly monitor the directors.\textsuperscript{100} State attorneys generally do have the authority to oversee non-profit activities within their respective states, but responses to even egregious non-profit behavior has been slow.\textsuperscript{101} Further, the parties who may be interested in enforcing non-profit leadership duties lack standing to do so.\textsuperscript{102} The NCAA student-athlete has a significant advantage with standing and, possibly enforcement of the NCAA’s mission statement. The following next section will discuss why a NCAA student-athlete is excellently positioned to file a breach of the duty of obedience claim against the NCAA.

\textit{i. Beneficiary Status: The Student-Athlete}

The student-athlete is specifically named in the NCAA’s mission statement. Thus, 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. 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.

However, 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 \textit{Ed O’Bannon v. NCAA} (“O’Bannon”) case.\textsuperscript{103} In

\begin{footnotes}
\item[101] James, supra note 106, at 99.
\end{footnotes}
2009, Ed O’Bannon sued the NCAA over the use of his likeness as an NCAA athlete. 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. And, in the summer of 2013, current student-athletes were permitted to join the suit as plaintiffs and six have done so.

Of course, the fact that a current student-athlete joins or commences 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. Overt or covert political or social pressure on a plaintiff student-athlete, no matter the claims in the lawsuit, is a concern. For example, in 2012 Metropolitan State University of Denver (Metro State) created an almost $9,000 lower tuition category for undocumented Metro State students than for documented out-of-state students. 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. On December 5, 2012, Tancredo stated that he was having trouble finding plaintiffs based upon the “perceived retribution” that could possibly result from the lawsuit. Tancredo stated that the reason students are not willing to be the plaintiff is that there could possibly be problems related to both grades and professors. 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. Finding and adding current student-athletes to a lawsuit claiming a duty of obedience violation 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.

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105 Id., note 118.
106 Andy Staples, supra note 118.
107 Patricia Callhoun, Metro State College’s tuition plan for illegals could teach the country a lesson, DENVER WESTWORD BLOGS: LATEST WORD (Jun. 7, 2012), http://blogs.westword.com/latestword/2012/06/metro_state_tuition_plan_illegal_immigrants_undocumented.php#ad_not_found.
108 Id.

Antitrust precedent can actually be a 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 legally 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 anti-trust complaint is an attractive means by which to initiate litigation. Additionally, the Ed O’Bannon lawsuit has shown that proper antitrust claims against the NCAA may be able to reach a jury. However, what is much more common is for the court decisions to address antitrust claims against the NCAA in the NCAA’s favor. When analyzing the antitrust elements, courts often wrangle with, and take great pains to explain, analyze, and draw conclusions regarding the mission statement of the NCAA. [Therefore claimants should look to alternate litigation strategies such as alleging a breach of the non-profit duty of obedience]

The NCAA antitrust decisions evaluate the NCAA mission statement decisions very 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, Board of Regents of the University of Oklahoma v. NCAA from the United States Supreme Court, Agnew v. NCAA from the U.S. Court of Appeals for the Seventh Circuit, Banks v. NCAA, and Pocono Invitational Sports Camp, Inc. v. NCAA. This supports the fact 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.

i. Board of Regents of the University of Oklahoma v. NCAA

The United States Supreme Court case of NCAA v. Board of Regents of the University of Oklahoma (Bd. of Regents) provides the initial example of a Court discussing antitrust principles and addressing the NCAA’s mission statement and purpose as a significant component of the opinion. Bd. of Regents was filed as a challenge to a television plan (TV Plan) the NCAA implemented that controlled the television appearances and possible compensation for all NCAA football participating members. Initially, the NCAA choose not to televise college football.

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114 See Richard M. Steuer, The Simplicity of Antitrust Law, 14 U. PA. BUS. L. REV. 543 (2012)(arguing that, despite the complex terminology and categorizations created by practitioners, academics, and judicial decisions, under antitrust law, “all competition law, if properly applied, should be directed against, and only against, assaults on competition from bullying and ganging up.”).

115 The lawsuit has survived dismissal hearings and is scheduled for a June 20, 2013 hearing to determine whether class certification will be granted or denied. 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.


117 683 F.3d 328 (7th Cir. 2012).


120 104 S. Ct. at 2948.

121 104 S. Ct., at 2954-55.
But, a recommendation from an NCAA Television Committee convinced the NCAA to create and follow a television plan.\(^\text{122}\) \(^\text{123}\) NCAA television plans have been used since 1951.\(^\text{124}\)

The TV Plan in question in the *Bd. of Regents* involved an antitrust challenge by both the University of Oklahoma and the University of Georgia to the 1981 plan set forth to control the 1982 to 1985 college football seasons.\(^\text{125}\) The main purposes of the 1981 TV Plan were to, first, “reduce the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance” and, second, “to spread television among as many NCAA member colleges as possible.”\(^\text{126}\) To achieve these stated purposes, the NCAA contracted directly with American Broadcast Companies (ABC) and Columbia Broadcasting System (CBS), providing each the exclusive right to negotiate television appearances with member institutions for football game broadcasting.\(^\text{127}\)

Despite the broadcasters’ ability to directly negotiate with the schools, the TV Plan required all fees for broadcast appearances to be set by a representative of the NCAA.\(^\text{128}\) The TV Plan also made the fees set by the NCAA representative non-negotiable.\(^\text{129}\) Further, NCAA membership schools were prohibited from selling television rights in any other way and were limited to the number of games per season that could be broadcast.\(^\text{130}\) 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…\(^\text{131}\)

After the implementation the TV Plan in 1981, NCAA football participating schools went outside of the TV Plan and entered into a broadcasting agreement with the National Broadcasting

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\(^\text{122}\) 104 S. Ct., at 2954-55; 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 L.A. L. REV. 437, 445 (1985).
\(^\text{124}\) *Board of Regents*, 104 S. Ct. at 2955.
\(^\text{125}\) Arico, 19 L.A. L. REV. at 445.
\(^\text{126}\) *Id.* (quoting *Board of Regents*, at 2955 n. 4).
\(^\text{127}\) *Id.* (citing *Board of Regents*, at 2955).
\(^\text{128}\) *Id.*, at 446; *Board of Regents*, at 2956.
\(^\text{129}\) *Id.*, at 446; *Board of Regents*, at 2956.
\(^\text{130}\) *Id.*; *Board of Regents*, at 2957.
\(^\text{131}\) *Id.*, at 447 n. 69 (quoting the NCAA Official Interpretation of Bylaw 11-3-(aa)).
Company (NBC Contract). 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. The universities of Oklahoma and Georgia then filed a Federal District Court claim against the NCAA stating that the TV Plan violated section 1 of the Sherman Antitrust Act. At each level of review, The Federal District Court, Court of Appeals, and United States Supreme Court all agreed that the TV Plan violated the Sherman Act. In concluding that the TV Plan, as implemented, did violate the Sherman Act, the Court noted that the TV Plan did not serve any interest that would justify its existence under the Sherman Act. The antitrust evaluation of the TV Plan demonstrates how the Court addressed, in broad terms, the purpose of the NCAA and tied the NCAA purpose closely with the preservation of intercollegiate athletics and athletic amateurism.

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. The Supreme Court recognized that college football, and NCAA’s sports in general, are distinct from professional athletics by, one, tying themselves to predominately academic institutions and, two, ensuring and maintaining the amateur status of the student-athletes. The court further recognized the NCAA’s “critical role in the maintenance of a revered tradition of amateurism in college sports” claiming that “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics.” The court morbidly categorized the NCAA’s role as being as one that must “preserve a tradition [amateur, intercollegiate athletics] that might otherwise die.” The language used by the Court in Bd. of Regents provides a critical component of analysis for a duty of obedience evaluation as well. Under a duty of obedience evaluation, a court would have to determine the central purpose of the NCAA and Bd. of Regents takes a significant amount of time in doing just that. Thus, from the U.S. Supreme Court itself, we can draw a connection between an antitrust evaluation and one involving the duty of obedience. Lower court decisions demonstrate this same connection as well, as will be discussed in the following section.

**ii. Banks v. NCAA & Agnew v. NCAA**

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132 Id., at 447; Board of Regents, at 2957. (This agreement with NBC provided a greater number of broadcasting appearances and greater revenues from the broadcasts for the schools party to the contract. Arico, at 447.
133 Id.
134 Id., at 437 (The Sherman Act is intended to bolster a free market economy by maintaining competition among. Section 1 makes illegal any unreasonable restraint on trade as a result of conspiracy, combination, or contract among two or more entities that affects foreign or interstate commerce. Arico, at 438; 15 U.S.C. §§ 1 -7 (citing ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 2 (2d ed. 1984)).
135 Board of Regents, 468 U.S. 85, 88 (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. Board of Regents, at 95-6 (citing Board of Regents v. NCAA, 546 F.Supp. 1276 (WD Okla. 1982))).
136 Id. at 101-2.
137 Id. at 101-02.
138 Id., at 102.
139 Id., at 96.
140 Id.
A case from almost 2 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 and supports the idea that courts may be receptive to a duty of obedience claim based upon a similar evaluation of an organization’s mission statement. The Court in Banks considered an antitrust challenge to NCAA regulations prohibiting student-athletes from, both, entering a professional draft as well as having contact with a professional agent. In relation to the purpose of the NCAA, the Banks court stated that “The regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.”

This same sentence could be used to begin a duty of obedience evaluation as well. Identifying the purpose of the non-profit organization, as the Banks decision does is a critical component of

Further evidence that Courts could easily transfer the mission statement evaluation under antitrust claims to duty of obedience claims is provided by the case Agnew v. NCAA. Twenty-two years following the decision in Banks, Judge Flaum’s majority opinion in Agnew v. NCAA provides another example from the Seventh Circuit in which the NCAA’s main purpose is analyzed in an antitrust context. 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 the NCAA’s bylaws which prohibited multi-year athletic scholarships and created a cap on the number of athletic scholarships that are allowed per each NCAA team. The two plaintiffs were student-athletes who had been injured during one of their years of participation in their respective sports. At the time of their injuries, the student-athletes, according to the NCAA regulations in place at that time, were party to a one year scholarship contract and were seeking renewal of that scholarship contract for subsequent years of attendance at their respective institutions. Further, NCAA rules limited the total number of scholarships a membership school could offer to its student-athletes during an academic year. The plaintiffs claimed that such rules were anti-competitive and restrained the market for student-athlete labor.

The Agnew opinion adopts the conclusions from the U.S. Supreme Court’s decision in Board of Regents v. NCAA where it was held that the type of competition the NCAA “seeks to preserve” (the “product”) is amateur intercollegiate athletics and that a certain level of collusion is necessary to preserve that particular “product.”

Further, the Agnew court specifically quotes the language of the Board of Regents opinion in a manner that complements a duty of obedience evaluation.

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141 977 F.2d 1081 (7th Cir. 1992).
142 683 F.3d 328 (7th Cir. 2012).
143 683 F.3d 328 (7th Cir. 2012).
144 Id. at 332.
145 Id.
146 Id. at 332-33 (citing NCAA DIVISION I MANUAL, Bylaw 15.3.3.1 (2009-10) which prohibited NCAA membership schools from offered more than 1 year contracts to any potential student-athlete).
147 Id. (citing NCAA DIVISION I MANUAL, Bylaw 15.5.4 (2009-10)).
148 Id.
149 Id., at 342. (citing NCAA v. Bd. of Regents, 468 U.S. 85 (1984)).
150 Id., at 343.
states that “most [NCAA] regulations will be a ‘justifiable means of fostering competition among amateur athletic teams.’”¹⁵² This language hints at what could be a duty of obedience analysis. Thus, although the plaintiff in Agnew did not bring a duty of obedience challenge, the Court’s willingness to evaluate antitrust claims within the context of a particular mission statement, supporting the idea that a duty of obedience claim may 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.”¹⁵³ So, the question raised is essentially whether a plaintiff can make an antitrust claim that includes a strong, persuasive argument that the NCAA is not “fostering competition among amateur athletics teams” in a manner that preserves the “product” of intercollegiate athletics as set forth in the bylaws and NCAA constitution. In other words, is the NCAA promoting intercollegiate competition as stated in its mission statement? This is almost the same as the first and most important question in duty of obedience analysis.

This conclusion in Agnew echoes language used to evaluate the NCAA under a duty of obedience claim. The only difference, like in Board of Regents as well as Banks, is that the analysis will focus upon the leadership’s adherence to the mission statement and not upon the competitiveness of the NCAA decision. This type of analysis is also being used at the U.S. District Court level, as will be demonstrated below with cases from Pennsylvania Federal Courts.

iii. Pocono Invitational Sports Camp, Inc. v. NCAA Follows Antitrust Precedent in Addressing the NCAA’s Mission Statement and Purpose

To continue the demonstration that duty of obedience claim may easily complement and support an antitrust challenge to the NCAA, consider the case of Pocono Invitational Sports Camp, Inc. v. NCAA (Pocono Camp).¹⁵⁴ In Pocono Camp, the District Court evaluates whether various private basketball camp companies have a valid antitrust claim against the NCAA for the NCAA’s rule changes in relation to how basketball camp participation is regulated, explained in further detail below. The U.S. District Court opinion, Corbett v. NCAA (The Corbett Lawsuit) that dismisses the Corbett Lawsuit refers to Pocono Camp in its dismissal opinion¹⁵⁵

A little background related to the Pocono Camp case will help us further see the elemental connection between an antitrust argument and duty of obedience arguments. In Pocono Camp, five for-profit basketball camp and event operators brought anticompetitive claims under the Sherman Act against the NCAA.¹⁵⁶ The Camp Operators claimed that three of the NCAA’s recruiting regulations, which restrict NCAA basketball coaches from (1) working, (2) evaluating players during, and/or (3) remaining present at certain types of basketball camps

¹⁵² Id., at 339 (quoting Bd. of Regents, supra note _______ at 117 (concluding that such regulations shall be assumed to be procompetitive under an antitrust evaluation)).
¹⁵³ Id., at
¹⁵⁵ 2013 U.S. Dist. LEXIS 79295, *16 (quoting that
¹⁵⁶ Pocono Camp, 317 F. Supp. 2d at 573.
or event, including those operated by the *Pocono Camp* plaintiffs, violated the Sherman Act.\textsuperscript{157} The *Pocono Camp* Plaintiffs specifically attacked the NCAA measures that required a non-institutional member summer camp to be certified by the NCAA only by adhering to certain operational standards.\textsuperscript{158} The standards for certification included limiting the amount of free apparel or gear a camp attendee may retain without paying for the apparel or gear,\textsuperscript{159} restricting the location of the event based upon whether or not betting on college athletics occurs or has occurred there,\textsuperscript{160} preventing athletic company sponsorship of the summer camps,\textsuperscript{161} and permitting awards to be given to camp attendees only if the cost of the award is included in the camp entry fee.\textsuperscript{162}

The court concluded that the *Pocono Camp* Plaintiffs failed to prove their Sherman Act claims, and granted summary judgment to the NCAA, based mainly because the Plaintiffs failure to prove a relevant market for basketball summer camps.\textsuperscript{163} But, the *Pocono Camp* opinion 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 athletes separate from professional sports.”\textsuperscript{164} The *Pocono Camp* Court stated that the NCAA was acting in a “paternalistic capacity” to promote both “amateurism and education.”\textsuperscript{165} 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.\textsuperscript{166} However, other regulations or decisions that are not related to academic performance may be challenged either in theories related to antitrust or, possibly, based upon a breach of fiduciary duty, such as the duty of obedience.

These four cases, *Bd. of Regents, Banks, Agnew,* and *Pocono,* show that the mission statement and the purpose of the NCAA have already been and continue to be central themes in litigation concerning the NCAA as a defendant. Including a duty of obedience claim, then, with the right plaintiff, is not an unattainable intellectual strain.

**Adding a Duty of Obedience Violation to the Consent Decree Challenges**

\textsuperscript{157} Id.
\textsuperscript{158} Id. at 576 (Explaining that some of the motivation for the certification program was that “street agents were 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...”)
\textsuperscript{159} Id. at 573-74.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 586-87.
\textsuperscript{164} Id. at 584. (Emphasis added.)
\textsuperscript{165} Corbett, 2013 U.S. Dist. 79295 at *17 (quoting *Pocono Camp*, 317 F. Supp. 2d 569 at 583).
\textsuperscript{166} Daniel E. Lazaroff, supra note 145, at 386 (making the case that, because the amateur status of student-athletes is crucial to the NCAA’s model, and its defenses against antitrust claims, most academic regulations that increase student-athletes’ academic performances are ‘laudable’ and less likely to be challenge on antitrust grounds. Although, challenges to such academic standards may result in discrimination claims.)
The four antitrust cases above provide evidence that courts are willing to evaluate organizations’, and more particularly the NCAA’s mission statement, and that a duty of obedience claim could have easily been added to the antitrust claims in the Penn State Scandal lawsuits. As these cases demonstrate, and as a duty of obedience claim was evaluated by the Courts in relation to the Penn State Scandal, it can be argued that a Consent Decree may not be a complete defense for the NCAA if the Consent Decree was challenged based upon the duty of obedience. A duty of obedience argument would assert that, in discharging its duties as a non-profit organization, the leadership of the NCAA must be particularly careful of skirting the organization’s bylaws simply to reach a result the leadership deems appropriate. In relation to the NCAA’s mission statement the duty of obedience evaluation requires a response to how the NCAA serves its student-athletes, the named beneficiaries for the non-profit organization. what about how such a decision affects the student-athlete? As Prof. Jerry Parkinson, a member of the NCAA Committee on Infractions for over a decade has stated:

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.167

It would be an interesting question to pose to Prof. Parkinson as to whether the Consent Decree is justified based upon his opinion. Does the Consent Decree “undermine the fair administration of intercollegiate athletics?”168 The strategy of the Consent Decree appears to place the findings and the penalties imposed by the NCAA under contract law, and outside the scope of normal NCAA sanction procedures. Was the motive to enhance the student-athlete’s educational experience? Was the motive to provide collegiate athletics as an avocation? An number of duty of obedience questions related to the antitrust analyses already raised could be answered by crafting arguments from the antitrust precedent.

V. A Duty of Obedience Claim Enhances an Antitrust Lawsuit Against a Non-Profit Organization and Complements Antitrust Arguments

The ultimate purpose of this paper is to show that 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 enhancement is possible. Because the two Penn State lawsuits discussed above, Corbett and Paterno, only address antitrust issues, and that one of the cases (Corbett) was quickly dismissed on those grounds, it is easy to assume that other legal arguments should have been used. One such argument could

168 Id.
have been that, in either case, the NCAA leadership failed to abide by the duty of obedience and sanctioning Penn State University outside of its established procedures for such sanctions.

It would make strategic sense, then, since often an antitrust claim against a non-profit organization may include arguments surrounding the organization’s mission statement, to add a duty of obedience claim, utilizing much of the same evidence that would be used for an antitrust case. The duty of obedience argument would add an extra legal evaluation for a court related to the evidence and arguments already being presented. Some differences in the arguments exist, of course, and would basically be that a court’s focus would be shift 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 as to whether the leadership did in fact seek to fulfill the mission of the non-profit organization.

The Corbett and Paterno lawsuits were excellent opportunities to attempt a claim based upon the theory that the NCAA leadership had violated the 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 fact that the NCAA went beyond its authority, exceeded its stated purpose, or diverged from its stated mission. These types of claims are the essence of a 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.

VI. CONCLUSION

In a relatively weak and disorganized environment of non-profit law, the fiduciary duty of obedience may be a tool to help provide clarity and consistency, especially in cases where a particular beneficiary is specifically named in a non-profit 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/Sandusky 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 the duty of obedience claims 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 such egregious, uncheck, and unacceptable behavior as occurred at Penn State will be handled outside the NCAA constitution, bylaws, and normal investigative and enforcement processes. However, because the NCAA is a non-profit organization, 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 decisions to use the Consent Decree against Penn State (and not Penn State’s voluntary agreement to it), may violate the fiduciary duty of obedience owed to its beneficiaries, 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 interested to see this theory put into practice, and how different, in practice, it may become.