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The Penn State "Consent Decree": The NCAA's Coercive Means Don't Justify Its Laudable Ends, but is There a Legal Remedy?

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The Penn State “Consent Decree”: The NCAA’s Coercive Means Don’t Justify Its Laudable Ends, but is There a Legal Remedy?

Matthew J. Mitten*

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I. INTRODUCTION

In a July 23, 2012 Consent Decree,¹ the National Collegiate Athletic Association (NCAA), acting through its Executive Committee and President Mark Emmert, imposed unprecedented sanctions on Pennsylvania State University (Penn State).² This action apparently was taken in an effort to

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1. RODNEY A. ERICKSON & MARK A. EMMERT, BINDING CONSENT DECREE IMPOSED BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND ACCEPTED BY THE PENNSYLVANIA STATE UNIVERSITY (2013) [hereinafter CONSENT DECREE], available at <http://www.scribd.com/doc/100830988/NCAA-Penn-State-Consent-Decree>.

2. Tony Hanson & Oren Libermann, *NCAA Announces Unprecedented Sanctions Against Penn*

convincingly demonstrate presidential control of intercollegiate athletics after recent widely reported scandals involving violations of NCAA amateurism, academic integrity, and ethical conduct rules by persons associated with high-profile intercollegiate football programs, including the University of Southern California, the Ohio State University, the University of North Carolina, and the University of Miami.³ Based solely on the findings and conclusions of the July 12, 2012 "Freeh Report"⁴ and the June 22, 2012 criminal conviction of former Penn State assistant football coach Gerald Sandusky of serial child sexual abuse, the NCAA coerced Penn State into accepting draconian institutional sanctions, including a \$60 million fine, a four-year ban on any postseason football games, a significant reduction of football scholarships over a four-year period, and vacation of 112 football wins from 1998–2011.⁵ It also required Penn State to waive its rights "to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process."⁶

This unprecedented use of de facto "best interests" power to punish a member university for individual criminal activity and institutional misconduct which "ordinarily would not be actionable by the NCAA"⁷ and which was unilaterally imposed outside of its customary rules enforcement and disciplinary procedures violated Penn State's contractual due process rights and private association law as well as possibly federal antitrust law and state common law restraint of trade laws.⁸ However, it is unlikely that any of the provisions of the Consent Decree, which effectively punishes thousands of innocent parties associated with Penn State, including its football players, students, faculty, administrators, alumni, and fans, will be judicially invalidated.⁹ Thus far, Penn State's Board of Trustees and current president have chosen to abide by its terms rather than contest any of them

State, CBS PHILLY (July 23, 2012, 3:20 PM), <http://philadelphia.cbslocal.com/2012/07/23/penn-state-community-awaits-ncaa-decision-on-football-program/>.

3. See *infra* notes 88–91 and accompanying text.

4. FREEH SPORKIN & SULLIVAN, LLP, 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 (2012) [hereinafter FREEH REPORT], available at http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.

5. See *infra* notes 42–44 and accompanying text.

6. CONSENT DECREE, *supra* note 1, at 2.

7. *Id.* at 4.

8. See *infra* Part III–IV.

9. *Id.*

in litigation. A Pennsylvania federal district court dismissed a *parens patriae* antitrust suit filed by Governor Thomas Corbett on behalf of the Commonwealth of Pennsylvania's natural citizens, which sought to enjoin the Consent Decree from being enforced.¹⁰ Another pending suit on behalf of former Penn State football coach Joe Paterno's estate and others asserts, *inter alia*, that the NCAA breached its contractual obligations and exceeded its authority, but none of the plaintiffs have authorization or standing to assert any claims on behalf of Penn State for injunctive relief against enforcement of the Consent Decree.¹¹

Initially, I will describe the background and chronology of events giving rise to the Penn State Consent Decree.¹² Next, I will analyze Penn State's potential breach of contract and violation of law of private association claims and consider the similar claims brought by the Paterno estate and others.¹³ Thereafter, I will review Pennsylvania Governor Corbett's unsuccessful *parens patriae* federal antitrust suit and consider Penn State's potential antitrust claims.¹⁴

II. BACKGROUND AND CHRONOLOGY

On November 4, 2011, Gerald Sandusky was indicted by a Pennsylvania grand jury on charges of involuntary deviate sexual intercourse, aggravated indecent assault, corruption of minors, unlawful contact with minors, and endangering the welfare of minors; several charged offenses occurred between 1998 and 2002, when he was a Penn State football coach or emeritus professor with unrestricted access to the university's campus and football facilities.¹⁵ Two days later, Penn State Senior Vice President of Finance and Business Gary C. Shultz and Athletic Director Timothy M. Curley were charged with failure to report child abuse and perjury; Curley was also placed on administrative leave while Schultz stepped down.¹⁶ On

10. See *infra* Part IV.A.

11. See *infra* Part III.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See Mark Scoloro & Genaro C. Armas, *Jerry Sandusky, Former Penn State Coach Accused of Molesting Boys, Barred From Campus*, DETROIT FREE PRESS (Nov. 6, 2011, 12:23 PM), <http://www.freep.com/article/20111106/NEWS07/111060648/Jerry-Sandusky-former-Penn-State-coach-accused-molesting-boys-barred-from-campus>.

16. Sara Ganim & Jan Murphy, *Penn State Athletic Director Tim Curley, VP Gary Schultz Step*

November 9, Penn State's Board of Trustees terminated the employment of President Graham Spanier¹⁷ and Head Football Coach Joe Paterno.¹⁸

In a November 17, 2011 letter,¹⁹ Emmert notified Penn State interim President Rodney Erickson that "the NCAA will examine Penn State's exercise of institutional control over its intercollegiate athletics program" in light of the November 5 grand jury indictment of Sandusky for serial child sexual abuse occurring in the university's athletic facilities and allegations that university officials failed to take proper action despite their knowledge of this behavior.²⁰ "[T]o prepare for potential inquiry" regarding whether the university violated any of several enumerated NCAA principles and rules regarding its duty to monitor and control its intercollegiate athletics program as well as whether there was any unethical or dishonest conduct by university employees in violation of NCAA rules (specifically, violation of character, integrity, civility, honesty, and sportsmanship obligations, or a failure to demonstrate positive moral values as teachers), Emmert requested that Penn State provide information regarding its policies and procedures to detect, prevent, and respond to sexual abuse of children.²¹ Although this letter provided notice that the NCAA might seek to hold Penn State institutionally liable for rule violations by its administrators and coaches and expressly stated, "universities are often held accountable in our infractions

Down in Wake of Jerry Sandusky Scandal, PENNLIVE (Nov. 7, 2011), http://www.pennlive.com/midstate/index.ssf/2011/11/penn_states_curley_schultz_are.html. On July 31, 2013, they were ordered to stand trial on these charges. Allison Steele, *Former Penn State Officials to Stand Trial, Judge Rules*, COLUMBUS DISPATCH (July 31, 2013, 9:01 AM), http://www.dispatch.com/content/stories/national_world/2013/07/31/3-ex-penn-state-officials-will-stand-trial.html.

17. Mark Viera, *Paterno Is Finished at Penn State, and President Is Out*, N.Y. TIMES (Nov. 9, 2011), <http://www.nytimes.com/2011/11/10/sports/ncaafootball/-joe-paterno-and-graham-spanier-out-at-penn-state.html>. Spanier was subsequently charged with perjury, conspiracy, and endangering the welfare of children and was ordered to be tried on these charges. See *Mike McQueary Takes Witness Stand*, ESPN (July 29, 2013, 6:53 PM), http://espn.go.com/college-football/story/_/id/9518784/mike-mcqueary-witness-stand-joe-paterno-said-penn-state-erred; Steele, *supra* note 16.

18. Viera, *supra* note 17. Paterno was not criminally charged prior to his January 22, 2012 death. See Jack Carey, *Penn State Coaching Legend Joe Paterno Dies at 85*, USA TODAY (Jan. 23, 2012, 3:01 PM), <http://usatoday30.usatoday.com/sports/college/football/story/2012-01-21/former-penn-state-coach-joe-paterno-dead/52737230/1>.

19. Letter from Mark A. Emmert, President, NCAA, to Rodney Erickson, President, Pa. State Univ. (Nov. 17, 2011) at 1.

20. *Id.*

21. *Id.* at 2-3.

process for failure to meet them,"²² it did not indicate that any disciplinary action against the university would be taken outside of this customary process.

In response, Erickson informed Emmert that Penn State planned to conduct its own investigation and requested that the NCAA defer taking any action until it was completed.²³ Emmert agreed to do so based on Erickson's agreement to share Penn State findings with the NCAA.²⁴

On November 21, 2011, Penn State's Board of Trustees commissioned the law firm of Freeh Sporkin & Sullivan, LLP to investigate the alleged failure of university personnel to report and respond appropriately to the sexual abuse of children by Sandusky as well as possible occurrences of abuse on Penn State's campus or under the auspices of its programs for youths.²⁵ It was also asked to provide recommendations to better enable Penn State to prevent and more effectively respond to future incidents of such abuse.²⁶

On June 22, 2012, a Pennsylvania jury convicted Sandusky of forty-five counts of the criminal charges against him.²⁷ Sandusky was found guilty of sexually abusing ten boys; some of these crimes occurred on the Penn State campus.²⁸ He was sentenced to 30–60 years in prison, which is effectively a lifetime sentence given that he is 69-years-old.²⁹

The July 12 Freeh Report found a "total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's

22. *Id.* at 1.

23. Don Van Natta Jr., *On Death's Door: Inside the Negotiations that Brought Penn State Football to the Brink of Extinction*, ESPN (Aug. 4, 2012), http://espn.go.com/espn/otl/story/_/id/8228641/inside-secret-negotiations-brought-penn-state-football-brink-extinction.

24. *Id.*

25. FREEH REPORT, *supra* note 4, at 8.

26. *Id.*

27. Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html>. In post-conviction media interviews, Sandusky continues to maintain his innocence. See Genaro C. Armas & Mark Scoloro, *Sandusky Speaks Again, Maintains Innocence*, AP (Mar. 25, 2013, 5:10 PM), <http://bigstory.ap.org/article/sandusky-interview-air-nbcs-today-show> (discussing Sandusky's interview on NBC's *Today* show). Acknowledging that his touching of the boys may have "tested boundaries," he denies having any inappropriate contact that harmed or violated them and is appealing his conviction. *Id.*

28. Drape, *supra* note 27.

29. Tim Rohan, *Sandusky Gets 30 to 60 Years for Sexual Abuse*, N.Y. TIMES (Oct. 9, 2012), <http://www.nytimes.com/2012/10/10/sports/ncaafootball/penn-state-sandusky-is-sentenced-in-sex-abuse-case.html>.

child victims.”³⁰ It found that, despite knowledge of Sandusky’s sexual abuse of children in university athletics facilities, Sandusky was given continued access to Penn State facilities and affiliation with its football program and was not prohibited from bringing children on campus.³¹ The report concluded that “to avoid the consequences of bad publicity, the most powerful leaders at the University—Spanier, Schultz, Paterno and Curley—repeatedly concealed critical facts relating to Sandusky’s child abuse from the authorities, the University’s Board of Trustees, the Penn State community, and the public at large.”³² Based on its conclusion that there was a “lack of centralized control” over Penn State’s athletic department³³ and “[f]or the past several decades, the University’s Athletic Department was permitted to become a closed community,”³⁴ the report recommended that Penn State take numerous steps to “ensure a sustained integration of the Intercollegiate Athletics program into the broader Penn State community” as well as to improve its governance and to protect children in its facilities and programs.³⁵

Almost immediately after issuance of the Freeh Report, Emmert informed Penn State’s president that a majority of the eighteen university presidents on NCAA’s Division I Board of Directors (which historically has not had any role in rules enforcement) wanted to unilaterally impose a four-year ban on its football program as institutional punishment for the foregoing misconduct of university personnel.³⁶ This is a sanction the Committee on Infractions, which is empowered to identify NCAA rules violations and determine appropriate disciplinary sanctions, had no explicit authority to impose sanctions on Penn State because none of the university’s athletic programs had been found guilty of a major violation of NCAA rules within the preceding five-year period.³⁷ Nevertheless, its imposition was

30. FREEH REPORT, *supra* note 4, at 14.

31. *Id.*

32. *Id.* at 16.

33. *Id.* at 131.

34. *Id.* at 139.

35. *Id.* at 129–44.

36. Van Natta, *supra* note 23.

37. *Id.* NCAA Bylaw 19.5.2.3.2 permits the “death penalty,” which prohibits an institution from participating in an intercollegiate sport for a designated period of time, to be imposed only on “repeat violators” (i.e., institutions found guilty of a “major violation” within the past five years). NCAA ACADEMIC & MEMBERSHIP AFFAIRS STAFF, 2009–10 NCAA DIVISION I MANUAL § 19.5.2.3.1–2 [hereinafter NCAA MANUAL]. A “major violation” is defined as a violation other than

threatened unless Penn State accepted the draconian terms of a “negotiated” consent decree and prevented them from being leaked to the media.³⁸ Gene Marsh, an attorney hired by Penn State to negotiate NCAA sanctions and a former chair of the NCAA Committee on Infractions, characterized this threat as “the NCAA equivalent of a cram-down.”³⁹ He also realized it would be futile to suggest that Penn State’s institutional liability and sanctions be determined through the NCAA’s traditional rules-enforcement process because “[t]heir minds were made up.”⁴⁰ In order to avoid a potential multi-year ban that would have prohibited the university’s football team from playing any games, Penn State’s president was effectively coerced under severe duress into accepting the NCAA’s unilaterally imposed, harsh sanctions without informing and obtaining approval from the entire university Board of Trustees.⁴¹

The July 23 Consent Decree requires Penn State to accept the findings of the Freeh Report, meaning “traditional investigative and administrative proceedings would be duplicative and unnecessary”; to acknowledge that the report’s findings establish the university’s violation of the NCAA principles and rules referenced in Emmert’s November 17, 2011 letter; and to waive its rights “to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process.”⁴² It imposes the following “punitive” sanctions on Penn State: a \$60 million

one “that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.” *Id.* § 19.02.2.1–2. This disciplinary sanction has been imposed only five times, generally in extreme cases in which an institution has committed intentional, severe, and repeated major violations demonstrating clear disregard for NCAA rules: University of Kentucky (no men’s basketball during 1952–1953 season); University of Southwestern Louisiana (no men’s basketball during 1973–1974 and 1974–1975 seasons); Southern Methodist University (no football during 1987–1988 season); Morehouse College (no men’s soccer during 2003–2004, 2004–2005, and 2005–2006 seasons); and MacMurray College (no men’s tennis during 2005–2006 and 2006–2007 seasons). Zac Wassink, *Top Five Harshes NCAA Sanctions Ever*, YAHOO! SPORTS (Sept. 23, 2010), <http://sports.yahoo.com/ncaa/football/news?slug=ac-6202256>.

38. Van Natta, *supra* note 23.

39. *Id.*

40. *Id.*

41. President Erickson informed only Karen Peetz, the chair of the Board of Trustees, and members of the Board’s Executive Committee in order to avoid a potential media leak of the consent decree’s terms prior to its execution. *Id.*; see also Don Van Natta Jr., *Penn State Faced 4-Year Death Penalty*, ESPN (July 26, 2012), http://espn.go.com/espn/otl/story/_/id/8199905/penn-state-nittany-lions-rodney-erickson-said-school-faced-4-year-death-penalty.

42. CONSENT DECREE, *supra* note 1, at 1–2.

fine, "equivalent to the approximate average" of the annual gross revenues generated by its football program; a four-year ban on any postseason football games; a four-year reduction of football scholarships from the allowable annual maximum of twenty-five to a limit of fifteen with an overall maximum of sixty-five during this period; vacation of all 112 football wins from 1998–2011; and five years of probation.⁴³ It also includes a "corrective component" requiring Penn State to adopt and implement all of the Freeh Report's recommendations regarding university governance, administration of the university's intercollegiate athletics program, and the protection of children, as well as to enter into an "Athletics Integrity Agreement" and to appoint an independent "Athletics Integrity Monitor."⁴⁴

During the July 23 press conference announcing the disciplinary sanctions imposed on Penn State, Dr. Edward J. Ray, the chair of the NCAA Executive Committee and president of Oregon State University, stated that the "historically unprecedented actions by the NCAA today are warranted by the conspiracy of silence that was maintained at the highest levels of the

43. *Id.* at 5–6; Van Natta, *supra* note 23. In addition to the NCAA sanctions, the Big Ten Conference disciplined Penn State by rendering its football team ineligible to play in the Big Ten's conference championship game and requiring the university to forfeit its \$13 million share of conference football bowl revenues during its four-year bowl ban. Colleen Kane, *Big Ten Hands Penn State 4-Year Ban from Conference Title Game*, CHI. TRIB. (July 23, 2012), http://articles.chicagotribune.com/2012-07-23/sports/ct-spt-0724-penn-state-big-ten--20120724_1_purdue-and-wisconsin-bowl-revenue-commissioner-jim-delany. From November 2011 to March 2013, Penn State has incurred an estimated \$46 million in NCAA and Big Ten financial penalties, legal and consulting fees, and lost sponsorship, advertising, and licensing revenues as a result of the Sandusky child-sexual-abuse scandal. Michael McCarthy, *Sandusky Sex-Abuse Scandal Has Cost Penn State \$46 Million*, ADVERTISING AGE (Mar. 25, 2013), <http://adage.com/article/news/cost-penn-state-scandal-46-million/240488/>. Penn State's brand, which was ranked in the top five most trusted brands in June 2011, was ranked last among 104 NCAA universities measured nationally in January 2012, but it rebounded to number sixty-three in March 2013. *Id.* Penn State athletics-department revenues declined by almost \$7.9 million during the 2011–2012 fiscal year, but, ironically, donor contributions to its football program nearly quintupled from \$2.1 million in 2010–2011 to \$9.7 million in 2011–2012. Steve Berkowitz & Jodi Upton, *Penn St. Athletics Revenue Fell by \$7.9 Million in 2012*, USA TODAY (Apr. 8, 2013, 10:56 PM), <http://www.usatoday.com/story/sports/2013/04/08/penn-state-athletics-finances-2012-sandusky/2064641/>. In the past two years Penn State's merchandising royalties declined almost \$1 million to \$3.1 million from their July 1, 2010–June 30, 2011 peak of almost \$4 million, which was prior to the Sandusky child abuse scandal. Allison Steele, *Penn State Caps, Other Items Continue Sales Slump*, Phil. Inquirer (Aug. 23, 2013) http://articles.philly.com/2013-08-23/news/41437681_1_billieve-lisa-powers-penn-state.

44. CONSENT DECREE, *supra* note 1, at 6–8; *see also* FREEH REPORT, *supra* note 4, at 129–44. Former U.S. Senator George Mitchell was subsequently appointed as the Athletics Integrity Monitor. Van Natta, *supra* note 23.

university in reckless and callous disregard for the children.”⁴⁵ He explained: “[T]hese are extraordinary circumstances. The [NCAA] Executive Committee has the authority to act on behalf of the entire Association in extraordinary circumstances, and we’ve chosen to exercise that authority.”⁴⁶ Noting that the chancellors and presidents of both the Executive Committee and Division I Board of Directors unanimously supported these sanctions, Ray stated: “We have to reassert our responsibilities and charge to oversee intercollegiate athletics. So the first question you asked is does this send a message? The message is the Presidents and the Chancellors are in charge.”⁴⁷

President Emmert stated, “[t]his was and is action by the Executive Committee exercising their [sic] authority, working with me to correct what was seen as a horrifically egregious situation in intercollegiate athletics.”⁴⁸ He cautioned: “[O]ne should not conclude that this was an abridged enforcement process. It was completely different than an enforcement process.”⁴⁹ He acknowledged that the Executive Committee unilaterally imposed the sanctions on Penn State without any negotiation.⁵⁰

45. Edward J. Ray, Exec. Comm. Chair, Nat’l Collegiate Athletic Ass’n, Press Conference (July 23, 2012) (transcripts available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/July/21207236> and <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/july/press+conference+q+and+a>) [hereinafter ESPN Press Conference I].

46. *Id.* An NCAA online publication subsequently cited NCAA Bylaw 4.1.2(e), which states that the Executive Committee is authorized to “[a]ct on behalf of the Association by adopting and implementing policies to resolve core issues and other Association-wide matters,” as the basis of authority. NCAA MANUAL, *supra* note 37, § 4.1.2(e); *see also NCAA Authority to Act*, NCAA (July 23, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/July/21207233>. Although Ray stated this was not an unprecedented exercise of this authority, which has been used in the past when a situation “was so extraordinary” it required action in individual instances, it does not appear the Executive Committee used this power to impose disciplinary sanctions for NCAA rules violations. *See* ESPN Press Conference I, *supra* note 45.

47. ESPN Press Conference I, *supra* note 45.

48. Mark Emmert, President, Nat’l Collegiate Athletic Ass’n., Press Conference (July 23, 2012) (transcript available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/july/press+conference+q+and+a>) [hereinafter ESPN Press Conference II].

49. *Id.*

50. *Id.*

III. BREACH OF CONTRACT AND VIOLATION OF LAW OF PRIVATE
ASSOCIATION CLAIMSA. *Penn State's Potential Claims*

It was appropriate for the Executive Committee to use its broad, undefined authority under NCAA Bylaws section 4.1.2(e) to require Penn State to immediately take corrective action to prevent future harm to children,⁵¹ including implementation of the Freeh Report's recommendations, entering into an Athletics Integrity Agreement, and the appointment of an independent Athletics Integrity Monitor.⁵² On the other hand, there were no then-existing "extraordinary circumstances" that justified its punishment of Penn State for misconduct that does not explicitly violate NCAA rules, punishment that was unilaterally imposed without the procedural safeguards of the NCAA's traditional rules-enforcement process.⁵³ At the time Penn State was coerced into agreeing to the terms of the consent decree, Sandusky had been convicted and imprisoned for his crimes,⁵⁴ and Penn State officials who did not appropriately respond to his serial sexual abuse of children had been removed from their positions for several months.⁵⁵ Although this was an unprecedented, horrific situation, it was very unlikely to be repeated (especially at Penn State), and, according to Emmert, the "Freeh Report is the product of an amazing . . . unprecedented degree of openness for any University that [he had] ever seen."⁵⁶ Thus, this unprecedented use of de facto "best interests" power to punish a member university violated Penn State's contractual due process rights and private association law.

The "basic purpose" of the NCAA, a private association of more than 1000 member colleges and universities,⁵⁷ "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

51. NCAA MANUAL, *supra* note 37, § 4.1.2(e).

52. CONSENT DECREE, *supra* note 1, at 6–8.

53. *See supra* note 50 and accompanying text.

54. *See* Drape, *supra* note 27.

55. *See* Van Natta, *supra* note 23 ("Paterno, Spanier, Curley and Schultz were no longer affiliated with the university,").

56. ESPN Press Conference II, *supra* note 48.

57. *See About the NCAA*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last updated Aug. 13, 2012).

demarcation between intercollegiate athletics and professional sports.”⁵⁸ NCAA member institutions are required to conduct their intercollegiate athletics programs “in a manner designed to protect and enhance the physical and educational well-being of student-athletes”⁵⁹ and have the responsibility “to protect the health of and provide a safe environment for each of its participating student-athletes.”⁶⁰ Another important objective of the NCAA is to “promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.”⁶¹

Although the NCAA has broad power to govern intercollegiate athletics in a manner that achieves these objectives and to discipline its member institutions for rules violations,⁶² there are contractual and other legal limits on its monolithic regulatory authority. Courts generally require a sports governing body to comply with its own rules, provide fair notice of the conduct that violates them, follow the basic requirements of due process in its internal disciplinary proceedings, exercise its governing and disciplinary authority in a rational and consistent manner without any malice or bad faith, and comply with applicable laws.⁶³ The NCAA is not subject to the requirements of the United States Constitution because it is not a “state actor,”⁶⁴ but it must comply with federal antitrust laws.⁶⁵ Regarding the scope of judicial review of NCAA disciplinary sanctions, a California court explained that “[t]he only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land.”⁶⁶

58. NCAA MANUAL, *supra* note 37, § 1.3.1..

59. *Id.* § 2.2.

60. *Id.* § 2.2.3.

61. *Id.* § 2.10.

62. *See id.* § 19.01.1 (“It shall be the mission of the NCAA enforcement program to eliminate violations of NCAA rules and impose appropriate penalties should violations occur.”).

63. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); Cal. State Univ., Hayward v. NCAA, , 88–89 (Cal. Ct. App. 1975); Bloom v. NCAA, 93 P.3d 621, 628 (Colo. App. 2004).

64. *See* NCAA v. Tarkanian, 488 U.S. 179, 197–99 (1988).

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

66. Cal. State Univ., Hayward, 121 Cal. Rptr. at 89 (quoting Smith v. Kern Cnty. Med. Ass’n, 120 P.2d 874, 876 (1942)). *But see* Ind. High Sch. Athletic Ass’n v. Reyes, 694 N.E.2d 249, 256 (Ind. 1997) (“Absent fraud, other illegality, or abuse of civil or property rights having their origin

The NCAA rules-enforcement program's mission is "to eliminate violations of NCAA rules and impose appropriate penalties should violations occur," while being "committed to fairness of procedures."⁶⁷ The Committee on Infractions is responsible for administering this enforcement program, which includes fact finding relevant to NCAA rules violations, determination of rules violations, and imposition of appropriate sanctions.⁶⁸ An NCAA member institution has the right to be given notice of any alleged major rules violations as well as the opportunity to be heard before the Committee on Infractions and the opportunity to appeal its findings of major violations or penalties to the Infractions Appeals Committee.⁶⁹ The institution may be represented by counsel of its choice in both proceedings. In all major infractions cases involving summary disposition (a cooperative endeavor between the NCAA enforcement staff and an institution that does not require a formal hearing that may be used only with the unanimous consent of the NCAA's enforcement staff, all involved individuals, and the participating institution), the Committee on Infractions must review and approve the agreed upon proposed fact findings, rules violations, and sanctions, which are submitted in written form.⁷⁰

Under the general law of private associations, a necessary condition of judicial deference to the NCAA's internal rules enforcement process as a private legal system is that it provides an appropriate level of express or implied contractual procedural due process (i.e., fair notice of the applicable rules of conduct and an opportunity to be heard before disciplinary sanctions are imposed for violations).⁷¹ Even if Penn State's former president, vice

elsewhere, Indiana courts will not interfere in the internal affairs of voluntary membership association. This means, *inter alia*, that Indiana courts will neither enforce an association's internal rules . . . nor second guess an association's interpretation or application of its rules . . .").

67. NCAA MANUAL, *supra* note 37, § 19.01.1.

68. *Id.* §§ 19.1, 19.1.3. See generally Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551 (2011) (discussing the NCAA's regulatory, enforcement, and sanctioning authority).

69. NCAA MANUAL, *supra* note 37, §§ 19.4, 19.5.

70. *Id.* § 32.7.

71. Indiana private association law may not provide a legal remedy if a sports governing body does not provide contractual due process to its member institutions. *Reyes*, 694 N.E.2d at 256 (declining to recognize exception to general judicial noninterference rule for "association rules requiring due process"). There is a potential Dormant Commerce Clause violation if state private association laws permitting broader judicial review of NCAA disciplinary action against its member institutions than Indiana law are applied to the NCAA, which is headquartered in Indianapolis. See *supra* notes 63 and 66 and accompanying text. In *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004),

president, athletic director, and head football coach individually and collectively failed to act appropriately, responsibly, and ethically or violated applicable laws by permitting Sandusky to use university athletic facilities and to participate in university-sponsored activities as well as by not promptly reporting Sandusky's alleged on-campus child abuse and criminal conduct, their conduct does not justify unilaterally imposed severe institutional sanctions without providing Penn State with a fair opportunity to be heard and defend itself before the NCAA Committee on Infractions, along with the right to appeal to the Infractions Appeals Committee.

In the Consent Decree, the NCAA acknowledges that "[t]he sexual abuse of children on a university campus by a former university official—and even the active concealment of that abuse—while despicable, ordinarily would not be actionable by the NCAA."⁷² Nevertheless, based on the findings of the Freeh Report, "[t]he NCAA conclude[d] that [the] evidence present[ed] an unprecedented failure of institutional integrity . . . in which a football program was held in higher esteem than the values of the institution, the values of the NCAA, the values of higher education, and most disturbingly the values of human decency."⁷³ This created a culture in which "the fear of or deference to the omnipotent football program . . . enabled a sexual predator to attract and abuse his victims,"⁷⁴ which was apparently the underlying basis of the NCAA's decision to impose harsh disciplinary sanctions on Penn State.

If the Executive Committee had not usurped the NCAA's customary disciplinary process and coerced Penn State into admitting that it violated the NCAA rules identified in Emmert's November 17, 2011 letter,⁷⁵ the university could have challenged the Freeh Report's findings and the

the NCAA asserted that the application of Colorado's private association law to resolve a student-athlete eligibility dispute violated the Dormant Commerce Clause, which prohibits direct state regulation of the interstate activities of national enterprises to prevent potentially conflicting and inconsistent state laws from inhibiting interstate commerce. Because the court rejected the plaintiff's claim on its merits, the court did not consider the Dormant Commerce Clause argument. *Id.* at 628. See generally *NCAA v. Miller*, 10 F.3d 633, 637 (9th Cir. 1993) (invalidating Nevada statute requiring "any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed").

72. CONSENT DECREE, *supra* note 1, at 4.

73. *Id.*

74. *Id.*

75. See *supra* notes 19–21 and accompanying text.

NCAA's conclusions on these issues in a hearing before the Committee on Infractions.⁷⁶ The testimony of key witnesses such as Gary Shultz, Timothy Curley, Michael McQueary,⁷⁷ and possibly Gerald Sandusky (none of whom were interviewed by Freeh Report investigators) could have been introduced as evidence during this proceeding. In addition, other evidence, such as the findings of the "Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno,"⁷⁸ could have been submitted for the committee's consideration in determining whether Penn State violated any NCAA rules and, if so, the appropriate disciplinary sanctions.

Despite the egregious nature of Penn State officials' conduct and its inconsistency with the values of the university, NCAA, and higher education,⁷⁹ it arguably does not violate any then-existing NCAA rules, whose primary objectives are to maintain and promote academic integrity, amateurism, and competitive balance as well as the health, safety, and welfare of student-athletes. The NCAA does not have specific rules providing clear notice that its member institutions may be disciplined for the criminal⁸⁰ or tortious conduct⁸¹ of athletic department employees that harms

76. The Freeh Report concluded that Sandusky's child abuse was concealed and not reported to authorities to avoid the consequences of bad publicity for its football program. FREEH REPORT, *supra* note 4, at 14–16. Arguably, the Committee on Infractions could have reached a different conclusion if it believed that Spanier, Shultz, Curley, and Paterno did not know that Sandusky was committing sexual abuse of children and simply were negligent in failing to investigate or take other appropriate steps to prevent this from occurring in Penn State facilities or in connection with its athletics program.

77. As a graduate assistant for the Penn State football program, he witnessed Sandusky's February 9, 2001 sexual assault of a young boy in the shower of the university's athletic facilities. See *Mike McQueary Takes Witness Stand*, *supra* note 17.

78. KING & SPALDING, CRITIQUE OF THE FREEH REPORT: THE RUSH TO INJUSTICE REGARDING JOE PATERNO, (2013), http://www.paterno.com/Resources/Docs/SOLLERS_FINAL_REPORT_2-9-2013.pdf.

79. At least one court has found that "'specific and concrete' promises contained in the NCAA manual" are legally enforceable. *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 716 (D. Vt. 2012). Courts have held that merely general aspirational "ideals" and "goals" in documents defining the parties' relationship do not create a legally enforceable compliance obligation. See *Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 676–77 (6th Cir. 2001) ("[A] breach of contract claim will not arise from the failure to fulfill a statement of goals or ideals."); *Gally v. Columbia Univ.*, 22 F.Supp. 2d 199, 207 (S.D.N.Y. 1998) ("[T]he mere allegation of mistreatment without the identification of a specific breached promise of obligation does not state a claim on which relief can be granted. . . . [G]eneral promises about ethical standards" are unenforceable.).

80. The findings of the Freeh Report indicate that the failure of Penn State officials to report Sandusky's on-campus sexual assaults of children to the proper authorities violated the "Clery Act," a federal law requiring reporting and warning of crimes occurring on-campus, and Pennsylvania law requiring the reporting of child abuse. FREEH REPORT, *supra* note 4, at 110–19.

or endangers others on-campus, or for the failure of university administrators to take appropriate action, including reporting to the proper authorities, if it occurs.⁸² Historically, the NCAA has not disciplined universities for failing to take effective steps to prevent the foreseeable crimes of athletic department personnel or student-athletes that injure other students (e.g., recruiting a student-athlete with a past history of criminal behavior).⁸³

The NCAA has not instituted disciplinary proceedings against institutions for recent tortious conduct associated with their athletic departments that results in the death of others (e.g., Notre Dame's "serious" Indiana Occupational Health and Safety Act violation that contributed to the death of Declan Sullivan, a student-manager filming football practice during high winds⁸⁴), or the deliberate indifference of a university's head football coach to sexual assaults of women during on-campus recruiting of student-athletes.⁸⁵ The NCAA does not generally discipline its member institutions for athletic department personnel action or inaction that harms the health,

81. The Freeh Report found that Penn State's policies and procedures did not adequately protect children using university facilities or participating in university-sponsored activities, especially in light of Sandusky's known inappropriate conduct, FREEH REPORT, *supra* note 4, at 120–26, which creates potential institutional tort liability. See, e.g., *A.B. v. Staropoli*, 929 F. Supp. 2d 266, 275 (S.D.N.Y. 2013) ("[W]here an infant plaintiffs [sic] injuries are caused by the acts of a third party, the elements that the infant plaintiff must establish in order to prevail on a claim based on ordinary negligence in failing to protect him or her against alleged sexual assaults are '(1) that defendant was provided with actual or constructive notice that such assaults might be made upon the infant plaintiff so as to give rise to a duty to protect him [or her], (2) that defendant was negligent in failing to take reasonable protective measures, (3) that the infant plaintiff sustained actual injury, and (4) that defendant's negligence was a proximate cause of that injury.'"). To date, several tort suits on behalf of Sandusky's victims have been filed against Penn State—in August 2013, Penn State settled twenty-five cases with Sandusky's victims, and other cases will reportedly be settled in the near future. Colleen Curry, *Penn State Settles 25 Suits in Jerry Sandusky Case*, ABC NEWS (Aug. 26, 2013), <http://abcnews.go.com/US/penn-state-settles-25-lawsuits-brought-jerry-sandusky/story?id=20069117>.

82. See *NCAA Recommends Violation Structure: New Structure Will Adopt a Four-Levels of Violation for Infractions*, NCAA (Jan. 13, 2013), <http://www.ncaa.com/news/ncaa/article/2012-01-13/ncaa-recommends-violation-structure>.

83. Mark Dent, *Penn State to Receive NCAA Penalties Today*, PITTSBURGH POST-GAZETTE (July 23, 2012, 12:03 AM), <http://www.post-gazette.com/stories/local/state/penn-state-to-receive-ncaa-penalties-today-645800/>.

84. See, e.g., Tom Coyne, *Notre Dame and Indiana Reach Settlement in Declan Sullivan's Death*, HUFFINGTON POST (July 1, 2011, 12:28 PM), http://www.huffingtonpost.com/2011/07/01/declan-sullivan-death-set_n_888645.html; Tom Coyne, *Notre Dame 'Collectively Responsible' for Declan Sullivan's Death*, HUFFINGTON POST (Apr. 18, 2011, 6:59 AM), http://www.huffingtonpost.com/2011/04/18/declan-sullivan-death-report_n_850539.html.

85. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184–85 (10th Cir. 2007).

safety, or welfare of student-athletes.⁸⁶

As a general rule, the NCAA has not traditionally disciplined colleges and universities for failing to comply with federal laws directly applicable to the operation of intercollegiate athletics such as Title IX, which requires equal athletic participation opportunities and benefits for both genders, even if there has been an intentional violation.⁸⁷

In comparison to recent cases in which the Committee on Infractions found that other institutions failed to monitor or control their intercollegiate athletic programs, persons whose conduct Penn State is responsible for did not violate NCAA rules that provide clear notice of well-defined obligations or prohibitions. In the University of Southern California⁸⁸ and The Ohio State University⁸⁹ infractions cases, coaches failed to disclose known violations of the NCAA's amateurism rules by student-athletes. In the Baylor University case,⁹⁰ a coach deliberately concealed his payment of impermissible benefits to student-athletes in violation of NCAA amateurism

86. Given the NCAA's imposition of severe disciplinary sanctions on Penn State, commentators have questioned whether the NCAA should discipline other institutions to be consistent with the precedent it now has established:

In an ongoing investigation, several Montana football players along with another man are accused of gang raping a fellow student. In the Montana case, head coach Robin Pflugrad disciplined several players but didn't report the incidents to his superiors.

Montana university president Royce Engstrom said in a statement "The University of Montana has determined not to renew the contracts of Athletics Director Jim O'Day and head football coach Robin Pflugrad." Then Engstrom thanked both O'Day and Pflugrad for their service as he let them go.

The Department of Justice is investigating the university and campus police, along with the Missoula Police Department and the Missoula County Attorney's Office for how they handle sexual assault allegations. For three years the Department of Justice alleges that those listed above failed to investigate or prosecute numerous allegations of rape.

Now that the NCAA has opened the door, should they come down just as hard on Montana as they did against Penn State?

Bryan Flynn, *NCAA Has Opened Pandora's Box Even If They Don't Want to Admit It*, JACKSON FREE PRESS (July 23, 2012), <http://www.jacksonfreepress.com/weblogs/sports/2012/jul/23/ncaa-has-opened-pandoras-box-even-if-they-dont-wan/>.

87. See Glenn George, *Title IX and the Scholarship Dilemma*, MARQ. SPORTS L.J. 273, 281 (1999); Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000).

88. COMM. ON INFRACTIONS, NCAA, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT (2010), available at http://assets.sbnation.com/assets/639494/20100610_USC_Public_Report.pdf.

89. COMM. ON INFRACTIONS, NCAA, THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (2011), available at http://espn.go.com/photo/preview!/pdfs/111220/ohio_state_report.pdf.

90. COMM. ON INFRACTIONS, NCAA, BAYLOR UNIVERSITY PUBLIC INFRACTIONS REPORT (2005).

rules and induced some of them to lie to university investigators as part of this cover-up. In the University of North Carolina case,⁹¹ a university tutor and several student-athletes violated NCAA amateurism and academic integrity rules.

Despite having potentially meritorious breach of contract and law of private association claims against the NCAA, Penn State's Board of Trustees ratified President Erickson's entry into the consent decree, and the university has adhered to its agreement not to legally challenge any of its terms.⁹² However, other parties, including the estate of Joe Paterno, have indirectly asserted similar legal claims on Penn State's behalf in an effort to invalidate the NCAA's disciplinary sanctions.⁹³

B. Paterno Estate and Others' Claims

Although the Consent Decree did not impose any disciplinary sanctions on Joe Paterno, his family filed an appeal with the NCAA to invalidate the sanctions imposed on Penn State.⁹⁴ They sought a hearing before the Infractions Appeals Committee "to redress the enormous damage done to Penn State, the State College community, former, current and future student and student athletes, Joe Paterno and certain others involved, as a result of the unprecedented actions taken by the NCAA."⁹⁵ Within about two hours, the NCAA vice president of communications responded by stating "[t]he Penn State sanctions are not subject to appeal" because the NCAA had not

91. COMM. ON INFRACTIONS, NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT (2012), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/university+of+north+carolina,+chapel+hill+public+infractions+report+march+12,+2012>.

92. PENN STATE, FACT SHEET ON PENN STATE NCAA SANCTIONS, available at http://progress.psu.edu/assets/content/120803_NCAA_Sanctions_Fact_Sheet_FINAL.pdf.

93. Associated Press, *Family of Joe Paterno Sues NCAA*, ESPN (May 31, 2013, 1:45 PM), http://espn.go.com/college-football/story/_/id/9325586/joe-paterno-family-others-penn-state-sue-ncaa.

94. *Id.* By requiring Penn State to vacate all 112 football wins from 1998–2011, Paterno's corresponding number of victories was reduced, which deprived him of the NCAA record for most Division I football games as a coach. Michael Klopman, *Joe Paterno Wins Vacated: NCAA Sanction Means Ex-Penn State Coach No Longer Tops Wins List*, HUFFINGTON POST (July 23, 2012), http://www.huffingtonpost.com/2012/07/23/joe-paterno-wins-vacated-ncaa-sanctions-penn-state_n_1694731.html.

95. Kevin Home, *Paterno Family Files Appeal Against NCAA*, ONWARD STATE (Aug. 3, 2012), <http://onwardstate.com/2012/08/03/paterno-family-files-appeal-against-ncaa/> (quoting an official appeal letter sent to the NCAA by the Joe Paterno family challenging sanctions).

sanctioned Penn State through its traditional enforcement process.⁹⁶

Based on the "Critique of the Freeh Report" commissioned by the Paterno family,⁹⁷ Joe Paterno's estate and family (as well as five Penn State Board of Trustees members, four faculty members, two former coaches, and nine former football players) filed a lawsuit in Pennsylvania state court against the NCAA, Emmert, and Ray on May 30, 2013.⁹⁸ In their complaint, plaintiffs allege that defendants "breached their contractual obligations and violated their duties of good faith and fair dealing"⁹⁹ by penalizing them for Sandusky's criminal conduct that "was not an athletics issue properly regulated by the NCAA."¹⁰⁰ They also circumvented the NCAA's rules-enforcement procedures, which "expressly protect and benefit students, staff, and other interested parties, recognizing that fair and proper procedures are important because the NCAA's actions can have serious repercussions on their lives and careers."¹⁰¹ The NCAA Executive Committee had no authority "to bypass or amend these procedures and impose discipline or sanctions on any member institution,"¹⁰² and the signing of the Consent Decree by Penn State's president did not validly waive plaintiffs' rights to these procedures.¹⁰³ Plaintiffs assert that defendants' adoption of the "flawed, unsubstantiated, and controversial [Freeh Report] that Defendants knew or should have known was not the result of a thorough, reliable investigation,"¹⁰⁴ which was not approved by Penn State's Board of Trustees,¹⁰⁵ "effectively terminate[d] the search for truth and cause[d] Plaintiffs grave harm."¹⁰⁶

96. Dennis Dodd, *NCAA: Paterno Family Cannot Appeal Penn State Sanctions*, CBS SPORTS (Aug. 3, 2012), <http://www.cbssports.com/collegefootball/blog/dennis-dodd/19721445/ncaa-paterno-family-cannot-appeal-sanctions> (quoting the Twitter account of Bob Williams, NCAA vice president of communications).

97. See *supra* note 78 and accompanying text.

98. Complaint, *Paterno v. NCAA*, No. 2013-2082 (Pa. Ct. of Common Pleas May 30, 2013), available at http://espn.go.com/pdf/2013/0530/espn_otl_State_Complaint.pdf.

99. *Id.* ¶ 1. They also allege defendants "intentionally and tortiously interfered with Plaintiffs' contractual relations, and defamed and commercially disparaged Plaintiffs." *Id.*

100. *Id.* ¶ 4.

101. *Id.* ¶ 24.

102. *Id.* ¶ 45.

103. *Id.* ¶ 111.

104. *Id.* ¶ 5.

105. *Id.* ¶ 59. "Nor did they ever accept its findings or reach any conclusion about its accuracy." *Id.*

106. *Id.* ¶ 5.

In summary, plaintiffs allege: "The NCAA's unauthorized involvement in criminal matters outside its authority and purview ha[d] prevented interested parties from being treated fairly and ha[d] undermined the search for truth. Instead of allowing the Freeh Report to be properly evaluated, the NCAA ha[d] crystallized its errors and flagrantly violated its own rules."¹⁰⁷

In addition to compensatory and punitive damages, they seek a "declaratory judgment that the NCAA-imposed Consent Decree was unauthorized, unlawful, and void *ab initio*" and "[i]ssuance of a permanent injunction preventing the NCAA from further enforcing the Consent Decree or the sanctions improperly imposed therein."¹⁰⁸

Regardless of the substantive merits of their claims, plaintiffs must be proper parties and have standing to assert them. None of the plaintiffs, who collectively constitute current Penn State trustees and faculty members, as well as former coaches and football players, have a direct contractual relationship with the NCAA.¹⁰⁹ Courts have generally held that only current student-athletes whose eligibility has been adversely affected by an NCAA ruling are third-party beneficiaries of the contractual relationship between the NCAA and its member institutions.¹¹⁰ Even if plaintiffs have standing to bring damages claims for individualized harm proximately caused by defendants' alleged breach of contract or tortious conduct, none of these individuals have authorization or standing to assert any claims on behalf of Penn State and obtain injunctive relief against enforcement of the Consent Decree.¹¹¹

107. *Id.* ¶ 104.

108. *Id.* ¶ 154.

109. See Robert Wheel, *How the Joe Paterno Lawsuit Against the NCAA Is Cynical, but Tactical*, SB NATION (May 31, 2013, 9:57 AM), <http://www.sbnation.com/college-football/2013/5/31/4381644/joe-paterno-lawsuit-penn-state-ncaa>.

110. See, e.g., *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 716 (D. Vt. 2012); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *Oliver v. NCAA*, 155 Ohio Misc. 2d 1 (2008). The Consent Decree does not adversely affect the eligibility of current Penn State football players and it provides that "any entering or returning football student-athlete will be allowed to immediately transfer and will be eligible to immediately compete at the transfer institution, provided he is otherwise eligible." CONSENT DECREE, *supra* note 1, at 6.

111. However, the Paterno estate may have standing to challenge the Consent Decree's requirement that Penn State vacate all of its football team victories from 1998–2011 because this causes individualized harm to Joe Paterno's reputation by precluding him from being recognized as the coach with the most Division I football game wins. See Klopman, *supra* note 94.

IV. FEDERAL ANTITRUST CLAIMS

A. *Commonwealth of Pennsylvania's Claims*

On January 2, 2013, Pennsylvania Governor Thomas W. Corbett, Jr. filed a *parens patriae* antitrust suit on behalf of the state's natural citizens against the NCAA,¹¹² which sought to invalidate the Consent Decree's disciplinary sanctions against Penn State and enjoin their imposition.¹¹³ He convened the grand jury investigation of Sandusky's sexual child abuse in 2009, when he was Pennsylvania attorney general, and is an *ex officio* member of Penn State's Board of Trustees.¹¹⁴ His complaint essentially alleges that the NCAA violated Penn State's contractual rights and the law of private associations, which it attempts to bootstrap into a federal antitrust claim under section one of the Sherman Act,¹¹⁵ which prohibits agreements that unreasonably restrain interstate commerce:

This suit arises out of the NCAA and its member institutions' arbitrary and capricious application of their enforcement power for the purpose of crippling Penn State football, thereby harming citizens of the Commonwealth [of Pennsylvania] who benefit from a successful football program at Penn State

112. Complaint, *Pennsylvania v. NCAA*, No. 1:13-cv-00006, 2013 WL 2450291 (M.D. Pa. June 6, 2013), 2013 WL 20316, available at http://espn.go.com/pdf/2013/espn_otl_PennGovlawsuit.pdf.

113. The filing of this lawsuit generated harsh commentary by some critics. See, e.g., Rodney K. Smith, *Column: Picking Politics and Football Over Education*, USA TODAY (Jan. 3, 2013), <http://www.usatoday.com/story/opinion/2013/01/03/penn-state-ncaa-sanctions-sandusky-tom-corbett/1805189/> ("Governor Corbett, on the other hand, clings to what may be a short-term politically correct commitment to the old win-at-all costs culture that has dominated big-time intercollegiate athletics for too long. When rhetoric is replaced with reality, Corbett's lawsuit is about whether winning on the field should continue to trump educational and student welfare concerns. This is a game the Governor deserves to lose."); E-mail from Michael Milillo, Schwenksville, PA, to Mark Emmert, President, NCAA (Jan. 9, 2013) (on file with author) ("The best response to Corbett's lawsuit is to expel Pennsylvania State University altogether from the National Collegiate Athletic Association. By severing all ties with Penn State, the NCAA can never again be accused by Corbett of overreaching its authority. Nor can the NCAA be accused by Schultz of committing a criminal act. If anyone should be held responsible for allowing Penn State football coach Jerry Sandusky to rape boys on the Penn State campus, it is Governor Corbett who refused to prosecute Sandusky for these insidious crimes against children while Corbett was the Attorney General.")

114. Shelley Ross, *Why Does Gov. Tom Corbett Get a Free Pass in the Penn State Scandal?*, HUFFINGTON POST (Nov. 16, 2011), www.huffingtonpost.com/shelley-ross/tom-corbett-penn-state_b_1093263.html.

115. 15 U.S.C. § 1 (2012).

. . . Penn State was forced to sign away its procedural rights, including an investigation of the charges against it, factual findings that NCAA rules were violated, a hearing before the NCAA's Committee on Infractions, and an appeal of any adverse ruling. These punishments threaten to have a devastating, long-lasting, and irreparable effect on the Commonwealth, its citizens, and its economy.

The NCAA is a trade association of competitors, formed for the purpose of promoting intercollegiate athletic competition, in part through self-regulating its members to ensure fair competition on the playing field and the protection of participating student-athletes. While the antitrust laws permit such an association to impose and enforce rules or standards to promote certain procompetitive purposes, such rules must be reasonably related to those purposes, and must be enforced through procedures designed to prevent their arbitrary application.

The NCAA's sanctions against Penn State fail to meet these requirements. The NCAA has punished Penn State without citing a single concrete NCAA rule that Penn State has broken, for conduct that in no way compromised the NCAA's mission of fair competition, and with a complete disregard for the NCAA's own enforcement procedures. In so doing, the NCAA and its members have forced Penn State to forfeit the valuable competitive advantages of full participation in the NCAA.¹¹⁶

In *Pennsylvania v. NCAA*, the federal district court granted the NCAA's motion to dismiss this antitrust suit.¹¹⁷ Initially, the court observed that "Penn State is not a party to this action and takes no position in this litigation"¹¹⁸ and that "the complaint limits [its] review to the question of whether [Governor Corbett] has articulated a violation of federal antitrust law."¹¹⁹ For section one of the Sherman Act to apply to the NCAA's

116. Complaint, *supra* note , ¶¶ 2–5.

117. No. 1:13-cv-00006, 2013 WL 2450291, at *15 (M.D. Pa. June 6, 2013).

118. *Id.* at *1.

119. *Id.* at *2. The court noted that the "Governor's complaint is an impassioned indictment of the sanctions against Penn State," which he condemned "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." *Id.* However, those allegations were "not the subject of the Governor's claim for

challenged conduct, a plaintiff “cannot allege just *any* harm, but must point to harm directed at commercial activity of the type the Sherman Act is designed to address.”¹²⁰ The court ruled that this requirement is not satisfied merely by the Governor’s allegations that the NCAA sanctions will cripple the ability of Penn State’s football program to compete on the playing field or reduce its ability to generate revenues for the university. Because “the complaint is devoid of allegations that [the NCAA] sought to regulate commercial activity or obtain any commercial advantage for itself by imposing sanctions on Penn State,” the court held that the Governor’s allegations “do not make out commercial activity subject to the Sherman Act.”¹²¹

Even if the NCAA sanctions are characterized as commercial activity and section one of the Sherman Act applies, the court ruled that the complaint did not sufficiently allege that the NCAA sanctions are the product of a conspiracy to achieve an anticompetitive objective and unreasonably restrain interstate commerce.¹²² There was no allegation that “Dr. Emmert, and unidentified members of the Division I Board of Directors and Executive Committee, agreed together to punish Penn State in an effort to achieve an unlawful purpose forbidden by the *antitrust laws*.”¹²³ Determining that the rule of reason would apply, the court noted that the Governor “bears the initial burden of demonstrating that the alleged restraint produced an adverse anticompetitive effect within the relevant geographic market.”¹²⁴ It concluded that he failed to sufficiently allege that the Consent Decree sanctions reduced economic competition among NCAA institutions in the nationwide markets for post-secondary education, Division I football players, and the sale of college-football-related apparel and memorabilia.¹²⁵ The court also ruled that the Governor has no standing to assert this claim because Pennsylvania’s natural citizens are not consumers or competitors of NCAA institutions in any of these relevant markets and therefore did not suffer antitrust injury.¹²⁶

relief, and [were] not before the Court for a review on their merits.” *Id.* at *3.

120. *Id.* at *3.

121. *Id.* at *8.

122. *Id.* at *12.

123. *Id.* at *9.

124. *Id.* at *11.

125. *Id.* at *14.

126. *Id.*

B. Penn State's Potential Claims

Courts have uniformly rejected antitrust challenges to NCAA disciplinary action arising out of its traditional rules-enforcement process as a matter of law.¹²⁷ For example, in *Bassett v. NCAA*, a coach who was sanctioned for NCAA amateurism and academic integrity rules violations alleged that "many coaches, including [himself], have been unfairly investigated or sanctioned through NCAA's enforcement process that fails to apply the due process protections contained in NCAA's enforcement process," in violation of section one of the Sherman Act.¹²⁸ The Sixth Circuit dismissed his antitrust claim because his complaint "contain[ed] no allegations of the effect of NCAA's enforcement of its non-commercial rules on the coaching market" and did not "allege the [sanction] resulted from some anticompetitive purpose."¹²⁹ It rejected his contention that the "NCAA's disciplinary scheme impacts commerce because the discipline involves financial sanctions" that effectively prohibited him from working as a college coach for eight years.¹³⁰ Observing that student-athlete amateurism and academic eligibility rules are non-commercial in nature, the court explained that "[a]s long as the enforcement of non-commercial rules is reasonably and rationally related to the rules themselves, . . . enforcement is a non-commercial activity."¹³¹

Consistent with *Bassett*, the court in *Pennsylvania v. NCAA* held that the

127. See, e.g., *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (dismissing antitrust challenge to sanctions imposed on coach for violating NCAA rules governing recruiting, improper benefits to athletes, and academic fraud); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (upholding one-year ban on institution's participation in intercollegiate football for egregious violations of NCAA amateurism rules); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) (rejecting antitrust challenge to two-year ban on university football team's postseason and television appearances because staff members and representatives of its football program violated NCAA amateurism rules). See also *Hairston v. Pac-10 Conference*, 101 F.3d 1315 (9th Cir. 1995) (upholding athletic conference sanctions, including two-year bowl ban, one-year television revenue ban, and scholarship limitations imposed on member school for player recruiting violations).

128. 528 F.3d 426, 434 (6th Cir. 2008).

129. *Id.*; cf. *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260, 1268 (N.D. Ga. 1973) (holding that the one-year suspension of a professional golfer for alleged rules violations by a governing board solely composed of competing tour players constituted "a completely unfettered, subjective and discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors" for their own potential financial benefit, which infringed upon her right to a fair disciplinary hearing in violation of federal antitrust laws).

130. *Bassett*, 528 F.3d at 431.

131. *Id.* at 433.

adverse effects of NCAA sanctions on Penn State’s ability to compete on the football field with other universities and generate revenues does not constitute the requisite antitrust injury caused by anticompetitive commercial activity.¹³² The Seventh Circuit (whose law governs Indiana, where the NCAA is headquartered) views the scope of the NCAA’s commercial activity subject to antitrust scrutiny more broadly than the *Pennsylvania v. NCAA* district court, applying Third Circuit law.¹³³ Nevertheless, in *Agnew v. NCAA*,¹³⁴ the Seventh Circuit confirmed that an antitrust plaintiff challenging NCAA regulatory activity bears the “burden of showing that an agreement had anticompetitive effects on a particular market.”¹³⁵ It explained: “The entire point of the Sherman Act is to protect competition in the commercial arena; without a commercial market, the goals of the Sherman Act have no place.”¹³⁶

In order to assert a viable section one claim, Penn State would be required to allege (and ultimately prove) that the disciplinary sanctions imposed by the Consent Decree reduce economic competition among NCAA member universities in a commercial market.¹³⁷ This is a difficult burden to satisfy, particularly because the Consent Decree does not prohibit Penn State from playing regular season intercollegiate football games or appearing on television, which are commercial markets that produce entertainment products desired by consumers.¹³⁸ Nor does it preclude Penn State from competing with other NCAA institutions in the markets for post-secondary education,¹³⁹ Division I football players,¹⁴⁰ or the sale of college-football-

132. *Pennsylvania v. NCAA*, No. 1:13-cv-00006, 2013 WL 2450291, at 14–15 (M.D. Pa. June 6, 2013).

133. *Id.* at *7 (“Contrary to the Third Circuit’s opinion in *Smith*, which distinguished between non-commercial and commercial activity for the purposes of applying the Sherman Act to Defendant’s regulatory activity, the Seventh Circuit held in *Agnew* that the Sherman Act ‘applies generally’ to Defendant’s actions.”).

134. 683 F.3d 328, 337 (7th Cir. 2012). “In an area that is not obviously commercial, and thus where the Sherman Act’s application is not clearly apparent, we believe it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market in which anticompetitive effects may be felt” *Id.* at 345.

135. *Id.* at 337.

136. *Id.* (citation omitted).

137. *See id.* at 335.

138. *See* CONSENT DECREE, *supra* note 1.

139. It would be very difficult to prove that the Consent Decree’s sanctions, rather than Penn State officials’ involvement in the Sandusky sexual child abuse scandal, are the proximate cause of any reduced ability of Penn State to engage in economic competition with other NCAA schools for students, faculty, and academic funding in the higher education market.

related apparel and memorabilia.¹⁴¹ Unless its financial effects were so severe that it prevented Penn State from fielding a college football team (which is not the case), the \$60 million fine would not reduce economic competition between NCAA universities in any commercial market for college football or intercollegiate athletics. Vacating Penn State's football wins from 1998–2011 and the university's five-year probationary period do not appear to restrain any commercial market. However, the four-year ban on Penn State's participation in post-season football games, if its team qualifies for a bowl game, may reduce economic competition among NCAA Division I FBS universities and restrain a commercial market.¹⁴²

If Penn State could satisfy its burden of showing that the Consent Decree is the product of an agreement among NCAA universities that has anticompetitive market effects,¹⁴³ the rule of reason would require the NCAA to show that its disciplinary sanctions have a judicially recognized procompetitive justification such as maintaining competitive balance, academic integrity, or amateurism.¹⁴⁴ It is difficult to see how these

140. The four-year football scholarship reductions do not have the requisite commercial effect if they only adversely affect the on-field performance of Penn State's football team in the short term. Even if the labor market for football student-athletes is a commercial market, *Agnew*, 683 F.3d at 346–47, a collective reduction of sixty Penn State football scholarships during this period may have only a de minimus anticompetitive effect. In September 2013 the NCAA announced that because of "Penn State University's continued progress toward ensuring athletics integrity," it would be restoring its lost football scholarships to enable it to award the NCAA's annual maximum of 25 scholarships in 2015-16 and maximum of 85 total scholarships in 2016-17. Press Release, NCAA, *Executive Committee to gradually restore Penn State scholarships*, available at <http://www.ncaa.com/news/football/article/2013-09-24/executive-committee-gradually-restore-penn-state-scholarships>.

141. See CONSENT DECREE, *supra* note 1.

142. *Worldwide Basketball and Sports Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (NCAA rule limiting the number of times Division I universities may participate in outside certified basketball tournaments "has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the [p]romoters."). The common law restraint of trade doctrine, which generally does not require pleading and proof that a relevant commercial market is restrained, provides an alternative theory for reducing the length of Penn State's postseason ban if it is shown to be unreasonable in duration given the NCAA's legitimate regulatory objectives. For a general discussion of this legal doctrine and how it has been applied by U.S. courts in other contexts, see generally Stephen F. Ross, *Principles of Antitrust Law* at 12–20 (Foundation Press 1993). If the common law restraint of trade law of a state other than Indiana is applied, potential Dormant Commerce Clause issues arise. See *supra* note 71 and accompanying text.

143. The common law restraint of trade doctrine, which generally does not require pleading and proof that a relevant commercial market is restrained, provides an alternative theory for potentially challenging the length of Penn State's postseason ban. See *supra* note 142.

144. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113–20 (1984); *Law v. NCAA*,

sanctions relate to the preservation of amateurism or academic integrity. However, they arguably bear a reasonable relationship to the NCAA's legitimate need to maintain competitive balance among its member universities if Penn State officials' conduct in connection with Sandusky's serial child abuse violated specific NCAA rules designed to achieve this objective, or their cover-up was intended to avoid bad publicity that would harm its football program. The NCAA also might assert that these disciplinary sanctions have the procompetitive justification of maintaining the integrity of and public confidence in intercollegiate athletics, which was harmed because "the reverence for Penn State football permeated every level of the University community" and created an "imbalance of power" with results "antithetical to the model of intercollegiate athletics embedded in higher education."¹⁴⁵

If the NCAA demonstrates that the Consent Decree has procompetitive effects, then Penn State must prove that its disciplinary sanctions are "not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."¹⁴⁶ It is likely Penn State would assert that the Executive Committee's usurpation of the NCAA's traditional rules-enforcement process met this standard because, given the opportunity to defend itself, the Committee on Infractions may have determined that its conduct did not violate NCAA rules or may have imposed lesser sanctions if it did. If both parties satisfy their respective burdens under the rule of reason, then the anticompetitive market effects of the Consent Decree and its procompetitive effects "must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable."¹⁴⁷ In antitrust litigation it is always hard to predict how the fact finder will resolve this issue.

Based on existing legal precedent, it is unlikely that Penn State could successfully plead and prove that the NCAA's conduct violated section one of the Sherman Act. Its primary difficulty would be proving that the terms of the Consent Decree have anticompetitive market effects, which is a significant hurdle that an antitrust plaintiff must surmount in challenging disciplinary sanctions imposed by a sports governing body.

134 F.3d 1010, 1019 (10th Cir. 1998).

145. CONSENT DECREE, *supra* note 1, at 4.

146. *Law*, 134 F.3d at 1019.

147. *Id.*

V. CONCLUSION

The NCAA's historically unprecedented imposition of draconian institutional disciplinary sanctions on Penn State for individual criminal and tortious conduct arising out of Gerald Sandusky's serial sexual child abuse constitutes an unwarranted "rush to judgment" to demonstrate presidential control of intercollegiate athletics in response to other recent scandals involving high profile intercollegiate football programs.¹⁴⁸ Although Penn State "agreed" to the Consent Decree's terms, the NCAA's coercive means violated the university's contractual due process rights and the law of private associations. The NCAA's objectives of holding Penn State accountable for its leaders' failure to take appropriate action to protect the safety and welfare of innocent children who were sexually abused on its campus and in connection with youth activities associated with its athletic program as well as changing the institutional culture that permitted it to occur is laudable and should be applauded. Nevertheless, the NCAA should have respected and followed its well-established rules-enforcement process before disciplining Penn State. It also should adopt proactive reforms requiring greater individual and institutional responsibility to take affirmative steps to protect the health, safety, and welfare of all persons exposed to known or foreseeable risks of harm by the operation of its athletics program, reforms that provide clear notice of specific action or inaction that violates NCAA rules and of potential sanctions.

148. See *supra* notes 88–91 and accompanying text. It has spawned Congressional introduction of the "National Collegiate Athletics Accountability Act," co-sponsored by Rep. Charles W. Dent (R-Pa.). Among other requirements, this proposed federal legislation would prohibit universities that receive federal funding from being a member of the NCAA unless: 1) it provides a mandated administrative hearing, with at least one appeal, and other due process procedures deemed necessary by the Secretary of Education; and 2) no sanctions begin until after the appeals process. Ali Fogarty, *Legislators introduce NCAA Accountability Act*, STATE COLLEGE NEWS (August 2, 2013), available at <http://www.statecollege.com/news/local-news/legislators-introduce-ncaa-accountability-act-1359666/>; Jenna Johnson, *Ohio, Penn. athletic scandals prompt lawmakers' call for NCAA change*, WASHINGTON POST (August 1, 2013), available at http://www.washingtonpost.com/politics/ohio-penn-athletic-scandals-prompt-lawmakers-call-for-ncaa-change/2013/08/01/aa21ef3e-facc-11e2-8752-b41d7ed1f685_story.html.

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