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AVOIDING THE SACK: HOW NEBRASKA'S DEPARTURE FROM THE BIG 12 CHANGED COLLEGE FOOTBALL AND WHAT ATHLETIC CONFERENCES MUST DO TO PREVENT DEFECTION IN THE FUTURE

I. INTRODUCTION

On December 5, 2009, the University of Nebraska (Nebraska) lost the Big 12 Championship Game to the University of Texas (Texas).¹ One year later, Nebraska again lost the Big 12 Championship Game to the University of Oklahoma, in what would be Nebraska's final Big 12 game, and the final Big 12 Championship Game.² Those consecutive conference championship losses cost Nebraska a chance to play in some of the most prestigious bowl games in college football and may have included a loss of recruits, lower ticket sales, and a disappointed fan base. One thing that Nebraska undoubtedly lost, though, was a chance for higher revenue.

There is no doubt that college football has become a huge business. In fact, the conferences that had teams participate in the five most important college football games—the Bowl Championship Series (BCS) games—received a share of almost \$170 million for the 2010–2011 post-season.³ Colleges spend enormous amounts of money on recruiting high school players, team travel, coaches' salaries, scholarships for athletes, academic and other types of support for the athletes, and their athletic programs in general.⁴ In return, these institutions earn revenues that some publicly traded companies cannot dream of matching.⁵ College football is also organized like a business,

1. Wendell Barnhouse, *Texas Wins Dr. Pepper Big 12 Football Championship*, BIG 12 CONFERENCE (Dec. 5, 2009), http://www.big12sports.com/ViewArticle.dbml?&DB_OEM_ID=10410&ATCLID=204844868.

2. Wendell Barnhouse, *Sooners Win Big 12 Championship*, BIG 12 CONFERENCE (Dec. 4, 2010), http://www.big12sports.com/ViewArticle.dbml?&DB_OEM_ID=10410&ATCLID=205042841.

3. *Revenue Distribution Data Released*, BCS (Jan. 25, 2011), <http://www.bcsfootball.org/news/story?id=6057935>.

4. See Jack Gillum et al., *College Athletics Soaking Up Subsidies, Fees; Findings Called 'Appalling' Amid School Funding Crisis*, USA TODAY, Jan. 14, 2010, at 1A.

5. See Molly Reppen, *Athletic Department Produces 10th Highest Revenue in U.S.*, THE DAILY

where almost every Football Bowl Subdivision (FBS) school is part of a voluntary association, known as a college athletic conference.

Since the final whistle of that 2010 Big 12 Championship Game sounded, the college football landscape has changed drastically. Twenty-two different schools with FBS football programs have joined, or agreed to join, a new conference.⁶ Two of those schools, Boise State University and Texas Christian University, changed conferences twice during this period without ever playing a game.⁷ While each school's departure had ripple effects, some were larger than others. Nebraska was one of the first schools to change conferences during this frenetic period and is, arguably, still the biggest name football program to do so.

Nebraska was a member of the private association known as the Big 12 Conference (Big 12) from the conference's inception in 1996,⁸ and was a member of the Big 8 Conference before that.⁹ In 2010, Nebraska formally applied to become a member of the Big Ten Conference (Big Ten), and the application was approved by the Big Ten Conference Council of Presidents and Chancellors.¹⁰ The Nebraska Cornhuskers officially made the move and began competing in the Big Ten during the Fall 2011 sports season.¹¹ When Nebraska decided to join the Big Ten, it necessarily meant that Nebraska also decided to end its relationship with the Big 12, creating great economic and legal ramifications.

This Comment will discuss the ramifications of conference realignment on the conferences and the universities involved and will discuss ways for conferences to protect themselves in these situations. Nebraska's departure from the Big 12 will be the focus of this Comment because it was one of the first dominos to fall and nearly caused the collapse of the Big 12. Part II of this Comment will discuss how the Big 12 is organized. Part III will then discuss the legal issues involved when a university terminates its relationship

CARDINAL (Univ. of Wis.-Madison), Dec. 9, 2010, http://host.madison.com/daily-cardinal/news/athletic-department-produces-th-highest-revenue-in-u-s/article_f2ab9fd0-857a-580c-bd1c-bf07fbb2f2af.html.

6. *See History of Conference Realignment*, NBCSPORTS, <http://nbcsports.msnbc.com/id/37689691/> (last visited Mar. 23, 2012).

7. *See id.*

8. *The Big 12 Conference – Outstanding Success*, BIG 12 CONFERENCE (Nov. 28, 2010), http://www.big12sports.com/ViewArticle.dbml?DB_OED_ID=10410&KEY=&ATCLID=1514841.

9. *Conference Timeline - Big 8*, HUSKERS.COM (July 1, 2011), http://www.huskers.com/ViewArticle.dbml?DB_OEM_ID=100&ATCLID=205175754.

10. *Big Ten Officially Accepts Nebraska*, HUSKERS.COM (June 11, 2010), http://www.huskers.com/ViewArticle.dbml?SPSID=173&SPID=41&DB_OEM_ID=100&ATCLID=204958959 [hereinafter *Nebraska Accepted*].

11. *Id.*

with an athletic conference. This discussion will focus on contracts, specifically contractual obligations and related remedies for breaching these contracts. Part III will also discuss the law of private associations, which generally governs conference actions. Part IV will discuss other instances of conference defection and the legal ramifications for the universities that left their athletic conferences. Part V will discuss Nebraska's and, to a lesser extent, the University of Colorado's (Colorado) decision to leave the Big 12 in 2010. Part VI suggests ways for the Big 12 and other conferences to include additional protections from defection in their contracts with universities and addresses the practicality of these suggestions. Finally, in Part VII, this Comment concludes that media revenue sharing and rights pooling are the best ways to ensure survival, but only if those provisions are upheld when they are eventually challenged.

II. THE BIG 12 CONFERENCE

The Big 12 was formed after the 1995 football season and officially began play in the fall of 1996.¹² As a member of the Big 12, Nebraska had to abide by the conference bylaws, which required the school to pay membership assessments at the end of the Big 12's fiscal year.¹³ These assessments are taken from the final distribution due to each institution at the end of the year.¹⁴ The revenue that each school receives is based on the total pool of revenues earned by all conference members.¹⁵ The percentage each school gets for football is based on a number of factors, including television revenues, appearance fees, and bowl game appearances, among other things.¹⁶

The Big 12 is organized much like other nonprofit corporations, with a board of directors comprised of the Chief Executive Officer of each member institution (usually a President or Chancellor).¹⁷ There is also a Council of Faculty Athletic Representatives, a Board of Athletic Directors, and a Board of Senior Woman Administrators.¹⁸ Through this structure, the Big 12 acts in

12. 2 EDSON A. BEARG & THOMAS R. RUDEBUSCH, *INSIDE THE PROGRAM: A HISTORY OF COLLEGE FOOTBALL, THE GOLDEN AGE OF THE 1950'S TO THE MODERN ERA* 251 (2006).

13. BIG 12 CONF., *BIG 12 CONF. 2010–11 HANDBOOK* art. II, § 2.2, at 1, 12, *available at* http://www.big12sports.com/fls/10410/pdfs/handbook/ConferenceHandbook.pdf?DB_OEM_ID=10410 (last visited Mar. 23, 2012) [hereinafter *HANDBOOK*].

14. *Id.*

15. *See id.* art. II, §§ 2.4–2.10, at 12–13.

16. *Id.*

17. *Id.* art. V, § 5.1.1, at 15.

18. *Id.* art. V, §§ 5.1.2–5.1.4, at 15–16.

the interests of all its member institutions.¹⁹ However, the Big 12 is still a separate entity from its institutions and, thus, needs to structure its contracts with the individual institutions in ways that allow the Big 12 to protect itself.

III. LEGAL ISSUES INVOLVED IN A UNIVERSITY LEAVING AN ATHLETIC CONFERENCE

Collegiate conferences are collections of colleges and universities that decide to form voluntary associations. Like the leaders of most entities in today's society, conference leaders must be concerned with many areas of law. Contract law and the law of private associations, however, are the primary areas of the law that conference leaders must be aware of in regard to relationships with its member universities.

A. Contracts

When an individual school wants to join the Big 12, there are certain membership requirements the institution must meet.²⁰ These requirements are found in the Certificate of Incorporation, the Big 12 bylaws, and the Big 12 rules.²¹ Once a school joins the Big 12, it is bound by all the rules and regulations of the conference.²² Additionally, if an institution chooses to withdraw from the Big 12, there are specific procedures and penalties that the Big 12 may enforce, which will be discussed further in Part V of this Comment.²³ These rules and obligations materialize through a contract between each individual member institution and the Big 12.

In any context, when there is a contract in place, each party to the contract expects every other party to perform the action that was agreed to in the contract.²⁴ If one party to the contract in some way breaches or does not fulfill his duties, the other party is entitled to remedies that would put that party in the same position it would have been in if the original contract was fulfilled.²⁵ The types of remedies vary by the contract but are most often monetary damages.²⁶ When the parties come together to form a contract,

19. *See id.* art. I, § 1.3.1, at 1.

20. *See id.* art. I, § 1.2.3, at 1.

21. *Id.*

22. *See generally id.*

23. *Id.* art. III, § 3.1–3.3, at 13–14.

24. CLAUDE D. ROHWER & ANTHONY M. SKROCKI, *CONTRACTS IN A NUTSHELL* 433 (5th ed. 2000).

25. *Id.* at 433–34.

26. *Id.* at 433.

damages can be negotiated into the contract itself, which might include a formula for determining damages or a specified amount of money.²⁷ Sometimes, it is also possible to have a court force the breaching party to perform its obligations under the contract, using a theory of specific performance.²⁸

Contracts can also have a large effect on third parties who did not negotiate the terms. In the collegiate athletic conference context, at least one court has been called upon to consider whether the contractual obligations owed by a university to its conference have any effect on the students.²⁹ In *Hairston v. Pacific 10 Conference*, the student-plaintiff tried to argue that there were obligations between the conference and the students related to providing an opportunity to play intercollegiate athletics and receiving the benefits involved in those sports, but the court dismissed that argument.³⁰ The court specifically stated that no breach of contract claim existed because no language in the contract showed that the Pacific 10 Conference (Pac-10) intended to obligate itself to the students.³¹ This ruling indicates that a conference has valid contracts only with the universities, and the courts are probably not willing to read more into a contract between a conference and its member universities than the parties clearly intended, based on the contract itself.

B. Law of Private Associations

Athletic conferences are private associations that exist only because of agreements among their members, created by contracts. However, when a dispute arises that is not specifically about these contracts, some parties may want to challenge a conference's rules. Courts will usually respect an association's rules and decisions unless the plaintiff can show that the rules should not be followed because of mistake, fraud, illegality, collusion, or arbitrariness.³² In *Gulf South Conference v. Boyd*, a student-athlete brought suit against the Gulf South Conference, seeking a declaratory judgment that he was eligible to play football.³³ The Supreme Court of Alabama considered the conference's argument that the lower court had no jurisdiction and said that

27. *Id.* at 436.

28. *Id.* at 438.

29. *See generally* *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315 (9th Cir. 1996).

30. *Id.* at 1320.

31. *Id.*

32. *See, e.g.,* *Harper v. Hoecherl*, 14 So. 2d 179 (Fla. 1943); *Blackshire v. NAACP, Inc.*, 673 N.E.2d 1059 (Ill. App. Ct. 1996).

33. *Gulf S. Conf. v. Boyd*, 369 So. 2d 553, 554 (Ala. 1979).

the dispute was clearly governed by common law regarding private associations.³⁴ The court noted that generally, “courts should not interfere with the internal management of such associations.”³⁵ The court reasoned that people or entities should be able to choose with whom to associate and in what manner and pointed out that courts would not have a workable standard of review for the reasonableness of an association’s rules.³⁶ Universities, unlike students, choose to associate with certain conferences and, therefore, the general noninterference doctrine for private associations applies, and the court will not inhibit the management of the associations.³⁷

To a certain extent, courts may be willing to give athletic conferences even more deference than other private associations because the conferences are tied to educational institutions. In a case challenging the tax status of an Atlantic Coast Conference (ACC) owned sports facility, the North Carolina Court of Appeals held that the operations and contracts of the conference are incidental to operating the educational institutions.³⁸ In its analysis, the court clearly distinguished athletic conferences from commercial associations and gave the ACC the flexibility to call the sports facility at issue an educational facility.³⁹ The court went on to state that management of network agreements and broadcasts is incidental to the operation of the universities, just like the maintenance of a parking lot.⁴⁰ This management is usually left to the conferences rather than individual institutions, so conferences like the ACC are in some ways extensions of their members. The court also looked to the uses and purposes of the building in question.⁴¹ It found that the ACC’s role is primarily to promote collegiate athletics by instructing students and developing those students’ skills.⁴² The court’s conclusion that the conference was an educational entity allowed the ACC to remain tax-exempt but also set a precedent of giving vast deference to college athletic conferences. This deference may prompt other plaintiffs to look to alternative areas of law for claims to bring against collegiate conferences.

34. *Id.* at 556.

35. *Id.*

36. *Id.* at 556–57.

37. *See id.* at 557.

38. *See In re Appeal of Atl. Coast Conf.*, 434 S.E.2d 865, 870 (N.C. Ct. App. 1993).

39. *Id.* at 871.

40. *Id.* at 870.

41. *Id.*

42. *Id.*

C. Other Areas of Law

Antitrust and fiduciary duties are the other areas of the law that plaintiffs are very likely to consider. Antitrust law cases are likely to be filed only by other institutions that feel left out by the conference structures and membership requirements rather than individuals because those organizations have much more to gain and can better afford the litigation expenses involved. If a plaintiff was considering an antitrust suit, that plaintiff would first look to the Sherman Act. Section One of the Sherman Act states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”⁴³ Although universities in conferences are usually located in several different states, each university has contractual obligations to a single conference entity, so it could be argued that these agreements are in violation of the Sherman Act. If the agreements between the universities and conferences were found to be in violation of the Sherman Act, the conferences would not be able to enforce the obligations of members or damages owed by universities that leave the conferences. Analysis of any antitrust claim that might stem from Nebraska’s agreement with the Big 12 and other member schools is beyond the scope of this Comment, which will focus solely on the contractual issues involved.

The other area of law likely to be implicated in a collegiate conference lawsuit is the area of fiduciary duties. Black’s Law Dictionary defines a fiduciary duty as “[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary . . . ; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person.”⁴⁴ Other conference members may want to file a claim against Nebraska alleging that, by leaving the Big 12, Nebraska breached its fiduciary duties to those members. Again, these claims will not be discussed because they are beyond the scope of this Comment, which is focused on contractual obligations and remedies.

Although several areas of law affect conferences and many decisions involving the conferences deal with different types of contractual obligations, there is a recognizable trend when these issues are litigated. The trend seems to be that courts will give college athletic conferences a large amount of deference in both the operation of college athletics and the contractual obligations that the conferences undertake.

43. Sherman Antitrust Act, 15 U.S.C. § 1 (2011).

44. BLACK’S LAW DICTIONARY 581 (9th ed. 2009).

IV. OTHER CONFERENCE DEFECTIONS AND THE LEGAL RAMIFICATIONS OF THOSE WITHDRAWALS

Conference realignment is nothing new in college sports, and movement among conferences, at least on the Division I FBS level, is almost always to help a college's football or men's basketball program. Between 1990 and 2008, about thirty schools changed conferences, including about twenty in 2003 alone.⁴⁵ Most of the movement in 2003 began with several schools leaving the Big East Conference (Big East) for the ACC and the Big East filling those vacancies with schools from Conference USA.⁴⁶ Institutions and conferences have different motivations for realignment, but it seems clear that revenue is the largest driving force in all of these decisions. The schools want to garner more television revenues by participating in more popular conferences and conference championship games, while the conferences look for member schools that help the conferences tap into larger television markets.⁴⁷

A. *The Big East in 2003*

As a result of the realignment involving the Big East and the ACC, lawsuits were filed.⁴⁸ The University of Connecticut, the University of Pittsburgh (Pittsburgh), Rutgers University, and West Virginia University (WVU) filed suit against the ACC.⁴⁹ All of these schools were members of the Big East and claimed that the ACC wrongfully coerced members of the Big East to breach contractual obligations and fiduciary duties owed to them and to join the ACC.⁵⁰ The court found that the suit was against the ACC itself and, therefore, no personal jurisdiction existed in Connecticut based on insufficient contacts with the state.⁵¹ The ACC's motion to dismiss was granted.⁵² In another case stemming from this realignment, Boston College (BC) filed suit against the Big East, claiming that an amended constitutional

45. Beth Rosenberg, *Domino Effect: Division I-A Conference Realignment Has Had Emotional, Structural Impact*, NCAA (Dec. 8, 2003), <http://fs.ncaa.org/Docs/NCAANewsArchive/2003/Division+I/domino+effect++12-8-03.html>.

46. DANIEL COVELL & CAROL A. BARR, *MANAGING INTERCOLLEGIATE ATHLETICS* 87 (2010).

47. *See id.*

48. *See generally* Trs. of Bos. Coll. v. Big E. Conf., No. 03-4818, 2004 Mass. Super. LEXIS 298 (Mass. Super. Ct. Aug. 18, 2004); *Univ. of Conn. v. Atl. Coast Conf.*, No. X07CV030082695S, 2004 Conn. Super. LEXIS 368 (Conn. Super. Ct. Feb. 23, 2004).

49. *Univ. of Conn.*, 2004 Conn. Super. LEXIS 368, at *1.

50. *Id.*

51. *Id.* at *8.

52. *Id.* at *13.

provision that increased penalties for leaving was invalid.⁵³ This suit came about because, after the withdrawal of the University of Miami and Virginia Tech from the Big East, the conference and its member schools wanted to protect themselves.⁵⁴ Therefore, the Big East increased the penalty for withdrawal from \$1 million to \$5 million and the notice period from 12 months to 27 months.⁵⁵ BC alleged that the increased penalty amount and withdrawal period were invalid.⁵⁶ The court granted BC's motion for summary judgment and denied the Big East's motion.⁵⁷ The fact that both cases were disposed of early in litigation leaves unanswered questions about the duties of the schools and conferences and the relationships between the parties.

The cases do seem to support the notion that the relationships are completely based on contracts. The plaintiff-schools in *University of Connecticut v. Atlantic Coast Conference* also tried to further the idea that the schools leaving the conference were breaching not only contractual obligations but fiduciary duties as well.⁵⁸

B. The Big East in 2011

As the college football landscape continued to change, the Big East also lost some key members. In September 2011, Syracuse University (Syracuse) and Pittsburgh announced they would leave the Big East for the ACC.⁵⁹ WVU accepted an invitation to join the Big 12 in late October 2011.⁶⁰ Immediately afterward, WVU filed a lawsuit against the Big East in a West Virginia circuit court.⁶¹ In that complaint, WVU alleged that the Big East breached fiduciary duties owed to the football schools and that the breach

53. See generally *Trs. of Bos. Coll.*, 2004 Mass. Super. LEXIS 298.

54. *Id.* at *6.

55. See *id.* at *8–9.

56. *Id.* at *1–2.

57. *Id.* at *26.

58. Gregg L. Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 357 (2006). However, the analysis of fiduciary duties between institutions in a conference is beyond the scope of this Comment.

59. Lenn Robbins, *Syracuse, Pittsburgh Leaving Big East for ACC*, N.Y. POST, Sept. 18, 2011, http://www.nypost.com/p/sports/college/football/big_hit_for_big_east_s18WCvu1wABdEy9Y90r3ZJ

60. *Big 12 Adding WVU, Will Stay 10 Strong*, ESPN (Oct. 28, 2011), http://espn.go.com/college-sports/story/_id/7159905/west-virginia-mountaineers-formally-invited-join-big-12.

61. See generally *Complaint for Declaratory Judgment, Breach of Contract, and Injunctive Relief*, W. Va. Univ. Bd. Gov. v. Big E. Conf., No. 11-C-695 (Magnolia Cnty., W. Va. Cir. Ct. Oct. 31, 2011).

forced the football schools to leave the conference.⁶² WVU claimed it was commercially impracticable for it to stay in the conference after other football schools left and that by seemingly protecting the interests of only the “basketball schools,” the Big East and its commissioner “breached their contract to WVU and nullified and voided [all or parts of] the Bylaws.”⁶³ The complaint sought judgment that, *inter alia*, the bylaws were invalid,⁶⁴ that the conference accepted WVU’s offer of immediate withdrawal,⁶⁵ and injunctive relief against enforcement of the withdrawal period.⁶⁶

In response, the Big East filed suit against WVU in Rhode Island on November 4, 2011.⁶⁷ The complaint alleged that WVU breached its contract with the Big East by attempting to withdraw and sought specific performance by WVU of the withdrawal requirements set forth in the Big East bylaws or an injunction to keep WVU from leaving the Big East before July 1, 2014.⁶⁸ The Big East also requested damages based on WVU’s actions.⁶⁹ WVU then moved to dismiss the case or for a stay pending the West Virginia state court action.⁷⁰ In a December 27, 2011 decision, the Rhode Island court denied WVU’s motion to dismiss the action on all grounds, finding personal jurisdiction, concluding there was sufficient service of process, and declining to dismiss the action based on comity with regard to sovereign immunity or *forum non conveniens*.⁷¹ However, on February 14, 2012, WVU announced that it settled the lawsuits with the Big East and would make the move to the Big 12 for the Fall 2012 season.⁷² As part of the settlement, WVU will not only pay an exit fee far above that required by the Big East bylaws, but it also agreed to have the West Virginia court enter judgment stating that the bylaws are valid and enforceable.⁷³ The judgment declaring the Big East bylaws valid is a clear win for the Big East and other conferences moving forward.

62. *Id.* ¶¶ 29–31.

63. *Id.* ¶ 34.

64. *Id.* ¶¶ 49, 61.

65. *Id.* ¶ 49.

66. *Id.* ¶¶ 76–77.

67. Complaint, *Big E. Conf. v. W. Va. Univ.*, No. PB-11-6391 (R.I. Super. Ct. Nov. 4, 2011).

68. *Id.* ¶¶ 1–6.

69. *Id.* ¶ 7.

70. Defendant’s Motion to Dismiss, *Big E. Conf. v. W. Va. Univ.*, No. PB-11-6391, 2 (R.I. Super. Ct. Nov. 29, 2011).

71. *See generally* *Big E. Conf. v. W. Va. Univ.*, No. PB-11-6391 (R.I. Super. Ct. Dec. 27, 2011).

72. Ralph Russo & Vicki Smith, *WVU Settles Big East Lawsuit, Will Join Big 12*, CNSNEWS.COM (Feb. 14, 2012), <http://cnsnews.com/news/article/wvu-settles-big-east-lawsuit-will-join-big-12-0>.

73. *Id.*

C. The Western Athletic Conference

The Big East was not the only conference that looked to the courts for help when the period of defection following Nebraska's move reached its membership. The Western Athletic Conference (WAC) filed suit in Colorado against California State University, Fresno (Fresno), the University of Nevada (Nevada), and the Mountain West Conference in September 2010.⁷⁴ The WAC sought a declaration that Fresno and Nevada were bound by the WAC bylaws to stay in the conference until June 30, 2012, as well as an injunction prohibiting these schools from scheduling games that interfere with the WAC schedule through the 2011–2012 seasons.⁷⁵ In October 2010, the two sides agreed to a settlement.⁷⁶ The schools agreed to stay through the 2011–2012 seasons for a reduced withdrawal fee of \$900,000 per school, instead of what the WAC claimed was over \$5 million.⁷⁷ As this Comment will discuss below, the WAC and its members may have been influenced by what took place between the Big 12 and its defecting members a month earlier.

V. THE BIG 12 CONFERENCE AND THE DEPARTURE OF THE UNIVERSITY OF NEBRASKA

When Nebraska decided to apply to the Big Ten in the summer of 2010, it was partly based on the reports that other Big 12 schools were looking to leave for other conferences as well as the fact that the Big Ten has a strong academic and athletic reputation.⁷⁸ Colorado also decided to leave the Big 12 in 2010, moving on to the Pac-10 (which became the Pac-12).⁷⁹ Many people feared, and there were reports, that the Pac-10 was also pursuing other Big 12 teams.⁸⁰ Some speculated that if those media reports were true, the movement amongst conferences would create sixteen team conferences and put other conferences, like the Big 12, at serious risk of extinction.⁸¹ Luckily for the

74. See generally Complaint, *W. Athletic Conf. v. Cal. State Univ., Fresno*, No. 10 CV-4281 (Colo. D. Ct. Sept. 20, 2010).

75. *Id.* ¶¶ 16, 19.

76. Michael C. Lewis, *Outgoing WAC Teams Will Stay Through 2011–12*, SALT LAKE TRIB., Oct. 28, 2010, at USU Aggies.

77. *Id.*

78. *Nebraska Accepted*, *supra* note 10.

79. Wendell Barnhouse, *United it Stands*, BIG 12 CONFERENCE (June 15, 2010), http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=204960432 [hereinafter *United it Stands*].

80. *Id.*

81. *Id.*

Big 12, the remaining ten teams committed to remain members,⁸² at least for the time being.⁸³ Most significantly, Texas—one of the highest profile college programs—committed to stay in the Big 12.⁸⁴ This commitment was in response to a request by the Big 12 for every school to commit to the future of the conference by June 11, 2010.⁸⁵ With that deadline looming, the Nebraska Chancellor contacted Big Ten Commissioner Jim Delaney and told him that something would need to happen immediately, if at all.⁸⁶ So, on June 11, 2010, Nebraska applied to and was accepted for membership by the Big Ten.⁸⁷

When Nebraska decided to leave the Big 12 for the Big Ten, the university was required to comply with provisions in the 2009–2010 Big 12 Conference Handbook (Handbook) dealing with withdrawal from the conference.⁸⁸ The Handbook, in section 3.1, states that a member who decides to withdraw “will in good faith give Notice not less than two (2) years before the end of the Current Term.”⁸⁹ That institution is then not “entitled to distribution of the then-current revenues from the Conference after the effective date of its withdrawal, resignation, or the cessation of its participation in the Conference.”⁹⁰ The Handbook goes on to state that if the other members believe the withdrawal will cause a financial hardship that cannot be calculated, the withdrawing member’s distributions will be reduced by 50% and that money will be redistributed to the other members.⁹¹ It also states that “[i]nstitutions agree that such reduction in the amount of revenues distributed to a Withdrawing Member is reasonable and shall be in the form of liquidated damages and not be construed as a penalty.”⁹² This provision is a strong statement, and it seems to be intended to protect the Big 12 from being challenged about the 50% rule. This provision, the Big 12 would likely claim, is necessary to ensure the survival of the conference when a major revenue-

82. *Id.*

83. Texas A&M and Missouri subsequently left for the Southeastern Conference (SEC). Pete Thamel, *Texas A&M Sets a Date to Leave the Big 12*, N.Y. TIMES, Sept. 1, 2011, at B12; *Missouri Leaving Big 12 for SEC*, FOX SPORTS (Nov. 7, 2011), <http://msn.foxsports.com/collegefootball/story/Missouri-leaving-Big-12-for-SEC-110611>.

84. *See United it Stands*, *supra* note 79.

85. Henry J. Cordes, *The Big Ten Decision*, BIG RED TODAY BLOG (Aug. 30, 2010), <http://www.omaha.com/article/20100830/BIGRED/708309872>.

86. *Id.*

87. *Nebraska Accepted*, *supra* note 10.

88. HANDBOOK, *supra* note 13, art. III, §§ 3.1–3.3, at 13–14.

89. *Id.* art. III, § 3.1, at 13.

90. *Id.*

91. *Id.* art. III, § 3.2, at 13–14.

92. *Id.*

contributing institution decides to withdraw.

Withdrawing from the Big 12 without giving proper notice is an entirely different situation for the institutions. The Handbook refers to any institution giving notice, other than proper notice under section 3.1, as a breaching member.⁹³ It further states that the breaching member agrees that the breach will cause financial hardship to the remaining members of the conference and that the amount could not be measured when the agreement was made.⁹⁴ The agreement specifies that if the notice is given less than two years before the effective date, the breaching member's revenue will be reduced by between 70% and 100%.⁹⁵ If Nebraska was determined to be a breaching member, 80% of the aggregate revenue due to Nebraska after its withdrawal would have been withheld by the conference.⁹⁶ If Nebraska's distributions were less than the aggregate amount withheld, the Big 12 would assess an amount equal to the difference, which Nebraska would be required to pay.⁹⁷ This would be a significant amount of revenue for Nebraska, or any other school in that situation. It might even be prohibitive, or at least act as a deterrent for a school that is considering leaving the Big 12 for another conference.

Again, the Big 12 protects itself by specifying that its member institutions agree that "reduction[s] in the distribution of revenues to a Breaching Member is reasonable and shall be in the form of liquidated damages and not be construed as a penalty."⁹⁸ This makes it much harder for a member institution to challenge the amount withheld in court because it becomes a part of the contract in the form of liquidated damages. If it were construed as a penalty, the school might be able to argue that the Big 12 was making a unilateral decision not in accordance with the contract, and the provisions might be voided.

Based on these provisions, the Big 12 initially sought to recover 80% of Nebraska's projected distributions from 2009–2010 and 2010–2011.⁹⁹ It also sought to retain 80% of Colorado's actual payout for 2009–2010 and expected payout for 2010–2011.¹⁰⁰ Both Nebraska and Colorado contended that the payments should not be required because the Big 12 was on the verge of

93. *Id.* art. III, § 3.1, at 13.

94. *Id.* art. III, § 3.2, at 13–14.

95. *Id.* art. III, § 3.3, at 14.

96. *See id.*

97. *See id.*

98. *Id.*

99. *Nebraska, Big 12 Agree to Settlement*, ESPN (Sept. 21, 2010), <http://sports.espn.go.com/ncf/news/story?id=5601182> [hereinafter *Nebraska Settlement*].

100. *Colorado, Big 12 Agree to Early Exit*, ESPN (Sept. 22, 2010), <http://sports.espn.go.com/ncf/news/story?id=5601601> [hereinafter *Colorado Settlement*].

collapse at the time of the withdrawals.¹⁰¹ Although each side contended it had a very strong case and were firm in their positions, the Big 12, Nebraska, and Colorado all determined it was better to settle rather than litigate the disagreement.¹⁰² Under the terms of the settlement, the Big 12 was entitled to withhold \$9.255 million of Nebraska's estimated \$19 million revenue due to the university during its final two years of affiliation with the Big 12.¹⁰³ Both sides said that it was a fair settlement for all parties.¹⁰⁴

Those statements are likely colored by what resulted from the conference shift, rather than the legal positions of the parties. The Big 12, and its then-Commissioner Dan Beebe,¹⁰⁵ accepted the roughly \$10 million conciliation by Nebraska because of the fact that the conference survived. If Texas had decided to leave the Big 12 at that time, and other remaining members followed, the Big 12 very well may have collapsed and would have been more willing to litigate in an effort to recover a full 80% of Nebraska's share. Alternatively, it may not have been able to sue at all because the Big 12 would no longer exist. From Nebraska's standpoint, it was an investment to give up almost \$10 million in order to enter the Big Ten.¹⁰⁶ If Nebraska did not believe its new conference affiliation would make up for the loss, it, too, may have been more willing to take its chances in court.

From the Big 12's perspective, 2010 could have resulted in extinction, but instead ended in sizeable, but not seismic, changes. However, it is not clear that anyone, including members of the Big 12, expected the changes to continue. The conference realized that in order to encourage stability and to encourage member institutions to stay, it had to renegotiate its media contracts to increase overall revenue.¹⁰⁷ It was able to do that,¹⁰⁸ but even a new TV contract could not discourage some members from leaving.¹⁰⁹

Because change did continue to happen after Nebraska decided to leave

101. *Nebraska Settlement*, *supra* note 99; *Colorado Settlement*, *supra* note 100.

102. *Nebraska Settlement*, *supra* note 99; *see Colorado Settlement*, *supra* note 100.

103. *Perlman Discusses Settlement with Big 12 Conference*, HUSKERS.COM (Sept. 21, 2010), http://www.huskersonline.com/ViewArticle.aspx?DB_OEM_ID=100&ATCLID=204998501.

104. *Id.*

105. Dan Beebe resigned in September 2011 because of the instability in the conference. *See Big 12 Boss Dan Beebe Steps Down, Wishes League 'Prosperous Future'*, SPORTSDAYDFW (Sept. 22, 2011), <http://www.dallasnews.com/sports/college-sports/20110922-source-dan-beebe-resigns-as-big-12-commissioner.ece>.

106. *Perlman Discusses Settlement with Big 12 Conference*, *supra* note 103.

107. *United it Stands*, *supra* note 79.

108. Andy Staples, *Who's Laughing Now? Beebe, Big 12 Hit Paydirt with Fox Sports TV Deal*, SL.COM (Apr. 14, 2011), http://sportsillustrated.cnn.com/2011/writers/andy_staples/04/13/big.12.tv.deal/index.html.

109. *See Thamel*, *supra* note 83; *see also Missouri Leaving Big 12 for SEC*, *supra* note 83.

the Big 12, the next part of this Comment will make several recommendations to conferences, including the Big 12, which may help protect the conferences from dissolution after the loss of a major program. These recommendations are wide-ranging and will not necessarily be applicable to every situation.

VI. RECOMMENDATIONS

The Big 12 can exist because of the contractual relationships that it has with its member institutions. Although the Big 12 acts in the interests of every member institution, when one or more institution decides to withdraw from the conference, the Big 12 must not only protect its remaining members, but it must also adequately protect itself to ensure that the conference can continue in the future. Because the conference exists through contracts, it must protect itself using those same contracts to carefully impose obligations on members and provide for adequate remedies after a member's withdrawal. The big question, then, is how can the Big 12 and other athletic conferences adequately protect themselves from part of their membership leaving and forcing the conference to dissolve?

Unfortunately for conferences, there is not one simple provision or term that can be added to every agreement that will ensure survival. Conferences are not corporations and, consequently, do not enjoy the benefit of perpetual existence.¹¹⁰ Therefore, conferences must look at new types of terms to include in their agreements and determine how to best leverage themselves in the negotiations with universities when beginning a relationship.

One way that a conference might attempt to keep universities from leaving is by setting the damages that each university must pay on a scale based on the conference that the university leaves for. For example, Nebraska might have been less eager to move to the Big Ten if the contractual damages owed were twice what Nebraska would owe to the Big 12 if it had moved to a conference like the Big East. Many colleges follow this model when drafting coaching contracts.¹¹¹ When the university knows that another specific school has great interest in its coach, the university might have a different buyout amount or buyout scale than the scale that would be applicable to all other jobs that the coach might leave for.¹¹² In those contracts, the increased buyout acts as a barrier to a new job for the coach.

However, if the Big 12 had required Nebraska to forfeit all revenue over

110. See BLACK'S LAW DICTIONARY, *supra* note 44, at 391.

111. See Memorandum from Robert H. Lattinville, Partner, Stinson, Morrison, Hecker, L.L.P., to Attendees of Marquette Univ. Nat'l. Sports L. Inst. 2010 Fall Conf. (Oct. 22, 2010) (on file with author) [hereinafter Memorandum].

112. See *id.*

its final two years because Nebraska left for the Big Ten but only 50% if Nebraska left for another conference, the Big 12 would need to show that it was damaged twice as much by Nebraska's defection to the Big Ten as it would have been if Nebraska had gone to the Pac-10 or the Big East in order to justify the additional damages. This justification would be hard, if not impossible to do, so the conference likely could not use this type of provision.

Another possibility is that conferences could change the structure of the damages. Currently, the Big 12 simply withholds a predetermined percentage of the revenue due to the university.¹¹³ One way that the conference might change this is to withhold a certain percentage of regular season revenue and all postseason revenue. For FBS conferences like the Big 12, that means that any school participating in a championship game (if the conference has one), national title game, BCS bowl game, or the NCAA basketball tournament would automatically forfeit all revenue from these events, as well as the predetermined percentage of regular season revenue.

The Big East decided to take a different approach to structuring damages in two ways. In 2011, the conference amended its bylaws, specifically section 11.02, to require a withdrawal fee of \$10 million dollars for schools joining the conference at the same time as, or after, the Naval Academy (Navy) or the Air Force Academy.¹¹⁴ This is double the amount that schools that were already members of the Big East before that time are required to pay, both under the 2008 bylaws and after the 2011 amendment.¹¹⁵ The conference also plans to fully enforce its provision requiring withdrawal to be at least twenty-seven months after notice is received, calling that provision "airtight."¹¹⁶ Because Pittsburgh, Syracuse, and WVU were members of the Big East before Navy decided to join,¹¹⁷ the larger withdrawal fee is inapplicable. Whether the twenty-seven-month waiting period can be enforced is still unknown, as WVU and the Big East ultimately settled their legal dispute before a court could rule on the matter.

113. HANDBOOK, *supra* note 13, art. III, § 3.3, at 14.

114. BIG EAST CONF., THE BIG EAST CONFERENCE AMENDED AND RESTATED BYLAWS AS OF OCTOBER 17, 2011, art. XI § 11.02, at 12 (2011) (on file with author) [hereinafter 2011 BYLAWS].

115. *Id.*; BIG EAST CONF., THE BIG EAST CONFERENCE AMENDED AND RESTATED BYLAWS AS OF MARCH 12, 2008, art. XI § 11.02, at 12 (2008) (on file with author). Therefore, Pittsburgh, Syracuse, and WVU would have had to pay only five million dollars each to withdraw. *Big 12 Adding WVU, Will Stay 10 Strong*, *supra* note 60.

116. *Big 12 Adding WVU, Will Stay 10 Strong*, *supra* note 60; *see* 2011 BYLAWS, *supra* note 114, § 11.02, at 12.

117. *Big 12 Adding WVU, Will Stay 10 Strong*, *supra* note 60; *Navy to Play Big East Football in 2015*, ESPN (Jan. 24, 2012), http://espn.go.com/college-football/story/_/id/7495168/navy-midshipmen-join-big-east-football-2015.

Conferences could also attempt to guarantee their economic well-being even without changing the agreements with their member universities. One way that might be possible is to do so through insurance. There is currently insurance available to cover coaching bonuses that are tied to on-field performance.¹¹⁸ The benefit to using insurance is that the involved university knows how much its cost for the coach will be, based on salary and the insurance premium.¹¹⁹ Although it is not clear that this is completely feasible, a conference might be able to convince an insurance company to write a policy that would pay the conference certain amounts that are based on postseason competition. For example, if a Big 12 team made the Final Four in men's or women's basketball, or if a football team won the national championship, the Big 12 could collect a certain payout from insurance. The conference would pay a premium, which it no doubt would pay by withholding additional funds from the member schools' payouts. Then, if a team won and the insurance paid, the conference would receive enough additional revenue to offset the increased payout to the university. That way, the conference would retain additional funds for itself and have a sounder financial situation even if a member school left.

The other way to guarantee a certain amount of revenue for a conference without having to renegotiate its contracts with the member universities is through its media contracts. The National Football League was guaranteed to receive \$4 billion in television revenues for the 2011 season, even if no games were played due to a labor lockout.¹²⁰ College athletic conferences could attempt to negotiate the same type of deal in their future media contracts. The biggest question would be whom the conferences are trying to negotiate with and whether the conference has enough viewership and probable advertisers to leverage the network. If a conference like the Big 12 could negotiate some guaranteed revenue from media contracts, it would, at least to a certain extent, offset any revenue loss due to the withdrawal of a member. This seems highly improbable though, especially in light of the fact that the Big 12's latest TV deal with Fox was contingent on the Big 12 having at least ten members.¹²¹

A conference can also attempt to control its members' actions through the media rights and revenues that the conference receives from those contracts. The first step is to share revenue equally. When each member of the conference receives equal revenue from the media contracts, it is in the best

118. Memorandum, *supra* note 111.

119. *See id.*

120. *NFLPA Files Challenge to TV Deals*, ESPN (June 10, 2010), <http://sports.espn.go.com/nfl/news/story?id=5268239>.

121. *See Big 12 Adding WVU, Will Stay 10 Strong*, *supra* note 60.

interest of each school to want stability and exposure for all of the other members of the conference. When one school makes more money, all of the member schools make more money. The Pac-12, the Big Ten, the Southeastern Conference, and the ACC all share media revenue equally amongst their members.¹²² In October 2011, the Big 12 also agreed to share revenue equally.¹²³ This agreement means that the schools will share all revenue from Tier I and Tier II broadcast rights for football and men's basketball.¹²⁴ However, it allows schools to keep revenue from Tier III network rights, which includes Texas' Longhorn Network.¹²⁵

The second step is to require conference members to grant their rights to the conference. The Big Ten and Pac-12 both already require their member institutions to assign media rights to the conference.¹²⁶ They also enjoy great stability, which may not be a direct result of the revenue sharing and pooling of media rights, but that certainly has something to do with it. The Big 12 member schools seem to understand this, because instead of stopping at equal revenue sharing, the members voted to require all schools to grant their media rights to the conference for a minimum of six years.¹²⁷ Therefore, even if a school were contemplating leaving the Big 12 for another conference, the school would be very reluctant to do so because it would not own its media rights.¹²⁸

Just as it takes more than one conference to create defection and the chaos that has occurred since June 2010, more than one conference can be part of the solution. The Big Ten and Pac-12 announced a partnership at the end of 2011 that will provide more inter-conference games and cross promotion on each

122. *A Look at Revenue Sharing in the Big 12*, KANSAS CITY STAR, Oct. 3, 2011, <http://www.kansascity.com/2011/10/03/3185173/a-look-at-revenue-sharing-in-the.html>.

123. Erick Smith, *Big 12 Announces Equal Revenue-Sharing Agreement Among Schools*, USA TODAY, Oct. 3, 2011, <http://content.usatoday.com/communities/campusrivalry/post/2011/10/big-12-revenue-sharing-agreement-grant-broadcast-rights/1>.

124. *Id.*

125. *Id.* Not surprisingly, Texas originally proposed the model that was agreed to. *Big 12 Presidents Approve Revenue Sharing*, SI.COM (Oct. 3, 2011), <http://sportsillustrated.cnn.com/2011/football/ncaa/10/03/Big.12.revenue.ap/index.html>.

126. *See Big East Was Planning TV Before Losses*, ESPN (Oct. 19, 2011), http://espn.go.com/college-sports/story/_/id/7124201/big-east-schools-were-working-giving-tv-rights-conference-losses.

127. Smith, *supra* note 123.

128. This is an even bigger hurdle in the Big Ten, where the conference owns the rights for twenty years. *A Look at Revenue Sharing in the Big 12*, *supra* note 122. The Big East was also reportedly working on pooling media rights before Pittsburgh and Syracuse decided to leave the conference. *Big East Was Planning TV Before Losses*, *supra* note 126.

conference's respective network.¹²⁹ Big Ten Commissioner Jim Delaney said that the agreement is in lieu of further expansion.¹³⁰ This creates no incentive for any school in either conference to leave because not only are the schools' media rights owned by their conferences, but each conference will be able to profit from the success of the other conference. This is not practical for all conferences, however, as the partnership likely requires conferences of similar reputations and revenue.

Each of the possible provisions discussed may help protect a conference like the Big 12 when a university decides to withdraw from membership. To implement these solutions, the conference must have the bargaining power to require the members to agree to the provisions. Because a conference is a joint venture association by its members, it actually makes sense that once the conference is no longer a viable option for all of the members, it would dissolve. However, because there is a limit on available FBS universities,¹³¹ it is not practical for an entire conference to dissolve every time one university wishes to switch conferences. Therefore, something must be done to keep the conferences stable going into the future.

VII. CONCLUSION

In the end, a conference's ability to protect itself from defection comes down to leverage in negotiations with member institutions, media companies, and other conferences. The Big 12 and other conferences have made great strides toward long-term stability by requiring the schools to share the conference-generated media revenue equally and requiring the schools to assign their media rights to their conferences. This gives the conferences greater bargaining power to negotiate with media networks and other conferences to generate even higher revenue than the conferences have enjoyed previously.

Just as many things in the world, conference realignment is all about money. Universities want to increase revenues and seek out the conferences that provide the best opportunity for those revenue increases, along with the best on-field competition. As long as the conferences can maintain this advantage and enforce their agreements to own each school's media rights, there will be more and more stability in FBS football. Whether those

129. Steve Wieberg, *Big Ten, Pac-12 Expand Alliance*, USA TODAY, Dec. 29, 2011, at SPORTS 2C.

130. *Id.*

131. There are currently 120 Division I FBS Schools. *Differences Among the Three Divisions: Division I*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/differences+among+the+divisions/division+i/about+division+i> (last updated Dec. 7, 2011).

agreements are enforceable is something that has not yet been challenged. When that time comes, a whole new period of chaos could be what college football holds in store.

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