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# Paying to Play (Somewhere Else): An Examination of the Enforceability of Athletic Conferences' Liquidated Damages Provisions

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# PAYING TO PLAY (SOMEWHERE ELSE): AN EXAMINATION OF THE ENFORCEABILITY OF ATHLETIC CONFERENCES' LIQUIDATED DAMAGES PROVISIONS

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ABSTRACT

Although often an afterthought, exit fees are an important aspect of college athletics today given the era of "conference realignment" when dozens of colleges and universities are choosing to leave their athletic conferences for greener pastures elsewhere. This Article focuses on the conferences that include liquidated damages clauses in their bylaws and determines whether they are legally enforceable. The answer is complicated, especially since different conferences utilize different contract language. Two approaches have developed. The best is to craft these clauses so the athletic conference withholds a portion of the profits due a breaching member after it announces it plans to leave. Clauses like these are consistent with precedent from non-sports contracts. Public policy is an alternative reason to argue for enforceability. Ultimately, a court will have to answer this question. In the meantime, schools will continue to pay millions to leave their conferences.

## I. INTRODUCTION

Hundreds of University of Missouri students crowded into the student union on November 6, 2011, to hear confirmation of what had become the worst kept secret in college sports: their beloved Tigers were switching from the Big 12 Conference to the Southeastern Conference (SEC).[1] The announcement was cause for celebration as confetti fell from the ceiling and the chancellor described the event as a momentous, bold, and defining moment in the his-

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1. *See* Vahe Gregorian, *MU, SEC Tie The Knot Courtship Ends In Smiles*, ST. LOUIS POST-DISPATCH, Nov. 7, 2011, at A1, *available at* http://www.stltoday.com/sports/college/mizzou/mizzou-sec-tie-the-knot/article_fd8d2311-0502-5f74-a07d-5112ce0bbfc6.html (describing press conference where Missouri announced its conference move). While the official announcement was made on Nov. 6, the SEC's website had accidentally announced the move ten days earlier. *See id.*

tory of the school.[2] As exciting as the announcement was, it was essentially a very public and much ballyhooed breach of contract. And like many breaches of contract, the University would owe damages. Negotiations finalized five months later settled those damages at $12.4 million.[3]

Missouri is only one of an ever-expanding number of colleges and universities that are changing conferences and exposing themselves to potential liability for breach of contract.[4] In fact, four schools have done it twice since 2010.[5] Although liquidated damages provisions have been included in conference bylaws for years, no clause appears to have been the subject of a lawsuit that has reached the merits.[6] Instead, parties prefer to settle their disputes out of court.[7] In the past, some schools simply paid the agreed-upon amount on their way out of the conference.[8] But in less than ten years, payments have increased greatly for athletic departments seeking to switch athletic conferences.[9] Exit fees are clearly an expensive part of college athletics today, and the hypothetical ques-

2. *See id.*

3. *See* Steve Walentik, *Big 12 Withholding $12.4 Million From MU as Exit Fees*, COLUMBIA DAILY TRIBUNE (Mo.), Feb. 29, 2012, at B1, *available at* http://www.columbiatribune.com/news/2012/feb/28/big-12-withholding-124-million-mu-exit-fees (reporting on settlement between the University of Missouri and Big 12).

4. *See* Andrea Adelson, *Conference Lineups Keep Changing*, ESPN (May 31, 2012), http://espn.go.com/college-football/story/_/id/7988280/college-football-landscape-changed-last-year-conference-lineups-adjust. In fact, 24 schools changed conference alignment in the scope of a calendar year. *See id.*

5. *See id.*

6. *See, e.g.*, *Big 12 Conference Bylaws* §§ 3.1-3.3, *available at* http://www.big12sports.com/fls/10410/pdfs/handbook/Bylaws.pdf [hereinafter Big 12 Bylaws] (last visited Dec. 1, 2012). For a further discussion of the history of collegiate athletic conferences, see *infra* Part II.

7. For a further discussion of instances of settlements regarding conference realignments, see *infra* notes 83-84, 103, and accompanying text.

8. *See* Gregg L. Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 346 (2006) (describing potential opportunities for revenue-boosting offered by shifting athletic conferences). In 2003, Virginia Tech, the University of Miami, and Boston College each paid $1 million to leave the Big East Conference for the Atlantic Coast Conference. *See id.*

9. *See* Mike Casazza, *Source: WVU, Big East Reach Conditional Settlement*, CHARLESTON DAILY MAIL, Feb. 9, 2012, at P1A, *available at* http://www.dailymail.com/News/breakingnews/201202090205 (reporting on settlement between West Virginia University and Big East Conference). Nine years after the 2003 Big East payouts, it reportedly cost West Virginia University $20 million to exit that conference. *See id.* In the Big 12 Conference, Missouri and Texas A&M settled with the Big 12 for $12.4 million each only one year after it cost Colorado and Nebraska $6.6 and $9.25 million respectively to exit the conference. *See* Walentik, *supra* note 3 (reporting on University of Missouri's and Texas A&M's exit fees); *see also* Suzanne Halliburton, *Nebraska and Colorado Pay to Exit Early*, AUSTIN AM.-STATESMAN, Sept. 22, 2010, at C01, *available at* http://www.statesman.com/sports/collegefoot-

tion of whether a conference's liquidated damages provision is legally enforceable is at the heart of every negotiation.

This article will attempt to answer that hypothetical question, examining the different bylaws of many of the nation's top athletic conferences along the way. Ultimately, it advises athletic conferences on how to draft an enforceable liquidated damages provision that will help provide the most protection for its interests when a college or university decides to leave.

## I. THE HISTORY OF COLLEGIATE ATHLETIC CONFERENCES

Athletic conferences have been a part of college athletics for more than a century, actually predating the establishment of the National Collegiate Athletic Association (NCAA).[10] Historically, athletic conferences have consisted of universities that share a common purpose and geography.[11] But that role has changed as college athletics, particularly football, have become more profitable. Maybe the most important role of athletic conferences today is negotiating television contracts for their members, something that was exclusively left for the NCAA just three decades ago. With this history in mind, it is no surprise that the president of the NCAA recently described the "conference realignment" phenomena as a "market shakedown" centered on media rights.[12]

Colleges and universities started teaming up in the 1890s to establish the first athletic conferences.[13] One of the goals of the newly created conferences was to give their member schools a "real

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ball/nebraska-colorado-reach-exit-deals-with-big-12-930282.html (reporting on Nebraska's and Colorado's exit fees).

10. *See History*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history (last updated Aug. 13, 2012) (stating that NCAA was founded in 1906). For a further discussion on athletic conferences first forming in the 1890s, see *infra* note 14 and accompanying text.

11. *See* Katz, *supra* note 8, at 348-49 (explaining background of conferences).

12. *See* Dennis Dodd, *NCAA President: Conference Realignment "A Market Shakedown,"* CBS SPORTS (May 31, 2012, 5:22 PM), http://www.cbssports.com/college football/blog/dennis-dodd/19217878/ncaa-president-conference-realignment-a-market-shakedown (stating NCAA president's views on conference realignments).

13. *See* Mark Fricke, *Nebraska Football In The 1890s*, COLL. FOOTBALL HISTORICAL SOC'Y NEWSLETTER, Vol. 19, Issue 1 (2005), *available at* http://www.la84foundation.org/SportsLibrary/CFHSN/CFHSNv19/CFHSNv19n1d.pdf (describing origins of intercollegiate athletic conferences). Seven Southern schools formed the Southern Intercollegiate Athletic Association three years later. *See* Roger Saylor, *Southern Intercollegiate Athletic Association*, COLL. FOOTBALL HISTORICAL SOC'Y NEWSLETTER, Feb. Issue 2 (1993), *available at* http://www.la84foundation.org/SportsLibrary/CFHSN/CFHSNv06/CFHSNv06n2g.pdf (discussing establishment of Southern Intercollegiate Athletic Association). Other universities met in the 1890s to begin forming the predecessor to today's Big 10 conference. *See History of Conference Realignment*, NBC SPORTS, http://nbcsports.msnbc.com/id/37689691/

schedule of opponents."[14] But controversies were common, highlighted by the Western Inter-State University Football Association's problems with racial tension,[15] fights between players,[16] and bickering between schools over money[17] and the scores of games.[18] Almost from their beginning, conferences frequently added and subtracted teams. The Missouri Valley Conference, for example, has counted more than 30 schools as members throughout its more than 100-year history.[19]

Athletic conferences took on new importance in 1984 after the United States Supreme Court held that the NCAA's monopoly of television rights of college football violated federal antitrust laws.[20] Conferences immediately took the NCAA's place at the negotiating table.[21] Conference movement has been constant ever since, as schools try to maximize their profits by moving to the conferences with the more lucrative television contracts.[22] In fact, more than forty percent of major college football teams changed their confer-

ns/sports-college_football/ (last visited Dec. 1, 2012) (illustrating chronology of history of conference realignment).

14. *See* Fricke, *supra* note 13, at 10 (explaining reasoning behind conference development).

15. *See id.* (describing how Missouri forfeited its 1892 contest against Nebraska rather than take field when Nebraska roster included black player). Nebraska was awarded a 1-0 forfeit victory and the conference established "rules against refusing to play scheduled matches." *Id.* (noting effect of Missouri walkout).

16. *See* David Briggs, *Bitter Divide Separated Missouri, Iowa*, COLUMBIA DAILY TRIBUNE (Mo.), Dec. 26, 2010, *available at* http://www.columbiatribune.com/news/2010/dec/26/bitter-divide-separated-missouri-iowa (offering examples of fighting between players).

17. *See Football*, COLUM. MO. HERALD, Jan. 18, 1895, at 5 (describing how Iowa and Nebraska threatened to withdraw from conference if not given half of proceeds from Thanksgiving game between Missouri and Kansas).

18. *See* Fricke, *supra* note 13, at 12 (recounting incident when touchdown was in dispute during game).

19. *See* Steve Richardson, CENTURY OF SPORTS: THE MISSOURI VALLEY CONFERENCE, 1907-2007 (2006) (listing members of Missouri Valley Conference during its history).

20. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 136 (1984) (holding NCAA was violating antitrust laws by exclusively negotiating television deals for member schools).

21. *See* Linda Greenhouse, *High Court Ends N.C.A.A. Control of TV Football*, N.Y. TIMES, June 28, 1984, at A1, *available at* http://www.nytimes.com/1984/06/28/us/high-court-ends-ncaa-control-of-tv-football.html (discussing conference development of "contingency plans" in anticipation of Supreme Court's ruling); *see also United Press International, Ruling on TV Rights Favor 2 Pac-10 Teams*, N.Y. TIMES, Sept. 11, 1984, at B13, *available at* http://www.nytimes.com/1984/09/11/sports/ruling-on-tv-rights-favors-2-pac-10-teams.html (discussing Pacific-10 Conference and Big 10 Conference entering television deals with CBS).

22. *See* John Infante, *Realignment's Effect on the NCAA*, NCAA (Sept. 19, 2011), http://www.ncaa.org/blog/2011/09/realignments-effect-on-the-ncaa [hereinafter

ence affiliations during a five-year span in the 1990s.[23] That era, one executive said, changed the role of conferences from "service organizations to sports properties," and "commissioners went from being rules interpreters and championship managers to business people – essentially CEOs of major sports properties."[24] It all has led up to today's college football industry, which attracts millions of fans and produces billions of dollars in revenue.[25]

Thirty-one conferences are part of NCAA Division I athletics today, but not every conference is created equally. Only eleven compete in the Football Bowl Subdivision, the highest level of intercollegiate college football.[26] Six of those – the Atlantic Coast Conference, the Big East Conference, the Big 10 Conference, the Big 12 Conference, the Pacific 12 Conference, and the Southeastern Conference – are commonly referred to as "power conferences" because of their position within the Bowl Championship Series, which determines football's national champion.[27] Very few football programs are unaffiliated with a conference.[28]

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Infante I] (discussing continued realignment of conferences and effects). Only one year since 1985 has been quiet of any conference movement. *Id.*

23. *See* Malcolm Moran, *College Football '95; A Season of First Looks, Last Looks and In-Betweens*, N.Y. TIMES, Aug. 27, 1995, § 8, at 5 (reporting that "By this time next year, 45 of the 109 major college football teams – 41 percent – will have changed conference affiliations within a five-year period, according to the College Football Association"). That decade also saw the expansion of the S.E.C. and the establishment of the Big 12 in order to host a conference championship in football, creating another premiere match up to produce more television revenue. *See Arkansas Goes to S.E.C.*, N.Y. TIMES, Aug. 2, 1990, at B9, *available at* http://www.nytimes.com/1990/08/02/sports/arkansas-goes-to-sec.html (discussing expansion of S.E.C.); *see also* Braden Gall, *The History of Big 12 Realignment*, ATHLON SPORTS, http://www.athlonsports.com/college-football/college-football-history-big-12-realignment (last visited Sept. 4, 2012) (recounting timeline of events leading to creation of Big 12).

24. Gary Brown, *Brand New Leagues: Conferences Make Their Marks Through New Branding Campaigns*, NCAA (Aug. 1, 2011), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/Brand+new+leagues (describing culture surrounding football conferences in 1990s).

25. *See* Katz, *supra* note 8, at 345 (noting "massive revenue-creating machine college football would become").

26. *See* John Infante, *Consolidation of Powers*, NCAA (Jan. 16, 2012), http://www.ncaa.org/blog/2012/01/consolidation-of-powers [hereinafter Infante II] (discussing eleven collegiate conferences that comprise Football Bowl Subdivision).

27. *See* John Hoover, *BCS Commissioners Favor Power Conferences in New Playoff Format*, BLEACHER REPORT (Nov. 14, 2012), http://bleacherreport.com/articles/1409139-bcs-commissioners-favor-power-conferences-in-new-playoff-format (listing six automatic qualifying conferences within current Football Bowl Subdivision).

28. *See Membership*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new (last updated Dec. 7, 2011) (stating that there are 120 schools that are members of the Football Bowl Subdivision); *see also* Andy Katz, *BYU Leaving MWC for 2011-12 Season*, ESPN, http://sports.espn.go.

A school's decision to leave its athletic conference can cause a domino effect, as the jilted conference will most likely find replacement members from other leagues, creating more vacancies for those conferences to try to fill.[29] The Big East has been on both sides of this scenario recently.[30] Texas Christian University's ("TCU") recent status epitomizes today's "conference realignment" pandemonium. TCU's Horned Frogs, a longtime member of the Mountain West Conference, were set to join the Big East until they decided instead to join the Big 12 to replace Texas A&M.[31]

Damages paid when a university leaves a conference have steadily risen in the past ten years as conferences have amended their bylaws and the profitability of college athletics continues to grow.[32] These payments no longer only effect the school that decides to move to greener pastures as, for example, the Big 12 reportedly agreed to pay a quarter of a $20 million settlement so its newest member, West Virginia University, could leave the Big East.[33]

Although conference movement is nothing new, the movement in the last few years has been ubiquitous, providing constant drama for even casual college football fans.[34] Given that no end of

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com/ncaa/news/story?id=5517305 (last updated Sept. 10, 2010, 2:42 PM) (listing four schools – BYU, Navy, Army, and Notre Dame – that were independent in football for 2011-2012 season).

29. *See* Paul Myerberg, *Conference Shifting Is Now The Norm*, N.Y. TIMES, Aug. 28, 2011, at SP10, *available at* http://query.nytimes.com/gst/fullpage.html?res=9804EFDD173BF93BA1575BC0A9679D8B63 (discussing domino effect that occurs when school leaves its athletic conference).

30. *See* Cheryl Waity & Julian Zeng, *History Repeating, Almost, with Big East Shakeup*, THE DEPAULIA, http://www.depauliaonline.com/sports/history-repeating-almost-with-big-east-shakeup-1.2611454#.UQANbR08CSo (last updated Aug. 27, 2012) (describing how, after Atlantic Coast Conference raided Big East Conference in 2003 for three schools to boost its membership to twelve teams, Big East recruited five schools, three of which played football, from Conference USA, which reciprocated by pilfering six teams from other conferences); *see also* Kevin Kelly, *TCU and West Virginia Officially Join the Big 12 Conference Today*, FBSCHEDULES.COM (July 1, 2012) http://www.fbschedules.com/2012/07/tcu-west-virginia-officially-join-big-12-conference-today/ (describing how Big 12 recruited Texas Christian University and West Virginia University away from Big East to replace Missouri and Texas A&M).

31. *See TCU Joins Big 12 for 2012-13*, ESPN (Oct. 11, 2011, 11:12 AM), http://espn.go.com/dallas/ncf/story/_/id/7085749/big-12-vote-unanimous-allow-tcu-horned-frogs-2012-13 (discussing TCU's latest conference change).

32. *See* Casazza, *supra* note 9 (discussing amount of money that colleges have to pay in order to change conferences).

33. *See* Myerberg, *supra* note 29, at 10 (discussing payments Big 12 made in order to assist West Virginia in changing conferences).

34. *See id.* (recounting history of conference realignment); *see also* Infante II, *supra* note 26 (discussing history of conference realignment); *TCU Joins Big 12*, *supra* note 31 (discussing history of conference realignment).

"conference realignment" is in sight, the enforceability of liquidated damages provisions and negotiation of "exit fees" will continue to be important for both athletic conferences and universities.

## II. LEGAL BACKGROUND

Although they are commonly referred to as "exit fees," the proper legal term for these payouts is liquidated damages.[35] In a liquidated damages clause, the parties agree to the compensation for a possible breach upon entering into a contract.[36]

### A. The Enforceability of Liquidated Damages Provisions

Courts typically distinguish between liquidated damages provisions that are meant to compensate the non-breaching party and those meant to penalize the breaching party; the former are legally enforceable, whereas the latter are not. However, even though this view is firmly entrenched as the law regarding liquidated damages, some critics have questioned its rationale.

#### 1. *The Established, Common Law Approach*

Courts have developed a two-part test to determine if a liquidated damages provision is enforceable. First, the stipulated damages must be reasonable in light of "the anticipated or actual loss caused by the breach."[37] The reasonableness of the approximation is judged at the time the parties entered the contract, whereas the actual damages are judged at the time of the breach.[38] Second, the non-breaching party must have difficulty in proving its loss.[39] Generally, the harder it is to prove the actual loss the easier it is to show that the amount fixed as liquidated damages is reasonable.[40] How-

35. *See* Gregorian, *supra* note 1 (discussing "exit fees"); Bradford, *infra* note 89.

36. *See* BLACK'S LAW DICTIONARY 432-33 (9th ed. 2009) (defining liquidated damages).

37. RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) (discussing first test to decide whether liquidated damages provision is enforceable).

38. *See* SAMUEL WILLISTON, Williston on Contracts § 65:1 (4th ed. 2012) (exploring reasonableness of approximation).

39. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 37 (explaining second part of test used to decide whether liquidated damages provision is enforceable).

40. *Id.* (explaining how to prove loss).

ever, if the amount is "unreasonably large," a court will deem it "unenforceable on grounds of public policy as a penalty."[41]

Allowing parties to stipulate in their agreement the amount of damages recoverable in the event of a breach is part of the "fundamental principle of freedom of contract."[42] Liquidated damages clauses also reduce the expense of litigation by saving time for "courts, juries, parties, and witnesses."[43]

An enforceable liquidated damages provision is meant simply to compensate the non-breaching party for damages that were too difficult to anticipate under the circumstances at the time the parties entered into the contract.[44] A liquidated damage clause is unenforceable if it is meant to punish the breaching party because the "central objective" of contract remedies is compensatory, not punitive.[45] Punishment clauses, in effect, seek to coerce performance by making a breach too costly.[46] However, distinguishing between clauses that merely induce performance and those that coerce it is "a subtle distinction" for courts to make.[47] Analyzing a liquidated damages provision requires balancing the interests of the parties, as the "rules are designed to allow [them] the greatest freedom of contract while at the same time preventing them from overstepping that freedom by including illegitimate penal provisions."[48]

Even if a liquidated damages provision is deemed unenforceable, the injured party is not left without a remedy.[49] The remainder of the agreement stands, and the non-breaching party may pursue the conventional damages remedy for breach of contract.[50]

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41. *See id.* (stating consequences of "unreasonably large" liquidated damages provision).

42. *See* WILLISTON, *supra* note 38 (discussing freedom to contract).

43. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 37 (describing how liquidated damages provisions can reduce litigation costs).

44. *See* WILLISTON, *supra* note 38 (discussing aim of liquidated damages provision).

45. *See id.* ("Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.").

46. *See id.* (describing punishment clauses).

47. *See id.* (discussing difference between clauses that induce performance and clauses that coerce performance).

48. *Id.* (discussing analysis of liquidated damages provisions).

49. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.18 (4th ed. 2004) (noting other remedies besides liquidated damages provisions).

50. *See id.* (stating contract with unenforceable penalty provision controls as though offending clause does not exist).

### 2. *A Modern and Liberal View of Penalty Provisions*

While the liquidated damages and penalty provision dichotomy is firmly entrenched as the law, it has received its fair share of criticism.[51] Most notably, some judges on the United States Court of Appeals for the Seventh Circuit have questioned the effectiveness of not enforcing penalty provisions, especially those included in contracts between sophisticated parties.[52]

Judge Posner introduced this criticism in the 1985 case of *Lake River Corporation. v. Carborundum Company*, which dealt with the enforceability of a damage formula that called for a minimum guaranteed amount of product to be shipped and paid for.[53] After the contract period, Carborundum had not fulfilled the guarantee and refused to pay Lake River the agreed-upon damages.[54] Lake River sued, claiming liquidated damages.[55] In dicta, Judge Posner questioned "whether a modern court should refuse to enforce a penalty clause where the signator is a substantial corporation, well able to avoid improvident commitments."[56] Penalty clauses, the judge said, "provide an earnest of performance" and increase the promisor's credibility, which may be essential in some deals.[57] On the other hand, they may discourage efficient breaches of contracts.[58] But sophisticated parties can weigh such risks when entering contracts that involve agreeing to a penalty clause.[59] Therefore, Judge Posner concluded, "the refusal to enforce penalty clauses is (at best) paternalistic—and it seems odd that courts should display parental solicitude for large corporations."[60] But ultimately, the Seventh

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51. *See, e.g.*, Larry A. Dimatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 637 (2001) (criticizing current application of law as "unwarranted judicial intervention into freedom of contract").

52. *See* WILLISTON, *supra* note 38 (detailing Judge Posner's criticism of common law which determined some economically sound clauses were penalties and therefore invalid).

53. Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1286 (7th Cir. 1985) (noting damage formula required payment in amount of shortage between received and contracted-for product).

54. *Id.* (explaining Carborundum's actions prior to lawsuit).

55. *Id.* at 1286-87 (noting procedure of case and plaintiff's argument).

56. *See id.* at 1288-89 (questioning modern theories on contract law).

57. *See id.* at 1289 (noting liquidated damage clause may prove essential to party's willingness to enter contract).

58. *See id.* (providing hypothetical in which efficient breach does not occur because of liquidated damage clause inclusion).

59. *See id.* (inferring that sophisticated parties consider all present and future costs inherent to inclusion of liquidated damages clause; therefore, presence of clause under these circumstances is valid as economically efficient).

60. *See id.* (questioning modern courts' paternalistic approach to large corporations).

Circuit panel declined to enforce its newly-developed view, given the Illinois case law on the subject, and it determined that the provision was an unenforceable penalty clause "because it is designed always to assure Lake River more than its actual damages."[61]

Twelve years later, Judge Posner further articulated the "academic criticism" in *Lawyers Ins. Corporation v. Dearborn Title Corporation*:

> A penalty clause has no effect on anyone except the parties, so why should a court refuse to enforce it, unless there is evidence of fraud or other overreaching not here argued? Penalty clauses can serve a valuable signaling device: by agreeing to a penalty Dearborn manifested a credible determination to break itself of what had become a bad habit of paying its debts to United with checks that bounced. . . . It can even be argued that a penalty clause is unlikely to overcompensate the promisee if an ex ante (before the fact) perspective is employed, because the promisor would not agree to such a clause unless it was necessary to compensate the promisee for an expected loss. As for any concern that penalty clauses might discourage efficient breaches . . . the promisee can always waive the penalty and will do so if compensated by the promisor. . . . Against all this it can be argued that penalty clauses, precisely by encouraging the formation of contracts likely to be broken . . . would, if enforceable, throw more contract cases into the courts. Such a clause might also make the promisee . . . stubborn about agreeing to contract modifications when the promisor gets into trouble.[62]

Despite Judge Posner's analysis, the opinion summarized that "[t]he law is clear that penalty clauses are unenforceable," and the majority of the panel came to the same outcome as it did in *Carborundum*.[63] More than a decade later, different plaintiffs invited a Seventh Circuit panel to adopt Judge Posner's stance, but the court again declined.[64]

61. *See id.* at 1289-90.

62. Lawyers Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1161 (7th Cir. 1997).

63. *Id.* (explaining holding that penalty clauses are unenforceable).

64. *See* Checkers Eight Ltd. P'ship v. Hawkins, 241 F.3d 558, 563 (7th Cir. 2001) (refusing to invalidate Illinois law controlling penalty in contract even where parties are "commercially experienced").

## B. Liquidated Damages in Sports Contracts

Although no court has ruled upon the enforceability of a liquidated damages provision in an athletic conference's bylaws, precedent interpreting these clauses in other sports contracts is enlightening.

### 1. *Coaches' Contracts*

The seminal case addressing the enforceability of liquidated damages in a coach's contract is *Vanderbilt University v. DiNardo.*[65] Vanderbilt University sued its former football coach, Gerry DiNardo, for breach of contract after he resigned from Vanderbilt to become the football coach at Louisiana State University.[66] Vanderbilt hired DiNardo in 1990 and the parties executed a five-year contract that contained a reciprocal liquidated damages provision.[67] The university agreed to pay DiNardo his remaining salary under the contract if Vanderbilt replaced him. Conversely, DiNardo agreed to reimburse the university one year's pay minus withholdings if he left Vanderbilt before the end of the contract and worked elsewhere.[68] The district court entered summary judgment for Vanderbilt and DiNardo appealed.[69]

DiNardo argued that the clause was "an unenforceable penalty under Tennessee law," which only allows for liquidated damages to be collected if the term "is reasonable in relation to the anticipated damages for breach, measured prospectively at the time the contract was entered into, and not grossly disproportionate to the actual damages."[70] DiNardo argued that the parties did not contemplate that Vanderbilt's damages "would go beyond the cost of hiring a replacement coach" and "that his salary ha[d] no relation to [the university's] damages."[71]

65. Vanderbilt University v. DiNardo, 174 F.3d 751 (6th Cir. 1999); *see also* Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 48 (2009) (noting *DiNardo* as leading case on point).

66. *See DiNardo*, 174 F.3d at 753 (detailing circumstances of DiNardo's employment and resignation from Vanderbilt).

67. *See id.* at 753-54 (noting agreement by Vanderbilt to pay remaining value in event of breach by university, and quoting contract language requiring payment in event of breach by DiNardo in amount of coach's base salary multiplied by number of years remaining).

68. *See id.* at 753-54.

69. *See id.* at 753 (discussing procedure of case).

70. *See id.* at 755 (explaining parties' arguments).

71. *Id.* at 756.

The majority of the Sixth Circuit panel rejected the coach's argument, emphasizing "that Vanderbilt wanted the five-year contract because 'a long-term commitment' by DiNardo was 'important to the University's desire for a stable intercollegiate football program,' and that this commitment was of 'essence' to the contract."[72] This stability, the court found, helped in recruiting players and retaining assistant coaches.[73] Finally, the court held that the amount of compensation was reasonable because Vanderbilt presented evidence of costs it incurred in recruiting a new head football coach, moving expenses for the new coaching staff, and compensation differentials.[74] Therefore, the circuit court affirmed the district court's ruling that the contract contained an enforceable liquidated damages provision.[75]

In a dissenting opinion, Judge Nelson concluded that the provision was meant to operate as a penalty, pointing to the fact that the clause only required DiNardo to pay damages if he left Vanderbilt and was employed by another institution.[76] However, the university's damages would presumably be the same regardless of whether DiNardo "quit to coach for another school."[77] Therefore, Judge Nelson said that the clause was meant to penalize DiNardo for taking another job rather than to compensate the university for any damages it suffered "as a result of being left in the lurch."[78]

A similar dispute involved the contract of former Ohio State basketball coach Jim O'Brien, who led the Buckeyes to the 1999

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72. *See id.*

73. *See id.* ("Both parties understood that the extension was to provide stability to the program, which helped in recruiting players and retaining assistant coaches.").

74. *See id.* at 757 ("The liquidated damages are in line with Vanderbilt's estimate of its actual damages. Vanderbilt presented evidence that it incurred expenses associated with recruiting a new head coach of $27,000.00; moving expenses for the new coaching staff of $86,840; and a compensation difference between the coaching staffs of $184,311.").

75. *See id.* at 760. Nonetheless, the panel remanded the case back for further proceedings to determine an unrelated factual issue. *Id.*

76. *See id.* at 760 (Nelson, J. concurring in part and dissenting in part) ("My principal reasons for viewing section eight as a penalty are these: (1) although the damages flowing from a premature resignation would normally be the same whether or not Coach DiNardo took a job elsewhere, section eight does not purport to impose liability for liquidated damages unless the coach accepts another job; (2) the section eight formula incorporates other variables that bear little or no relation to any reasonable approximation of anticipated damages; and (3) there is no evidence that the parties were attempting, in section eight, to come up with a reasonable estimate of the university's probable loss if the coach left.").

77. *See id.* (stating irrelevance of DiNardo's use of post-resignation time to University's damages).

78. *See id.* (discussing impetus behind section eight clause).

Final Four, but was fired five years later because of a recruiting violation.[79] O'Brien sued alleging that the university owed him liquidated damages because the firing was not "for cause."[80] Like Coach DiNardo's contract, O'Brien's agreement called for liquidated damages based upon his salary and the length of time remaining on the contract when he was fired.[81] The Ohio court held that the liquidated damages were not a penalty and awarded the coach more than $2.25 million, finding that when the parties entered into the contract extension in 1999, the damages that O'Brien might suffer for being fired without cause were "uncertain as to amount and difficult [to prove]."[82]

More recently, West Virginia University sued its former football coach, Rich Rodriguez, seeking the enforcement of a $4 million liquidated damages provision after Rodriguez left to coach at the University of Michigan. The parties eventually settled for $1.5 million.[83]

2. *Conference Realignment*

Disputes over the amount of damages an athletic department must pay when switching conferences has also led universities into court, but no case appears to have been decided on the merits of the enforceability of a conference's liquidated damages provision. For example, Virginia Tech and Virginia Commonwealth University sued five members of their conference that left to merge with another conference, seeking to enforce a $500,000 withdrawal fee, but

79. *See* O'Brien v. Ohio State Univ., 859 N.E.2d 607, 610 (Ohio Ct. Cl. 2006) ("The evidence shows that the violation consists of a loan made to the family of a prospect for humanitarian reasons. The evidence also demonstrates that such prospect was ineligible to participate in intercollegiate athletics at the time that the loan was made.").

80. *See id.* at 610 ("The court previously determined that defendant had committed a breach of its contract with plaintiff when it dismissed him from his position as men's head basketball coach without sufficient cause to do so.").

81. *See id.* at 611 ("If Coach's employment hereunder is terminated by Ohio State other than for cause . . . Ohio State shall pay and provide to Coach, as partial liquidated damages, for a period not to exceed twelve (12) months (i) the full amount of Coach's then-current base salary . . . and (ii) such normal employee benefits as Ohio State then provides generally to its administrative and professional employees . . . .") (emphasis omitted).

82. *See id.* at 614-15 (discussing court's holding for liquidated damages, not penalty). Consistent with Ohio law, the court also found that the clause was intended by the parties and was not unconscionable. *Id.*

83. *See* Karcher, *supra* note 65, at 51-52 (discussing settlement amount markedly less than amount specified in penalty clause). The University of Michigan also settled for $2.5 million to cover the $4 million liquidated damages provision. *Id.* at 52.

the parties eventually settled out of court.[84] Additionally, Boston College successfully sued the Big East Conference to invalidate an amended $5 million liquidated damages provision in favor of the older $1 million clause when it decided to leave the Big East for the Atlantic Coast Conference.[85]

## III. COMMENT

It is impossible to establish a blanket rule regarding the enforceability of athletic conference liquidated damages provisions because each conference utilizes unique contract language. However, most athletic conferences appear to prefer one of two approaches.[86]

There are signs pointing to the enforceability of conference liquidated damages provisions, particularly a jilted conference's difficulty in proving its loss. Also, precedent exists where courts have recognized the unique qualities of sports contracts that validate liquidated damages.[87] Of course, some clauses are better constructed than others and, therefore, more likely to be blessed as legally enforceable. For example, one conference, in what is not the best choice of words, expressly uses the word "penalty" in its liquidated damages provision.[88] Public policy is a stronger rationale for the argument that all liquidated damages provisions should be legally enforceable since it was the breaching college or university that either took part in forming the bylaws or assented to them when it joined the association.

84. *See* Katz, *supra* note 8, at 350 (illustrating how universities engage in litigation over conference realignments).

85. *See* Trustees of Boston Coll. v. Big E. Conference, No. 034818BLS, 2004 WL 1926799 (Mass. Super. Aug. 18, 2004) ("Boston College is entitled to withdraw from the Big East Conference . . . upon payment of a $1 million withdrawal fee. . . ").

86. This according to an unscientific survey conducted by the author of athletic conference bylaws; bylaws that are available on the Internet and mentioned in news accounts.

87. For a discussion of the enforceability of liquidated damages clauses, see *infra* notes 100-121 and accompanying text.

88. *See Colonial Athletic Association Constitution*, art. 4.06(C) (2011-2012), *available at* http://www.nmnathletics.com/fls/8500/supportfiles/Handbook/Mission_Constitution.pdf?DB_OEM_ID=8500 ("Any member that elects to withdraw from the Association will be assessed a financial penalty of $1,000,000 and forfeits its share of the accrued assets of the Association. The purpose of such payment requirement is to reflect possible financial damages to the Association and to each of its remaining member institutions.").

### A. Types of Liquidated Damages Provisions in Conference Bylaws

For those athletic conferences that include liquidated damages provisions in their bylaws, two approaches are commonly used: 1) accessing a fixed "exit fee" for departing schools or 2) determining the contract liability based upon the conference payouts due to the school after it announces its plans to leave the conference.[89] Notice is an important ingredient in both types of clauses. The conferences that prefer to include a fixed "exit fee" require an exact amount of notice, whereas conferences that base liquidated damages upon the conference payouts sometimes utilize a sliding scale with departing schools forfeiting more revenue the less notice they provide.

#### 1. *Fixed Exit Fees*

A flat exit fee appears to be the preferred method of stipulating damages for breach of contract in athletic conferences today. For the most powerful conferences, these fees range from $5 million to $50 million.[90] Even in a less prestigious league like the Sun Belt Conference, exit fees can cost a departing school up to $500,000.[91] Notice is an important factor for every conference that utilizes an exit fee, ranging from the Sun Belt's requirement of one year to the Big East's 27-month notice provision.[92]

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89. *See Compliance*, SEC SPORTS, http://www.secdigitalnetwork.com/SEC-SPORTS/THESEC/Compliance.aspx (last visited Dec. 1, 2012) (discussing Southeastern Conference Rules including lack of liquidated damages provision); *see also* Farnsworth, *supra* note 49, § 12.18 (stating no matter their difference in form, "exit fees" are also considered liquidated damages and courts could review them because "the form of the provision should not obscure the underlying issue of whether what is provided is in substance a penalty for nonperformance."); *see also* Steve Bradford, *Athletic Conference Exit Fees and the Law of Liquidated Damages*, BUSINESS LAW PROF BLOG (Sept. 26, 2011), http://lawprofessors.typepad.com/business_law/2011/09/athletic-conference-exit-fees-and-the-law-of-liquidated-damages.html ("It's important to keep in mind that these exit fees are, in essence, liquidated damages.").

90. *Compare* Complaint at 12-14, The Big E. Conference v. West Virginia Univ., (Case No. PB11-6391), *available at* http://news.providencejournal.com/breaking-news/2011/11/04/bigeast_v_wvu_110411.pdf (discussing withdrawal provisions of Big East Bylaws in appendix to complaint), *with* Harvey, *infra* note 138 (reporting on ACC's increase of its exit fee from $20 million to $50 million).

91. *See* Graham Watson, *UNO Withdraws Sun Belt Membership*, ESPN (Jan. 20, 2010), http://sports.espn.go.com/ncaa/news/story?id=4842825 (discussing Sun Belt Conference's decision to waive $500,000 withdrawal fee in light of University of New Orleans's unique circumstances after Hurricane Katrina).

92. *Compare id.*, *with* Complaint at 12-14, *The Big E. Conference*, (Case No. PB11-6391), *supra* note 90.

### 2. *Withholding Conference Payouts*

Other conferences calculate liquidated damages based on the amount of conference payouts due a breaching member. These clauses take on two different forms: a static calculation withholding an agreed-upon percentage of profits or a sliding scale withholding more funds depending on the amount of notice a breaching school provides.

#### a. Static Calculations

The Western Athletic Conference's ("WAC") liquidated damages provision allows a member institution to leave the conference if it provides ten months of notice, but the withdrawing school forfeits all of its year-end revenue.[93] The Mountain West Conference ("MWC") follows a similar calculation, but requires 12 months of notice.[94] The Big 12 also utilizes this approach in one of its two liquidated damages provisions, requiring two years of notice and the school to withdraw at the end of the current membership term.[95] Additionally, the Big 12 spreads out the loss for the school, taking half of a school's payouts for two years instead of an entire year's worth of payouts.[96]

#### b. Sliding Scale

In its second liquidated damages provision, triggered when a school gives less than two years notice, the Big 12 utilizes a sliding scale to calculate liquidated damages. Under the conference's bylaws, failure to provide two years notice costs the school between 70 and 100 percent of the final payouts given to a school.[97] A breach-

93. *See Western Athletic Conference Code Book 2009-10*, art. 2, § 3, W. ATHLETIC CONFERENCE, http://www.wacsports.com/fls/10100/docs/pdfs/2009-10%20Code.pdf?DB_OEM_ID=10100 (last visited Sept. 4, 2012) (outlining proper procedure for withdrawing from league).

94. *See Handbook Appendix A: Bylaws of Mountain West Conference*, § 1.04(b), CBS SPORTS, *available at* http://graphics.fansonly.com/schools/mwc/graphics/pdfs/handbook/1213-appA.pdf (last visited Dec. 1, 2012) (detailing notice requirements for resigning members).

95. *See* Big 12 Bylaws, *supra* note 6, §§ 3.1-3.2 (explaining withdrawal sanctions in Big 12).

96. *See id.* (providing "each Member agrees that the amount of revenue that would have been otherwise distributable to a Withdrawing Member pursuant to Section 2 herein for the final two (2) years of the Current Term or the then-current Additional Term, as the case may be, shall be reduced by fifty percent (50%), with the remainder to be distributed to the other Members who are not Withdrawing Members or Breaching Members.").

97. *See id.* § 3.3 (outlining penalties for teams withdrawing from league without giving proper notice).

ing school forfeits more revenue the less notice it provides.[98] The Missouri Valley Conference utilizes a similar liquidated damages scheme, but allows for a member school to receive its entire share of conference revenue if it provides the conference with two years of notice before its departure.[99]

## B. The Enforceability of the Liquidated Damages Clauses

Most courts would analyze the enforceability of an athletic conference's liquidated damages provision under the two-part Restatement test. A conference could easily show the difficulty in proving its loss, but it would have a harder time proving that the liquidated damages are a reasonable approximation of anticipated loss.

### 1. *Reasonable Approximation of Anticipated Losses*

The terms of a conference's liquidated damages provision determine whether that provision provides a reasonable approximation of anticipated loss. A static damages calculation based upon conference payouts is a more reasonable approximation of anticipated loss than fixed monetary values and sliding scales, which may be unenforceable penalties.

The legal background involving liquidated damages in coaching contracts and other dealings is particularly enlightening. On the one hand, in *DiNardo* and *O'Brien,* Vanderbilt and Ohio State's liquidated damages clauses were based on the coaches' salaries and were both upheld.[100] On the other hand, the *Carborundum* case involved a minimum-quantity guarantee, similar to a fixed "exit fee,"

98. *See id.* (explaining that failure of member to provide proper notice causes "financial hardship to the remaining Members of the Conference" and so greater breaches result in greater liquidated damages).

99. *See Constitution of the Missouri Valley Conference*, § 3.5.3.1, MO. VALLEY CONFERENCE, http://www.mvc.org/manual/constitution.pdf (last visited Sept. 24, 2012) (stating "[w]ith 24 or more months' notice of intent to resign from the membership, the departing institution receives 100% of its designated share of distributable revenues, per Conference formula.").

100. *See* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 755 (6th Cir. 1999) (holding that liquidated damages clause was not penalty because it was "reasonable in relation to the anticipated damages for breach . . . ."); *see also* O'Brien v. Ohio State Univ., 859 N.E.2d 607, 614-15 (Ohio Ct. Cl. 2006) (holding that liquidated damages was not penalty after considering several factors and recognizing that liquidated damages provision is not penalty "if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.").

and was struck down as legally unenforceable.[101] In the Rich Rodriguez dispute, which involved a fixed monetary amount of damages, the parties settled for less than half the contracted-upon figure, suggesting that even the parties themselves may have been skeptical that a court would bless the clause as enforceable.[102]

In *DiNardo*, the Sixth Circuit determined that the liquidated damages provision was reasonable because it was in line with Vanderbilt's estimate of actual damages, including expenses of recruiting a new coach, moving expenses for the new coaching staff, and a compensation difference between the coaching staffs.[103] The expenses caused by a breaching conference member are similar. Losing a member reduces the number of conference games or matches, creating fewer revenue-producing opportunities (e.g., television contracts, sponsorships, and advertising deals). And like in *O'Brien*, a conference's damages include "collateral income" that it earns from the member institution's affiliation with the conference, particularly in relation to the postseason success of a conference's member institutions.[104] But replacing a breaching member does not completely mitigate the damages. The conference's remaining schools may incur higher traveling expenses for years to come, duplicated several times a year for the plethora of teams a school sponsors.[105] Also, recruiting a new school may cost the conference

101. *See* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1292 (7th Cir. 1985) (holding that penalty provision was legally unenforceable because, "it [was] apparent from the face of the contract that the damages provided for by the 'liquidated damages' clause [were] grossly disproportionate to any probable loss and penalize some breaches much more heavily than others regardless of relative cost.").

102. For a discussion of this dispute, see *supra* note 83 and accompanying text.

103. *See DiNardo*, *supra* note 100, at 755 (holding that liquidated damages clause was not penalty because it was "reasonable in relation to the anticipated damages for breach" after being "measured prospectively at the time the contract was entered into" and after finding that damages provision was "not grossly disproportionate to the actual damages").

104. *See O'Brien*, 859 N.E.2d at 611-12 (explaining importance of conference's "collateral income" in determining damages); *see also* Blair Kerkhoff, *Missouri Loss Shortchanges Big 12*, KANSAS CITY STAR (Mar. 16, 2012), http://www.kansascity.com/2012/03/16/3496127/mizzou-loss-short-changes-big.html (describing payouts to athletic conferences for NCAA basketball tournament wins by its members schools); *see also* Chris Smith, *Moving To The SEC Will Pay Off For Missouri, Texas A&M*, FORBES (Feb. 29, 2012), http://www.forbes.com/sites/chrissmith/2012/02/29/why-moving-to-the-sec-will-pay-off-for-missouri-texas-am (explaining how conferences receive money from conference members' football bowl appearances).

105. *See* Dosh, *infra* note 129 (reporting that University of Nebraska spent $1 million more on travel after it moved from Big 12 to Big 10); *see also* DISTANCE BETWEEN CITIES, http://www.distance-cities.com/search?from=Morgantown%2C+

money to help that school leave its current conference, evidenced by the Big 12 ultimately agreeing to pay part of West Virginia's exit fee so that it could replace Missouri.[106] That payment is $5 million in tangible damages that the conference could have presented during a potential lawsuit. This shows that a jilted conference is stuck between the proverbial rock and a hard place: either operate a smaller conference that would produce less revenue or recruit a new member that would cost money to attract to the conference and maintain as a member of the conference.

It is reasonable for the liquidated damages to be tied to the conference payouts. Like any partnership, each conference member profits from the overall success of the conference. And given the rapid increased profitability of college sports, it is wise to state the damages as a percentage of conference payouts instead of a lump sum. The damages adequately grow as the conference becomes more successful. Likewise, if the conference were to become less profitable, then the liquidated damages decrease accordingly.

Lump sum payments, on the other hand, are problematic because they may be arbitrarily decided and may require a more detailed proof to convince a court that they are not an unenforceable penalty.[107] Also, the fact a conference recently voted to increase its exit fee could be used to argue against lump sum payments.[108] However, the conference would respond that such an increase responded to the increased profitability of the conference.[109] This may be difficult to prove if the amendment of the bylaws did not follow a renegotiated television contract, or other event that increased the conference's profitability.[110]

Sliding scales are even more problematic. Judge Nelson, the dissenting vote in *DiNardo*,[111] would likely object to a sliding scale

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WV&to=Columbia%2C+MO (last visited Oct. 14, 2012) (calculating that Morgantown, West Virginia, is approximately 660 miles east of Columbia, Missouri).

106. For a discussion of the importance of a conference's "collateral income" in determining damages, see *supra* notes 32-33 and accompanying text.

107. *See* Bradford, *supra* note 89 (discussing pitfalls of lump sum payments).

108. *See id.* (explaining how court might view fact that conference recently increased its exit fee); *see also* Harvey, *infra* note 138 (reporting on a university official who labeled the ACC's recent increase in exit fee as "punitive").

109. *See* Bradford, *supra* note 89 (suggesting how conferences might respond to court's concerns about exit fees).

110. *See id.* ("Presumably, the original fee was a reasonable attempt to approximate damages. If nothing has changed to increase the likely damages, is the increase just a penalty?").

111. *See* Vanderbilt Univ. v. DiNardo, 174 F.3d 751 (6th Cir. 1999) (reversing District Court's summary judgment in favor of enforcing damages clause on football coach who breached contract).

because the conference's damages would presumably be the same no matter how much notice a college or university provides.[112] Granted, earlier notice allows a conference more time to find a replacement member, but this does not relate to damages because a stipulated damages clause alleviates the non-breaching party's common law duty to mitigate damages.[113] If the notice provision is not evidence of a penalty provision, a sliding scale's particularity seems arbitrary at best. In the case of the Big 12, does a university that gives just under two years notice really produce 30 percent more damage to the conference than a member that gives two years notice? How can this be reconciled with the Missouri Valley Conference bylaws, which tacitly admit that a member institution that gives two years of notice creates no damages at all?[114] These rhetorical questions highlight how a court could read these provisions as penalizing a member institution for leaving a conference in a hurry.

2. *Difficulty in Proving Losses*

A jilted athletic conference would have a much easier time asserting that its damages are difficult to prove when a member institution breaches the bylaws and moves to another conference, thus satisfying the second prong of the Restatement's enforceability test. A conference's damages are not easily quantifiable in monetary amounts because each university adds unique qualities to the conference.

A loss of stability is a conference's biggest damage when a university leaves. In *Vanderbilt University v. DiNardo*, the Sixth Circuit recognized stability as an important interest in college sports.[115] In the *DiNardo* case, the court recognized that stability was important for Vanderbilt to recruit future players and retain current assistant coaches.[116] For an athletic conference, stability helps recruit future member institutions and retain existing ones. No major athletic

112. *See id.* at 761 (stating that reasonableness of liquidated damages provision is determined at time agreement is entered into by parties).

113. *See* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1291 (7th Cir. 1985) (reasoning that "mitigation of damages" is a doctrine of the law of court-assessed damages, while the point of a liquidated-damages clause is to substitute party assessment).

114. *See Constitution of the Missouri Valley Conference, supra* note 99, at 6 (noting when member of conference wishes to resign, Missouri Valley Conference requires 24 months notice).

115. *See DiNardo*, 174 F.3d at 756 (noting DiNardo's contract language explained significance of fulfilling contract terms to satisfy Vanderbilt's desire for "a stable intercollegiate football program.").

116. *See id.* (explaining Vanderbilt's football program's stability was "essence" of DiNardo's contract).

conference has suffered a loss of stability more than the Big 12, which lost a third of its founding members in the course of two years, thereby jeopardizing its very existence.[117] Moreover, two of those founding members – the University of Missouri and the University of Nebraska – had been affiliated with the Big 12's predecessors for more than 100 years.[118]

An athletic conference suffers other "intangible damage" to its reputation, prestige, and athletic competition when a member institution exits.[119] These damages are difficult to measure, especially when the conference replaces the departing member. Should damages be calculated differently if the conference does not replace the breaching member? If not, is a court supposed to judge the two universities—the former member and the new member—and their sports programs, side-by-side to determine which is a better member? If so, what factors should a court consider when making that comparison? Should academic prestige factor into the calculations? What is the value of historical rivalries, several of which have been upset by a recent "[c]onference [r]ealignment?"[120] And what is the value of a conference's loss of stability? How much of the instability, however much there is, can be attributed to the breaching school, rather than other schools that may have left the conference beforehand or athletic departments that flirted with the idea of leaving but decided to stay? What expert witness would a conference call to testify about these damages? This extreme difficulty in proving its loss has been recognized as potentially offsetting any deficiencies in the proof that the damages are reasonable estimates.[121]

117. *See* Dave Matter, *Missouri Looks to Leave Big 12*, COLUMBIA DAILY TRIBUNE (Mo.) (Oct. 5, 2011, 1:17 PM), http://www.columbiatribune.com/news/2011/oct/04/missouri-will-explore-conference-options/ (noting Big 12 teams that departed include University of Missouri, University of Colorado, Texas A&M University and University of Nebraska).

118. *See* Richardson, *supra* note 19, at 2 (discussing Nebraska and Missouri were both founding members of Missouri Valley Conference in 1907); *id.* at 6-8 (discussing how Missouri, Nebraska and four other schools broke off from the Missouri Valley Conference to create Big Six conference, which eventually became part of the Big 12); *see also* Joe Walljasper, *What Becomes of a Bitter Rivalry When the Games End?*, COLUMBIA DAILY TRIBUNE (Mo.) (May 13, 2012), http://www.columbiatribune.com/news/2012/may/13/what-becomes-of-a-bitter-rivalry-when-the-games/ (noting that for more than 100 years, Missouri and Kansas were always members of same conference).

119. *See DiNardo*, 174 F.3d at 757 (discussing difficulties proving damages should breach of coaching contract occur).

120. *See* Walljasper, *supra* note 118 (noting end of rivalry between University of Kansas and University of Missouri when Missouri left the Big 12 Conference for the Southeastern Conference).

121. For a discussion of this issue, see *supra* note 38 and accompanying text. *See also* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just*

### C. The Enforceability of the Clauses as Penalty Provisions

Even if an athletic conference's liquidated damages clause is a penalty provision, the situation is a perfect example of why certain penalty provisions should be legally enforceable. Universities and conferences are both sophisticated parties. Neither needs "paternalistic" protection from the courts.[122] Furthermore, any judicial protection would only encourage the "deception" and "double dealing" that allows athletic departments to "one day . . . agree to play . . . for one group, only to repudiate that agreement the following day or whenever a better offer comes along."[123] Courts should not be in a hurry to encourage this type of "contract jumping."[124] Conferences in today's college athletic environment are yearning for stability more than ever, and they should be able to contract for that stability with their members.

Universities and colleges assent to a conference's liquidated damages provision, either as a founding member or when they join a pre-existing conference. A court should not bail out an institution that agreed to a penalty provision.[125] Enforcing the provisions does not affect anyone except the parties to the contract.[126] Moreover, the parties, not the courts, are in the best position to judge what is a "reasonable" approximation of likely damages upon a breach *ex ante*.[127] Simply put, the liquidated damages provisions may be the best way to preserve a conference's "idiosyncratic value" of a university's membership in the conference.[128]

The normal concerns for not enforcing penalty provisions are also not present during today's "conference realignment." Dozens

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*Compensation Principle: Some Notes on an Enforcement Model and A Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 560 (1977) ("If the conditions inducing damage agreements are viewed on a continuum, the application of the penalty rule becomes clearer: as the uncertainty facing the contracting parties increases, so does their latitude in stipulating post-breach damages.").

122. *See* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985) (highlighting disapproval of modern courts' paternalistic approach to large corporations)

123. *See* Ne. Univ. v. Brown, No. 20040827F, 2004 WL 616225, at *1 (Mass. Super. Mar. 11, 2004) (quoting Detroit Football Co. v. Robinson, 186 F. Supp. 933, 934 (E.D. La. 1960)).

124. *See id.* (discussing problems with conference jumping).

125. *See Lake River*, 769 F.2d at 1289 (noting liquidated damage clause may prove essential to party's willingness to enter contract, but stressing that court should not paternalistically protect large entities).

126. *See id.* (emphasizing freedom to contract and subsequent responsibilities arising from such freedom).

127. *See id.*

128. *See* Goetz & Scott, *supra* note 121, at 574 (explaining relationship between penalty clauses and willingness to enter into contracts).

of universities have been eager to efficiently breach their contracts despite not knowing whether the relevant clause in their athletic bylaws was enforceable.[129] If leaving was not an efficient breach, athletic departments like those at the University of Missouri would decide to stay in their existing conferences. Even if the clauses were enforceable penalty provisions, Missouri and the Big 12 would have been free to settle their disputes for all of the same reasons that any party to a lawsuit can settle out of court. The only change would have been a likely increase in the settlement price.

### D. The Best Approach for Athletic Conferences

Of course, a liquidated damages clause is not the only way for an athletic conference to protect its interest. Pursuing conventional breach of contract damages is always an option by not including a liquidated damages clause in the conference bylaws.[130] Conferences may also seek an injunction, which is expressly mentioned in the Big East bylaws, to prevent a member institution from leaving the conference.[131]

When crafting a liquidated damages provision in its bylaws, a conference is likely primarily concerned with maximizing its exit payment from a breaching member. There are two ways to accomplish this goal: suing under a liquidated damages provision or settling out of court. Negotiation saves time and money, but the likely enforceability of such a clause can create valuable leverage for an athletic conference. On the other hand, enforcing a liquidated damages provision necessarily requires filing suit against a former business partner, which would definitely sour the relationship and may deter other schools from joining the conference in the future. With these concerns in mind, it is safe to say that an ideal liquidated damages clause would be legally enforceable and would maximize the exit fee that a breaching member must pay. That way, the con-

129. The University of Missouri expects the initial $12.4 million withholding to create a budget deficit for the University that may last seven years. *See* Joe Walljasper, *MU Official Says Big 12 Exit Fee is Reasonable*, COLUMBIA DAILY TRIBUNE (Mo.), Mar. 1, 2012, at B1, *available at* http://www.columbiatribune.com/news/2012/feb/29/mu-athletic-official-discusses-big-12-exit-fees/. After seven years the university will likely reap benefits from the more lucrative SEC contracts. *See* Smith, *supra* note 104; *see also* Kristi Dosh, *How Much Does A&M Stand To Gain From SEC Move?*, THE BUS. OF COLL. SPORTS (Sept. 25, 2011), http://businessofcollegesports.com/2011/09/25/how-much-does-am-stand-to-gain-from-sec-move.

130. *See* FARNSWORTH, *supra* note 49 (listing alternative remedies available).

131. *See* Complaint at 13, *The Big E. Conference*, (Case No. PB11-6391), *supra* note 90, (noting that other means exist to protect conferences besides liquidated damages).

ference could either sue the institution seeking collection of those liquidated damages or use the clause to maximize its position during negotiations, if it decides to settle out of court.

Athletic conferences seeking to craft a legally enforceable clause while increasing leverage should mimic the Western Athletic Conference's approach, which boils down to a simple *quid pro quo*: a school can leave the conference if it provides a reasonable amount of notice, but should not expect to share any of the conference profits after it provides such notice.[132] This provision is strikingly similar to the one that the Sixth Circuit upheld in the *DiNardo* case and avoids using a fixed monetary amount or a sliding scale that would be more difficult to prove as a reasonable approximation of anticipated loss.[133]

An athletic conference primarily concerned with increasing its bargaining position may disagree with this position, preferring instead to take the ACC and Big East approaches of establishing, and then occasionally increasing, a fixed amount of liquidated damages.[134] Supporters of this approach, primarily concerned with maximizing their bargaining positions, would think the legal enforceability of these amended clauses would be irrelevant since they would never intend for the liquidated damages provision to be hauled into court. The Big East's recent success in settling with West Virginia for an unprecedented $20 million – more money than the Big 12 negotiated with four teams that withdrew from that conference in the past two years – may support a fixed exit fee approach over a withholding of a certain percentage of conference payouts.[135] But the Big 12's use of a sliding scale, which applied to

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132. For a further discussion of the Western Athletic Conference's approach, see *supra* note 93 and accompanying text.

133. *See* Vanderbilt Univ. v. DiNardo, 174 F.3d 751, 757 (6th Cir. 1999) ("[U]sing the number of years left on the contract multiplied by the salary per year was a reasonable way to calculate damages considering the difficulty of ascertaining damages with certainty.").

134. *See* Paul Doyle, *Big East Raises Exit Fee, Won't Say Which Teams Are Targeted To Join*, HARTFORD COURANT (Oct. 18, 2011), http://articles.courant.com/2011-10-18/sports/hc-big-east-expansion-1018-20111017_1_john-marinatto-exit-fee-football-only-member (reporting on Big East raising exit to try to prevent schools from leaving and increase stability); *see also* Mark Giannotto, *Notre Dame is Set to Join ACC*, WASH. POST, at D06, Sept. 13, 2012, *available at* http://www.washingtonpost.com/sports/notre-dame-to-join-acc-in-all-sports-but-football-hockey/2012/09/12/1dcb9ee2-fce2-11e1-b153-218509a954e1_story.html.

135. *See* Casazza, *supra* note 9 (describing fixed exit fee approach); Halliburton, *supra* note 9 (referencing monetary amount of Nebraska and Colorado's exit fees); Walentik, *supra* note 3 (referencing monetary amounts penalized against Missouri University and Texas A&M for withdrawing from Big 12 conference).

all four departing schools, has its drawbacks pointing toward classification as a penalty and includes a part that is nonsensical.[136]

Drafting a clause without considering its potential enforceability is shortsighted for at least two reasons. First, negotiation and legal enforceability are not mutually exclusive. Litigation is always a backup option to negotiation and athletic conferences should draft their bylaws to give them as many options as possible. A school that breaches a contract with one of these athletic conferences could point toward the increasing amount as proof of its arbitrariness, suggesting it is a penalty provision and driving down the conference's leverage.[137] In fact, a leader at one ACC school thought that recently increasing the exit fee from $20 million to $50 million was "punitive."[138] Second, the figure agreed upon could fail to keep pace with the growing profitability of college athletics, which is what appeared to happen to the Big East in 2003.[139] If a conference signs a new television contract but cannot amend its bylaws before a member institution breaches its contract, the conference may not receive as much liquidated damages as if the liquidated damages was calculated based on year-end distributions of revenue that automatically account for increased profitability. During rising instability, some member institutions may be hesitant to increase the exit fee because they contemplate a future move, blocking the proposed amendment from receiving the required majority of votes, which is often more than a simple majority.[140] For all of these reasons, drafting a liquidated damages provision that calcu-

136. For a discussion of the Big 12's use of the sliding scale, see *supra* notes 111-114 and accompanying text. *See also* Clay Travis, *Big 12 Bylaws on Leaving Are Complicated, Weak*, OUTKICK THE COVERAGE (Aug. 30, 2011), http://outkickthecoverage.com/big-12-bylaws-on-leaving-.php (highlighting confusing language in conference bylaws).

137. *See* Bradford, *supra* note 89 (asserting damage provisions in conference bylaws can be construed as unenforceable penalty provisions if dollar amount is too high).

138. *See* Coley Harvey, *Florida State One of Two Schools to Vote Against ACC Exit Fee*, ORLANDO SENTINEL (Sept. 12, 2012), http://articles.orlandosentinel.com/2012-09-12/sports/os-florida-state-acc-exit-fee-vote-20120912_1_exit-fee-new-fsu-fsu-athletics-director (reporting Florida State board of trustees chairman believed exit fee increase was "punitive").

139. *See* Katz, *supra* note 8 (noting booming profitability of Big East teams prior to 2003).

140. *See, e.g.*, *Colonial Athletic Association Constitution*, *supra* note 88, art. 6.05 (requiring two-thirds majority to amend conference constitution). For instance, the ACC, which is adding members instead of losing them, was recently two votes shy of not having the required amount to increase its exit fee. *See* Giannotto, *supra* note 134 (reporting that ten of twelve ACC schools voted for increase in exit fee when bylaws required nine).

lates these damages based upon conference profits is the most prudent course of action.

## IV. CONCLUSION

Different clauses included in athletic conference bylaws would have different difficulties if a court is called to scrutinize them as liquidated damages provisions. Damage clauses that call for athletic conferences to withhold profit shares from breaching members are the most likely to be legally enforceable because they represent more reasonable approximation of anticipated loss. Even if the provisions are partially or entirely punitive in nature, there is a compelling argument that a court should still enforce them as a matter of public policy. But no court has adopted this novel view. Of course, an athletic conference's primary concern may not be creating an enforceable clause, rather including a clause that provides it the most leverage in upcoming negotiations.

The only way to get a clear answer is for an athletic conference or a college or university to subject a clause to judicial scrutiny through a lawsuit. Until then, athletic conferences should borrow from precedent interpreting similar clauses in other contracts, both in and out of sports. The precedent suggests that liquidated damages calculated based on the profitability of the athletic conferences would be more likely to be enforceable than lump sum payments. Doing so would maximize the conference's interest no matter if they decide to try to enforce the clause in court or negotiate a payment outside of it. For colleges and universities looking to switch conferences and breach their conference bylaws, they should expect to pay millions of dollars. The price to play somewhere else may continue to skyrocket.