

CONFERENCE REALIGNMENT: FROM BACKYARD BRAWLS TO CASH COWS

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I. TELEVISION, COMMERCIALISM, AND THE RISE OF THE CONFERENCE

Today, intercollegiate athletics is a wildly successful commercial enterprise. Through the advent of television and media outlets and a growing public appetite for sports spectacle, intercollegiate athletics continues to grow rapidly. In 1938, the University of Pennsylvania (“Penn”) televised the first

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intercollegiate football game, albeit to only six viewers.¹ As the number of televisions in households across the country increased in the late 1940s, universities began to televise their athletic competitions.² Then, in 1951, the National Collegiate Athletic Association (“NCAA”) members endorsed a program of restricted live football telecasts, administered by the NCAA and continuing through the 1983 playing-season.³ NCAA member institutions were initially skeptical about the NCAA’s control over television broadcasting, and Penn threatened to continue broadcasting its athletic contests within its own parameters.⁴ Penn, however, backed away from its position after the NCAA declared it a “member in bad standing” and four visiting opponents cancelled athletic contests with Penn for the 1951 season.⁵

In 1977, sixty-two of the largest college football programs formed the College Football Association (“CFA”) to coordinate internal lobby efforts on behalf of major college football interests.⁶ The CFA desired to increase revenue for top college football programs, which included larger television revenue.⁷ In 1981, the CFA was offered a four-year \$180 million contract to pull its members’ games from the NCAA television program with ABC and sell them independently to NBC. This would have been a sizeable increase in revenue for the sixty-two members of the CFA.⁸ Initially, the CFA members relented in light of the NCAA’s threats to expel any institution, including all athletic programs that participated in removing their football contests from the NCAA television program.⁹

¹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 89 (1984).

² ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 91 (1988).

³ *A Brief History of NCAA Television Coverage*, NAT’L COLLEGIATE ATHLETIC ASS’N (2010), <http://www.ncaa.org/wps/wcm/connect/broadcast/media/broadcasting/a+brief+history+of+ncaa+television>.

⁴ MURRAY SPERBER, COLLEGE SPORTS, INC. 49 (New York: Henry Holt and Company, 1990).

⁵ *Id.*

⁶ KEITH DUNNAVANT, THE FORTY-YEAR SEDUCTION 114 (Newman, Ga.: Solovok Publishing, 1997).

⁷ *Id.*

⁸ *Id.* at 132.

⁹ *Id.*

The skepticism among CFA members only grew in the 1980s, with the CFA's support the University of Oklahoma ("Oklahoma") and the University of Georgia, in a legal action against the NCAA, alleging that the collective sale of football broadcast rights constituted an illegal cartel in restraint of trade.¹⁰ After arguing the case to the United States Supreme Court, the Court determined that the NCAA violated Section 1 of the Sherman Act thereby ending the NCAA's centralized control of college football television broadcast rights;¹¹ therefore, the CFA was free to enter into agreements on behalf of its sixty-two member body.

In the summer of 1984, the CFA negotiated the first of four successful television agreements spanning from 1984 to 1995. The first agreement was a one-year agreement with ABC for \$12 million.¹² The CFA then negotiated three more television agreements including: a two-year agreement for 1985 and 1986 with ABC and ESPN, a four-year agreement for 1987-1990 with CBS and ESPN, and a final five-year agreement for 1991 to 1995 with ABC/ESPN.¹³ With competition in the marketplace, fans were able to watch four times as many games following the invalidation of the NCAA's television rights agreement.¹⁴

As more football contests were televised nationally, the broadcasters began to develop a regional based format that generated concern among CFA members. One such concerned institution was the University of Notre Dame ("Notre Dame"). Notre Dame became unhappy with ABC's regional broadcast format and, consequently, resigned from the CFA to negotiate its own media rights agreement with NBC that ultimately totaled \$38 million over four years.¹⁵ Then, in 1995, CBS made a direct

¹⁰ A.A. FLEISHER, B.L. GOFF, & R.D. TOLLISON, *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 59 (1992).

¹¹ *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 106-13 (1984) (holding the record supported the district court's conclusion that the NCAA unreasonably restrained trade under the Sherman Act).

¹² Mark Asher, *ABC-CFA After TV Deal in Light of NBC-Notre Dame*, WASHINGTON POST, Feb. 8, 1990, at C12.

¹³ DUNNAVANT, *supra*, note 6 at 159, 161-68, 198, 216.

¹⁴ *Id.* at 163.

¹⁵ Mark Asher, *ABC-CFA After TV Deal in Light of NBC-Notre Dame*, WASHINGTON POST, Feb. 8, 1990, at C12; William F. Reed, *All Shook Up: Seismic Shifts Are Altering the Sport's Landscape*, SPORTS ILLUSTRATED, Aug. 26, 1991.

pitch to the Southeastern Conference¹⁶ (“SEC”) to acquire its television rights.¹⁷ CBS offered and the SEC accepted an offer of \$85 million over five years to move its football contests to CBS, which was double the average amount each team was receiving under the CFA agreement.¹⁸

With the CFA suffering as a result of the defections of Notre Dame and the SEC institutions, member institutions began to jockey for inclusion in conferences that had the best opportunity for large television revenue. The first conference concerned with losing its position among the elite was the Southwest Conference.¹⁹ In 1992, the University of Arkansas (“Arkansas”) left the Southwest Conference to join the SEC, which boasted eighteen percent of the national television audience, which provided a larger viewing audience.²⁰ Arkansas’ defection left the all-Texas conference vulnerable, because it had only 6.7 percent of the nation’s television sets.²¹ After the loss of Arkansas and major scandals on almost every Southwest Conference campus, the demise of the conference was inevitable. In the fall of 1996, Texas A&M University (“Texas A&M”), University of Texas (“UT”), Baylor University (“Baylor”), and Texas Tech University (“Tech”) joined the Big Eight Conference institutions to create the Big 12 Conference²² (“Big 12”), thus the Southwest Conference dissolved.²³

¹⁶ The Southeastern Conference has boasted a rich athletic history since its inception in 1933, which produced 140 national team championships since 1990. *About the SEC*, THE OFFICIAL SITE OF THE SOUTHEASTERN CONFERENCE, <http://www.secdigitalnetwork.com/SECSPORTS/THESEC/AbouttheSEC.aspx>.

¹⁷ Tom Dienhart & Mike Hugenin, *CFA Bids Farewell After Accomplishing Its Goal*, THE SPORTING NEWS, June 30, 1997.

¹⁸ *Id.*

¹⁹ The Southwest Conference was founded in 1914 and operated until the conclusion of the 1995-96 athletic year. Gary Cartwright, *0:00 To Go: Time Has Run Out on the Southwest Conference, but What a Time it Was*, SPORTS ILLUSTRATED, Oct. 30, 1995.

²⁰ *A Look Back at the Southwest Conference*, TEXAS ALMANAC, <http://www.texasalmanac.com/topics/sports/look-back-southwest-conference>.

²¹ *Id.*

²² The Big 12 Conference began play in 1996 and boasts 42 NCAA team titles and 492 individual national championships. *The Big 12 Conference*, BIG 12 CONFERENCE - OFFICIAL ATHLETIC SITE (Nov. 28, 2011), http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=1514841

²³ *A Look Back at the Southwest Conference*, *supra*, note 20.

Today, conferences have immense power with the ability to restructure the state of intercollegiate athletics. With the chase for stability among conference members and the pursuit of even more revenue, conferences look more like high school dating relationships than long-term marriages among institutions with similar academic and athletic goals. Conferences are now the sole negotiators among the purveyors in the media rights market and, thus, have substantial control to manipulate the market. Now, the media rights agreements entered into by conferences on behalf of their member institutions have inflated to in excess of \$1 billion. According to the *Sports Business Journal*, the major conferences have entered into the following media rights agreements:

Conference	Terms	Contract Years	Network(s)
Big Ten	\$1 billion/10 years	2007-08 through 2016-17	ESPN/ABC
	\$200 million/6 years	2011-12 through 2016-17	CBS
	\$2.8 billion/25 years	2007-08 through 2031-32	Big Ten Ntk
Big East	\$200 million/6 years	2007-08 through 2012-13	ESPN/ABC
SEC	\$2.25 billion/15 years	2009-10 through 2023-24	ESPN/ABC
	\$825 million/15 years	2009-10 through 2023-24	CBS
ACC	\$1.86 billion/12 years	2011-12 through 2022-23	ESPN/ABC
Big 12	\$1.17 billion/13 years	2012-13 through 2025-26	Fox
	\$480 million/8 years	2008-09 through 2015-16	ESPN/ABC
	\$78 million/4 years	2008-09 through 2011-12	FSN
Pac-12	\$3 billion/12 years	2011-12 through 2022-23	ESPN/Fox ²⁴

With the increase in media rights agreements, conferences are increasingly powerful, and possibly more powerful than the NCAA. With such power and the ability to re-open media rights agreements with the addition of new members, conference realignment, at least for the time being, is a side effect of the omnipotence and desire for increased revenue.²⁵ Conferences are now major players that can create seismic shifts in institution membership, revenue, and loyalty.

This article argues that conference realignment erodes many of the rivalries that make college sports exceptional and how it

²⁴ Michael Smith and John Durand, *Expanding ACC Will Reopen ESPN Deal*, SPORTS BUS. J. 1 & 32 (Sep. 26-Oct. 2, 2011).

²⁵ *Id.*

fails to account for the better interests of student-athletes. Intercollegiate athletics must change and redirect its focus to matters that benefit student-athletes instead of additional revenue. Part II of this article describes the changes to conference membership since 2010. Part III discusses recent conference realignment litigation. Finally, Part IV discusses the impact of conference realignment on student-athletes and the loss of rivalries among longtime conference rivals.

II. THE FRENZY OF CONFERENCE REALIGNMENT FROM 2010 TO PRESENT

In December 2009, the Big Ten Conference²⁶ (“Big Ten”) announced its interest in conference expansion.²⁷ Such an announcement led to rampant speculation and ultimately an ongoing case of intercollegiate athletic musical chairs. The following Division I institutions have changed their conference affiliation since 2010:

<u>Institution</u>	<u>Former Conference</u>	<u>New Conference</u>
Air Force Academy ²⁸	MWC	MWC/CUSA Merger
Belmont Univ. ²⁹	Atlantic Sun	Ohio Valley
Boise State Univ. ³⁰	WAC/MWC	Big East (football)/WAC
Brigham Young Univ. ³¹	MWC	WCC/Independent
Cal. St. Univ., Fresno ³²	WAC	MWC

²⁶ The Big Ten Conference was formed in 1896. *About the Conference*, BIG TEN CONFERENCE OFFICIAL ATHLETIC SITE, <http://www.bigten.org/school-bio/big10-school-bio.html>.

²⁷ *Big Ten Statement on Expansion*, BIG TEN CONFERENCE OFFICIAL ATHLETIC SITE (Dec. 15, 2009), <http://www.bigten.org/genrel/121509aaa.html>.

²⁸ *C-USA Board to Talk Merger*, ESPN OFFICIAL WEB SITE (FEB. 8, 2012), http://espn.go.com/college-sports/story/_id/7554045/conference-usa-board-discuss-possibility-merging-mountain-west-source-says.

²⁹ *Belmont to Join OVC*, COLLEGE SPORTS INFO. OFFICIAL WEB SITE (MAY 13, 2011) <http://collegesportsinfo.com/2011/05/13/belmont-to-join-ovc/>.

³⁰ *Boise State Moves to Mountain West*, ESPN OFFICIAL WEB SITE (June 11, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5276064>.

³¹ Brigham Young University competes in the West Coast Conference in all sports other than football. The football team is an independent and is not affiliated with a conference. Diamond Leung, *BYU Set to Join the West Coast Conference*, ESPN OFFICIAL WEB SITE (June 30, 2010), http://espn.go.com/blog/collegebasketballnation/post/_id/32536/byu-set-to-join-the-west-coast-conference.

³² *Nevada, Fresno State move to MWC*, ESPN OFFICIAL WEB SITE (Sep. 21, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5474774>.

Colorado State Univ. ³³	MWC	MWC/CUSA Merger
East Carolina Univ. ³⁴	MWC	MWC/CUSA Merger
Houston Baptist Univ. ³⁵	Great West	Southland
Marshall Univ. ³⁶	Conference USA	MWC/CUSA Merger
Naval Academy ³⁷	Independent	Big East (football)
Northern Kentucky Univ. ³⁸	GLVC	Atlantic Sun
Oral Roberts Univ. ³⁹	The Summit League	Southland
Rice Univ. ⁴⁰	Conference USA	MWC/CUSA Merger
San Diego State Univ. ⁴¹	MWC	Big East
Southern Methodist Univ. ⁴²	Conference USA	Big East
Southern Utah Univ. ⁴³	The Summit League	Big Sky
Syracuse Univ. ⁴⁴	Big East	ACC
Temple Univ. ⁴⁵	Atlantic 10	Big East
Texas A&M Univ. ⁴⁶	Big 12	SEC
Texas Christian Univ. ⁴⁷	MWC/Big East	Big 12

³³ *Supra* note 28.

³⁴ *Id.*

³⁵ *Houston Baptist to Join Southland on July 1, 2013*, SOUTHLAND CONFERENCE OFFICIAL WEB SITE (NOV. 21, 2011), http://www.southland.org/ViewArticle.dbml?DB_OEM_ID=18400&ATCLID=205336618

³⁶ *Supra* note 28.

³⁷ *Navy to Make Big East Its First Football Conference Home*, BIG EAST CONFERENCE OFFICIAL WEB SITE (JAN. 24, 2012), <http://www.bigeast.org/News/tabid/435/Article/230685/navy-to-make-big-east-its-first-football-conference-home.aspx>.

³⁸ *Northern Kentucky Joins Atlantic Sun*, ATLANTIC SUN CONFERENCE OFFICIAL WEB SITE (DEC. 8, 2011), <http://www.atlanticsun.org/msoccer/news/2011-12/5920/northern-kentucky-to-join-atlantic-sun/>.

³⁹ *Oral Roberts to Join Southland Conference*, SOUTHLAND CONFERENCE OFFICIAL WEB SITE (OCT. 25, 2011), http://www.southland.org/ViewArticle.dbml?DB_OEM_ID=18400&ATCLID=205322100

⁴⁰ *Supra* note 28.

⁴¹ *Big East Conference Introduces 5 New Schools*, ESPN OFFICIAL WEB SITE (DEC. 8, 2011), http://espn.go.com/college-sports/story/_id/7327683/big-east-conference-introduces-boise-state-broncos-san-diego-state-aztecs-houston-cougars-smu-mustangs-ucf-knights.

⁴² *Id.*

⁴³ *Southern Utah, North Dakota Join Big Sky*, BIG SKY CONFERENCE OFFICIAL WEB SITE (NOV. 1, 2010), http://www.bigskyconf.com/news/2010/11/1/GEN_1101105326.aspx.

⁴⁴ *See Darcy, infra*, note 64.

⁴⁵ *Temple Joins Big East Conference*, BIG EAST CONFERENCE OFFICIAL WEB SITE (MAR. 7, 2012), <http://www.bigeast.org/News/tabid/435/Article/232409/temple-university-joins-big-east-conference.aspx>.

⁴⁶ *Mitch Sherman, A&M Doing its Recruiting Homework*, ESPN OFFICIAL WEB SITE (Oct. 4, 2011), http://espn.go.com/college-sports/recruiting/football/story/_id/7058408/texas-looking-perfect-sec-player.

⁴⁷ *Texas Christian University joined the Big 12 Conference and left the Big East Conference without playing a single game in the Big East Conference. Andrea Adelson, TCU Leaves for Big 12 as Expected*, ESPN OFFICIAL WEB SITE (Oct. 10, 2011), http://espn.go.com/blog/bigeast/post/_id/24805/tcu-leaves-for-big-12-as-expected.

Texas State Univ. ⁴⁸	Southland	WAC
Tulane Univ. ⁴⁹	Conference USA	MWC/CUSA Merger
Univ. of Ala., Birmingham ⁵⁰	Conference USA	MWC/CUSA Merger
Univ. of Central Florida ⁵¹	Conference USA	Big East
Univ. of Colorado ⁵²	Big 12	Pac 12
Univ. of Denver ⁵³	Sun Belt	WAC
Univ. of Hawaii ⁵⁴	WAC	MWC/Big West
Univ. of Houston ⁵⁵	Conference USA	Big East
Univ. of Memphis ⁵⁶	Conference USA	Big East
Univ. of Missouri ⁵⁷	Big 12	SEC
Univ. of Nebraska ⁵⁸	Big 12	Big 10
Univ. of Nebraska, Omaha ⁵⁹	MIAA	The Summit League
Univ. of Nevada ⁶⁰	WAC	MWC
Univ. of Nev., Las Vegas ⁶¹	MWC	MWC/CUSA Merger
Univ. of New Mexico ⁶²	MWC	MWC/CUSA Merger
Univ. of North Dakota ⁶³	Great West	Big Sky

⁴⁸ Art Garcia, *Texas-Arlington Expected to Join WAC*, ESPN OFFICIAL WEB SITE (July 14, 2011), http://espn.go.com/dallas/nbc/story/_id/6766969/texas-arlington-mavericks-expected-join-wac.

⁴⁹ *Supra* note 28.

⁵⁰ *Id.*

⁵¹ *Supra* note 41.

⁵² *Colorado to Pac-10 in 2011 Still an Option*, ESPN OFFICIAL WEB SITE (Aug. 19, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5474774>.

⁵³ Ted Miller, *Sources: Three Teams to Join WAC*, ESPN OFFICIAL WEB SITE, (Nov. 10, 2010), http://espn.go.com/blog/pac10/post/_id/13361/colorado-to-pac-10-in-2011-still-an-option.

⁵⁴ Andy Katz, The University of Hawaii joined the Mountain West Conference in football and the Big West Conference in all other sports. *Hawaii Joins MWC, Big West for 2012*, ESPN OFFICIAL WEB SITE (Dec. 10, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5907111>.

⁵⁵ *Supra* note 41.

⁵⁶ University of Memphis Joins Big East Conference, BIG EAST CONFERENCE OFFICIAL WEB SITE (FEB. 8, 2012), <http://www.bigeast.org/News/tabid/435/Article/231211/university-of-memphis-joins-big-east-conference.aspx>.

⁵⁷ Edward Aschoff, *Welcome to the SEC Missouri*, ESPN OFFICIAL WEB SITE (Nov. 7, 2011), http://espn.go.com/blog/sec/post/_id/32521/welcome-to-the-sec-missouri.

⁵⁸ Adam Rittenberg, *Nebraska to Celebrate BIG Arrival Friday*, ESPN OFFICIAL WEB SITE (June 30, 2011), http://espn.go.com/blog/bigten/post/_id/28632/nebraska-to-celebrate-big-arrival-friday.

⁵⁹ University of Nebraska at Omaha Accepts Invitation to Join Summit League, THE SUMMIT LEAGUE CONFERENCE OFFICIAL WEB SITE (MAR. 25, 2011), http://www.thesummitleague.org/ViewArticle.dbml?DB_OEM_ID=3900&ATCLID=205122920.

⁶⁰ *Nevada, Fresno State move to MWC*, ESPN OFFICIAL WEB SITE (Aug. 19, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5474774>.

⁶¹ *Supra* note 28.

⁶² *Id.*

⁶³ *Supra* note 43.

Univ. of Pittsburgh ⁶⁴	Big East	ACC
Univ. of Seattle ⁶⁵	Independent	WAC
Univ. of South Dakota ⁶⁶	Great West	The Summit League
Univ. of Southern Miss. ⁶⁷	Conference USA	MWC/CUSA Merger
Univ. of Texas, Arlington ⁶⁸	Southland	WAC
Univ. of Texas, El Paso ⁶⁹	Conference USA	MWC/CUSA Merger
Univ. of Tx., San Antonio ⁷⁰	Southland	WAC
Univ. of Tulsa ⁷¹	Conference USA	MWC/CUSA Merger
Univ. of Utah ⁷²	MWC	Pac 12
Univ. of Wyoming ⁷³	MWC	MWC/CUSA Merger
West Virginia Univ. ⁷⁴	Big East	Big 12

There is further speculation other institutions will soon change conferences. Because of the mass movement of institutions, conferences at all levels of play are affected and are seemingly fighting to remain in existence.

III. LEGAL CHALLENGES RELATING TO CONFERENCE REALIGNMENT

A. Big East Litigation

Following the announcement that the University of Miami (“Miami”), Virginia Polytechnic Institute and State University

⁶⁴ Kieran Darcy, *Syracuse, Pitt Stuck in Big East Until 2014*, ESPN OFFICIAL WEB SITE (Sept. 20, 2011), http://espn.go.com/blog/new-york/colleges/post/_id/2610/syracuse-pitt-stuck-in-big-east-until-2014.

⁶⁵ Diamond Leung, *Seattle Looks Forward to WAC*, ESPN OFFICIAL WEB SITE (June 14, 2011), http://espn.go.com/blog/collegebasketballnation/post/_id/31952/seattle-looks-forward-to-the-wac.

⁶⁶ South Dakota Accepts Invitation to Join Summit League, THE SUMMIT LEAGUE CONFERENCE OFFICIAL WEB SITE (MAR. 25, 2011), http://www.thesummitleague.org/ViewArticle.dbml?DB_OEM_ID=3900&ATCLID=3720305.

⁶⁷ *Supra* note 28.

⁶⁸ Andy Katz, *Sources: Three Teams to Join WAC*, ESPN OFFICIAL WEB SITE (Nov. 10, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5789078>.

⁶⁹ *Supra* note 28.

⁷⁰ Andy Katz, *Sources: Three Teams to Join WAC*, ESPN OFFICIAL WEB SITE (Nov. 10, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5789078>.

⁷¹ *Supra* note 28.

⁷² Ted Miller, *Happy Pac-12 Day!*, ESPN OFFICIAL WEB SITE (July 1, 2010), http://espn.go.com/blog/pac10/post/_id/22870/happy-pac-12-day.

⁷³ *Supra* note 28.

⁷⁴ David Ubben, *Big 12 Sees WVU as a Member in 2012*, ESPN OFFICIAL WEB SITE (Nov. 2, 2010), http://espn.go.com/blog/big12/post/_id/37852/big-12-sees-wvu-as-a-member-in-2012.

(“Virginia Tech”), and Boston College would leave the Big East Conference (“Big East”) to join the Atlantic Coast Conference⁷⁵ (“ACC”), a flurry of the members of the Big East filed lawsuits and countersuits.⁷⁶ The loss of these institutions placed the Big East in a less than advantageous position, because these institutions were the strongest football competitors in the conference. Understandably, the University of Connecticut (“UConn”) filed suit against Miami, Virginia Tech, Boston College, and the ACC for, among other things, breach of contract and breach of fiduciary duties.⁷⁷ Additionally, Boston College filed suit against the Big East seeking a declaration of the proper interpretation of the conference bylaws relating to the withdrawal notice and withdrawal fee.⁷⁸ After years of dispute, the Big East added several membership institutions to replace the departed institutions, and the parties settled all of the pending lawsuits against one another.⁷⁹ The departing institutions agreed to pay \$5 million to settle all claims and agreed to schedule nine football games against Big East competition from 2008 to 2012.⁸⁰

*B. Western Athletic Conference v. California State
University, Fresno*

Following California State University, Fresno State University (“Fresno State”) and the University of Nevada’s (“Nevada”) announcements that they intended to join the

⁷⁵ The Atlantic Coast Conference was founded on May 8, 1953 with seven initial members and currently has twelve member institutions. *About the ACC*, THE OFFICIAL ATHLETIC SITE OF THE ATLANTIC COAST CONFERENCE, <http://www.theacc.com/this-is/acc-this-is.html?&rsrc=nav>.

⁷⁶ *Conference Schedule Games as Part of Settlement*, ESPN OFFICIAL WEB SITE (May 3, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2052787>.

⁷⁷ *Univ. of Conn. v. Univ. of Miami*, Cause No. X07CV030081757S, 2003 Conn. Super LEXIS 2745 (Oct. 10, 2003); *Univ. of Conn. v. Atl. Coast Conf.*, Cause No. X07CV030082695S, 2004 Conn. Super LEXIS 369 (Feb. 23, 2004).

⁷⁸ The court granted Boston College’s motion for summary judgment and determined that Boston College could withdraw from the Big East on July 1, 2005, with the payment of a \$1 million withdrawal fee, or before July 1, 2005, with the payment of a \$2 million withdrawal fee. *Trustees of Boston Coll. v. Big E. Conf.*, Cause No. 03-4818 BLS, 2004 Mass. Super LEXIS 298 *26-27 (Aug. 18, 2004).

⁷⁹ *W. Va. Univ. Bd. of Governors v. Big E. Conf.*, No. 11-C-695 at 4 (W. Va. Cir. Ct. Oct. 31, 2011) [hereinafter *WVU Complaint*]. *Complaint for Declaratory Judgment, Breach of Contract, and Permanent Injunctive Relief*.

⁸⁰ *Conferences Schedule Games as Part of Settlement*, ESPN OFFICIAL WEB SITE (May 3, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2052787>.

Mountain West Conference⁸¹ (“Mountain West”), the Western Athletic Conference (“WAC”) filed suit seeking declaratory and injunctive relief against Fresno State, Nevada, and the Mountain West.⁸² According to Section 7 of the WAC Bylaws,

[a]ny member may withdraw from the Conference by filing with each of the other Members and the Commissioner of the Conference, on or before July 1 of any year, an official notice of withdrawal, in which event the withdrawal shall be effective the following June 30. Any withdrawing Member shall, however, play all approved athletic competitions scheduled with the other Members in accordance with the governing contract unless such competitions are waived by written consent of the parties affected.⁸³

Fresno State and Nevada provided notice of withdrawal subsequent to the June 30th deadline provided in the WAC Bylaws. They also specifically provided notice of withdrawal on August 20, 2010 and August 24, 2010;⁸⁴ however, on July 1, 2011, both institutions expressed a desire to compete in the Mountain West. The WAC argued the potential competition violated the Bylaws’ terms.⁸⁵

The WAC asserted that Fresno State and Nevada’s defections would cause great harm to its membership; therefore, it sought a declaration that both institutions are bound by the WAC Bylaws and must remain members of the WAC through June 30, 2012.⁸⁶ Additionally, the WAC argued that the conference and its remaining members will suffer immediate irreparable injury for the following reasons: 1) the incalculable and severe financial injury to the WAC and its remaining institutions because their departure places negotiations for media rights with ESPN in jeopardy; 2) the impossibility of scheduling football games; 3) the

⁸¹ The Mountain West Conference started in 1999 and has celebrated three team national championships and twenty-seven individual national championships since its inception. *This is the Mountain West*, MOUNTAIN WEST CONFERENCE OFFICIAL ATHLETIC SITE, <http://www.themwc.com/about/mwc-about.html>.

⁸² *W. Athletic Conf. v. Cal. State Univ., Fresno*, No. 10 CV-4281 (Colo. Dist. Ct., Sept. 9, 2010) [hereinafter WAC Complaint].

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 2-3.

⁸⁵ *Id.*

⁸⁶ *Id.* at 3.

irreparable injury to the status of the WAC to receive revenue distribution from the BCS;⁸⁷ 4) the irreparable injury to the conference's national stature; 5) the premature departure of Fresno State and Nevada would irreparably interfere with the process and prospects of finding acceptable replacement institutions; and 6) the departure of Fresno State and Nevada would jeopardize the prospects of the WAC fulfilling its football bowl obligations.⁸⁸ As a result, the WAC sought injunctive relief to prohibit Fresno State, Nevada, and the Mountain West "from scheduling any athletic contests that will interfere with the scheduling of [WAC] games . . . through the 2011-13 athletic seasons."⁸⁹

Shortly after filing, the parties resolved the dispute and entered into a settlement agreement.⁹⁰ According to the terms of the agreement, Fresno State and Nevada each agreed to pay the WAC \$900,000 for a combined total of \$1.8 million.⁹¹ In exchange, Fresno State and Nevada agreed to compete in the WAC through June 30, 2012, and the WAC agreed to release its claims against both institutions.⁹²

C. *West Virginia University v. The Big East Conference*

On October 31, 2011, West Virginia University ("WVU"), by and through the West Virginia Board of Governors, filed suit against the Big East⁹³ seeking declaratory relief, permanent

⁸⁷ The BCS has served as a five game showcase of college football designed to ensure the top two rated teams in the country meet for a national championship game and to create exciting matchups among eight other highly competitive teams. Michael A. McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C. L. REV. 517, 517-18 (2011).

⁸⁸ See WAC Complaint, *supra*, note 82 at 4.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* Settlement Agreement and Release of Claims, WACSPORTS.COM, <http://www.wacsports.com/pdf8/719352.pdf>.

⁹¹ *Id.* at 2 § 3.

⁹² *Id.* at 1-4, § 2, 10, 11.

⁹³ The Big East Conference was formed on May 31, 1979, when seven member institutions, Providence College, Georgetown University, St. John's University, Syracuse University, Seton Hall University, University of Connecticut, and Boston College, formed an alliance for the purposes of developing an intercollegiate conference. Since that time, the Big East Conference member institutions have won twenty-eight national championships in six different sports and one hundred twenty-eight student-athletes have won individual national titles. The Big East Conference is headquartered in Providence, Rhode Island and administers to more than 5,500 student-athletes.

injunctive relief, and damages for breach of contract.⁹⁴ WVU joined the Big East as a football member only in 1991 for its inaugural football season and subsequently joined as a full member in all sports in 1995.⁹⁵ For the following eight years, the Big East had seven institutions that competed in NCAA Division I football and seven that did not compete in Division I football.⁹⁶ According to WVU, this arrangement led to “instability in the conference” and caused Miami, Virginia Tech, and Boston College to withdraw from the Big East in order to join the ACC.⁹⁷ Following the defection of these institutions to the ACC, the Big East invited the University of Louisville, the University of Cincinnati, and the University of South Florida to join as full members competing in NCAA Division I football. The Big East also invited DePaul University and Marquette University to join as full members not competing in NCAA Division I football.⁹⁸ As such, the Big East reorganized with sixteen member institutions including eight institutions competing in NCAA Division I football and eight non-football institutions.⁹⁹

In March 2008, the Big East members agreed to amend the conference bylaws entitled the Big East Conference Amended and Restated Bylaws (“Big East Bylaws”).¹⁰⁰ According to WVU, the critical purpose of the Big East is to “[e]nhance the opportunities for participation in, and the level of competition of, men’s and women’s intercollegiate athletics on an equitable basis[.]”¹⁰¹ Among other things, the Big East Bylaws provide for various decisions to be made by the member institution leaders including matters relating to football members. According to the Big East Bylaws, Big East members that do not offer football are permitted to vote on football-related matters.¹⁰²

About the Big East, BIG EAST CONFERENCE OFFICIAL WEB SITE, <http://www.bigeast.org/AbouttheBIGEAST.aspx>

⁹⁴ See WVU Complaint, *supra*, note 79 at 1.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 4-5.

On October 28, 2011, WVU accepted an invitation to join the Big 12.¹⁰³ The Big East Bylaws, provide that a withdrawing member is 1) required to present written notice of its intent to withdraw from the conference; 2) specify an effective date of withdrawal, which must be at least twenty-seven months after the date that the withdrawal notice is received by the commissioner; and 3) pay a withdrawal fee to the Big East in the amount of \$5 million.¹⁰⁴ The Big East maintained that WVU is not eligible to join the Big 12 until July 1, 2014.¹⁰⁵ WVU, however, stated it “had no choice but to accept the Big XII’s offer” because the conference had “denigrated into a non-major football conference” in light of the defection of Texas Christian University (before playing a game), Syracuse University, the University of Pittsburgh, and potentially UConn.¹⁰⁶

As a result, WVU stated the denigration of the conference is “a direct and proximate result of ineffective leadership and breach of fiduciary duties to the football schools by the Big East Conference and its commissioner.”¹⁰⁷ WVU also explained that the Big East and its commissioner¹⁰⁸ “failed to take proactive measures to maintain, let alone enhance, the level of competition for the Big East football schools” despite the Big East football institutions advocating for measures to be taken by the Big East and its commissioner.¹⁰⁹ Additionally, WVU argued the commissioner failed to protect the football playing institutions,

¹⁰³ Letter from James P. Clements, Ph.D., President, West Virginia University, to John M. Marinatto, Commissioner. The Big East Conference (Nov. 1, 2011) (on file with author), available at <http://www.kansan.com/news/2011/nov/01/west-virginia-takes-legal-action-get-out-big-east/>; *West Virginia University to Join Big 12 Conference*, BIG 12 CONFERENCE OFFICIAL WEB SITE, (Oct. 28, 2011), http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=205323383.

¹⁰⁴ See WVU Complaint, *supra*, note 79 at 5.

¹⁰⁵ Andrea Adelson, *W. Virginia Files Lawsuit Against Big East*, ESPN.COM (Oct. 31, 2011), http://espn.go.com/college-sports/story/_/id/7175251/west-virginia-files-civil-lawsuit-big-east-places-blame-commissioner-john-marinatto.

¹⁰⁶ See WVU Complaint, *supra*, note 79 at 5-6; see also Andy Katz & Joe Schad, *UConn Eyes ACC Move*, ESPN.COM, (Sept. 18, 2011), http://espn.go.com/college-sports/story/_/id/6989031/uconn-huskies-aggressively-seeking-acc-move-source-says.

¹⁰⁷ See WVU Complaint, *supra*, note 79 at 6-8.

¹⁰⁸ John Marinatto is the commissioner of the Big East Conference. *Conference Staff*, BIG EAST CONFERENCE OFFICIAL WEB SITE, <http://bigeast.org/AbouttheBIGEAST/ConferenceStaff.aspx>.

¹⁰⁹ See WVU Complaint, *supra*, note 79 at 6-7.

but took direct measures to protect the non-football playing institutions.¹¹⁰

Therefore, WVU filed suit seeking a declaration that the Big East Bylaws are void and have no effect as between the parties, or in the alternative, declaring that the Big East accepted WVU's proposal or offer to immediately withdraw from the conference.¹¹¹ Additionally, WVU argued that the twenty-seven month notice period provided for in the Big East Bylaws is an unreasonable restraint on trade and, thus, the Big East should be enjoined from enforcing such provision.¹¹² Finally, WVU stated the "actions and inactions of the Big East and its Commissioner" constituted a material breach of their agreement, which thereby excuses WVU from performance.¹¹³

Only five days later, the Big East returned the favor and sued WVU.¹¹⁴ The Big East argued that WVU was a party to and entered into three contracts relating to televising Big East football and men's and women's basketball contests.¹¹⁵ Each of these contracts run through the 2013 seasons. As a result of the defection of WVU, the Big East argued that such action will cause great harm to the Big East and its member institutions and will potentially violate the terms of these agreements.¹¹⁶ Additionally, the Big East noted that WVU's desire to compete in the Big 12 on or about July 1, 2012, violates Article 11 of the Big East Bylaws, which call for a twenty-seven month withdrawal period.¹¹⁷ Because of the alleged breaches, the Big East claimed that its member institutions are irreparably harmed, since, it will be "impossible to reschedule all of the Conference athletic contests in a fair and equitable manner. . . . [and] will likely incur [additional] costs and unquantifiable injuries."¹¹⁸ Therefore, the Big East seeks monetary damages (including court costs and attorneys'

¹¹⁰ *Id.* at 7; see also John Durand, *Big East Appears Left Behind by Media Influence that Created It*, SPORTS BUS. J. 13 (Oct. 17-23, 2011) (stating Big East Commissioner John Marinatto lost support among the conference membership).

¹¹¹ See WVU Complaint, *supra*, note 79 at 9-10.

¹¹² *Id.* at 12-13.

¹¹³ *Id.* at 10-12.

¹¹⁴ Big E. Conf. v. W. Va Univ., No. PB-11-6391 (R.I. Sup. Ct. Nov. 4, 2011) [hereinafter Big East Complaint].

¹¹⁵ *Id.* at 4-6.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 7-8.

¹¹⁸ *Id.* at 9.

fees) for the purported breach of Article 11 of the Big East Bylaws and injunctive relief seeking to obligate WVU “to participate fully in all scheduled Conference athletic events during the 2012-13 and 2013-14 seasons [i.e., through and including June 30, 2014].”¹¹⁹

According to Section 11.02(b) of the Big East Bylaws, “if a Member attempts or purports to withdraw from the Conference without complying to Section 11.02 (withdrawal procedures), the Conference shall be entitled to seek and obtain equitable relief.”¹²⁰ Thus, the parties to the Bylaws agree there is no adequate remedy at law and irreparable harm would be caused by failing to comply with the withdrawal provisions, which gives rise to injunctive relief.¹²¹

On February 13, 2012, the parties entered into a settlement agreement that allows WVU to withdraw from the Big East on June 30, 2012 and enter the Big 12 on July 1, 2012. In return, WVU agreed to pay the Big East \$20 million, the Big 12 contributed a portion of the settlement payment, and agreed to a consent judgment that states the Big East Bylaws are “valid and enforceable.”¹²²

*D. Baylor University v. Texas A&M University and
Southeastern Conference: It Did Not Happen, But What
If...*

The announcements by the University of Nebraska (“Nebraska”) and the University of Colorado (“Colorado”) that they were exiting the Big 12 to enter the Big Ten and Pac-12 Conference, respectively, sent shockwaves throughout the country and specifically to the institutions in the Big 12. Still, the remaining members of the Big 12 agreed to remain partners to keep the conference intact.¹²³ Thus, Nebraska and Colorado were thought to be the only defectors and paid exit fees of \$9.25 million

¹¹⁹ *Id.* at 9-10.

¹²⁰ THE BIG EAST CONFERENCE AM. & RESTATED BYLAWS, art. XI, § 11.02(b).

¹²¹ *Id.*

¹²² *Settlement Agreement*, WVGAZETTE.COM, http://www.wvgazette.com/mediafiles/document/2012/02/15/BigEast-SettleHickman_I120215124107.pdf.

¹²³ *Big 12 to Stay Together as a 10-Team League*, AOL OFFICIAL WEB SITE (June 14, 2010), <http://aol.sportingnews.com/ncaa-football/story/2010-06-14/texas-turns-down-pac-10s-invitation>.

and \$6.86 million,¹²⁴ respectively, to leave the conference to compete in their new conferences in 2011.¹²⁵ Unfortunately, the talk of realignment did not conclude with Nebraska and Colorado leaving for new conference affiliations. In September 2011, Texas A&M announced its admission to the SEC after initially being “rejected” by the conference.¹²⁶ In what appears as a legal maneuver, the SEC accepted Texas A&M for membership shortly after rejecting its initial bid.¹²⁷ As a result, Baylor made its desires known to all those listening that it would sue Texas A&M and the SEC.¹²⁸

*E. Navigating Texas Sovereign Immunity Law if Baylor
Brought Suit Against Texas A&M*

Texas is one of only four states that consistently uphold sovereign immunity in the context of contract disputes.¹²⁹ The Texas Supreme Court has held that the concept of sovereign immunity embraces two principles: (1) immunity from suit; and (2) immunity from liability, which are separate and distinct.¹³⁰ Immunity from suit bars an action against the state unless the state expressly consents to the suit.¹³¹ In contrast, immunity from liability protects the state from judgment even if the legislature has expressly consented to the suit.¹³²

¹²⁴ Such amounts were negotiated sums to fulfill each institutions obligation under Big 12 Conference Bylaws. BIG 12 CONFERENCE BYLAWS §§ 3.1-3.3.

¹²⁵ David Briggs, *The Cost of Walking Away? It's Negotiable*, COLUMBIA TRIB. (Oct. 14, 2011), <http://www.columbiatribune.com/news/2011/oct/14/the-cost-of-walking-away-its-negotiable/>.

¹²⁶ *SEC Nixes Talk About Expansion, for Now*, FOX SPORTS OFFICIAL WEB SITE (Aug. 15, 2011), <http://msn.foxsports.com/collegefootball/story/Southeastern-Conference-nixes-talk-about-expansion-including-Texas-A%26M-081411>.

¹²⁷ Andy Katz & Joe Schad, *Big 12 Line Up Against A&M*, ESPN SPORTS OFFICIAL WEB SITE (Sept. 8, 2011), http://espn.go.com/college-sports/story/_/id/6939017/texas-aggies-accepted-sec-legal-threat-delays-move.

¹²⁸ Gil LeBreton, *Baylor Can File Suit, But History is on Texas A&M's Side*, FORT WORTH STAR TELEGRAM, (Sept. 8, 2011), <http://www.star-telegram.com/2011/09/08/3349177/baylor-can-file-suit-but-history.html>.

¹²⁹ L. Katherin Cunningham & Tara D. Pearce, *Contracting with the State: The Daring Five – The Achilles' Heel of Sovereign Immunity?*, 31 ST. MARY'S UNIV. L.J. 255, 274 n. 99 (1999).

¹³⁰ *Gen. Serv. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001).

¹³¹ *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520-21 (Tex. 2001).

¹³² *Id.*

Furthermore, a state is liable for contracts made for its benefit as if it were a private person.¹³³ Consequently, when the state contracts with private citizens, it waives its immunity from liability.¹³⁴ In *Federal Sign v. Texas Southern University*, the Texas Supreme Court reaffirmed the principle that the State of Texas, its agencies, and its officials do not waive immunity to suit by merely entering into a contract with a private entity or person;¹³⁵ however, the Court restricted its holding to the facts of the case before it and expressly warned:

We hasten to observe that neither this case nor the ones on which it relies should be read too broadly. We do not attempt to decide this issue in any other circumstances other than the one before us today. There may be other circumstances where the state may waive its immunity by conduct other than simply executing a contract so that it is not always immune from suit when it contracts.¹³⁶

In a concurring opinion, Justice Hecht, joined by three other justices, all of whom joined the six-member majority opinion, restricted the holding to its facts and specifically pointed out that the decision did not apply to debt obligations such as bonds, because the contract in question dealt exclusively with goods and services.¹³⁷ In addition, the concurring opinion posed hypotheticals regarding when a party had tendered performance to the state, fully performed services on state property, or delivered goods that were accepted by the state, and concluded that the hypotheticals were not decided by the *Federal Sign* opinion.¹³⁸ The concurring opinion emphasized and warned that the state may waive immunity to suit by conduct other than simply executing a contract. It concluded by stating “[i]n short, today’s decision does not hold that the state is always immune from suit for breach of contract absent legislative consent; it holds only that the mere

¹³³ *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).

¹³⁴ *Id.* at 405-406; *State v. Elliott*, 212 S.W. 695, 698 (Tex. Civ. App.—Galveston 1919, ref.).

¹³⁵ *Fed. Sign*, 951 S.W.2d at 406-408.

¹³⁶ *Id.* n.1. at 408 .

¹³⁷ *Id.* at 413 (Hecht, J., concurring).

¹³⁸ *Id.*

execution of a contract for goods and services, without more, does not waive immunity from suit.”¹³⁹

The Texas Supreme Court then held that the waiver-by-conduct exception to sovereign immunity could not be judicially adopted in light of the existence of Texas Civil Practice and Remedies Code Chapter 107 and Texas Government Code Chapter 2260.¹⁴⁰ Also, the court held that courts must defer to the legislature on whether to waive sovereign immunity.¹⁴¹ Consequently, the court concluded that the only means of redressing breach of contract claims against the state is with legislative approval;¹⁴² therefore, unless a particular statute confers consent, a person cannot sue the state for breach of contract without legislative consent under Texas Civil Practice and Remedies Code Chapter 107 and Texas Government Code Chapter 2260 (hereinafter Chapter 2260). Thus, compliance with the notice and claim procedures of Chapter 2260 is a mandatory prerequisite before a person can petition to sue the state.¹⁴³

One interpretation of this decision could lead to the conclusion that the Texas Supreme Court rejected a waiver-by-conduct theory as to any contract with the State of Texas. But, the court’s analysis was based largely on that all the appeals before it were within the coverage of Texas Civil Practice and Remedies Code Chapter 107 and Chapter 2260. The court concluded that the legislature had foreclosed the possibility for a waiver-by-conduct exception in breach of contract claims covered by the statutory provisions.¹⁴⁴

In 2002, the Texas Supreme Court decided a case that at first appeared to bar the waiver-by-conduct theory, but at the same time maintains its potential validity.¹⁴⁵ In *Texas Natural Resource Conservation Commission v. IT-Davy*, IT-Davy’s contract was not subject to the provisions of Chapter 2260, but was clearly within the provisions of Texas Civil Practice and Remedies Code Chapter 107.¹⁴⁶ IT-Davy alleged it had fully performed the contract and

¹³⁹ *Id.* at 412-413 (Hecht, J., concurring).

¹⁴⁰ *Gen. Serv. Comm’n*, 39 S.W.3d at 595.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 595-96.

¹⁴⁴ *Id.* at 597-600.

¹⁴⁵ *Tex. Nat. Res. Conserv. Comm’n v. IT-Davy*, 74 S.W.3d 849, 853-55 (Tex. 2002).

¹⁴⁶ *Id.*

that the Texas Natural Resource Conversation Commission had accepted the full performance.¹⁴⁷ These facts were assumed to be true because the case was before the court on a petition to review the court of appeals' ruling on an interlocutory appeal from the trial court's denial of a plea to the jurisdiction based on sovereign immunity.¹⁴⁸

Furthermore, the Texas Supreme Court reaffirmed its holding in *General Services Commission v. Little-Tex* that only the legislature can waive or abrogate its sovereign immunity, and the court refused to recognize a waiver-by-conduct theory.¹⁴⁹ The concurring justices concluded that the court could, however, still recognize waiver other than by express consent or statutory authorization in future cases that involve acknowledged contractual compliance and a refusal to pay the contract price.¹⁵⁰

The Texas Supreme Court appears to indicate in multiple cases that the waiver-by-conduct doctrine is no longer a viable argument; however, each opinion is left with a caveat of possibility in a certain case.¹⁵¹ However, the court has never found that a governmental body (including an institution of higher learning) has waived sovereign immunity by entering into a contractual agreement. Therefore, a plaintiff is left to rely on cases from the courts of appeals, which by and large fall on *Texas Southern University v. State Street Bank & Trust Company*.¹⁵² In *State Street Bank*, the Texas Court of Appeals held that government officials lured the party into entering into a contractual agreement with false promises, and then disclaimed any obligation under the contract; therefore, Texas Southern University waived sovereign immunity based on its conduct.¹⁵³

Coach Mike Leach, whose lawsuit against Texas Tech University relating to his termination was recently denied review of his waiver-by-conduct argument by the Texas Supreme Court, cited *Texas Southern University* as authority for the proposition that a state institution can waive sovereign immunity by conduct,

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 853-55 (Hecht, J., concurring).

¹⁴⁹ *Id.* at 853-54.; *Gen. Serv. Comm'n*, 39 S.W.3d at 595.

¹⁵⁰ *IT-Davy*, 74 S.W.3d at 861-63 (Hecht, J., concurring).

¹⁵¹ *Id.*; *Fed. Sign*, 951 S.W.2d at 412-13.

¹⁵² *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 907-908 (Tex. App.—Houston [1st Dist.] 2007, pet. den.).

¹⁵³ *Id.* at 908.

but the Amarillo Court of Appeals failed to follow his analysis and held that the Texas Supreme Court has not acknowledged a single case that has allowed waiver-by-conduct.¹⁵⁴ As such, Texas Tech University's appeal in favor of sovereign immunity was granted and review was denied by the Texas Supreme Court.¹⁵⁵ According to a long line of case law that simply has failed to adopt a single case that would grant sovereign immunity based on the doctrine of waiver-by-conduct, Texas A&M would more than likely be successful in defending itself against a breach of contract cause of action.

Baylor would not be precluded from seeking relief by equitable or declaratory means.¹⁵⁶ Thus, Baylor could maintain an action to enjoin Texas A&M, but would not be able to seek monetary damages. For example, Baylor could argue that the defection of Texas A&M would cause 1) scheduling difficulties with other member institutions; 2) parties to media rights agreements would terminate their agreements with the Big 12 and member institutions; 3) the national reputation of the Big 12 would be diminished; and 4) the Big 12 is unable to attract other acceptable replacements.

F. Potential Claims against the Southeastern Conference

The SEC worked diligently to give the appearance that it did not attempt to procure Texas A&M for admission into the conference.¹⁵⁷ In fact, the SEC initially denied Texas A&M's request for admission only to reverse the decision in subsequent weeks.¹⁵⁸ Clearly, such maneuvers were created to avoid potential legal claims in light of Baylor's threats of litigation. Specifically, Baylor would likely have sought monetary damages, if suit was filed, pursuant to a cause of action for tortious interference with a contract. Unlike Texas A&M, the SEC, a private company, will not

¹⁵⁴ *Leach v. Tex. Tech Univ.*, 335 S.W.3d 386, 400-01 (Tex. App.—Amarillo 2011, pet. denied).

¹⁵⁵ *Id.*

¹⁵⁶ *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995); *Leach*, 335 S.W.3d at 399; *City of Arlington v. Randall*, 301 S.W.3d 896, 906-07 (Tex. App.—Fort Worth 2009, pet. filed).

¹⁵⁷ *SEC Nixes Talk About Expansion, for Now, supra*, note 97.

¹⁵⁸ *Katz & Schad, supra* note 98.

have a sovereign immunity defense and, thus, would have to defend the merits of the claim.

The elements for a tortious interference with a contract cause of action are: (1) the existence of a contract subject to interference; (2) the occurrence of an act of interference that was willful and intentional; (3) the act was a proximate cause of the plaintiff's damage; and (4) actual damage or loss occurred.¹⁵⁹

In reviewing a claim of this kind, the first question will be how did the relationship originate? During the domino effect created by the Big Ten's announcement that it was considering conference expansion, SEC Commissioner Mike Slive contacted the Big 12. Commissioner Slive informed the Big 12 that the SEC would make advances to Texas A&M and Oklahoma to determine whether those institutions would consider joining the SEC.¹⁶⁰ Although both Texas A&M and Oklahoma did not seek admission to the SEC at that time, Commissioner Slive continued to discuss and approach Texas A&M about joining the SEC including a discussion at the 2011 Cotton Bowl in Dallas, Texas.¹⁶¹ Indeed, when the Board of Regents of Texas A&M provided approval for President Bowen Loftin to gain admission to the SEC, Commissioner Slive slyly stated, "I believe the SEC would favorably consider that."¹⁶² Thus, the genesis of the relationship came at the insistence of the SEC with the intent of coaxing Texas A&M to join the SEC.

A move by Texas A&M from the Big 12 to the SEC will have large ramifications on a national scale including the possible dissolution of the Big 12. As such, Texas A&M's withdrawal from the Big 12 could have affected media rights agreements that could have substantially reduced the revenue distributed to Big 12 member institutions like Baylor. In fact, Baylor may not be able to gain acceptance into another conference that would provide for revenue at or near the level of the Big 12. As such, the overtures made by the SEC to Texas A&M constitute interference with

¹⁵⁹ *Browning-Ferris Indus. v. Reyna*, 865 S.W.2d 925, 926 (Tex. 1993); *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991).

¹⁶⁰ Interview with Anonymous Source, Dallas, Texas (Oct. 15, 2011).

¹⁶¹ *Id.*

¹⁶² Paul Burka, *The End: How Did It Happen? What Does it Mean?*, TEXAS MONTHLY, Nov. 2011, at 116.

existing contracts and likely the proximate cause for any damages that arise.

The more difficult element at this stage is whether Baylor has been damaged by the SEC's conduct. If the Big 12 stays intact, as it appears it will, and the media rights holders do not seek to terminate or otherwise renegotiate the terms of existing media rights agreements, then Baylor's damages are substantially reduced. Currently, it appears that the Big 12 will remain a viable conference on a national scale. However, if the Big 12 dissolves or media rights holders seek to alter the revenue stream provided in accordance with negotiated agreements, then Baylor will likely have a multi-million dollar claim for damages.

IV. WHAT IS THE AFFECT OF CONFERENCE REALIGNMENT?

The desire to win at virtually any cost and to attract elite athletes combined with the increases in public interest in intercollegiate athletics, in a consumer sense, has led to a highly commercialized world of intercollegiate athletics that focuses more heavily on revenue than anything else.¹⁶³ The former commissioner of the Big East, Mike Tranghese, summarized conference realignment as follows:

I think college football has just taken control of everything. All these moves are about football and money and greed . . . What we have are little fiefdoms who have conference names and we're living in a society where it's almost like its Wall Street. Greed is good and I'm Gordon Gecko.¹⁶⁴

Comments like these require introspective questions like what are the effects of realignment and what is the actual focus of intercollegiate athletics?

¹⁶³ Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 991 (1987).

¹⁶⁴ *Big 12 Mulling Big East Merger*, ESPN SPORTS OFFICIAL WEB SITE (Sept. 19, 2011), http://espn.go.com/college-football/story/_/id/6993604/big-east-big-12-talking-possible-merger-sources-say.

A. *What about the Student-Athletes?*

For years, the NCAA has fought the notion that major college football is a breeding ground for the National Football League.¹⁶⁵ The NCAA commonly points to the academic pursuits of student-athletes and concludes that it offers a product that is distinguishable from professional sports.¹⁶⁶ Currently, intercollegiate athletics is facing the most volatile period ever observed. There are no shortages of critics that bemoan the treatment of student-athletes. In fact, Michael Lewis, the author of *The Blind Side: Evolution of a Game*, joined the debate in 2007 when he drafted an opinion column for the *New York Times* and stated:

Everyone associated with [intercollegiate athletics] is getting rich except the people whose labor creates the value. At this moment there are thousands of big-time college football players, many of whom are black and poor. They perform for the intense pleasure of millions of rabid college football fans, many of whom are rich and white The poor black kids put up with it because they find it all but impossible to pursue N.F.L. careers unless they play at least three years in college. Less than one percent actually sign professional football contracts and, of those, an infinitesimal fraction ever make serious money. But their hope is eternal, and their ignorance exploitable. Put that way the arrangement sounds like simple theft; but up close, inside the university, it apparently feels like high principle.¹⁶⁷

Also, former shoe company executive, Sonny Vaccaro, has made it his personal mission to rid intercollegiate athletics of exploitation and has stated “young kids [are] misused in the system of the NCAA.”¹⁶⁸ Similarly, United States Congressman

¹⁶⁵ *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1090 (7th Cir. 1992).

¹⁶⁶ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984).

¹⁶⁷ Michael Lewis, *Serfs of the Turf*, N.Y. TIMES (Nov. 11, 2007), <http://www.nytimes.com/2007/11/11/opinion/11lewis.html>.

¹⁶⁸ Lewis Rice, *At HLS Symposium, the “Godfather of Grassroots Basketball” Decries Exploitation of College Athletes* (Apr. 7, 2011), <http://www.law.harvard.edu/news/spotlight/student-pursuits/sonn-vaccaro-sports-law-symposium.html>. (Mr. Vaccaro has advocated extensively on behalf of student-athletes and has indicated that third-party commercial entities have to pay endorsement fees to

Bobby Rush likened the NCAA to “Al Capone” and to “the Mafia.”¹⁶⁹ Yet, the most provocative viewpoint on intercollegiate athletics came from historian Taylor Branch in which he called the NCAA a “classical cartel” that has “an unmistakable whiff of the plantation.”¹⁷⁰ Indeed, Mr. Branch stated “[c]ollege sports, as overseen by the N.C.A.A., is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized.”¹⁷¹

Student-athletes are fighting for their share of the revenue created by major college football and major college basketball while studies argue that athletic scholarships place student-athletes at poverty levels.¹⁷² These student-athletes have even petitioned the NCAA for a slice of the television revenue created by their play.¹⁷³ These overtures have been met with negativity and no prospect of becoming a reality, but that has not stopped the media from devising ways to compensate student-athletes for their play.¹⁷⁴ Yet, member institutions require student-athletes to travel thousands of miles to play a single conference game in light of the changing geography of the modern conference.¹⁷⁵ NCAA President Mark Emmert questioned this practice and stated “[n]obody was talking about what this is going to do for student-athletes or intercollegiate athletics programs. It was all about let’s

institutions due to NCAA rules, but they really want the student-athletes. Telephone Interview with Sonny Vacarro (Apr. 13, 2011).

¹⁶⁹ *Bobby Rush Compares NCAA to Mafia*, ESPN SPORTS OFFICIAL WEB SITE (Nov. 2, 2011), http://espn.go.com/college-sports/story/_id/7177833/illinois-congressman-bobby-rush-compares-ncaa-mafia.

¹⁷⁰ Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/print/2011/10/the-shame-of-college-sports/8643>.

¹⁷¹ *Id.*

¹⁷² Ramogi Huma & Ellen J. Staurowsky, Ph.D., *The Price of Poverty in Big Time College Sports*, NCPANOW.ORG, (Sep. 2011); *Report Makes Case for Paying Players*, ESPN SPORTS OFFICIAL WEB SITE (Sept. 12, 2011), http://espn.go.com/college-sports/story/_id/6962151/advocacy-group-says-top-college-athletes-worth-six-figures.

¹⁷³ *Petition Seeks Slice of College TV Money*, ESPN SPORTS OFFICIAL WEB SITE (Oct. 24, 2011), http://espn.go.com/college-sports/story/_id/7145251/college-athletes-seeking-cut-television-revenue-cover-school-costs.

¹⁷⁴ George Dohrmann, *Pay for Play*, SPORTS ILLUSTRATED, Nov. 7, 2011, at 52-59.

¹⁷⁵ If Brigham Young University accepts conference admission from the Big East Conference, it would require student-athletes to travel approximately 2,500 miles for some conference games. *Big East Focused on Adding BYU Cougars*, ESPN SPORTS OFFICIAL WEB SITE (Nov. 16 2011), http://espn.go.com/college-football/story/_id/7244078/big-east-conference-focused-adding-byu-cougars.

make a deal.”¹⁷⁶ University of Texas head football coach Mack Brown had a similar take on conference realignment and stated “[a]s much as we talk about money, as much as we talk about college football . . . we better go back and make sure that we’re taking care of the players”¹⁷⁷

By all means, revenue in intercollegiate athletics is important and vital to the success of student-athletes and institutions of higher learning. It is important to provide opportunities to student-athletes and to the student body at large to share in high-level intercollegiate competition. Still, in the quest to secure the largest media rights agreements and best coaches, the powers of intercollegiate athletics forget about the welfare of student-athletes. Also, the frequent travel across the country to compete throughout the week hinders the academic aspects of being a student-athlete. Although athletic directors, conference commissioners, and executives at the NCAA discuss academics as often as they mention athletic endeavors, the facts support an ever increasing athletic pressure and a time commitment that substantially exceeds the twenty-hour weekly maximum prescribed by the NCAA.¹⁷⁸

In sum, there are two ways to account for the increased commercialization of intercollegiate athletics: (1) regulate commercialization and place an emphasis on being a student before being an athlete; or (2) allow student-athletes to seek compensation whether through the institution or third-parties. If intercollegiate athletics continues to grow commercially, it is only common sense that student-athletes will continue to voice their desire to be compensated. Student-athletes read the nearly daily headlines that discuss conference movement among institutions, lucrative bowl packages, and television rights agreements.

Conference realignment is akin to a professional sports franchise seeking to gain a larger fan base in a new territory. Intercollegiate athletics is supposed to be different and student-

¹⁷⁶ *Mark Emmert Tries to See Beyond Money*, ESPN SPORTS OFFICIAL WEB SITE (Sep. 28, 2011), http://espn.go.com/college-sports/story/_id/7032299/ncaa-prez-asks-schools-consider-more-money.

¹⁷⁷ *OU Authorizes Prez to Act on Pac-12*, ESPN SPORTS OFFICIAL WEB SITE (Sept. 20, 2011), http://espn.go.com/college-sports/story/_id/6992952/regents-oklahoma-sooners-texas-longhorns-ok-presidents-act-pac-12.

¹⁷⁸ Student-athlete participation shall be limited to a maximum of four hours per day and twenty hours per week. 2011-2012 NCAA DIVISION I MANUAL § 17.1.6.1 (2011).

athletes are supposed to be pursuing avocation rather than a vocation.¹⁷⁹ Treating student-athletes as a pawn in a greater scheme is creating an ever-increasing distaste for the establishment of intercollegiate athletics. It is time to return the attention to the student-athlete and allow them to have a voice in conference realignment. Unfortunately, the designated individuals that are supposed to be looking out for student-athletes' better interests have failed to account for the realities of being a modern day student-athlete.

B. What Happened to the Rivalries?

Rivalries in college sports are like no other in all of sports. Top rivalries have been the subject of fight songs, books, and coffee shop debates. To see a stadium split completely in half with one side of the stadium wearing one color and the other side wearing another color is something only synonymous with intercollegiate athletics. Despite rivalries being a fabric of American culture, conference realignment threatens to rob fans, alumni, and student-athletes of the opportunity to rejoice in the sanctity of state versus state and school versus school.

It is widely reported that coaches and administrators have renounced the importance of the some of the most revered rivalries in all of sports. In college sports, rivalries have names like the Red River Rivalry,¹⁸⁰ the Border Showdown,¹⁸¹ and the

¹⁷⁹ "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.* at § 2.9.

¹⁸⁰ The Red River Rivalry is one of the most hotly anticipated athletic events of any given year pitting the University of Oklahoma against the University of Texas. The rivalry began in 1900 and currently plays annually in Dallas, Texas. *AT&T Red River Rivalry*, http://www.fairpark.org/index.php?option=com_content&view=article&id=223.

¹⁸¹ The Border Showdown, formerly known as the Border War, is annual series of athletic contests between the University of Missouri and the University of Kansas. *M&I Border Showdown Series*, MUTIGERS.COM, <http://www.mutigers.com/ot/border-showdown.html>. The hatred between Missouri and Kansas dates back to 1863 when William Quantrill of Missouri slaughtered citizens of Lawrence, Kansas and set the city on fire. Austin Murphy, *Bordering on Hatred*, SPORTS ILLUSTRATED, Nov. 28, 2011, at 58. After raids and retaliatory attacks ceased, in 1893, the University of Missouri and the University of Kansas settled into a 120-year war on the gridiron. *Id.* Following a University of Missouri victory on November 26, 2011, these two fine institutions may never meet again. *Tigers Trounce Jayhawks 24-10 in Border Showdown*,

Lone Star Showdown.¹⁸² Yet, these monumental events can be easily disregarded. The University of Kansas (“Kansas”) indicated that it will no longer compete against the University Missouri (“Missouri”) when Missouri announced it was leaving the Big 12 for the SEC, which would end over one hundred years of competition in the Border Showdown.¹⁸³ Similarly, Oklahoma head football coach Bob Stoops said he could envision a time when Oklahoma and UT would not compete against one another in the Red River Rivalry.¹⁸⁴

The State of Texas has seen no rivalry like the hatred between UT and Texas A&M, which possibly concluded in 2011 or is taking a hiatus until at least 2019.¹⁸⁵ The Lone Star Showdown began on October 19, 1894, in Austin, Texas with UT winning 38 to 0.¹⁸⁶ Both institutions make reference to one another in their respective fight songs. Texas A&M’s War Hymn makes multiple references to UT:

Hullabaloo, Caneck! Caneck!
Hullabaloo, Caneck! Caneck!

All hail to dear old Texas A&M
Rally around Maroon and White
Good luck to dear old Texas Aggies
They are the boys who show the real old fight

MUTIGERS.COM (Nov. 26, 2011), <http://www.mutigers.com/sports/m-footbl/recaps/112611aaa.html>.

¹⁸² The Lone Star Showdown pins the University of Texas against Texas A&M University. See Burka, *supra*, note 134 at 118; see generally W.K. Stratton, BACKYARD BRAWL: INSIDE THE BLOOD FEUD BETWEEN TEXAS AND TEXAS A&M (New York, NY.: Three Rivers Press, 2002). The rivalry began in 1894 and the University of Texas currently leads the series 76-37-5. See Burka, *supra*, note 134 at 118; *Tex. v. TA&M*, ESPN SPORTS OFFICIAL WEB SITE (Nov. 24, 2011), <http://m.espn.go.com/ncf/gamecast?gameId=313280245&wjb>.

¹⁸³ *Missouri Hopes to Join SEC*, ESPN SPORTS OFFICIAL WEB SITE (Oct. 6, 2011), http://espn.go.com/college-sports/story/_/id/7063633/missouri-tigers-hope-join-sec-had-wanted-big-ten-invite-most.

¹⁸⁴ *OU Coach: End of Rivalry Not Unlikely*, ESPN SPORTS OFFICIAL WEB SITE, (Sep. 7, 2011), http://espn.go.com/college-football/story/_/id/6936844/oklahoma-sooners-bob-stoops-see-future-texas-longhorns-rivalry.

¹⁸⁵ *Texas AD to A&M: Our Schedule is Full*, ESPN SPORTS OFFICIAL WEB SITE, (Oct. 15, 2011), http://espn.go.com/college-football/story/_/id/7103015/texas-longhorns-deloss-dodds-tells-texas-bill-byrne-nonconference-schedule-full-2018.

¹⁸⁶ See Burka, *supra*, note 133 at 118.

That good old Aggie spirit thrills us
 And makes us yell and yell and yell
 So let's fight for dear old Texas A&M
 We're going to beat you all to
 Chig-gar-roo-gar-rem
 Chig-gar-roo-gar-rem
 Rough Tough! Real Stuff! Texas A&M!

Good-bye to texas university
 So long to the orange and the white
 Good luck to dear old Texas Aggies
 They are the boys that show the real old fight
 "The eyes of Texas are upon you . . ."
 That is the song they sing so well
 So good-bye to texas university
 We're going to beat you all to
 Chig-gar-roo-gar-rem
 Chig-gar-roo-gar-rem
 Rough Tough! Real Stuff! Texas A&M!¹⁸⁷

Similarly, UT takes jabs at Texas A&M in response to the Texas A&M War Hymn as follows:

Texas Fight! Texas Fight!
 And it's goodbye to A & M.
 Texas Fight! Texas Fight!
 And we'll put over one more win.
 Texas Fight! Texas Fight!
 For it's Texas that we love best.
 Hail, Hail, the gang's all here,
 And it's goodbye to all the rest!

Yea, Orange! Yea, White!
 Yea, Longhorns! Fight! Fight! Fight!
 Texas Fight! Texas Fight!
 Yea, Texas Fight!
 Texas Fight! Texas Fight!
 Yea, Texas Fight!

¹⁸⁷ Texas A&M University, *War Hymn*.

The 'Eyes of Texas' are upon you,
All the live long day!
The 'Eyes of Texas' are upon you,
You cannot get away!
Texas Fight! Texas Fight!
For it's Texas that we love best!
Hail, Hail, the gang's all here!
And it's goodbye to all the rest!¹⁸⁸

These fight songs, chants, and displays of camaraderie are different than professional athletics. Unlike professional sports, thousands of alumni travel to each game and cheer loudly for their alma mater. The tradition and history is based on the alumni that played on the field of battle or cheered loudly in the stands during these unprecedented athletic contests.

Research shows that alumni, of the very institutions that are seeking to or have left their conferences, prefer traditional rivalries in close geographic proximity to one another.¹⁸⁹ In fact, 76 percent of fans and alumni favor traditional rivalries.¹⁹⁰ Close proximity allows institutions to develop natural rivalries that extend for hundreds of years. Indeed, the alumni can take part in rivalries and can support their teams by traveling to weekly football contests. Now that conferences are expanding their geography to spread thousands of miles, it is next to impossible for fans, alumni, and parents to travel to each athletic contest. It is both cost and time prohibitive. As such, universities have failed to honor their commitment to history and the desires of their alumni.

V. CONCLUSION

Intercollegiate athletics has risen to a level of enormous commercial success. Thus, many member institutions have focused primarily on increased revenue and mobility at the expense of tradition, student-athlete welfare, and alumni preferences. At this stage, it is important to take a step back and focus on the advantages and disadvantages of making decisions primarily based on the bottom line. Although intercollegiate

¹⁸⁸ University of Texas, *Texas Fight*.

¹⁸⁹ *Conference Realignment Poll*, BAYLOR UNIVERSITY OFFICIAL WEB SITE, <http://www.baylor.edu/survey>.

¹⁹⁰ *Id.*

athletics are increasingly commercialized, it is necessary to focus on the aspects of intercollegiate athletics that separate it from its professional counterparts. The rich history of traditions cannot be ignored. Nor, can the values administrators express to student-athletes. In sum, conference realignment and focusing primarily on financial rewards is sending the wrong message to student-athletes. Conference member institutions must honor their commitments to their conference affiliates and their student-athletes. Otherwise, intercollegiate athletics will spiral further away from the core distinctions that make intercollegiate athletics unique.

