Considering the Implementation and Enforceability of NCAA Member Conference Exit Fee Provisions

By Curry Sexton, Kyle Ritchie, and Greg Whiston

As conference realignment has been – and continues to be – a hot topic over the last decade, NCAA member conferences must prepare themselves for the inevitable departure of one or more of its members. Many conferences have already implemented prearranged exit fee provisions into their constitutions. These provisions require a withdrawing conference member to pay an exit fee for its withdrawal from the conference. Because these provisions essentially operate as liquidated damages clauses, the legal enforceability of exit fee provisions is unclear and not yet considered by a court. In order to avoid drawn out litigation disputes over an exit fee provision, conferences should carefully implement exit fee provisions into their governing documents that are more than likely to be upheld as reasonable by a court, should a court ever address the enforceability.

Exit Fee Provisions and Liquidated Damages Clauses

Liquidated damages clauses are contractual tools that provide parties the opportunity to predetermine the amount of damages in the event of a breach of contract. The parties have the ability to set a fixed number or a formula for determining damages. Conference exit fees effectively operate as liquidated damages. Generally, a conference's governing documents provide a specific number or formula that determines the amount of damages a member must pay to the conference if it decides to leave the conference. Conferences generally employ three different methods in drafting and implementing an exit fee provision, which includes:

1. "Fixed fee" – withdrawing member must pay the conference a predetermined sum for its exit;
2. "Withholding of Conference Payout" – the departing member's yearly conference payout is withheld as a result of its exit from the conference; and
3. "Percentage of Conference Operating Budget" – the withdrawing member must pay an amount

equal to a specified percentage of the total conference operating budget.

Enforceability of Liquidated Damages Clauses

These sometimes one-sided provisions are not enforced by courts where it is determined that the provision, in effect, amounts to a penalty. A liquidated damages clause is deemed an unenforceable penalty where it sets an “unreasonably large” sum as damages. Ultimately, this is a question of law that must be determined by a court. A liquidated damages clause found to be a penalty is unenforceable on public policy grounds and can be severed from the contract. The result of an unenforceable liquidated damages provision will vary by state.

Courts typically consider two factors in determining whether a liquidated damages clause is enforceable:

1. “Reasonableness” – whether the amount awarded via the liquidated damages clause is reasonable as a result of the anticipated or actual loss caused by the breach; and
2. “Difficulty Proving Loss” – if proving damages or loss is difficult to quantify, it will favor enforceability of the liquidated damages clause.

Enforceability of Exit Fee Provisions

This specific issue has not yet been adjudicated by a court, and the level of enforceability courts will give these provisions remains unclear. It seems rather clear that a conference would be able demonstrate to a court that it is extremely difficult to quantify the damages that will result from a conference member’s withdrawal. Thus, a court’s determination regarding the enforceability of an exit fee provision will likely come down to whether the exit fee is reasonable.

If you have questions about the implementation or enforceability of an exit fee provision, please feel free to contact the authors of this article, Curry Sexton, Kyle Ritchie, or Greg Whiston, at 816-421-4460.

This article is general in nature and does not constitute legal advice.