

LOUISVILLE V. DUKE AND ITS IMPLICATIONS FOR BREACHED COLLEGE FOOTBALL SCHEDULING AGREEMENTS

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INTRODUCTION

In June 1999, the University of Louisville Cardinals (“Louisville” or “Cardinals”) and the Duke University Blue Devils (“Duke” or “Blue Devils”) entered into an athletic-competition agreement under which the schools’ football teams agreed to play each other four times over the next decade.¹ At the time the contract was signed, the two football squads were relatively evenly matched: Duke had finished sixth in the Atlantic Coast Conference (“ACC”) in 1998 with an overall record of four wins and seven losses, while Louisville had placed third in the less competitive Conference USA (“C-USA”) with a 7-5 overall record.² However, by the time the two schools were ready to play their first scheduled contest in 2002, Louisville’s program had improved significantly. The Cardinals were

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1. DUKE UNIV. & UNIV. OF LOUISVILLE, ATHLETIC COMPETITION AGREEMENT (1999) [hereinafter COMPETITION AGREEMENT]. *See also* Univ. of Louisville v. Duke Univ., No. 07-CI-1765, at 1 (Franklin Cir. Ct. June 19, 2008) (discussing the agreement whereby Duke and Louisville agreed to play four times over the next decade), *available at* [http://www.ncbusinesslitigationreport.com/Duke Opinion.pdf](http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf).

2. COLLEGE POLL ARCHIVE, 1998 *College Football Standings*, http://www.collegefootballpoll.com/1998_archive_standings.html (last visited Oct. 11, 2010) [hereinafter *1998 Standings*].

ranked seventeenth in that year's pre-season college football Top 25 poll³ following a C-USA championship and 11-2 overall record in 2001.⁴ Meanwhile, Duke's program had fallen to a projected last-place finish in the ACC,⁵ on the heels of a 0-11 2001 campaign.⁶ Not surprisingly, Louisville won the first game by a score of 40-3.⁷

Following that initial defeat, the Blue Devils developed second thoughts about playing three more games against the suddenly formidable Cardinals, and elected to cancel the remaining contests under the scheduling agreement (scheduled for 2007, 2008, and 2009) in March 2003.⁸ Upset by Duke's breach of contract, Louisville ultimately sued Duke in a Kentucky state court, seeking enforcement of the scheduling agreement's liquidated damages provision. That clause specified that if the contract was broken, the breaching party would pay \$150,000 per cancelled contest to the other university should the non-breaching party be unable to schedule a replacement game against a "team of similar stature."⁹

The Kentucky state court dismissed Louisville's case, construing the "team of similar stature" language in the liquidated damages clause to mean simply any Division I football program, whether competing in the Football Bowl Subdivision or Football Championship Subdivision.¹⁰ Because Louisville was able to replace Duke on its schedule with other Division I opponents, the court ruled that no damages were owed.¹¹

Although *Louisville v. Duke* appears to have marked the first time that a court considered the sufficiency of a replacement opponent following the breach of a college football scheduling agreement, it is an issue that may arise again in the future. Indeed, the cancellation of uncompleted college football scheduling agreements has become commonplace.¹² As the

3. COLLEGE POLL ARCHIVE, 2002 *Preseason Football Polls*, <http://www.collegepollarchive.com/football/ap/seasons.cfm?appollid=874> (last visited Nov. 11, 2010).

4. COLLEGE POLL ARCHIVE, 2001 *College Football Standings*, http://www.collegefootballpoll.com/2001_archive_standings.html (last visited Oct. 11, 2010) [hereinafter *2001 Standings*].

5. 2002 ACC Football Preseason Poll, THEACC.COM, <http://www.theacc.com/sports/m-footbl/spec-rel/072302aao.html> (last visited Oct. 11, 2010).

6. *2001 Standings*, *supra* note 4.

7. Tommy Bowman, *Cardinals Cruise Past Blue Devils as Winning Streak Comes to Halt*, WINSTON-SALEM JOURNAL, Sept. 8, 2002, at C4.

8. *Univ. of Louisville v. Duke Univ.*, No. 07-CI-1765, at 1 (Franklin Cir. Ct. June 19, 2008), available at <http://www.ncbusinesslitigationreport.com/DukeOpinion.pdf>.

9. COMPETITION AGREEMENT, *supra* note 1, at 3.

10. *Louisville v. Duke*, No. 07-CI-1765, at 4. For more on the distinction between the Football Bowl Subdivision and the Football Championship Subdivision, see *infra* notes 17-18 and accompanying text.

11. *Louisville v. Duke*, No. 07-CI-1765, at 5-6.

12. See John Walters, *The Blackout Bowl: Scheduling is a Slippery Game in*

economics of college football continue to escalate rapidly upwards—in recent years, teams from major conferences have begun to pay schools from smaller conferences over one million dollars to play a single game¹³—universities are constantly reevaluating their scheduling commitments. Thus, the question of how to assess the sufficiency of a replacement opponent following the breach of a football scheduling agreement is likely to arise again in future litigation, either when determining the applicability of a liquidated damages clause (as in *Louisville v. Duke*), or as part of a determination of damages under contracts without liquidated damages provisions.

Louisville v. Duke provides a poor precedent for future courts to follow when grappling with this issue, as the court's overly simplistic analysis ignored many of the relevant factors that colleges and universities consider when drafting their football schedules. Football scheduling has become an increasingly complex process, with colleges and universities weighing a number of competitive and financial considerations beyond simply whether the prospective opponent competes at the Division I level.¹⁴ Consequently, a better framework than that used by the *Louisville v. Duke* court is needed for future disputes arising from breached scheduling agreements.

This article considers the implications of *Louisville v. Duke*, both from the perspective of colleges and universities attempting to draft future scheduling agreements, as well as courts wrestling with similar issues in forthcoming cases. Specifically, Part I reviews modern college football scheduling strategies and trends, while Part II critically analyzes the court's opinion from *Louisville v. Duke*. Finally, Part III offers both suggestions for colleges and universities when drafting future scheduling agreements in the aftermath of the *Louisville v. Duke* precedent, as well as a proposed framework for future courts to use when deciding cases arising from breached scheduling agreements.

I. COLLEGE FOOTBALL SCHEDULING STRATEGIES AND TRENDS

The National Collegiate Athletic Association (“NCAA”) regulates

College Football, SI.COM, (Apr. 14, 2006), http://sportsillustrated.cnn.com/2006/writers/the_bonus/04/12/cfb.scheduling/ (listing examples).

13. See Pat Forde, *Big Nonconference Games Vanishing*, ESPN.COM, (June 8, 2009), http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=4239858&sportCat=nf. See also Evan Woodbery, *ASU Says It Will Get a Million for Auburn Football Trip*, AL.COM, (Mar. 5, 2009), http://blog.al.com/auburnbeat/2009/03/auburn_adds_arkansas_state_to.html (reporting that Auburn University agreed to pay Arkansas State University one million dollars for a single football game to be played in September 2010).

14. See Robert Zullo, *The Right Moves*, ATHLETIC MGMT., (Aug.–Sept. 2005), <http://www.momentummedia.com/articles/am/am1705/rightmoves.htm> (identifying factors).

intercollegiate football competition.¹⁵ The NCAA has divided its football-sponsoring member institutions into several divisions, with those colleges and universities participating at the highest level of competition designated as Division I.¹⁶ Division I football is itself subdivided into two separate classifications: Football Bowl Subdivision (“FBS,” formerly known as I-A) and Football Championship Subdivision (“FCS,” formerly known as I-AA).¹⁷ FBS is regarded as the more competitive of the two subdivisions.¹⁸

In addition to belonging to the NCAA, most schools sponsoring Division I football also belong to a conference consisting of eight or more other colleges and universities.¹⁹ These schools play eight or nine of the twelve permitted regular-season football games against their fellow conference

15. See Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift From Nostalgic 19th and 20th Century Ideals of Amateuism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2–3 (2000).

16. See Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateuism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 70 (2006); see also Michael J. Nichols, *Time for a Hail Mary? With Bleak Prospects of Being Aided by a College Version of the NFL’s Rooney Rule, Should Minority College Football Coaches Turn Their Attention to Title VII Litigation?*, 8 VA. SPORTS & ENT. L.J. 147, 149–50 (2008) (discussing how the NCAA classifies a college or university football team as Division I).

17. 2009 NCAA Division I Manual, § 20.1.1.2, available at http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf.

Prior to 2006, FBS teams were referred to as Division I-A, while FCS teams were labeled I-AA. C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 286 n.5 (2008) (citing David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM (Dec. 15, 2006), <http://sports.espn.go.com/ncl/columns/story?id=2697774>).

This article primarily focuses on scheduling issues at the Division I FBS level, although many of the same factors discussed herein may also be relevant in the case of a terminated scheduling agreement at the Division I FCS, Division II, or Division III level.

18. Josh Martin, Comment, *The Fairness Doctrine: The BCS of American Politics*, 60 MERCER L. REV. 1393, 1393 n.4 (2009). See also Nathaniel Grow, *Antitrust & The Bowl Championship Series*, 2 HARV. J. SPORTS & ENT. L. 53, 60 (2010) (noting same).

19. See Gregg L. Katz, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 348 (2006) (“Within the larger framework of the NCAA, entities known as conferences provide further structure to intercollegiate athletics. Conferences are associations of NCAA-member schools that conduct competitions among their members and determine a conference champion in one or more sports.”).

Presently, 117 of the 120 FBS schools belong to a conference. See 2009 NCAA College Football Standings, ESPN.COM, <http://espn.go.com/college-football/standings/> (last visited Jan. 12, 2010). Only the University of Notre Dame (“Notre Dame”), the United States Naval Academy (“Navy”), and the United States Military Academy (“Army”) remain independent of any conference affiliation. *Id.* See also Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365, 369–70 (2009) (noting same).

members, and these contests are generally scheduled by the conference office.²⁰ Therefore, most colleges and universities control the scheduling of only three to four regular-season, non-conference games per year.²¹

Even with so few games left to the discretion of the individual college or university, drafting an ideal college football schedule is a difficult, time-intensive process involving the input of several key decision makers, including members of both the football coaching and athletic-department staffs.²² Indeed, the scheduling of each non-conference game has become incredibly important, affecting not only the college or university's chances for a successful football season, but also the profitability of its football program and athletic department as a whole. Colleges and universities thus must balance the competitive interests of the football program with the program's (and athletic department's) best financial interests when making scheduling decisions. While all institutions balance these two (sometimes conflicting) concerns, the precise weighing of these factors will vary not only from school to school,²³ but sometimes even from game to game on a single university's schedule.

The first factor that all colleges and universities must consider when drafting a college football schedule is the competitive strength of the potential opponent. This consideration not only requires schools to schedule opponents weak enough to maximize their chances of a winning season, but also to schedule opponents challenging enough to prepare their teams adequately for conference play and to garner respect from the media

20. See Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 298 n.150 (2008) (“[A] sizeable portion of most college football teams’ schedules are set by the team’s respective conference”). Since 2006, the NCAA has permitted FBS teams to play up to 12 regular-season contests. 2009 NCAA Division I Manual, *supra* note 17, § 17.9.5.1. FBS universities located in Alaska or Hawaii are authorized to play thirteen regular season games per year. *Id.* at § 17.28.2. See also Liz Clarke, *College Football Gets 12th Game: NCAA Approves Move for 2006*, WASH. POST, April 29, 2005, at D01 (reporting that the NCAA approved an expansion from an eleven game schedule to a twelve game schedule to begin with the 2006 season).

21. The three FBS independents, Notre Dame, Navy, and Army, control the scheduling of all twelve of their annual regular season football games.

22. See Max Olson, *Fans, Funds Factor into Scheduling Non-conference Games*, DAILY NEBRASKAN, (Oct. 1, 2009), <http://www.dailynebraskan.com/sports/fans-funds-factor-into-scheduling-non-conference-games-1.1933821> (noting that scheduling a single non-conference game can take months of negotiations with multiple schools).

23. See Danny Daly, *Gameday: Piecing Together the Scheduling Puzzle*, DAILY NORTHWESTERN (Oct. 16, 2009), <http://www.dailynorthwestern.com/outback-bowl/gameday-piecing-together-the-scheduling-puzzle-1.2001150> (noting that scheduling goals differ between the Big 10’s Northwestern University and the Mid-American Conference’s Northern Illinois); Olson, *supra* note 22 (“Each school takes a different approach to scheduling non-conference foes.”); Zullo, *supra* note 14 (“One question that needs to be at the heart of the scheduling game: What will give our team the greatest success? This will be very different for Florida than for Indiana, for example.”).

and fans for having played a sufficiently difficult schedule.

The primary competitive goal for most FBS colleges and universities is to have a winning season and qualify to play in a post-season bowl game.²⁴ Under present NCAA regulations, FBS teams must win at least six games in a season in order to qualify for a bowl game, and may not have an overall losing record.²⁵ Of the requisite six wins, only one may come against an FCS opponent, and only then if that FCS opponent has granted at least ninety percent of the permitted number of scholarships over the previous two years.²⁶ Therefore, the most basic competitive factor an FBS college or university considers when designing a schedule is how a prospective opponent will affect its chances of having a winning season and participating in a bowl game.²⁷

However, most schools do not simply seek to schedule the easiest possible non-conference games for several competitive reasons. As an initial matter, playing extremely weak competition in the non-conference portion of the schedule can risk leaving a team unprepared for the level of competition it will face when playing two-thirds of its contests against its conference rivals.²⁸

In addition to failing to adequately prepare a team for its conference schedule, playing only weak non-conference opponents can also backfire for FBS colleges and universities seeking to contend for the national title or a berth in one of the other most prestigious and lucrative bowl games. Presently, the participants in the national championship game, as well as four of the other most prestigious bowl games (the Rose, Sugar, Orange, and Fiesta Bowls), are selected through the Bowl Championship Series (“BCS”) selection process.²⁹ Under the BCS selection procedures, the teams that finish the regular season ranked first and second in the final BCS Standings are selected as the participants in the national championship game,³⁰ while the remaining champions of the so-called “BCS Conferences”—the ACC, Big East, Big Ten, Big 12, Pacific-10 (“Pac-10”),

24. Zullo, *supra* note 14 (“First of all, you want your necessary wins to get into a bowl game.”).

25. 2009 NCAA Division I Manual, *supra* note 17, § 30.9.2.1.

26. *Id.* § 30.9.2.2.

27. *See* Zullo, *supra* note 14.

28. *See* Stu Durando, *In Years Ahead, MU, Illini Face Schedule Issues*, ST. LOUIS POST-DISPATCH, Aug. 31, 2009, at B1 (finding that the University of Missouri attempts to draft a schedule that “prepares [its team] for the Big 12 [Conference season] and gives [it] the best shot to compete in the postseason.”); *see also* Chris Suellentrop, *A College Football Playoff That Works*, SLATE, (Oct. 24, 2000), <http://www.slate.com/id/91886/> (noting that playing the “toughest teams possible [helps] to prepare your team for the rigors of conference play.”).

29. *See* *BCS Explained*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/bcs_explained.html (last visited Oct. 14, 2010) [hereinafter *BCS Explained*].

30. *Id.*

and Southeastern (“SEC”)—are each guaranteed an automatic berth in one of the other BCS bowl games.³¹ Meanwhile, the champions of the other, so-called “non-BCS Conferences,” as well as the remaining teams from the BCS Conferences, are eligible—but not guaranteed—to be invited to participate in a BCS bowl game depending upon their rankings in the final BCS Standings.³²

The BCS Standings are presently calculated by combining the results of two human rankings (the Harris Interactive College Football Poll and the USA Today Coaches Poll) with the average of six different computer-ranking systems.³³ The strength of a team’s competition factors into both the computer and human rankings. All six of the BCS’s component computer systems explicitly consider schedule strength in their ranking formulas,³⁴ a calculation which typically considers not only the win-loss record of a team’s opponents, but also the strength of those opponents’ own opponents.³⁵ Meanwhile, although schedule difficulty is not explicitly factored into the human polls, many voters will nevertheless consider the strength of a team’s schedule when ranking the team.³⁶ Thus, by playing only weak non-conference opponents, a college or university runs the risk of being judged to have not played a sufficiently challenging schedule to merit a berth in the national championship game or one of the other BCS bowls.

For this reason, many schools have settled on a scheduling strategy that balances winnable games against weaker competition with more

31. *Id.*

32. *Id.* The non-BCS Conferences include C-USA, as well as the Mid-American (“MAC”), Mountain West, Sun Belt, and Western Athletic (“WAC”) Conferences. *See Is There a True No. 1?*, WASH. POST, Aug. 30, 2006, at H8. The BCS prefers to distinguish the BCS and non-BCS Conferences as Automatic Qualifying (“AQ”) or non-Automatic Qualifying (“non-AQ”), depending on whether the conference is guaranteed an annual BCS bowl bid. *See* BCS Conferences, BOWL CHAMPIONSHIP SERIES, <http://www.bcsfootball.org/news/story?id=4809755> (last visited Sept. 25, 2010). This article will nevertheless use the more widely adopted BCS and non-BCS Conference terminology.

33. *BCS Explained*, *supra* note 29. The six computer rankings are provided by Anderson & Hester, Richard Billingsley, Colley Matrix, Kenneth Massey, Jeff Sagarin, and Peter Wolfe. *Id.*

34. *Id.* (“Each computer ranking provider accounts for schedule strength within its formula.”).

35. *See* K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 63 n.36 (1999) (explaining that computer strength-of-schedule calculations are typically “calculated by determining the cumulative won/lost records of a team’s opponents and the cumulative won/lost records of a team’s opponent’s opponents. The formula is weighed two-thirds for the opponent’s record and one-third for the opponent’s opponents’ record.”).

36. *See* John Feinstein, *Vote for Utah, for College Football’s Sake*, WASHINGTONPOST.COM (Jan. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/06/AR2009010600092.html> (noting that voters in college football’s human polls consider strength of schedule when ranking teams).

challenging games against tougher competition. While the exact breakdown will vary by school, one commonly employed strategy is to schedule one or two games against competition that presents a significant challenge (typically a school in a BCS Conference), and then to fill the other non-conference slots by playing easier competition, typically at home.³⁷ Under such a strategy, each non-conference game is scheduled to fill a specific purpose within the overall scheduling scheme.

For example, in 2009, national powers the University of Southern California (“USC”) and the Ohio State University (“Ohio State”) played each other in a challenging non-conference game.³⁸ USC filled its other two non-conference slots with a game against traditional rival Notre Dame and a home game against San Jose State University, a less competitive team from the non-BCS WAC.³⁹ Meanwhile, Ohio State played its remaining three non-conference games at home against lesser opponents Navy, the University of Toledo, and New Mexico State University.⁴⁰ Similarly, top-ten powers the University of Alabama and Virginia Tech University played a season-opening game in 2009,⁴¹ with Alabama then rounding out the rest of its non-conference schedule with easier home games against Florida International University, the University of North Texas (“North Texas”), and the University of Tennessee-Chattanooga,⁴² while Virginia Tech scheduled winnable games against Marshall University and East Carolina University, along with another challenging game versus the University of Nebraska.⁴³

A similar competitive strategy is also utilized by schools in the lower ranked, non-BCS Conferences. For example, Ohio University from the

37. See Steve Yanda, *Scheduling Play Dates is Far From Kid's Stuff*, WASH. POST, Sept. 12, 2008, at E01 (noting that although “scheduling philosophies differ from program to program, athletic-department officials contacted for this story said they attempt to fill out their nonconference schedule in roughly the same manner” including “one legitimate challenge from another BCS school”). See also Daly, *supra* note 23 (describing Northwestern University’s ideal schedule as being one game against an FCS opponent, one game against an FBS opponent from a non-BCS Conference, and two games against programs from BCS Conferences); Olson, *supra* note 22 (noting that the University of Nebraska seeks to play “a competitive schedule” including at least one opponent from a BCS Conference every season).

38. Kelly Whiteside, *McKnight Carries USC in Clutch*, USA TODAY, Sept. 14, 2009, at 7C.

39. *USC 2009 Schedule/Results*, ESPN.COM, <http://sports.espn.go.com/ncf/teams/schedule?teamId=30> (last visited Oct. 14, 2010).

40. *Football–2009 Schedule & Results*, OHIO STATE BUCKEYES, http://www.ohiostatebuckeyes.com/SportSelect.dbml?SPSID=87745&SPID=10408&D_B_OEM_ID=17300&Q_SEASON=2009 (last visited Jan. 14, 2010).

41. Mark Viera, *Hokies Come Up Short*, WASH. POST, Sept. 6, 2009, at D01.

42. *2009 Alabama Football Schedule*, CBSSPORTS.COM, <http://www.rolltide.com/sports/m-footbl/sched/alab-m-footbl-sched.html> (last visited Oct. 13, 2010).

43. *2009 Schedule & Results*, HOKIESPORTS.COM, <http://www.hokiesports.com/football/schedule/2009> (last visited Oct. 13, 2010).

MAC scheduled two games against challenging BCS Conference opponents in 2009 (the University of Tennessee and the University of Connecticut), as well as two non-conference games against lighter opposition (North Texas and FCS school California Polytechnic State University).⁴⁴ Meanwhile, Troy University of the Sun Belt Conference played two difficult opponents in the University of Florida and the University of Arkansas, both from the SEC, along with more winnable games against non-BCS programs Bowling Green State University and the University of Alabama-Birmingham.⁴⁵ Similarly, the University of Wyoming from the Mountain West Conference took on the University of Texas and the University of Colorado from the Big 12 Conference, in addition to easier games against Florida Atlantic University and FCS school Weber State University.⁴⁶

While the strategy of blending a combination of both challenging and more winnable games has thus become common in college football, other colleges and universities have adopted different competitive strategies. For instance, some schools belonging to BCS Conferences have adopted the strategy of not playing any challenging non-conference games, in order to maximize their chances of being undefeated entering conference play.⁴⁷ Meanwhile, other schools—typically from non-BCS Conferences—take the opposite approach and schedule as many challenging opponents as possible.⁴⁸

On top of deciding how many difficult teams to play, colleges and universities must also weigh the competitive implications of where the games will be held. Presently, the home team wins approximately sixty percent of the time in FBS Division I football,⁴⁹ meaning that schools seeking to give themselves the strongest competitive advantage will try to

44. 2009 Schedule, CBSSPORTS.COM, <http://www.ohiobobcats.com/sports/m-footbl/archive/ohio-m-footbl-sched-2009.html> (last visited Oct. 13, 2010).

45. 2009 Football Schedule, TROY UNIVERSITY, <http://www.troytrojans.com/schedule.aspx?path=football&schedule=12> (last visited Oct. 13, 2010).

46. 2009–2010 Schedule, CBSSPORTS.COM, <http://www.wyomingathletics.com/sports/m-footbl/archive/wyo-m-footbl-sched-2009.html> (last visited Oct. 13, 2010).

47. See Olson, *supra* note 22 (“Several Big 12 schools tend to take on a light load of those so-called ‘creampuff’ teams from smaller conferences in the interest of playing four relatively easy games to prepare for the Big 12 season.”); Ryan Wood, *Mangino: What’s Good for ‘Cats Good for KU*, KUSPORTS.COM (Sept. 18, 2007), http://www.kusports.com/news/2007/sep/18/mangino_what's_good_cats_good_ku/ (noting that the University of Kansas and Kansas State University have both been known to often schedule “games that weren’t expected to be tough”).

48. Walters, *supra* note 12 (noting that Fresno State University has adopted the strategy of playing the most challenging non-conference schedule possible and is willing to schedule games against “anyone, anytime, anywhere”).

49. Greg Dohmann, *Wins Aren’t Home Free: Visitors Prevailing More Frequently*, USA TODAY, Oct. 9, 2007, at 8C.

schedule most, if not all, of their non-conference games at home. However, whether for financial reasons (as will be discussed below)⁵⁰ or to present a challenge and prepare their teams for conference road games,⁵¹ some colleges and universities may elect to play one or more non-conference games away from home. Thus, although the specific scheduling strategies used by colleges and universities may differ, most schools follow some discernable strategy when deciding what level of competition and where to play in a given football season.

In addition to considering the potential competitive implications of a non-conference game against a particular opponent, colleges and universities must also weigh the financial benefits of the potential game. Football and men's basketball are considered the two primary revenue-generating sports for most colleges and universities,⁵² with football in particular accounting for significant profits in some programs.⁵³ Even at those colleges and universities where the football program does not generate a profit, schools must nevertheless consider the financial implications of scheduling decisions with an eye towards minimizing the losses incurred by their football teams.⁵⁴

50. See *infra* notes 59, 66 and accompanying text.

51. See Durando, *supra* note 28.

52. See, e.g., Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L. REV. 199, 202 (1996) (noting that "Division I-A football and men's basketball [are] the most prominent revenue-producing sports."); Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 883 (2002) ("[M]ale student-athletes account for a significant percentage of revenue-generation, as men's basketball and football are the two NCAA sports with multi-million dollar television contracts."); Michael A. McCann & Joseph S. Rosen, *Sports and Eligibility—Who is Eligible to Play?: Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 749 (2006) ("The football teams and the basketball teams are generally the only way that any college can make money. The revenue they generate supports other teams at those universities."); Mitten, *supra* note 15, at 2 ("The tremendous public popularity of men's college football and basketball creates a substantial revenue-generating capacity and the prospect of increased visibility for universities."); John C. Weistart, *Setting a Course for College Athletics: Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 208 (1996) ("Primary responsibility for generating money . . . rests with the revenue-generating potential of a few sports, typically football and men's basketball.")

53. 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, 8 (2009) ("[F]ootball by far generates the most revenue at the top revenue producing schools."). 68 of the 120 FBS football programs generated a profit from the 2004 through 2008 seasons. *2004–08 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report*, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 1, 29, <http://www.ncaapublications.com/productdownloads/RED3ONLINE.pdf>.

54. See Jack Carey, *For Small Schools, There's a Big Payoff to Road Trips*, USATODAY.COM, (Sept. 3, 2009), http://www.usatoday.com/sports/college/football/2009-09-02-smallschool_payoffs_N.htm (noting that smaller schools not only use guaranteed

College football programs generate revenue from several sources. Some revenue comes to the college or university from its conference, which distributes profits generated from the conference's television contract(s), as well as payouts earned from conference members' participation in bowl games.⁵⁵ Most of the remaining revenue is generated individually by the college or university through the scheduling of home and road football games. Colleges and universities generate revenue from home games through ticket sales, sponsorship agreements, concession sales, and, in the case of some schools with particularly strong followings, by requiring fans to make significant donations to the college or university simply to obtain the right to buy tickets.⁵⁶ Meanwhile, non-conference road games can also generate revenue for colleges and universities, as schools negotiate so-called "guarantee" payments in exchange for agreeing to play games in the opponent's home stadium.⁵⁷

The revenues produced from both home and road games can be significant. For schools with large stadiums and fervent fan bases, a single home game can generate more than five million dollars in revenue.⁵⁸ Meanwhile, because home games can be so lucrative, the demand for teams willing to travel to play on the road has risen dramatically in recent years, with visiting teams now able to negotiate guaranteed payments as high as \$1.2 million in exchange for playing a single road game.⁵⁹

How an individual college or university best balances these competing potential revenue streams will vary from school to school. In the case of those colleges and universities with extremely strong fan support—where a sellout crowd is virtually guaranteed for every home game regardless of the quality of the opponent⁶⁰—the most prudent financial strategy is relatively

payments from road games to fund the football program, but also other non-revenue sports).

55. See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 511–13 (2008) (discussing the role of the conferences in revenue generation and distribution).

56. *Id.* at 522 (stating that "at many schools, fans are required to make an additional 'donation' each year to the university to be eligible to purchase season tickets."); Jack Carey & Andy Gardiner, *Commercialized College: Corporate Sponsors in Spring*, USATODAY.COM, (Apr. 20, 2009), http://www.usatoday.com/sports/college/football/2009-04-16-spring-game-sponsorship_N.htm (discussing revenues from football-related corporate sponsorships).

57. See, e.g., Carey, *supra* note 54 (discussing the frequency and use of guarantee payments).

58. Olson, *supra* note 22 (noting that the University of Nebraska generates over five million dollars for every home football game).

59. See Forde, *supra* note 13 (discussing examples).

60. *Id.* (noting that for many SEC schools, the demand for tickets is so high that they can attract "80,000 to 110,000 [fans] in the stands to see the home team play just about anyone"); Ralph D. Russo, *For Some College Teams, It Pays to Play Poorly*, ASSOCIATED PRESS, Sept. 15, 2006, available at <http://www.cstv.com/sports/m-footbl/stories/091506abb.html> ("At schools such as LSU, Michigan, Ohio State, Florida and Tennessee, fans fill 90,000-plus seats no matter who the home team plays.").

simple: maximize the number of home games while minimizing the guaranteed payments to your opposition.

However, for those schools that do not automatically sell out every home game they play, selecting the best financial strategy becomes more difficult. These schools must weigh the expected profitability of a home game against a particular opponent against the availability of a significant guarantee payment for playing on the road. For example, with respect to estimating the profitability of a home game, colleges and universities must compare the attractiveness of a game against the potential opponent for its fans (and thus how many tickets it is likely to sell) to the cost of the guaranteed payment necessary to entice the opponent to play on the road. Generally speaking, fans consider games against high-profile, competitive opponents—especially those from the BCS Conferences—to be more attractive than games against less competitive schools from the smaller, non-BCS FBS or FCS conferences.⁶¹ However, because these high-profile colleges and universities generally reside near the top of the Division I food chain, they are often unwilling to travel on the road to play more than a single non-conference game per season, not only because doing so would force the high-profile school to forgo a large profit at home, but also because it risks placing the team at a competitive disadvantage by playing too many games on the road.⁶²

In those cases where a high-profile college or university is willing to travel on the road to play, they will typically favor playing against a fellow BCS school and will generally require the host school to play at least one return game at the visiting team's stadium.⁶³ Meanwhile, when a lower-profile, non-BCS school finds a high-profile school willing to travel to play in its stadium, the larger school will often require two or three home games

61. Zullo, *supra* note 14 (“[M]ost fans and alumni are not attracted to games with lower-caliber opponents, causing ticket sales, as well as related gameday revenue, to dip.”).

62. Jude D. Schmitt, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 *SPORTS LAW J.* 219, 246 (2007) (“[F]ew BCS schools are willing to play straightforward home-and-home series with non-BCS teams.”).

63. See Iliana Limon, *When It Comes to College Football, the Cash Flow Starts at the Top: The Big Schools Benefit from Scheduling Advantages*, *ORLANDO SENTINEL*, July 29, 2009, available at <http://www.allbusiness.com/sports-recreation/sports-games-outdoor-recreation/12594334-1.html> (stating that getting larger programs to agree to play on the road is difficult for the non-BCS leagues); Pete Thamel & Thayer Evans, *Playing Matchmaker for Reluctant Teams*, *N.Y. TIMES*, Sept. 6, 2008, at D1 (reporting that the BCS school the University of Cincinnati refuses to “play a major out-of-conference game without a return game”); Graham Watson, *The Key for the Non-BCS: Just Win*, *ESPN.COM*, (June 1, 2009), http://espn.go.com/blog/ncfnation/post/_/id/4643/the-key-for-the-non-bcs-just-win (finding that teams from smaller conferences like “C-USA, the MAC and the Sun Belt [Conference] . . . rarely get home-and-home series” with opponents from larger schools).

in return.⁶⁴ Not only does such an agreement require the host school to give up multiple home games in future years, but these future road trips often do not come with significant guarantee payments,⁶⁵ meaning that the school must forgo up to several large paydays in order to secure a single home game with a high-profile opponent. This can make scheduling a marquee home non-conference game an expensive proposition for those schools that do not consistently draw at least 30,000 or 40,000 fans per game.

Accordingly, because it is difficult and expensive to schedule quality non-conference opponents at home, many schools—especially those in the lower-profile, non-BCS Conferences—find that scheduling non-conference road games, each coming with a potential guarantee of one million dollars or more, will generate significantly more revenue for the college or university than will home games. For colleges and universities that lose money on their football programs, the allure of playing at least one or two of these guarantee games is usually too strong to pass up, even if their teams are unlikely to win such games.⁶⁶ Therefore, while the most prudent financial scheduling strategy is relatively clear for schools with traditionally strong and supportive fan bases, those colleges and universities that do not consistently sell out all of their home games—and especially those schools which lose money on their football programs—have much more difficult financial decisions to make when drafting their football schedules.

Although competitive and financial concerns are the two primary factors for colleges and universities when deciding whether to schedule a football game against a particular opponent, a variety of other factors may also be considered in the case of a particular game. For example, one factor that has taken on increased importance in recent years is whether a potential game is likely to be selected for national television coverage.⁶⁷ The

64. Zullo, *supra* note 14 (noting that agreements “in which a major conference school gets two home games and the mid-major school gets one home game over the course of three years” were popular in the mid-2000s).

65. See Tim Tucker, *Low-tier Programs Starting to Cash In*, ATL. JOURNAL-CONST., June 2, 2009, at 1C (stating that large guarantee payments are not required in home-and-home contracts). See also Russo, *supra* note 60 (reporting that some BCS Conference teams unable to afford the current going rate for guarantee games have had to agree to travel on the road to a non-BCS school’s stadium in exchange for two or more home games).

66. See Bruce Feldman, *Mailbag: Conference Rankings*, ESPN.COM, (Sept. 12, 2008),

http://sports.espn.go.com/espn/blog/index?entryID=3583996&name=feldman_bruce (finding that “[m]ost schools from non-BCS conferences will schedule major college powers now and then to . . . make a quick buck”); Watson, *supra* note 63 (reporting that teams from “C-USA, the MAC and the Sun Belt [Conference] . . . often play two or three major BCS opponents on the road in order to make sure they have enough money in their operating budgets for future seasons”).

67. Zullo, *supra* note 14 (stating that television exposure is an important

geographic location of a prospective opponent may also be considered, either in the case of schools avoiding the scheduling of road games requiring extensive travel,⁶⁸ or in cases where colleges and universities actively seek to schedule an opponent from a region of particular recruiting importance.⁶⁹ Other times, the continuation of a long-standing rivalry with another school may motivate colleges and universities to enter into a particular scheduling agreement.⁷⁰

To make matters even more complicated, colleges and universities rarely weigh any of these motivations in isolation. For example, when scheduling a home game, a college or university may desire a particularly strong opponent for competitive reasons, but find that the cost of such an opponent is unreasonable from a financial perspective. Similarly, a school might decide that it is in its best financial interest to play all four non-conference games on the road in exchange for the largest guarantee payments possible, but hesitate when the competitive realities mean that its team will have little chance of winning a single such game.⁷¹ In these cases, colleges and universities typically elect to balance the competing concerns, perhaps by scheduling less competitive but cheaper home opponents, or taking a smaller guarantee payment in order to play a more beatable team on the road.⁷²

Because each non-conference game is designed to serve both a particular competitive and financial purpose, selecting and finalizing agreements with suitable opponents can be an extremely time-intensive endeavor.⁷³

consideration when making scheduling decisions, as playing on television gives universities greater national recognition, increases revenue, and helps recruit future athletes).

68. See Yanda, *supra* note 37 (reporting that few schools located on the East Coast are willing to travel to play games against universities from the Pacific-10 Conference).

69. See Daly, *supra* note 23 (quoting Northwestern head coach Pat Fitzgerald as stating that he likes to “play in geographic areas that [they]’re going to recruit in”); Limon, *supra* note 63 (finding that many larger programs are willing to play games at the University of Central Florida because the school is located in a prime recruiting area).

70. See Jack Bogaczyk, *This Lineup Should Please Fans*, CHARLESTON DAILY MAIL, Sept. 16, 2005, at 1B (noting that West Virginia University regularly plays non-conference games against regional rivals the University of Maryland and Marshall University); *Wolverines, Irish Add 20 More Years to Rivalry*, WASH. POST, July 31, 2007, at E02 (reporting that the University of Michigan and Notre Dame entered a 20-year scheduling agreement in order to ensure that their non-conference rivalry continues well into the future).

71. See Limon, *supra* note 63 (quoting Eastern Michigan University’s athletic director as stating, “You have to be careful because we absolutely rely on road games at some of these big schools to fund our entire athletics department, but we don’t want to put our team at risk of no longer being competitive . . . You have to really think about how much injuries and team morale can be hurt by playing too many of those games for money.”).

72. See *id.* (noting examples of same).

73. See Olson, *supra* note 22 (stating that scheduling “[n]egotiations can take several months” for just a single contract).

Accordingly, most schools attempt to stay well ahead of the process by scheduling their non-conference games years in advance.⁷⁴ This makes last-minute cancellations especially difficult to replace, as most suitable alternative candidates are no longer available to schedule a game on the particular date in question.⁷⁵

Although cancellations inflict a significant burden on their peers, colleges and universities are nevertheless increasingly terminating unfinished scheduling agreements, often only months before a game is scheduled to be played.⁷⁶ In some cases, colleges and universities back out of these contracts after reevaluating the competitive benefits of an agreement that was entered into years in advance (as in *Louisville v. Duke*). In other cases, a college or university may back out of a previously scheduled road game in favor of a new agreement paying a significantly larger guarantee, especially when the former agreement calls for minimal liquidated damages.⁷⁷ Occasionally, colleges and universities will even break scheduling agreements at the behest of a television network, in order to schedule a game with guaranteed television coverage against another team.⁷⁸ Whatever the reason in a particular case, such breaches have become increasingly common in college football, wreaking havoc on the would-have-been opponent's well-planned schedule.

Despite this increase in the breach of football scheduling agreements, such disputes have historically been resolved outside of the litigation process, for several reasons. As an initial matter, many colleges and universities include liquidated-damage provisions in their scheduling agreements in order to minimize the harm inflicted by last-minute cancellations. These provisions typically take one of two forms, either requiring a specific payment in the event of a breach, without consideration of any mitigating factors, or alternatively requiring a financial payment only in the event that a comparable or suitable replacement opponent is not found.⁷⁹

74. Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 *SPORTS LAW. J.* 97, 115 (2003); Zullo, *supra* note 14.

75. See Tony Barnhart, *Schools Race to Plug Holes in Schedules*, *ATL. JOURNAL-CONST.*, Jan. 24, 2008, at 1D (quoting University of Kentucky Athletic Director Mitch Barnhart as stating that finding a last-minute replacement opponent "is very complicated—and expensive"); Walters, *supra* note 12 (noting that finding a last-minute replacement can be extremely difficult); Zullo, *supra* note 14 (explaining that last-second cancellations can quickly put "the host school's schedule . . . in disarray").

76. See Walters, *supra* note 12 (listing examples).

77. Barnhart, *supra* note 75 (reporting that Tulsa University decided to pay Texas Tech University \$150,000 in liquidated damages in order to enter a last-minute agreement with the University of Arkansas paying \$850,000); Forde, *supra* note 13 (noting general trend).

78. See Thamel & Evans, *supra* note 63 (discussing the role of ESPN in scheduling college football games); see also Walters, *supra* note 12.

79. Zullo, *supra* note 14.

In the case of the former category of agreements—automatically requiring a financial payment in the event of any breach—litigation is avoided when the breaching party simply pays the other party the agreed-upon damages. However, even in those cases where no liquidated damages provision was included in the agreement, or when the parties dispute whether the applicable mitigation provisions have been triggered, litigation has still been rare. In some cases, the affected college or university may simply decide that the cost of litigation outweighs the potential benefit. In other cases, the college or university may fear developing a reputation of being overly litigious, a stigma that may cause potential opponents to become leery of scheduling games with the school in the future.⁸⁰

In any event, given the rapidly escalating value of these football scheduling agreements,⁸¹ and the increasing frequency with which they are broken,⁸² litigation is likely to become more common in the future, making *Louisville v. Duke*—the only existing precedent on the issue—all the more important.

II. A CRITICAL ASSESSMENT OF *LOUISVILLE V. DUKE*

To date, only one court has confronted the issue of how to legally determine the sufficiency of a replacement opponent following the breach of a college football scheduling agreement. As discussed above, in *Louisville v. Duke*,⁸³ Duke cancelled the final three games of a four-game scheduling agreement with Louisville following an embarrassing 40-3 loss in the initial game under the contract.⁸⁴ Louisville sued, seeking payment under the agreement's liquidated damages clause, which provided that the breaching party must pay \$150,000 for each cancelled game if the non-breaching college or university was unable to schedule a replacement game against "a team of similar stature."⁸⁵

The suit was ultimately dismissed by the Kentucky state court upon

80. See *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 92 (1997) (statement of Gary R. Roberts, then-Professor of Law and Sports Law Program Director, Tulane Law School) (noting that college athletics officials disfavor litigation against other universities not only due to the potential stigma affecting their ability to schedule future competitions, but also for fear of alienating potential future employers); see also K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 *SPORTS LAW J.* 57, 84–85 (1999).

81. See *supra* notes 13, 59 and accompanying text.

82. See Walters, *supra* note 12.

83. *Univ. of Louisville v. Duke Univ.*, No. 07-CI-1765 (Franklin Cir. Ct. June 19, 2008), available at <http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf>.

84. *Id.*

85. COMPETITION AGREEMENT, *supra* note 1; see also *Louisville v. Duke*, No. 07-CI-1765 at 2.

Duke's motion for judgment on the pleadings.⁸⁶ In its opinion, the court focused specifically on the "team of a similar stature" language from the agreement's liquidated damages provision, interpreting it to mean two teams "on the same level."⁸⁷ The court determined that this standard "could not be any lower" in the case before it since Duke had won only one of its twelve games during the 2007 season.⁸⁸ Therefore, the court believed that it was unnecessary "to conduct an in-depth analysis of the relative strengths and weaknesses of the breaching team and its potential replacements,"⁸⁹ and instead held that "any team designated by the NCAA as a Division I school, whether in the [FBS] or the [FCS]" competed at the same level as Duke, and thus was a team of similar stature as the Blue Devils.⁹⁰ Because Louisville could not establish that any of its opponents were not Division I colleges or universities, the court held that the action must be dismissed.⁹¹

The *Louisville v. Duke* court's analysis was flawed in several respects. As an initial matter, the court erred by misapplying basic black letter contract law. Specifically, it is well established that in breach of contract cases, courts attempt to place the injured party "in as good a position as he would have been in had the contract been performed,"⁹² as judged by the parties' expectations at the time of contract formation, not at the time it was breached.⁹³ Despite this well-established principle, the court in *Louisville*

86. *Louisville v. Duke*, No. 07-CI-1765 at 1.

87. *Id.* at 2.

88. *Id.* at 3.

89. *Id.* at 2.

90. *Id.* at 4.

91. Technically, the court dismissed the suit with respect to Louisville's claim for damages for the 2007 and 2008 seasons, while holding that the claim arising out of the 2009 season was not yet ripe for adjudication. *Id.* at 1.

92. RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981). *See also* Karcher, *supra* note 53 at 54 ("A bedrock principle of contract law is that 'damages for breach of contract should be sufficient 'to place the plaintiff in the position he would be in if the contract had been fulfilled.'") (citing *Eckles v. Sharman*, 548 F.2d 905, 910 (10th Cir. 1977) (quoting C. MCCORMICK, HANDBOOK OF THE LAW ON DAMAGES § 137, at 560 (1935))).

93. *RealNetworks, Inc. v. DVD Copy Control Assoc., Inc.*, 641 F.Supp.2d 913, 948 (N.D. Cal. 2009) ("Under established principles of contract interpretation . . . the Agreement must be interpreted to reflect the mutual intent and reasonable expectations of the parties *at the time of contracting.*") (emphasis in original); *VTech Holdings Ltd. v. Lucent Techs. Inc.*, 172 F.Supp.2d 435, 441 (S.D.N.Y. 2001) ("[T]he essence of contract interpretation . . . is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract.") (citation omitted); *District of Columbia v. District of Columbia Pub. Serv. Comm'n*, 963 A.2d 1144, 1158 (D.C. 2006) (noting that the court's role is "to interpret the contract's terms as of the time of its formation in light of what the parties expected at the time"); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 92 at § 344(a) cmt. a ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract.").

v. Duke focused its analysis on Duke's record during the 2007 season, the season in which the first cancelled game would have been played, rather than considering Duke's stature at the time the contract was formed in 1999. Thus, even if one accepts the court's argument that in 2007 any Division I opponent would have been a sufficient replacement for a one-win Duke squad (a contention rejected below), the court's analysis was nevertheless flawed because Duke was not coming off a 1-11 record when the contract was initially entered in 1999. Rather, Duke had just completed a 4-7 season in which it was a middle-of-the-pack ACC team.⁹⁴

However, more significantly for future cases, the *Louisville v. Duke* court also erred by interpreting the breached agreement's "team of similar stature" language in a manner inconsistent with the realities of modern college football scheduling. Contrary to the court's suggestion, colleges and universities do not view all Division I schools as equally attractive opponents, from either a competitive or financial perspective. Competitively speaking, the *Louisville v. Duke* court erroneously concluded that just because Duke finished with a record of 1-11 in the 2007 season, it was necessarily one of the worst teams in Division I. In reality, Duke's win-loss record was not only a function of the quality of the Blue Devils' team, but also the quality of the opposition that it faced. As a member of the ACC, Duke played a series of conference games against extremely strong competition. For example, the Sagarin computer rankings (one of the computer rating systems factored into the BCS Standings), ranked Duke's 2007 schedule as the twenty-eighth most difficult in Division I.⁹⁵ Had Duke played in a weaker conference against easier competition, its record would likely have been significantly better. Indeed, despite its 1-11 record, the Sagarin system rated Duke the 109th best football team out of the 242 total Division I colleges and universities, and better than thirty-one other FBS teams, including a number of schools with significantly better win-loss records.⁹⁶

Moreover, even if one were to accept that Duke really was among the worst teams in the nation, that fact alone does not mean that any other Division I team would have been a replacement of similar competitive stature. As noted above, colleges and universities do not always want to schedule the most competitive teams possible in non-conference games. Rather, most colleges and universities attempt to build a schedule with a blend of teams, some more competitive than others, in order to help ensure a winning season and bowl eligibility.⁹⁷ It is quite possible that Louisville entered its scheduling agreement with Duke specifically because it viewed

94. 1998 *Standings*, *supra* note 2.

95. Jeff Sagarin *NCAA Football Ratings*, USATODAY.COM, <http://www.usatoday.com/sports/sagarin/fbt07.htm> (last visited Oct. 14, 2010).

96. *Id.*

97. See *supra* notes 37-46 and accompanying text.

the Blue Devils as a weak program, and thus a game that the Cardinals could expect to count as one of its requisite six wins to become bowl-eligible. In that case, Louisville would not view a stronger FBS opponent as being of a similar stature to Duke, nor necessarily for that matter any FCS team (as only one win versus an FCS team can count for purposes of bowl eligibility, and only then if it comes against a FCS team awarding a sufficient number of scholarships).⁹⁸ In fact, Duke's poor record and FBS status likely dramatically narrowed the pool of potential replacement opponents of a similar stature.⁹⁹

It is also possible that despite the Blue Devils' lowly record, a game versus Duke would have actually improved the Cardinals' strength-of-schedule calculations, in view of the fact that the BCS' computer rankings consider not only a team's opponents' win-loss record, but also the strength of its opponents' opponents.¹⁰⁰ Because Duke is a member of the highly competitive ACC, a game versus the Blue Devils thus could have resulted in a significant boost to the Cardinals' strength of schedule—as evidenced by Duke's own schedule having been rated the twenty-eighth most difficult in the country—despite Duke itself not being a particularly competitive opponent. Therefore, by failing to consider any of Louisville's competitive motivations in entering its scheduling agreement with the Blue Devils, the *Louisville v. Duke* court erred in summarily concluding that all Division I teams were of a similar stature as Duke.

Furthermore, the *Louisville v. Duke* court also erred by not giving any consideration to Louisville's potential financial motivations when scheduling its games against the Blue Devils. Although Duke had a poor win-loss record in 2007, it is nevertheless a high-profile university in a major BCS Conference. Thus, home games against Duke may have had significant appeal to Louisville fans, even if the Blue Devils did not field the most competitive team. This heightened appeal would likely have enabled Louisville to sell more tickets for a game against Duke than a lower-profile FBS or FCS opponent, a factor which should be relevant in assessing whether two teams are truly of a "similar stature."

Despite these analytical failings, the *Louisville v. Duke* court nevertheless may have ultimately reached the correct outcome based upon the merits of the case. Specifically, Louisville apparently replaced Duke on its 2007 schedule with a game against the University of Utah ("Utah"),¹⁰¹ a

98. See *supra* note 26 and accompanying text.

99. See Gabe Feldman, *We're Number 119! More on Duke Football*, SPORTS LAW BLOG, (Sept. 18, 2008), <http://sports-law.blogspot.com/2008/09/were-number-119-more-on-duke-football.html> (noting that "[o]nly a few teams can claim to be the 'best' or the 'worst,' so it would seem to be more difficult to replace teams on either end of the spectrum.").

100. See *supra* notes 34–35 and accompanying text.

101. Univ. of Louisville v. Duke Univ., No. 07-CI-1765 at 5 (Franklin Cir. Ct. June 19, 2008), available at [http://www.ncbusinesslitigationreport.com/Duke Opinion.pdf](http://www.ncbusinesslitigationreport.com/Duke%20Opinion.pdf).

team that had developed a strong reputation despite not belonging to a BCS Conference. Utah's reputation thus likely helped mitigate the financial effect of Duke's cancellation on Louisville's expected ticket sales, although perhaps not offering the Cardinals an equally predictable chance of victory (for the reasons discussed below).¹⁰² Indeed, Louisville drew nearly 41,000 fans for its game against Utah,¹⁰³ slightly more than its average home attendance for that season of just under 40,000 fans per game.¹⁰⁴

Perhaps more significantly, though, the *Louisville v. Duke* court noted in its opinion that Louisville did not argue that any of the teams on its 2007 or 2008 schedules were inferior to Duke,¹⁰⁵ and failed to propose an alternative standard for the "team of similar stature" language, instead simply arguing that the term was inherently ambiguous.¹⁰⁶ Therefore, it appears that Louisville failed to make a sufficient case that the replacement opponents it scheduled were of a significantly different stature than Duke, either competitively or economically.

However, even if the *Louisville v. Duke* court ultimately reached the correct outcome given the posture of the case, the analytical errors discussed above render the decision an insufficient precedent for future courts wrestling with these issues. A better analytical framework is needed.

III. THE IMPLICATIONS OF *LOUISVILLE V. DUKE* FOR FUTURE SCHEDULING AGREEMENTS AND RELATED LITIGATION

Given the questionable approach adopted by the court in *Louisville v. Duke*, the decision raises implications for both how colleges and universities draft future football scheduling agreements, as well as how future courts deal with assessing damages in forthcoming cases involving breached scheduling agreements.

A. Drafting Better Scheduling Agreements

As an initial matter, colleges and universities should take the *Louisville v. Duke* decision into account when drafting future scheduling agreements, not only for football games, but potentially for other revenue-generating

Louisville contested this finding, but failed to offer any evidence to the contrary. *Id.*

102. See *infra* notes 127–129 and accompanying text.

103. *Utah vs. Louisville Cardinals*, Oct. 5, 2007, <http://www.uofl sports.com/sports/m-footbl/stats/2007-2008/game06.html> (last visited Oct. 14, 2010).

104. *Louisville Cardinals Cumulative Season Statistics*, <http://www.uofl sports.com/sports/m-footbl/stats/2007-2008/teamcume.html> (last visited Oct. 14, 2010).

105. *Louisville v. Duke*, No. 07-CI-1765 at 3.

106. *Id.*

sports as well. As noted above,¹⁰⁷ most football scheduling contracts presently contain some form of a liquidated damages provision, either requiring the breaching party to make a specific financial payment without consideration of any mitigating factors, or alternatively requiring a financial payment only in the event that a comparable or suitable replacement opponent is not found.¹⁰⁸

Given the broad interpretation of the “team of similar stature” clause by the *Louisville v. Duke* court,¹⁰⁹ colleges and universities should reevaluate the use of similar mitigating language in their liquidated damages provisions. While this article has argued that the court’s interpretation of that clause was flawed,¹¹⁰ it nevertheless remains the only decided case on point. Therefore, if a college or university contests the breach of an agreement containing an analogous liquidated damages provision in court, it risks a finding that any Division I college or university constitutes a comparable or suitable replacement opponent.

Colleges and universities that wish to protect themselves against such an outcome should use more precise terminology when drafting liquidated damages provisions in the future. The safest approach would be to simply dispense with any mitigating language at all, and instead require that liquidated damages be paid in the event of any breach irrespective of the comparability of the ultimate replacement opponent. Alternatively, rather than forgoing liquidated damages whenever a “similar” opponent is scheduled, schools should instead more specifically identify the type of replacement opponent that must be found to forgo the payment of liquidated damages. For instance, colleges and universities could specify that the replacement opponent must come from the ranks of FBS, or perhaps even a particular conference or group of conferences—such as the BCS Conferences—in order to avoid the payment of liquidated damages, as is appropriate for the particular agreement being negotiated.

Although not considered explicitly by the court in *Louisville v. Duke*, another factor that colleges and universities must consider when drafting a liquidated damages provision is its likely enforceability should it be challenged in court. Historically, the propriety of rejecting liquidated damages provisions as unenforceable has been the subject of significant debate amongst both courts and scholars.¹¹¹ Today, most courts refuse to enforce a liquidated damages clause that goes beyond simply compensating the other party for its actual injury, and instead serves to unfairly penalize

107. See *supra* note 79 and accompanying text.

108. Zullo, *supra* note 14.

109. See *supra* notes 86–91 and accompanying text.

110. See generally *supra* Part II.

111. See generally Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633 (2001) (discussing various perspectives).

the breaching party.¹¹² Liquidated damages provisions constitute unlawful penalties when they are unreasonable in light of either the anticipated injury at the time the contract is formed, or the actual injury caused by the breach viewed retrospectively.¹¹³ Additionally, courts are more likely to enforce a liquidated damages provision when the actual amount of damage accruing as the result of the breach is difficult to assess.¹¹⁴

The United States Court of Appeals for the Sixth Circuit specifically considered the enforceability of a liquidated damages provision in the college football context in the 1999 case of *Vanderbilt University v. DiNardo*.¹¹⁵ In *DiNardo*, Vanderbilt University (“Vanderbilt”) sued its former head football coach in order to enforce the liquidated damages provision in his employment contract after DiNardo left the school to become the head coach at Louisiana State University.¹¹⁶ Among other things, DiNardo argued that the liquidated damages provision—which required him to pay Vanderbilt his net salary for each remaining year of service under the agreement in the event of a breach¹¹⁷—was an unlawful penalty and should not be enforced.¹¹⁸ The court rejected this argument, concluding that the liquidated damages provision was reasonable in light of the likely damages resulting from a breach, damages that “would be difficult to measure.”¹¹⁹ Specifically, the court quoted the district court opinion, which found that the loss of a head football coach would result in “damage beyond the cost of hiring a replacement coach,” including damage to “alumni relations, public support, football ticket sales, contributions, etc.,” all of which would be difficult, if not impossible, to precisely assess.¹²⁰

112. See, e.g., U.C.C. § 2-718; *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 755 (6th Cir. 1999); *Carr-Gottstein Props. v. Benedict*, 72 P.3d 308, 310-11 (Ala. 2003); *Tal Fin. Corp. v. CSC Consulting, Inc.*, 844 N.E.2d 1085, 1093 (Mass. 2006); *Berens and Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 747 N.W.2d 383, 387 (Neb. 2008); *Boots, Inc. v. Prempal Singh*, 649 S.E.2d 695, 697 (Va. 2007). See also Daniel Browder, Comment, *Liquidated Damages in Montana*, 67 MONT. L. REV. 361, 377 (2006); Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Pénales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code*, 32 BROOK. J. INT’L L. 67, 73 (2006); Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 726 (2000); Paul Bennett Marrow, *The Unconscionability of a Liquidated Damage Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 32-34 (2001).

113. Calleros, *supra* note 112, at 74.

114. Browder, *supra* note 112, at 377.

115. *DiNardo*, 174 F.3d at 751-56.

116. *Id.* at 753.

117. *Id.* at 753-54.

118. *Id.* at 753.

119. *Id.* at 756.

120. *Id.* (quoting *Vanderbilt Univ. v. DiNardo*, 974 F. Supp. 638, 642 (M.D. Tenn. 1997)).

Although *DiNardo* does not present a directly analogous case, it nevertheless provides a valuable precedent for purposes of determining the enforceability of liquidated damages provisions in college football scheduling agreements. Similar to the wide-ranging potential damage resulting from the loss of a head football coach noted by the court in *DiNardo*, the breach of a college football scheduling agreement can also affect a school in a variety of ways that are difficult to assess, including ticket sales, alumni donations, public support, and media coverage. For example, if a college or university loses a previously scheduled home game against a particularly compelling opponent, that breach might not affect just ticket sales on the day in question, but may also result in lost season-ticket sales and alumni donations, especially if the remaining schedule is not nearly as attractive. Similarly, if the ultimate replacement opponent is significantly stronger or weaker competitively than the breaching college or university, the breach may also dampen the affected school's chances of reaching a bowl game (in the case of a stronger replacement) or competing for a national championship (in the case of a weaker opponent), both of which could have a significant impact on alumni relations, public support, media coverage, and financial donations.

Therefore, damages accruing from college football scheduling agreements appear to possess the requisite difficulty of calculation some courts look for when approving a liquidated damages provision. Accordingly, the remaining factor for colleges and universities to consider when drafting a liquidated damages provision is whether the clause calls for unreasonably high damages compared to either the anticipated or actual harm, and thus runs the risk of being declared an unlawful penalty.¹²¹ While the appropriateness of liquidated damages provisions will of course ultimately vary on a case-by-case basis, the recent escalation in the required guaranteed payments necessary to schedule even a single non-conference football game—currently over one million dollars per game in some cases¹²²—provides colleges and universities with a strong reasonableness argument in support of significant liquidated damages provisions.

Thus, while colleges and universities can never guarantee that a court will uphold a particular liquidated damages provision, by drafting such clauses with an eye towards the ruling in *Louisville v. Duke*, schools can better protect themselves should a prospective opponent later decide to cancel a previously scheduled game.

B. A Recommended Framework for Future Courts Considering Breach of College Football Scheduling Agreement Cases

In addition to the best practices for drafting college football scheduling

121. Calleros, *supra* note 112, at 74.

122. See *supra* note 13 and accompanying text.

agreements, the *Louisville v. Duke* opinion also raises implications for courts deciding similar cases in the future. The issue of the suitability of a replacement opponent may arise in either of two contexts. First, the issue could come up when determining the applicability of a liquidated damages provision where damages are due only if the aggrieved party cannot find a sufficient replacement opponent, as was the case in *Louisville v. Duke*. Given the common use of liquidated damages clauses in football scheduling contracts,¹²³ this is probably the most likely scenario. However, in the case of a breached scheduling agreement without a liquidated damages provision, the court may need to consider the suitability of the non-breaching college or university's replacement opponent as part of its damages analysis. In either scenario, future courts should reject the *Louisville v. Duke* precedent, and instead assess the suitability of the replacement opponent in light of the affected college or university's relevant motivations for entering the original contract.

The first factor that courts will generally need to consider is the affected college or university's competitive motivations for entering the original scheduling agreement. As discussed above, colleges and universities employ different competitive strategies when drafting their non-conference football schedules.¹²⁴ In many cases, schools will seek a mix of one or two competitive teams along with several home games against less competitive opponents, with each specific game intended to fill a particular role in the overall scheduling scheme.¹²⁵ In other cases, a college or university may have elected to schedule only highly competitive or non-competitive opponents.¹²⁶ Whatever the case, courts should attempt to understand the aggrieved college or university's competitive scheduling strategy, and then assess where the cancelled game or games fit into that overall scheme.

Once the court understands the college or university's scheduling strategy, it can then assess the sufficiency of the replacement opponent. In this regard, the court should compare the expected competitiveness of the breaching school at the time the original agreement was entered—considering not only the college's or university's win-loss record, but also its conference affiliation and computer rankings—with that of the ultimate replacement opponent. While it is unlikely that the original and replacement opponents will ever be exact competitive equals, this analysis will enable courts to better gauge the relative similarity of the replacement opposition to the breaching college or university.

For instance, if the court in *Louisville v. Duke* had employed this analysis with respect to the cancelled 2007 Cardinals-Blue Devils game, it

123. See Zullo, *supra* note 14 (noting that scheduling agreements typically include a buyout provision).

124. See *supra* notes 23, 37–48 and accompanying text.

125. See *supra* notes 37–46 and accompanying text.

126. See *supra* notes 47–48 and accompanying text.

would have compared the competitive status of Duke in 1999 (a team that had just finished tied for sixth in the challenging ACC with a 4-7 overall record, and a computer ranking of eighty-fifth in the country),¹²⁷ with that of its apparent replacement Utah¹²⁸ (a team that went 8-5 in 2006, finishing third in the slightly less competitive Mountain West Conference, but with a computer ranking of forty-sixth in the country).¹²⁹ In that case, the question of whether Utah served as a sufficient competitive replacement for Duke would hinge on whether the Cardinals intended for the Blue Devils to serve as a challenging opponent (in which case Utah likely served as a reasonable replacement), or as an expected win (in which case Utah probably was not a team of reasonably similar stature). Similarly, had the record revealed that Louisville was forced to replace Duke on its schedule with a much less competitive team from the FCS, or with one of the most competitive FBS teams in the country, the analysis would again hinge on Louisville's competitive purpose in scheduling the Duke game.

In addition to assessing competitive motives, many cases will also require courts to consider the affected college or university's financial motivations for entering into the original scheduling agreement. For example, in a case where the sufficiency of a substitute home opponent is at issue, courts should consider whether a game against the originally scheduled opponent would have had similar appeal to the host school's fans as the game against the eventual replacement. In the case of *Louisville v. Duke*, the court thus should have considered whether Louisville would have reasonably expected to sell significantly more tickets to a home game versus Duke than a game against Utah. Additionally, in cases where no liquidated damages clause exists, the difference in guarantee payments for the cancelled and replacement games will also be highly relevant to the court's calculation of damages.

The specific applicability and weighting of these factors will vary by case. As noted above, college and universities will often balance competitive and financial motivations when entering a particular scheduling agreement,¹³⁰ a balancing that courts should consider when assessing the sufficiency of a replacement opponent. In other cases, however, the record will reflect that a college or university was primarily driven by only competitive or financial concerns when scheduling a game. Moreover, courts may also need to consider the relevancy of additional

127. Jeff Sagarin *NCAA Football Ratings*, USATODAY.COM, <http://www.usatoday.com/sports/sagarin/fbt98.htm> (last visited Oct. 14, 2010); see also *1998 Standings*, *supra* note 2.

128. See *supra* note 101 and accompanying text.

129. *2006 College Football Standings*, COLLEGEFOOTBALLPOLL.COM http://www.collegefootballpoll.com/2006_archive_standings.html (last visited Oct. 14, 2010); Jeff Sagarin *NCAA Football Ratings*, USATODAY.COM, <http://www.usatoday.com/sports/sagarin/fbt06.htm> (last visited Oct. 14, 2010).

130. See *supra* notes 71–72 and accompanying text.

factors, such as whether the cancelled or replacement games were scheduled to be televised, or whether a historic rivalry was involved.¹³¹ While these secondary factors are unlikely to drive the analysis in most cases—and often may not be implicated at all—they may nevertheless sometimes assist the court, particularly in difficult cases.

Whatever the case, by comparing the affected college or university's competitive and financial motivations when initially entering the breached agreement to those served by the eventual replacement opponent, future courts will be able to more accurately determine whether a sufficiently similar or suitable replacement was ultimately found, and what, if any, damages are owed.

IV. CONCLUSION

This article has considered the increasingly common occurrence of breached college football scheduling agreements by first exploring the modern trends in college football scheduling, and then critically evaluating the *Louisville v. Duke* decision, before finally offering suggestions to colleges, universities, and courts dealing with college football scheduling agreements. This article has argued that colleges and universities should take reasonable measures to protect themselves when drafting scheduling agreements, while courts need to develop a more sensible analytical framework in order to accurately assess the harm inflicted on a college or university by such a breach. In particular, future courts should primarily consider the sufficiency of a replacement opponent in view of both the non-breaching college's or university's competitive and financial motivations at the time the original scheduling agreement was executed. This framework will allow future courts to assess the sufficiency of a replacement opponent more accurately, and in the process help to ensure that colleges and universities affected by a breached scheduling agreement are more fully and fairly compensated for their harm.

131. See *supra* notes 67–70 and accompanying text.

