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Litigating On The Front Lines Of Pac-12 Power Struggle

By **Alex Lawson**

Law360 (April 4, 2024, 4:02 PM EDT) -- The mass exodus from the Pac-12 sparked fierce litigation over the considerable money and power at stake for the conference, challenging attorneys to deal with a high-pressure dispute moving along at breakneck speed.

One lawyer at the center of the fight was Keker Van Nest & Peters LLP partner Eric H. MacMichael, who led a team representing Oregon State University, one of the two schools looking to remain in the winnowed Pac-12 and ensure the outgoing members did not exercise outsized control of the conference's governance.

The litigation began last September, with the 10 outgoing schools slated to formally exit the conference at the end of the 2023-24 academic year. When it became apparent the conference was headed for a power struggle, OSU along with Washington State University lawyered up.

After a Washington state judge ruled OSU and WSU should remain in control of the conference while the litigation played out, settlement negotiations intensified, eventually culminating in a deal splitting $65 million in fees between the two remaining schools and giving them certain checks on the outgoing schools.

MacMichael joined Law360 for a phone interview this week to break down how the litigation took shape and the unique challenges he and his team had to address. MacMichael was the lead attorney for all in-court dealings but made sure to credit the other members of his team, including partners David Silbert, Nicholas Goldberg and Franco Muzzio as well as associates Nathaniel Brown and Taylor Reeves.

The conversation has been edited for length and clarity.

College sports realignment is something top-of-mind for a lot of casual sports fans. How did it bleed into court here?

In the case of the Pac-12, 10 of the 12 members announced they were planning to leave once the current media contract expired at the end of July 2024, and the initial two were USC and UCLA. Then, starting in July 2023, there was this mass exodus that was caused by Oregon and Washington announcing they were leaving, and their announcement came on the day the conference was going to receive the final offer from Apple about the new media deal that would come into place once the current one expired.

Obviously, the timing there was extremely harmful to the conference and basically scuttled that deal. So then you've got the situation where you've got essentially another 11 months of these schools being in the conference: 10 who are leaving at the end of the current media deal, two who are staying. The question becomes: Who's going to govern the conference?

So that is what led to the fight spilling into court, our sense that the 10 schools and the conference had an understanding that the 10 schools would still maintain their seats on the board of directors. They'd still be entitled to vote on everything, even though we thought that under our reading of the bylaws, once they announced they were planning to leave, they should be automatically removed from the board and not entitled to vote on any matter. We had clear indications they were not, that they had a different interpretation.

What were the circumstances under which Oregon State retained you?

I think it was a Friday that Oregon and the University of Washington announced they were leaving at like 6:55 a.m., and then by 3:00 p.m. that same day, you had five other schools who announced they were leaving. So it left only four in the conference, and then a few weeks later, Stanford and Cal announced they were leaving. So I got a call, I think it was the week after that sort of fateful day.

We obviously got involved right away and tried to understand the governance piece and how this was going to play out. And it was just a really rapidly evolving situation where every day you'd get new information about what people's positions might be or what position the conference might take.

And obviously, this conference needed to be making decisions at this time. You really couldn't have the conference in the state of paralysis where no one could make decisions because it has a lot of employees. There's a lot of contractors, there's a lot of people who need clear direction to keep this conference alive. So you can imagine it sort of came to a head very quickly.

Our firm has done a lot of sports-related litigation. We represented the PGA Tour in the antitrust fight against LIV Golf, and we've done a lot of other really interesting sports-related cases. So that's how we got involved, and within days or weeks we were kind of off to the races.

What were the main challenges you faced when litigating this case?

We were going against 10 schools and the conference. So we essentially had 11 adversaries from the beginning, which is obviously very, very challenging. The challenge was, if the conference was not aligned with us at that time, it was very difficult for us to get the information that we needed.

We had to sort of develop a record on our own, because one of the main arguments we were making is that the conference had previously adopted our interpretation of the bylaws when USC and UCLA announced their departure. And that was about 13 months prior. But of course, the conference would not give us any of the information we needed to sort of make that point clearly, and so we had to really use our own ingenuity to try to get the information we needed to make our case.

I would say within weeks, it was clear there was going to be a big fight. And then, when you're going against that number of adversaries, there's lots of complicated questions about venue and where they could be sued. And these schools would argue that they have sovereign immunity in certain states. And so it was really legally complicated, where to bring this dispute and how to bring this dispute. So all of that was tricky.

When you're working on a case like this, to what extent are you just focused on a good outcome for your client versus ensuring some kind of stability for college athletics going forward?

The way that I think about it, maybe it's overly simplistic, is just what is the best outcome for my client? But that takes into account a lot of different factors. One of those factors in this case would include the sort of shifting landscape and college athletics and how all of these things are rapidly evolving and there's a lot of uncertainty. And so the best outcome for my client, you know, was to preserve as much flexibility and optionality as they possibly could going into the future.

They obviously needed to address the immediate concern, which was getting control of the board of directors and making sure the 10 weren't able to get control, because that would eliminate options. We thought they would probably or very likely dissolve the conference so that they could distribute the assets before they left. So there were a lot of different factors we were trying to basically weigh and assess to get to the best outcome for our client.

So I look at every case as, what's the best outcome I can help achieve?

This was a fight that burned hot but ultimately pretty briefly — what can you tell me about how the settlement materialized?

Once it was clear through the preliminary injunction that we were going to be in charge, of course our goal shifted to trying to find a way to resolve this. And I think that was the same for the other 10.

It's a very complicated negotiation any time you've got these 12 institutions and the conference involved. But I think the preliminary injunction at least gave everybody clarity on what would happen if there wasn't a settlement, because in that case, we would obviously be the only two board members. But we were certainly mindful of the fact that even with the preliminary injunction in place, there could be other litigation filed elsewhere, or this could really sprawl into an even bigger mess.

So I think there was a desire to achieve some certainty for everybody so that Oregon State and Washington State could focus on the business of running the Pac-12 and exploring all their different options. And whenever you're dealing with athletics or dealing with college institutions, there's so much interest from all these different constituencies. But at the end of the day, I think we had our guiding principles about what we thought a fair resolution would look like.

So we had very extensive discussions with the 10. There was a real three-ring circus to try to get all 12 institutions in the same room, which obviously had to happen multiple times. We were able to get what we really wanted, which was the right to run this conference in an unfettered way, without unnecessary distraction or complication arising from the fact that 10 of the members are leaving and are really looking more at these other conferences.

One of the significant things that had to be addressed is the liabilities facing the Pac-12, along with the other major conferences and the NCAA. There is significant litigation out there involving name, image and likeness rights, and the Pac-12 is a defendant in several of those cases, along with the other Power Five conferences. And so we needed to find a way to ensure that those potential liabilities, which were incurred when all 12 members were there, were dealt with in a fair way.

This isn't the only litigation centered around conference realignment. If other attorneys working on such cases read this, what is something you would want them to keep in mind?

These are complicated, tricky cases that people have strong feelings about. I think the thing that really benefited Oregon State, my client, was the conviction of their leadership team starting with the president, but also the general counsel and others. They were incredibly decisive.

It's not an easy decision to take this to litigation, but I think our case illustrates that if you are firm in your belief that you're right, you need to act quickly and decisively — because otherwise you're sort of left in this state of limbo or paralysis, and that's not going to improve your situation.

--Editing by Philip Shea.
