

11-20-2010

## Third and Extremely Long: Why the Elimination of the BCS Seems All But Impossible

Brad Taconi

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/jbel>

 Part of the [Antitrust and Trade Regulation Commons](#), and the [Entertainment and Sports Law Commons](#)

---

### Recommended Citation

Brad Taconi, *Third and Extremely Long: Why the Elimination of the BCS Seems All But Impossible*, 4 J. Bus. Entrepreneurship & L. Iss. 1 (2010)

Available at: <http://digitalcommons.pepperdine.edu/jbel/vol4/iss1/7>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in The Journal of Business, Entrepreneurship & the Law by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

---

# THIRD AND EXTREMELY LONG: WHY THE ELIMINATION OF THE BCS SEEMS ALL BUT IMPOSSIBLE

BRAD TACONI\*

I.Introduction .....	181
II.The Participants.....	183
A. The NCAA .....	183
B. NCAA Division I FBS Member Institutions .....	184
C. The Bowl Championship Series .....	186
1. The Early Days of Polls and Bowl Games .....	186
2. The Implementation of the Bowl Championship Series.....	189
III.The Issue .....	191
IV.BCS and Antitrust Implications .....	193
A. The NCAA, Sherman, and the Run to the BCS .....	193
B. The BCS and Whether or Not it is a Violation of Sherman Antitrust Act.....	197
1. Sherman Antitrust Analysis .....	197
2. Identifying the Conduct of the BCS that is Being Challenged....	200
3. The BCS and the Per Se Rule .....	201
4. The BCS and the Quick-Look Analysis.....	202
5. The BCS and the Rule of Reason.....	202
a. Anticompetitive Effects of the BCS .....	203
b. Procompetitive Justifications for the BCS.....	206
c. Less Restrictive Alternatives .....	209
d. Analysis of the Viability of a BCS Antitrust Violation Suit.....	210
C. Further Developments.....	211
V.Congress' 2009 Antitrust Debate .....	212
A. House Resolution 1120 .....	213
B. College Football Playoff Act of 2009 .....	214
C. Championship Fairness Act of 2009 .....	215
VI.Conclusion .....	217

## I. INTRODUCTION

On January 8, 2009, the University of Florida Gators defeated the University of Oklahoma Sooners in Miami, Florida to win the Bowl Championship Series

---

\* Pepperdine University School of Law, J.D. Candidate 2011.

(“BCS”) Championship Game.<sup>1</sup> As a result of their victory, the Gators were named the Associated Press National Champions after capturing forty eight out of a possible sixty five first place votes.<sup>2</sup> The win on the football field gave the Gators their second national championship in three seasons, but it also reignited a debate about the inherent fairness of the BCS system: whether the BCS violates antitrust law, and whether the federal government should interject and force the National Collegiate Athletic Association (“NCAA”) to create a system in which a national champion is determined in a different manner.<sup>3</sup>

In the months leading up to the 2009 BCS Championship Game, college football pundits, internet bloggers, sports reporters, politicians, and President Barack Obama all extolled the virtues and the follies of implementing a playoff system in college football and eliminating the BCS.<sup>4</sup> Arising out of these discussions and the incongruent results on the football field, three separate bills have been introduced into the House of Representatives with the goal of each bill being to help bring an end to the BCS and to implement a playoff system for Division IA college football.<sup>5</sup>

This paper will seek to identify and discuss two primary issues as well as answer follow up questions that arise throughout. The first issue to be discussed is whether the BCS and the NCAA have violated any antitrust laws and, if they have, whether or not it is beneficial to put these anticompetitive practices to rest as a practical matter. The second issue revolves around whether Congressional mandates would solve the perceived problems and force major college football to determine its national champion through a playoff.

---

<sup>1</sup> Pete Thamel, *Florida Raises Another Trophy*, N.Y. TIMES, Jan. 9, 2010, at B10.

<sup>2</sup> *See id.* In addition to Florida receiving first place votes, the University of Utah received sixteen first place votes and the University of Southern California, the University of Texas and the University of Oklahoma each received one first place vote. *Id.*

<sup>3</sup> The University of Utah Utes finished the season undefeated by beating the University of Alabama Crimson Tide 31-17 in the Sugar Bowl. Ray Glier, No. 7 *Utah 31, No. 4 Alabama 17; Perfect Utah Rolls Past Alabama*, N.Y. TIMES, Jan. 3, 2009, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0DEFDA1F3DF930A35752C0A96F9C8B63&scp=2&sq=Utah+uteu&st=nyt>. Because the Utes did not finish the regular season in either first or second place of the BCS standings, they were not invited to the Championship Game. The Florida Gators and the Oklahoma Sooners, on the other hand, finished the regular season 12-1 after losing to the Mississippi State Bulldogs and the University of Texas, respectively.

<sup>4</sup> During a Monday Night Football telecast on November 3, 2008, Obama was interviewed by Chris Berman of Entertainment and Sports Programming Network (“ESPN”) and stated that the one thing he would change about sports is that he would like to see a college football playoff system implemented. *Obama Wants Playoff; McCain to Stop Performance-Enhancing Drugs*, ESPN, Nov. 3, 2008, <http://sports.espn.go.com/espn/news/story?id=3680895>. He advocated an eight team playoff with the winner of the tournament being crowned the national championship. *Id.* He also stated that he was “fed up with [those] computer rankings.” *Id.* Both candidates appeared on the telecast the night before the 2008 Presidential election and advocated for political and Congressional assistance with current issues in the sports world. *Id.*

<sup>5</sup> Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365, 366 (2009).

## II. THE PARTICIPANTS

### A. *The NCAA*

Football spawned the creation of the NCAA.<sup>6</sup> The first incarnation of the NCAA was founded in late 1905 under the mandates of President Theodore Roosevelt as a response to the rugged, rough, and sometimes deadly nature of collegiate football.<sup>7</sup> As a follow up to the president's demands, sixty two institutions created the Intercollegiate Athletic Association of the United States ("IAAUS") whose purpose was to initiate change in the rules of collegiate football.<sup>8</sup> As the IAAUS grew, it began concerning itself with other college athletics and, in 1910, it changed its name to the NCAA and became a rules-making and discussion body for several different sports.<sup>9</sup> In 1921, it hosted its first national championship of any kind and, in the ensuing years, has added more sports under its umbrella as the primary collegiate athletics governing body.<sup>10</sup>

Since the NCAA began regulating and governing college football, universities and colleges around the country have gained membership in to the NCAA which regulates player eligibility rules and strives to provide a regulated playing field for all teams.<sup>11</sup> Since 1973, college football has been broken down into three distinct divisions, and since 1978, Division I has been broken down into two subdivisions: the Football Bowl Subdivision ("FBS") and the Football Championship Subdivision ("FCS").<sup>12</sup> The Division I FBS schools are all colleges and universities whose football programs participate in postseason bowl games rather than participate in the playoff system of the FCS, which is run by the

---

<sup>6</sup> JOSEPH N. CROWLEY, *IN THE ARENA: THE NAT'L COLLEGIATE ATHLETIC ASS'N'S FIRST CENTURY I* (Nat'l Collegiate Athletic Ass'n 2006, Digital Ed.).

<sup>7</sup> Nat'l Collegiate Athletic Ass'n, *History of the Nat'l Collegiate Athletic Ass'n*, <http://NCAA.org/wps/NCAA?key=/NCAA/NCAA/about+the+NCAA/overview/history.html> (last visited Jan. 7, 2010).

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> Nat'l Collegiate Athletic Ass'n, *2009-10 Nat'l Collegiate Athletic Ass'n Division I Manual I* (2009), <http://www.NCAAPublications.com/productdownloads/D110.pdf> [hereinafter *Nat'l Collegiate Athletic Ass'n Manual*].

<sup>12</sup> *See id.* The three divisions are Division I, Division II, and Division III. Beginning in 1978, Division I was broken down further into Division IA and Division IAA, with the Division IAA having a championship tournament at the end of the season while Division IA retained the traditional bowl format. Timothy Kober, Comment, *Too Many Men on the Field: Why Congress Should Punt on the Antitrust Debate Overshadowing Collegiate Football and the Bowl Championship Series*, 15 SETON HALL J. SPORTS & ENT. L. 57, 58-59 (2005). In 2006, the Nat'l Collegiate Athletic Ass'n changed the subdivisions of Division I from Division IA and Division IAA to the Division I Football Bowl Subdivision and Division I Football Championship Subdivision, respectively, in order to make the names more accurately reflect the end of season contests. Steve Wieberg, *Nat'l Collegiate Athletic Ass'n to Rename College Football Subdivisions*, USA TODAY, Aug. 3, 2006, available at <http://www.usatoday.com/sports/college/football/2006-08-03-NCAA-subdivisions.x.htm>. The criteria for each division remained the same as under the previous designations. *Id.* See NAT'L COLLEGIATE ATHLETIC ASS'N, *What's the Difference Between Division I, II, and III?*, [http://www.NCAA.org/wps/NCAA?key=/NCAA/NCAA/about+the+NCAA/membership/div\\_criteria.html](http://www.NCAA.org/wps/NCAA?key=/NCAA/NCAA/about+the+NCAA/membership/div_criteria.html) (last visited Jan. 7, 2010).

NCAA.<sup>13</sup> Under the bowl system, the NCAA does not technically organize any of the bowls, but, in order for a bowl to host a game between NCAA member institutions, that bowl must be authorized by the NCAA.<sup>14</sup> Beginning in 1998, the BCS, in conjunction with the commissioners of the various FBS conferences and the NCAA, was implemented in order “to pair the two top-rated teams in a national championship game and to create competitive match-ups among highly regarded teams in three other games as part of the bowl system.”<sup>15</sup> While there have been tweaks to the system since 1998, the BCS still governs the major bowl games and dictates which two teams will play in the BCS Championship Game.<sup>16</sup> The NCAA has used this system to organize and administer FBS college football.

### B. NCAA Division I FBS Member Institutions

The NCAA FBS member institutions are universities and colleges organized into eleven collegiate athletic conferences.<sup>17</sup> The conferences are: the Atlantic Coast Conference (“ACC”),<sup>18</sup> the Big East Conference (“Big East”),<sup>19</sup> the Big Ten Conference (“Big 10”),<sup>20</sup> the Big Twelve Conference (“Big 12”),<sup>21</sup> Conference

---

<sup>13</sup> Press Release, NAT’L COLLEGIATE ATHLETIC ASS’N, Nat’l Collegiate Athletic Ass’n Q&A on Postseason Football (Dec. 14, 2006), [http://www.NCAA.org/wps/NCAA?key=/NCAA/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2006/Miscellaneous/NCAA+Q\\_A+on+Postseason+Football](http://www.NCAA.org/wps/NCAA?key=/NCAA/NCAA/Media+and+Events/Press+Room/News+Release+Archive/2006/Miscellaneous/NCAA+Q_A+on+Postseason+Football).

<sup>14</sup> Nat’l Collegiate Athletic Ass’n Manual, *supra* note 11, at 287.

<sup>15</sup> BCS, BCS Chronology, <http://www.bcsfootball.org/bcsfb/history> (last visited Jan. 7, 2010) [hereinafter BCS Chronology].

<sup>16</sup> Joe Drape, *BCS Adds Fifth Game and Access for Have-Nots*, N.Y. TIMES, March 1, 2004, at D1. The major change implemented was to add an extra game to the format. *Id.* This would add an additional two openings for teams not already assured of a spot in the BCS bowl games. *Id.*

<sup>17</sup> See Nixon, *supra* note 5, at 369.

<sup>18</sup> See Nat’l Collegiate Athletic Ass’n, Nat’l Collegiate Athletic Ass’n Sports Sponsorship: Football Bowl Subdivision, <http://web1.NCAA.org/online/Dir/exec/sponsorship> (last visited Jan. 7, 2010). The ACC consists of Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Maryland – College Park, University of Miami (Florida), North Carolina State University, University of North Carolina at Chapel Hill, University of Virginia, Virginia Polytechnic Institute & State University, and Wake Forest University. *Id.*

<sup>19</sup> See *id.* The Big East consists of University of Cincinnati, University of Connecticut, University of Louisville, University of Pittsburgh, Rutgers – State University of New Jersey – New Brunswick, University of South Florida, Syracuse University, and West Virginia. *Id.*

<sup>20</sup> See *id.* The Big 10 consists of University of Illinois – Champaign, Indiana University – Bloomington, University of Iowa, University of Michigan, Michigan State University, University of Minnesota – Twin Cities, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University, and University of Wisconsin – Madison. *Id.* Beginning with the 2011 season, the University of Nebraska Cornhuskers will begin playing in the Big 10. Leslie Reed, *Huskers’ Big Ten Move Official*, OMAHA WORLD HERALD, June 11, 2010, available at <http://www.owh.com/article/20100611/SPORTS/306119924>.

<sup>21</sup> See Nat’l Collegiate Athletic Ass’n, *supra* note 18. The Big 12 consists of Baylor University, University of Colorado – Boulder, Iowa State University, University of Kansas, Kansas State University, University of Missouri – Columbia, University of Nebraska – Lincoln, University of Oklahoma, Oklahoma State University, Texas A & M University – College Station, Texas Tech University, and University of Texas – Austin. *Id.* In June 2010, both the University of Nebraska Cornhuskers and University of Colorado Buffaloes accepted offers to move to other conferences. See Reed, *supra* note 20; Tom Kensler, *CU, Pac 10 Have a Certain Ring to Them*, DENVER POST, June 12, 2010, available at [http://www.denverpost.com/sports/ci\\_15281580](http://www.denverpost.com/sports/ci_15281580).

USA (“C-USA”),<sup>22</sup> the Mid-American Conference (“MAC”),<sup>23</sup> the Mountain West Conference (“MWC”),<sup>24</sup> the Pacific-Ten Conference (“Pac 10”),<sup>25</sup> the Southeastern Conference (“SEC”),<sup>26</sup> the Sun Belt Conference (“Sun Belt”),<sup>27</sup> and the Western Athletic Conference (“WAC”).<sup>28</sup> The University of Notre Dame, the United States Naval Academy, and the United States Military Academy are not a part of a conference affiliated with the FBS, but continue to compete with FBS

---

<sup>22</sup> See Nat’l Collegiate Athletic Ass’n, *supra* note 18. C-USA consists of University of Alabama at Birmingham, University of Central Florida, East Carolina University, University of Houston, Marshall University, University of Memphis, Rice University, Southern Methodist University, University of Southern Mississippi, University of Texas – El Paso, Tulane University, and University of Tulsa. *Id.*

<sup>23</sup> See Nat’l Collegiate Athletic Ass’n, *supra* note 18. The MAC consists of University of Akron, Ball State University, Bowling Green State University, University at Buffalo – the State University of New York, Central Michigan University, Eastern Michigan University, Kent State University, Miami University (Ohio), Northern Illinois University, Ohio University, Temple University, University of Toledo, and Western Michigan University. *Id.*

<sup>24</sup> See *id.* The MWC consists of Brigham Young University, Colorado State University, University of Nevada – Las Vegas, University of New Mexico, San Diego State University, Texas Christian University (“TCU”), United States Air Force Academy, University of Utah, and University of Wyoming. *Id.* Starting with the 2011 season, the Boise State University Broncos are scheduled to move to the MWC, while the Fresno State Bulldogs and University of Nevada Wolfpack are scheduled to join the conference in either 2011 or 2012. Andy Katz et al., *Nevada, Fresno State Move to MWC*, ESPN, Aug. 18, 2010, <http://sports.espn.go.com/NCAA/news/story?id=5474774>. Furthermore, the Utah Utes will be moving to the Pac 10 Conference. *Id.* Finally, Brigham Young University announced that they will be leaving the MWC to become an independent in football beginning in 2011. Andy Katz, *BYU Leaving MWC for 2011-12 Season*, ESPN, Aug. 31, 2010, <http://sports.espn.go.com/NCAA/news/story?id=5517305>.

<sup>25</sup> See Nat’l Collegiate Athletic Ass’n, *supra* note 18. The Pac 10 consists of University of Arizona, Arizona State University, University of California – Berkeley, University of California – Los Angeles, University of Oregon, Oregon State University, University of Southern California, Stanford University, University of Washington, and Washington State University. *Id.* In June 2010, the Pac 10 Conference attempted to expand as it invited the University of Utah Utes, University of Colorado Buffaloes, University of Texas Longhorns, Texas A&M University Aggies, Texas Tech University Red Raiders, University of Oklahoma Sooners, and the Oklahoma State Cowboys to join the conference. Chuck Carlton, *Texas Turns Down Pac 10; Big 12 Schools Have Framework of Deal*, DALLAS MORNING NEWS, June 14, 2010, available at [http://www.dallasnews.com/sharedcontent/dws/spt/stories/061510dnspoblogcoll\\_a2975b0c.html](http://www.dallasnews.com/sharedcontent/dws/spt/stories/061510dnspoblogcoll_a2975b0c.html). The University of Utah Utes and the University of Colorado Buffaloes accepted the offer to join the Pac 10 beginning in 2011. Lya Wodraska, *Utah Officially Accepts Pac 10 Invitation*, SALT LAKE TRIB., Aug. 3, 2010, available at <http://www.sltrib.com/sltrib/sports/49781044-75/utah-utes-pac-scott.html.csp>; see John Henderson, *Colorado Buffaloes to Join Pac 10 Conference Next Year*, DENVER POST, Sept. 21, 2010, available at [http://www.denverpost.com/sports/ci\\_16134205?source=rss](http://www.denverpost.com/sports/ci_16134205?source=rss).

<sup>26</sup> See Nat’l Collegiate Athletic Ass’n, *supra* note 18. The SEC consists of University of Alabama – Tuscaloosa, University of Arkansas – Fayetteville, Auburn University, University of Florida, University of Georgia, University of Kentucky, Louisiana State University, University of Mississippi, Mississippi State University, University of South Carolina – Columbia, University of Tennessee – Knoxville, and Vanderbilt University. *Id.*

<sup>27</sup> See *id.* The Sun Belt consists of Arkansas State University, Florida Atlantic University, Florida International University, Louisiana at Lafayette, University of Louisiana at Monroe, Middle Tennessee State University, University of North Texas, Troy University, and Western Kentucky University. *Id.*

<sup>28</sup> See NAT’L COLLEGIATE ATHLETIC ASS’N .org, *supra* note 18. The WAC consists of Boise State University, California State University – Fresno, University of Hawaii – Manoa, University of Idaho, Louisiana Tech University, University of Nevada – Reno, New Mexico State University, San Jose State University, and Utah State University. *Id.* By 2012, the Boise State University Broncos, Fresno State University Bulldogs, and University of Nevada Wolfpack will have completed moves to the MWC. See Katz, *supra* note 24.

institutions and are eligible for the BCS if they qualify.<sup>29</sup>

### C. *The Bowl Championship Series*

The BCS was first established in order to provide major college football with a championship game within the framework of the traditional bowl system. The BCS was formed on the back of both the Bowl Coalition and the Bowl Alliance which had also attempted to create a way to provide college football with a consensus national champion. All three of these systems relied on polling to determine which teams would be considered the national champions after all of the bowl games were played.

#### 1. *The Early Days of Polls and Bowl Games*

Since the beginning of organized college football, several polls have been created in order to rank the college football teams throughout the country.<sup>30</sup> These ranking systems rely upon mathematical formulae as well as the opinions of sportswriters throughout the country in order to select a national champion at the end of the season.<sup>31</sup> While each poll strives to name the team they deem most deserving of the national championship, there have been several occasions where the polling system has failed to name a unanimous champion, or even a consensus champion.<sup>32</sup> As college football gained more notoriety and became a billion dollar business, coaches, universities, and conferences attempted to implement a system that would streamline the polls and name a consensus national champion on a yearly basis.<sup>33</sup>

In addition to the polls naming a champion at the end of the season, college football has created a bowl system that allows qualifying teams to play one postseason game. The first bowl game was the 1902 Rose Bowl that was created to enhance the New Year's Day festivities surrounding the Tournament of Roses Parade.<sup>34</sup> In the years that have followed, several bowl games have been added to the yearly schedule with the current number totaling thirty four.<sup>35</sup> The expansion of the bowl system has come as a direct result of university and college presidents, conference commissioners, and the fans' desire to see their teams play an extra game, as well as the financial and recruiting incentives that come to those teams

---

<sup>29</sup> See Nat'l Collegiate Athletic Ass'n, *supra* note 18. Additionally, the Brigham Young University ("BYU") Cougars will forego a conference and strike out as an independent beginning in 2011. See Katz, *supra* note 24. Unlike Notre Dame, BYU will not be afforded the same considerations within the BCS system as Notre Dame, at least initially. *Id.*

<sup>30</sup> See Kober *supra* note 12, at 59.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> Tournament of Roses, Rose Bowl Game History, <http://www.tournamentofroses.com/history/gamehistory.asp> (last visited Jan. 7, 2008). The University of Michigan Wolverines defeated Stanford University 49-0 and caused the Tournament of Roses Parade organizers to drop the football game in favor of chariot races until 1916 when the bowl game resumed. *Id.*

<sup>35</sup> ESPN, 2009 Nat'l Collegiate Athletic Ass'n Football Schedule – Bowl Week, <http://espn.go.com/college-football/schedule> (last visited Jan 7, 2010) [hereinafter Bowl Schedule].

that participate.<sup>36</sup> Additionally, the number of host cities for the bowl games have increased as those cities have found the exposure and financial incentives to be similarly rewarding.<sup>37</sup>

While the bowl system developed, some of the games became associated with certain conferences.<sup>38</sup> As these bowl affiliations became formalized through contract, the postseason match-ups became predictable and it became difficult to manipulate the bowl games in order to create a de facto national championship.<sup>39</sup> While these arrangements provided exciting capstones to the season, they hindered the process of determining the two best teams.<sup>40</sup> In effect, the arrangements limited the participation in each of the major bowl games such that certain conference champions were committed to attending certain bowls while others were wholly excluded; the net result was a system which was ill suited to match the two best teams in a national championship game.<sup>41</sup>

Due to the inconsistency of the polls and an inability to match the two best teams on the football field, certain conferences allied themselves to create the Bowl Coalition in 1992,<sup>42</sup> a precursor to the BCS. The system organized the Big East, ACC, Southwest Conference, Big Eight Conference, the SEC, and Notre Dame into a coalition that would attempt to create a national championship game.<sup>43</sup>

---

<sup>36</sup> Brad Humphreys, *More on Economic Impact of Bowl Games*, THE SPORTS ECONOMIST, Dec. 22, 2009, <http://thesportseconomist.com/labels/economic%20impact.htm>. While the economic recession has caused some teams to actually lose money by attending some of the smaller bowl games, teams are just as eager to participate because of the exposure playing on national television brings to their programs. Additionally, the BCS games (the Rose Bowl, Fiesta Bowl, Sugar Bowl, Orange Bowl, and BCS Championship game) guarantee \$18 million payouts to its participants. *Id.* That money is split between the university playing in the game and the other universities and colleges within that team's conference. *Id.*

<sup>37</sup> See *Orlando Bowl Games: \$80M Economic Impact*, ORLANDO BUS. J., Dec. 28, 2009, <http://orlando.bizjournals.com/orlando/stories/2009/12/28/daily2.html>; see also Gaylord Hotels Music City Bowl, Nashville's Holiday Tradition, [http://www.musiccitybowl.com/about\\_us/history.php](http://www.musiccitybowl.com/about_us/history.php) (last visited Jan. 7, 2010); PAC. LIFE HOLIDAY BOWL, *Local Bowl Games Have Record Economic Impact for Region*, May 14, 2009, <http://www.holidaybowl.com/2009/local-bowl-games-have-record-economic-impact-for-region.html>. In addition to the number of cities hosting bowl games, several cities have begun hosting multiple bowl games each season. See Bowl Schedule, *supra* note 35.

<sup>38</sup> See Kober, *supra* note 12, at 60.

<sup>39</sup> In particular, the Rose Bowl began selecting only the champion from the Big 10 Conference to match-up against the winner of the Pac 10 Conference, the Orange Bowl selected the champion of the Big Eight Conference annually, the Sugar Bowl selected the champion of the SEC, and the Cotton Bowl selected the champion of the Southwest Conference. See Tournament of Roses, *supra* note 34; see BCS Chronology, *supra* note 15.

<sup>40</sup> See Kober, *supra* note 12, at 60.

<sup>41</sup> See *id.*

<sup>42</sup> See BCS Chronology, *supra* note 15.

<sup>43</sup> See *id.* The system would allow the Southwest, Big Eight, and SEC to retain their traditional bowl tie-ins while the ACC, Big East, and Notre Dame would travel to the individual bowl games to play the champion of each of those conferences if the match-up would feature the number one and two teams in the country. *Id.* Additionally, if one and two came solely from the Big East, ACC, or Notre Dame, those two teams would meet in the Fiesta Bowl in Tempe, Arizona. *Id.* Further, the slots that were vacated by teams switching bowls would be filled in by at large teams. The Southwest Conference was considered a major football conference at the time as it was the home to the Texas Longhorns as well as several other prominent football programs. Blair Kerkhoff, *Big 12 Problems Trace to League's Roots*, KANSAS CITY STAR, June 5, 2010, available at <http://www.dallasnews.com/>



While the Bowl Coalition was much more successful than the previous system,<sup>44</sup> there were still limitations.<sup>45</sup> For instance, the Bowl Coalition did not include the Pac 10 and the Big 10.<sup>46</sup> This created a situation where the Bowl Coalition could not match a team with a representative from those conferences; if a team from the Pac 10 or the Big 10 were in the top two, there could not be a national championship game that season.<sup>47</sup> According to the terms of the contract governing the Bowl Coalition, the arrangement was to be reviewed every three years.<sup>48</sup> After the 1994 season, the conference commissioners determined it was in the best interest of college football to create a new system since the contracts between certain conferences and bowl games expired.<sup>49</sup> The net result was the Bowl Alliance.<sup>50</sup>

The biggest difference between the Bowl Alliance and the Bowl Coalition was that the Bowl Alliance eliminated the traditional bowl tie-ins.<sup>51</sup> The Bowl Alliance created a system where the ACC, Big East, Big Eight, Southwest, and SEC would send their champions to either the Sugar, Fiesta or Orange Bowl with the hosting bowl committees choosing their own match-ups.<sup>52</sup> The system attempted to “provide the best opportunity to match the top two teams and provide the greatest flexibility in creating the postseason match-ups between Alliance partners.”<sup>53</sup> Because none of the conference champions were committed to play in any specific game, the system was much more flexible and allowed for a greater number of match-ups that resulted in national championship games.<sup>54</sup> Despite matching up the only two unbeaten teams in the nation in the 1996 Fiesta Bowl, the Bowl Alliance still failed to include both the Pac 10 and the Big 10.<sup>55</sup> Just as happened three years earlier with the Bowl Coalition, the Bowl Alliance was jettisoned after the 1997 regular season.<sup>56</sup>

---

sharedcontent/dws/spt/colleges/topstories/stories/060610dnspobig12sider2.112db5e.html. When the Big Eight expanded to twelve teams and became the Big 12, the conference disbanded. *See id.*

<sup>44</sup> In the first season of the Bowl Coalition, it matched No. 1 Miami and No. 2 Alabama in the Sugar Bowl in a national championship game. *See Kober, supra* note 12, at 60.

<sup>45</sup> *See* BCS Chronology, *supra* note 15.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See* BCS Chronology, *supra* note 15.

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *See* Kober, *supra* note 12, at 60 (quoting Nat'l Collegiate Athletic Ass'n, Official 2003 Nat'l Collegiate Athletic Ass'n Football Records, [http://www.NCAA.org/library/records\\_football\\_records\\_book/2003/2003\\_football\\_records\\_book.pdf](http://www.NCAA.org/library/records_football_records_book/2003/2003_football_records_book.pdf)).

<sup>54</sup> *See* BCS Chronology, *supra* note 15.

<sup>55</sup> *See id.* Nebraska beat Florida in the championship game, 62-24. Fiesta Bowl, Game History, <http://www.fiestabowl.org/index.php/tostitos/history/> (last visited Jan. 8, 2010).

<sup>56</sup> *See* BCS Chronology, *supra* note 15.

## 2. *The Implementation of the Bowl Championship Series*

In 1997, the Bowl Championship Series was created,<sup>57</sup> and in 1998, the BCS was first used in order to create a national championship game between the first and second ranked teams.<sup>58</sup> The new system addressed the largest problem with the Bowl Coalition and Bowl Alliance as it included both the Pac 10 and the Big 10 while still assuring them participation in the Rose Bowl if their conference champions were not chosen for the national championship game.<sup>59</sup> Furthermore, it reintroduced the conference tie-ins that had dominated the pre-Bowl Coalition period.<sup>60</sup> The compromise was made possible when each bowl and the conferences agreed to rotate the BCS National Championship Game amongst the four bowls and to supplement the other bowls with competitive match-ups.<sup>61</sup>

In order to determine which teams should be selected for the BCS National Championship Game, the BCS agreement created its own standings.<sup>62</sup> The original standings consisted of four parts: 1) the subjective polls of sportswriters and coaches, 2) the average of three computer rankings (Sagarin, Seattle Times, and New York Times), 3) the teams' records, and 4) the teams' strength of schedule index.<sup>63</sup> Unlike the sportswriters and coaches polls, the BCS Standings were not released every week; instead, the BCS Standings were not made public until the midpoint of the regular season.<sup>64</sup> It was under this format that the University of Tennessee Volunteers won the first BCS Championship as it defeated the Florida State University Seminoles in the Fiesta Bowl.<sup>65</sup>

In the years since the first BCS Championship Game, the BCS Committee has made several significant changes to the original agreement in an attempt to make the series more competitive, increase revenue, and increase the number of

---

<sup>57</sup> M. Todd Carroll, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235, 1264 (2004). The two primary groups of parties to the agreement were six conferences (ACC, Big East, Big 10, Big 12, Pac 10, and SEC) and four bowl games (Rose Bowl, Fiesta Bowl, Sugar Bowl, and the Orange Bowl). *See id.* at 1264 n.171.

<sup>58</sup> *See* BCS Chronology, *supra* note 15.

<sup>59</sup> *See id.* Thus, the ACC, Big East, Big 10, Big 12, Pac 10, and the SEC were guaranteed at least one spot in one of the four BCS bowl games each season. *Id.* Furthermore, the University of Notre Dame would be guaranteed a spot in one of the games if it finished within the top ten of the final BCS Standings or had at least nine wins. *Id.*

<sup>60</sup> *See id.* The Big 12 champion would play in the Fiesta Bowl, the SEC champion would play in the Sugar Bowl, and either the ACC or Big East champion would play in the Orange Bowl. *Id.*

<sup>61</sup> *See id.* Each year, one bowl would be designated as the BCS Championship Game. *Id.* The teams that would be chosen as the first and second rated teams would forego their traditional bowl tie-ins and go to the BCS Championship Game. *Id.* The bowls that would lose their traditional conference champions would then choose at large teams (or the teams displaced from their traditional games because their traditional tie-in was hosting the BCS Championship Game) to replace the first or second rated teams. *Id.* The teams that would be eligible as at large choices are determined by the BCS standings and need to meet a strict set of criteria. *Id.*; *see* BCS Chronology, *supra* note 15 (identifying the exact criteria).

<sup>62</sup> *See id.*

<sup>63</sup> *See* BCS Chronology, *supra* note 15.

<sup>64</sup> *See id.*

<sup>65</sup> Cable News Network Sports Illustrated ("CNNSTI"), *Vols Reach Rocky Top*, Jan. 9, 1999, [http://sportsillustrated.cnn.com/football/college/1998/bowls/fiesta/news/1999/01/04/fiesta\\_bowl/](http://sportsillustrated.cnn.com/football/college/1998/bowls/fiesta/news/1999/01/04/fiesta_bowl/).

non-BCS participants.<sup>66</sup> The single biggest change to the BCS system occurred in 2004, when the BCS Committee agreed to add a fifth game to the Series.<sup>67</sup> In 2003, Scott Cowen, President of Tulane University, formed the Presidential Coalition for Athletics Reform in order to use antitrust law to bring equality and fairness to the BCS System.<sup>68</sup> Cowen and his coalition were able to convince Congress to listen to his demands and the ensuing publicity compelled the BCS to modify its structure.<sup>69</sup> Instead of requiring one of the bowls to host the BCS National Championship Game in lieu of its traditional game, the new system created a game independent of the traditional bowl game that would be played a week later than the traditional bowl game at the same location.<sup>70</sup> By adding an additional game to the Series without adding any additional conference champion guarantees, the BCS added two additional at large bids for each season.<sup>71</sup>

To supplement this change, the BCS addressed the rules for the inclusion of at large teams both from the conferences with a guaranteed BCS game and those from outside the guaranteed six.<sup>72</sup> Starting with the 2006 season, a conference champion from one of the non-guaranteed conferences would earn an automatic berth if it was ranked in the top twelve of the BCS Standings or ranked in the top sixteen of the BCS Standings and its ranking was higher than that of a champion of one of the automatic-qualifying conferences.<sup>73</sup> Further, the committee determined that if more than one team from a non-automatic-qualifying conference won its conference and finished within the top twelve, only the highest ranked team would be guaranteed a place in one of the BCS games.<sup>74</sup> In addition to adding a fifth game to the BCS, the BCS Committee has altered its ranking formula several times since its inception in 1998.<sup>75</sup> Despite the alterations, the BCS Standings still strive

---

<sup>66</sup> See BCS Chronology, *supra* note 15.

<sup>67</sup> See *id.*

<sup>68</sup> Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS L. J. 219, 234 (2007). In 1998, Tulane finished the regular season undefeated while winning ten games by a double-digit margin. *Id.* at 232-33. Despite their impressive record, their BCS ranking was not high enough to secure a spot in the BCS Championship Game. *Id.*

<sup>69</sup> See *id.* at 234.

<sup>70</sup> See *id.* For instance, for the 2009 season, the Rose Bowl Committee hosted the Rose Bowl game on New Year's Day 2010 and then hosted the BCS Championship Game on Jan. 7, 2010. Thayer Evans, *Buckeyes Win Some Respect at the Rose Bowl*, N.Y. TIMES, Jan. 2, 2010, at D4; Pete Thamel, *Alabama returns to the Top*, N.Y. TIMES, Jan. 8, 2010, at B7.

<sup>71</sup> See BCS Chronology, *supra* note 15.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* The University of Notre Dame would also earn an automatic berth if it finished the regular season within the top eight of the BCS Standings. *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* Under the current formula, there are three components to the BCS Standings with each component counting as 1/3 of the BCS formula. College Football Poll, BCS Explained, [http://www.collegefootballpoll.com/bcs\\_explained.html](http://www.collegefootballpoll.com/bcs_explained.html) (last visited Jan. 8, 2010). The first component is the Harris Interactive Poll, which replaced the Associated Press Poll. *Id.* The second component is the USA Today Coaches Poll. *Id.* The third component is the average of six computer rankings to provide an objective component. *Id.* The six computer rankings are the Peter Wolfe Ranking, the Wes Colley Ranking, the Sagarin Ranking, the Seattle Times Ranking, the Richard Billingsley Ranking, and the Kenneth Massey Ranking. *Id.* Both the top computer ranking for each team as well as the lowest computer ranking for each team are excluded and an average is taken for the remaining four rankings.

to place the top two teams in the BCS National Championship Game.

### III. THE ISSUE

Former Michigan State University football coach Duffy Daugherty once said that “[w]hen you are playing for the national championship, it’s not a matter of life or death. It’s more important than that.”<sup>76</sup> While Daugherty maintained a jovial relationship with the media,<sup>77</sup> his quip about the seriousness of college football has been proven time and time again. The level of passion that fans of college football maintain is unparalleled in the United States. Between alumni, state sponsored universities, amateur athletes, pep rallies, tailgating, and 100,000 seat stadiums, college football holds a unique spot in the American sports landscape, and as such, it is subjected to strict scrutiny when an injustice appears.

While Daugherty and his teams never dealt with the BCS, the implementation of the Series has taken this level of scrutiny to a new level. The BCS maintains that it is an “arrangement for post-season college football that is designed to match the two top-rated teams in a national championship game.”<sup>78</sup> Because the BCS is almost solely concerned with pairing only two teams in a winner take all game, all but two universities are excluded from competing for the national championship at the close of the regular season. Effectively, the BCS eliminates the possibility of a national championship to all but two teams on the last day of the regular season, before the final bowl games are played, regardless of the team’s record.

In the past few years, ardent college football fans have become disillusioned with the BCS as the system has barred seemingly deserving teams from the opportunity to compete for the national championship. Some of the most outspoken critics of the BCS have been politicians. In addition to President Obama decrying the BCS and presenting a plan for a playoff, several members of Capitol Hill have expressed outrage towards the BCS. In hopes of curing the ills that they see, legislators have proposed different bills that would address some of the major flaws of the BCS system.

While fans, members of the media, and politicians call for a change to the BCS system, the NCAA, its member institutions, and the Division I FBS conferences have resisted major substantive changes to the arrangement. Starting in 1976, various proposals for a championship playoff have been presented and studied by various committees.<sup>79</sup> Shortly after being proposed, these plans have

*Id.*

<sup>76</sup> Quoteland, Duffy Daugherty, [http://www.quoteland.com/topic.asp?CATEGORY\\_ID=211](http://www.quoteland.com/topic.asp?CATEGORY_ID=211) (last visited Jan. 8, 2010). Daugherty was the head coach at Michigan State University for nineteen seasons between 1954 and 1972. Shav Glick, *At Michigan State, the Spirit of Duffy Still Moves Team*, L.A. TIMES, Dec. 29, 1987, available at [http://articles.latimes.com/1987-12-29/sports/sp-31975\\_1\\_michigan-state](http://articles.latimes.com/1987-12-29/sports/sp-31975_1_michigan-state). Daugherty was an assistant coach on the 1951 and 1952 national championship teams and the head coach on the 1955, 1957, 1965, and 1966 teams. 2006 Michigan State University Spartans Football Media Guide, [http://graphics.fansonly.com/photos/schools/msu/sports/m-footbl/auto\\_pdf/06-mg-section3.pdf](http://graphics.fansonly.com/photos/schools/msu/sports/m-footbl/auto_pdf/06-mg-section3.pdf) (last visited Jan. 8, 2010).

<sup>77</sup> See Glick, *supra* note 76.

<sup>78</sup> BCS, The BCS Is..., <http://www.bcsfootball.org/bcsfb/definition> (last visited Jan. 9, 2010).

<sup>79</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, Postseason College Football FAQs, <http://www>.

either been rejected or withdrawn.<sup>80</sup> In 1988, a resolution was presented at the annual NCAA Convention which stated the Division IA membership did not support the creation of a playoff system in order to determine a national championship.<sup>81</sup> The vote passed with ninety eight votes in favor and thirteen opposed.<sup>82</sup> Additionally, in 1994, a blue ribbon panel was formed in order to gather information about the viability of establishing an NCAA sponsored football championship.<sup>83</sup> The report was forwarded to the NCAA Presidents Commission which subsequently stated that the NCAA would not pursue a football championship.<sup>84</sup> Currently, football is the only sport administered by the NCAA that does not have a playoff to determine an official national champion, and it appears that the NCAA and the majority of the member institutions are content with the current system.<sup>85</sup> It was under these set of circumstances that the Bowl Coalition, Bowl Alliance, and Bowl Championship Series were formed.<sup>86</sup>

As teams from non-automatic qualifying conferences have gotten more competitive and teams from automatic qualifying conferences have retained their overall level of play, more teams are beginning to finish the regular season either undefeated or with only one loss.<sup>87</sup> Several teams, and more importantly, their fans, have felt as if they have been victimized by a system that does not determine a champion on the field, but rather by computers and sportswriters that cannot possibly watch every team play every game. While the teams and fans of schools left out of the BCS Championship Game lose out on the ability to play in the national championship game, they also lose other ancillary benefits.<sup>88</sup> One of the biggest losses is that the rejected institutions receive less prize money which, “affects scholarships, booster donations, compliance with NCAA requirements, recruiting abilities” and more.<sup>89</sup> It is because of these negative effects to several teams that changes have been proposed in Congress and that the eradication of the BCS will continue to be a pet project of several prominent lawmakers.

---

NCAA.org/wps/NCAA?ContentID=2222 (last visited Jan. 9, 2010) [hereinafter Postseason FAQs].

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> Postseason FAQs, *supra* note 79.

<sup>85</sup> *See Nixon, supra* note 5, at 367.

<sup>86</sup> *See supra* Part II.C. and accompanying notes 42-65.

<sup>87</sup> In the 2009 regular season alone, the University of Alabama Crimson Tide, the University of Texas Longhorns, the University of Cincinnati Bearcats, the Texas Christian University Horned Frogs, and the Boise State University Broncos all finished the regular season undefeated. ESPN, 2009 College Football Rankings – Week 15 (Dec. 6), [http://espn.go.com/college-football/rankings/\\_/week/15](http://espn.go.com/college-football/rankings/_/week/15). Out of those five, Alabama and Texas met in the BCS Championship Game. *See Thamel, supra* note 70. After each team’s bowl game, both Alabama and Boise State remained undefeated. ESPN, 2009 College Football Rankings – Postseason, [http://espn.go.com/college-football/rankings/\\_/week/1/seasontype/3](http://espn.go.com/college-football/rankings/_/week/1/seasontype/3).

<sup>88</sup> *See Nixon, supra* note 5, at 368.

<sup>89</sup> *See id.*

## IV. BCS AND ANTITRUST IMPLICATIONS

A. *The NCAA, Sherman, and the Run to the BCS*

When the Sherman Antitrust Act<sup>90</sup> was first enacted, the goal was to “protect and promote a competitive market in the United States.”<sup>91</sup> The method to achieve these goals was through eliminating cartels, monopolies, and illegal business practices that restrain trade.<sup>92</sup> Restraints of trade exist when parties prevent the market from operating freely through subverting competition.<sup>93</sup> Through Supreme Court jurisprudence, the Sherman Antitrust Act has been interpreted to prohibit only “unreasonable restraints” of trade.<sup>94</sup> Because of the “unreasonable restraints” language, it is possible for restraints of trade that may subvert competition to exist without being unreasonable. Sports in general have been generally found to exist under a series of reasonable restraints.

Sports have a unique place in the fabric of antitrust law because the market and structure of sporting events is one where regulation and organization under a sole governing body actually creates a more competitive market than if teams, organizations, and leagues all operated under separate systems.<sup>95</sup> It is with these considerations in mind that professional sports have largely been free of regulation, despite their obvious monopolistic tendencies.<sup>96</sup> The NCAA, on the other hand, has recently seen an increase in antitrust consideration.

Beginning in the late 1970s, the court system began applying the Sherman Antitrust Act to the NCAA.<sup>97</sup> Because the Sherman Antitrust Act was enacted in

---

<sup>90</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*Id.*

<sup>91</sup> Katherine McClelland, Comment, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 191 (2004).

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> See Jason R. Corns, Comment, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167, 182-83 (2003) (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1911)).

<sup>95</sup> *See id.*

<sup>96</sup> *See generally* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); William S. Robbins, Comment, *Baseball's Antitrust Exemption – A Corked Bat for Owners*, 55 LA. L. REV. 937, 939-40 (1995); Joseph Covelli, Note, *Brown v. Pro Football, Inc.: At the Intersection of Antitrust and Labor Law, Supreme Court's Decision Gives Management the Green Light*, 27 STETSON L. REV. 257, 264-76 (1997); Dan Messeloff, Note, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 539-41 (2000).

<sup>97</sup> *See* Schmit, *supra* note 68, at 236.

order to regulate trusts and other economic arrangements, the NCAA relied upon its status as the promoter and organizer of amateur sports to remain immune from close scrutiny.<sup>98</sup> Because the NCAA is “designed to initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit within amateur intercollegiate athletics,” the NCAA had been able to circumvent most antitrust actions.<sup>99</sup> However, as Division I basketball and football have grown economically, in popularity, and in national visibility, the NCAA has come under closer scrutiny through the Sherman Antitrust Act, with particular attention being paid to matters of revenue, as the method for finding violations.<sup>100</sup>

The first major case stating that the NCAA was subject to federal antitrust law was *Hennessey v. NCAA*.<sup>101</sup> In 1977, two University of Alabama assistant coaches brought suit against the NCAA.<sup>102</sup> The two coaches protested an NCAA bylaw that restricted the number of assistant coaches a football and basketball program could keep on staff at one time.<sup>103</sup> While the court said that the NCAA could keep the rule, the Fifth Circuit court recognized that the NCAA was subject to federal antitrust laws.<sup>104</sup> The court acknowledged that the purpose of the bylaw was to encourage collegiate athletic competition as well as to ensure that college football and basketball programs were enhancing the educational process.<sup>105</sup>

The second major antitrust case involving the NCAA was *NCAA v. Board of Regents of the University of Oklahoma*.<sup>106</sup> The University of Oklahoma and the University of Georgia brought suit against the NCAA in order to challenge the NCAA wide plan for televising college football games.<sup>107</sup> According to the plan, the NCAA agreed to a deal with the television networks ABC and CBS whereby each network could carry fourteen live “exposures” throughout the college football season and would do so for a minimum aggregate compensation.<sup>108</sup> In short, the agreement authorized each network to negotiate with member institutions for the

---

<sup>98</sup> See *id.* See generally Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 658, 667-95 (1993) (giving historical information about the Sherman Antitrust Act).

<sup>99</sup> See McClelland, *supra* note 94, at 170 (quoting 2004-2005 Nat’l Collegiate Athletic Ass’n Division I Manual, NAT’L COLLEGIATE ATHLETIC ASS’N Const. art. 1.2(a) (2004), <http://www.NCAA.org/library/membership/divisionmanual/2004-05d1manual.pdf>) (internal marks omitted).

<sup>100</sup> See Corns, *supra* note 94, at 179.

<sup>101</sup> See *id.*

<sup>102</sup> *Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d 1136, 1141 (5th Cir. 1977).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1149. The court stated that the National Collegiate Athletic Association was subject to the Rule of Reason analysis as it weighed the anticompetitive effects of the National Collegiate Athletic Association’s act against its procompetitive effects in order to determine whether there was an unreasonable restraint. See Corns, *supra* note 94, at 179. The Rule of Reason analysis is one test that the courts use in order to determine whether or not there is an antitrust violation. See *infra* Part IV.B.

<sup>105</sup> *Hennessey*, 564 F.2d at 1153.

<sup>106</sup> See Corns, *supra* note 94, at 179-80.

<sup>107</sup> *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 88 (1984).

<sup>108</sup> *Id.* at 92-93.

right to broadcast their games.<sup>109</sup>

While the agreements with the network did not set a method for computing the fees, the NCAA did recommend certain fees, with national telecasts being the most valuable, followed by regional telecasts, and then Division II or III games.<sup>110</sup> Other than the different fees for national telecasts and regional telecasts, the amount that teams received did not change based on audience size, the number of markets that the game was broadcast in, or the particular characteristics of the teams.<sup>111</sup> Furthermore, the plan dictated that the networks must show a minimum number of teams over a two year period and that no member institution may appear more than a total of six times over a two year period.<sup>112</sup> The Court determined that “the plan limits the total amount of televised intercollegiate football and the number of games that any one team may televise” while it prevented the member institutions from selling television rights for games outside of the basic plan.<sup>113</sup> Accordingly, the Court held that the television deal violated federal antitrust law.<sup>114</sup>

In 1988, the NCAA was brought back into court in *Law v. NCAA*.<sup>115</sup> Law alleged that the NCAA violated federal antitrust law by enforcing a rule that restricted the level of coaches’ compensation for entry-level coaches.<sup>116</sup> The NCAA argued that the restriction would help level an uneven playing field among its member institutions.<sup>117</sup>

---

<sup>109</sup> *Id.* at 93.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Bd. of Regents*, 468 U.S. at 94.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 120. The Court again used Rule of Reason analysis in order to determine that there was a federal antitrust violation. *See id.* The Court found that the National Collegiate Athletic Association’s plan of effectively setting the price of television rights as well as limiting the number of games broadcasted created a horizontal restraint in trade which resulted in more anticompetitive effects than procompetitive effects for college football programs all while prohibiting those programs from negotiating their own television deals for those games otherwise not televised. *See Corns, supra* note 94, at 180 The National Collegiate Athletic Association attempted to justify the plan by stating that the plan “intended to reduce . . . the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance.” *Bd. of Regents*, 468 U.S. at 91. Later cases suggested that a new test, the quick-look Rule of Reason test would have been more prescient as it would easily skip the lengthy, fact detailed analysis necessary for the Rule of Reason test, because a simple economic analysis would show that the limitation of television exposure (output) and the setting of a fixed minimum price would have an extreme anticompetitive effect on the market. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999). Similar arguments were made by the National Football League (“NFL”) in light of antitrust legislation. *See Lacie L. Kaiser, Comment, Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity From Section One of the Sherman Act for all Professional Sports Leagues*, 54 DEPAUL L. REV. 1237 (2005). In response to potential litigation, the National Football League convinced Congress to pass the Sports Broadcasting Act which stated that “antitrust laws . . . shall not apply to any joint agreement . . . by which any league [] participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games . . . engaged in or conducted by such clubs.” *Id.* at 1245 (quoting Sports Broadcasting Act of 1961, 15 U.S.C. 1291 (2006)).

<sup>115</sup> *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998).

<sup>116</sup> *Id.* at 1012.

<sup>117</sup> *Id.* at 1024.



The court held that the restriction did constitute an unreasonable restraint of trade and that the NCAA did not meet the burden of showing that the procompetitive effects outweighed the anticompetitive effects.<sup>118</sup> The NCAA put forth three justifications for the rule that were all rejected by the Tenth Circuit.<sup>119</sup> First, the NCAA stated that by restricting one of the coaching positions to an entry-level position would create more balance by keeping wealthier teams from hiring a more experienced coach.<sup>120</sup> The Tenth Circuit held that the NCAA failed to produce evidence that the rules would be effective over time.<sup>121</sup> Second, the NCAA posited that the bylaw would help member institutions cut cost.<sup>122</sup> The Tenth Circuit rejected this justification in a similar vein as it stated that there was no evidence that the bylaw would reduce the deficits reported by member institutions as they could simply use the saved money elsewhere.<sup>123</sup> Finally, the NCAA stated that the bylaw would help “maintain competitive equity” among member institutions by preventing the wealthier and more profitable teams from installing a higher-priced coach in the entry-level position.<sup>124</sup> The Tenth Circuit rejected the NCAA’s reasoning by holding that the NCAA offered no proof that “salary restrictions enhance competition [or] level an uneven playing field.”<sup>125</sup> Since the NCAA could not provide any evidence that the procompetitive effects outweighed the anticompetitive effects, the Tenth Circuit held that the NCAA bylaw violated federal antitrust law.<sup>126</sup>

The common tie between these three cases is commerce. The courts have been willing to hold the NCAA accountable for federal antitrust violations when the opposing party has been able to show that the NCAA has instituted rules or regulations that restrict, hinder, or impact commercial matters of its member institutions and employees. The courts recognize the specific role of the NCAA to organize and administer amateur athletics designed to enhance the academic experience of its participants, but it also recognizes that the NCAA has become big business. Accordingly, when the NCAA has regulated universities or colleges in non-commercial matters, such as participant eligibility, competition conditions, standards of amateurism, and other essentials to the game, courts have found the actions to fall outside of federal antitrust law.<sup>127</sup> However, when the NCAA

---

<sup>118</sup> *Id.* at 1024.

<sup>119</sup> *Id.* at 1019, 1021.

<sup>120</sup> *Law*, 134 F.3d at 1022.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1023.

<sup>124</sup> *Id.* at 1024.

<sup>125</sup> *Law*, 134 F.3d at 1024.

<sup>126</sup> *See* Schmit, *supra* note 68, at 239-40. The court again used the Rule of Reason analysis to determine that the National Collegiate Athletic Association could not show that the procompetitive effects outweighed the anticompetitive effects. *Law*, 134 F.3d at 1024.

<sup>127</sup> *See* Corns, *supra* note 94, at 180 n.120 (citing *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 185-86 (3rd Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999); *Banks v. Nat’l Collegiate Athletic Ass’n*, 997 F.2d 1081, 1093-94 (7th Cir. 1992); *Adidas Am., Inc. v. Nat’l Collegiate Athletic Ass’n*, 40 F. Supp. 2d 1275, 1287 (D. Kan. 1999); *Jones v. Nat’l Collegiate Athletic Ass’n*, 392 F. Supp. 295, 303 (D. Mass. 1975); *Bowers v. Nat’l Collegiate Athletic Ass’n*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998); *Gaines v. Nat’l Collegiate Athletic Ass’n*, 392 F. Supp. 738, 745 (M.D. Tenn.

attempts to regulate commercial matters, such as television contracts, employee salaries, and the number of jobs a school can offer, it is subject to federal antitrust law.

*B. The BCS and Whether or Not it is a Violation of Sherman Antitrust Act*

While it is clear that the NCAA is subject to the Sherman Antitrust Act, the validity of the BCS in terms of antitrust jurisprudence has not yet been subject to judicial scrutiny. The following section takes a deeper look into antitrust law and attempts to determine whether or not the BCS does violate the Sherman Antitrust Act.

*1. Sherman Antitrust Analysis*

The Sherman Antitrust Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.”<sup>128</sup> The goal of the Sherman Antitrust Act was to prohibit only those actions which constitute an unreasonable restraint on trade, rather than create a bright line rule barring all restraints on trade.<sup>129</sup> Accordingly, the Supreme Court declared that the analysis of antitrust violations “cannot be determined by so simple a test, as whether it restrains competition.”<sup>130</sup>

One of the first Sherman Act cases was *Board of Trade of the City of Chicago v. United States*, in which the Supreme Court was asked to analyze whether or not the Board could continue implementing the “Call” rule despite the arrangement restricting commerce.<sup>131</sup> The Board adopted the “Call” rule in order to restrict purchasing grain after a certain point in the day in order to keep the market steady.<sup>132</sup> In its decision, the Court rejected the assertion that all restraints on trade violated the Sherman Antitrust Act.<sup>133</sup> The court examined the nature, scope, and the actual affects of the rule and found that the “Call” rule better served to improve market conditions as it allowed for an increase in output, brought buyers and sellers together to facilitate commerce, distributed the grain to a greater number of people, and eliminated the risks of buying and selling grain on the private market.<sup>134</sup> The Court reasoned that every board of trade has rules and regulations that are designed to facilitate business by its members and that if these rules of practicality were eliminated by the Sherman Antitrust Act, commerce would be adversely harmed.<sup>135</sup> By stating that the rules of the Board were

---

1990); (ARTHUR A. FLEISHER III ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 15 (U. Chi. Press 1992)).

<sup>128</sup> Sherman Antitrust Act, *supra* note 90.

<sup>129</sup> *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 241 (1918).

<sup>130</sup> *Id.* at 238.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 239.

<sup>133</sup> *Id.* at 241.

<sup>134</sup> *Id.* at 240.

<sup>135</sup> *Bd. of Trade*, 246 U.S. at 241.

necessary in order to further the commercial interests, the Court laid the groundwork for a line of reasoning that allowed for procompetitive justifications to trump the desire for a free and open market.<sup>136</sup>

In subsequent cases, the Court has continued to develop antitrust law in order to provide lower courts and corporations with guidelines for dealing with antitrust issues.<sup>137</sup> The Court has indicated that there are several instances where restrictions are not unreasonable when the procompetitive effects outweigh the anticompetitive effects.<sup>138</sup> Accordingly, the Court has clearly identified three tests to be used in analyzing whether or not there is a restraint on competition that violates the Sherman Antitrust Act.<sup>139</sup>

The first of these tests is the Per Se Rule. The Per Se Rule has been applied in situations where, facially, the restraints imposed by the practice are unreasonable.<sup>140</sup> As a matter of law, certain forms of restraint are considered per se violations as they “almost always tend to restrict competition and decrease output.”<sup>141</sup> Furthermore, if the evidence shows that a significant restraint on trade causes a detrimental effect on competition, a court can end its analysis and label the restraint a violation of antitrust law.<sup>142</sup> Examples of per se violations include horizontal price fixing, bid rigging, output limitation, and group boycotts.<sup>143</sup>

Originally, courts consistently ruled group boycotts as per se violations of antitrust law.<sup>144</sup> These boycotts were defined as “concerted refusals by traders to deal with other traders.”<sup>145</sup> Further, the courts stated that group boycotts could not be “saved by allegations that they were reasonable in the specific circumstances.”<sup>146</sup> While this bright line rule made analysis easy, the courts found it untenable and began amending their analyses.<sup>147</sup> In modern antitrust jurisprudence, group boycotts are subjected to the more flexible Rule of Reason.<sup>148</sup>

The second test is the Rule of Reason Test. The first Supreme Court case involving the Rule of Reason Test was *Standard Oil Co. v. United States*.<sup>149</sup> In *Standard Oil*, the Supreme Court ruled that Standard Oil formed an illegal trust, and in conjunction with its subsidiary holdings, formed a monopoly in order to restrain commerce in the petroleum industry.<sup>150</sup> In order to remedy the problem,

---

<sup>136</sup> *Id.*

<sup>137</sup> See Kober, *supra* note 12, at 64.

<sup>138</sup> See McClelland, *supra* note 91, at 193-94.

<sup>139</sup> See Kober, *supra* note 12, at 65.

<sup>140</sup> See McClelland, *supra* note 91, at 194.

<sup>141</sup> *Bd. of Regents*, 468 U.S. at 100 (quoting *Broad. Music, Inc. v. Columbia Broad. Sys. Inc.*, 441 U.S. 1, 19-20 (1979)).

<sup>142</sup> *Id.* at 103-04.

<sup>143</sup> See McClelland, *supra* note 91, at 194; See Kober, *supra* note 12, at 65.

<sup>144</sup> See Corns, *supra* note 94, at 186.

<sup>145</sup> *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879, 883 (1st Cir. 1960).

<sup>146</sup> *Id.*

<sup>147</sup> See Carroll, *supra* note 57, at 1266.

<sup>148</sup> See Corns, *supra* note 94, at 186.

<sup>149</sup> *Standard Oil*, 221 U.S. at 49.

<sup>150</sup> *Id.* at 82 (Harlan, J., concurring).

the Court affirmed the circuit court's ruling of enjoining Standard Oil and the subsidiary companies from conducting interstate commerce in the petroleum industry while Standard Oil still had ownership in those subsidiaries.<sup>151</sup> In its decision, the Court expanded on the narrow language of the Sherman Antitrust Act and incorporated the Rule of Reason Test in order to determine whether Standard Oil had violated the Act.<sup>152</sup> The Court determined that Standard Oil went beyond the limitations of the Rule of Reason Test and that their contracts with the subsidiaries placed an unreasonable restraint on trade.<sup>153</sup>

In the years since *Standard Oil*, the Rule of Reason Test has been refined. The Test requires the fact-finder to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint of competition."<sup>154</sup> In *Board of Trade*, the Court laid out the most oft cited statement for the Rule of Reason Test:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.<sup>155</sup>

Furthermore, the Rule of Reason Test shifts the burden to the party accused of the antitrust violation if the charging party can show either actual anticompetitive effects or "proof of the market power possessed by the parties in agreement."<sup>156</sup> In order to defeat this burden, the party accused of the antitrust violation can proffer evidence of its procompetitive intent by showing how the arrangement benefits competition rather than inhibits it.<sup>157</sup> If the party being charged can defeat the burden, the burden is once again shifted back to the party alleging the antitrust violation. That party must then show that the current arrangement is unreasonable and that a less restrictive alternative exists.<sup>158</sup>

Through the course of its antitrust jurisprudence, the Court has applied both the Per Se Rule and the Rule of Reason. However, several cases have arisen that do not fit neatly into either test. As such, the court has developed the quick-look Rule of Reason Test.<sup>159</sup> In *California Dental Association v. Federal Trade*

---

<sup>151</sup> *Standard Oil*, 221 U.S. at 45-46.

<sup>152</sup> *Id.* at 66.

<sup>153</sup> *Id.* at 81.

<sup>154</sup> *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

<sup>155</sup> *Id.* at n.15.

<sup>156</sup> *See Kober, supra* note 12, at 65-66.

<sup>157</sup> *See id.*

<sup>158</sup> *See id.* at 66.

<sup>159</sup> *Cal. Dental Ass'n*, 526 U.S. at 769-70.

*Commission*, the Federal Trade Commission charged the California Dental Association with implementing guidelines that in effect “restrict truthful, nondeceptive advertising.”<sup>160</sup> The Federal Trade Commission alleged that this violated antitrust law.<sup>161</sup> On appeal, the Court of Appeals for the Ninth Circuit approved the use of the Federal Trade Commission’s use of the quick-look Rule of Reason test.<sup>162</sup>

In its decision, the Supreme Court affirmed the quick-look Rule of Reason Test and clarified when it should be used.<sup>163</sup> First, the Court held that a “naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis”<sup>164</sup> but “no elaborate industry analysis is required to demonstrate the anticompetitive character of horizontal agreements among competitors to refuse to discuss prices, or to withhold a particular desired service.”<sup>165</sup> Second, the Court held that the Test should be used when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”<sup>166</sup>

As construed, the party charged with violating antitrust laws must proffer evidence that there are procompetitive justifications for the restraint.<sup>167</sup> If the party cannot meet this burden, the analysis is ended and the agreement is rendered invalid.<sup>168</sup> If the party charged does meet its burden, then the court must conduct a full Rule of Reason analysis.<sup>169</sup>

## 2. Identifying the Conduct of the BCS that is Being Challenged

As described in Part II.C.2., the BCS is a contractual agreement between the six major conferences of college football and four major bowl games.<sup>170</sup> Both of

---

<sup>160</sup> *Id.* at 761.

<sup>161</sup> *Id.* (stating that the violation falls under the Federal Trade Commission Act’s prohibition of unfair competition and deceptive acts or practices, 15 U.S.C. § 45(a)(1), this Act overlaps the scope of the Sherman Antitrust Act). The Federal Trade Commission Act makes it illegal to engage in “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices or practices in or affecting commerce.” Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006).

<sup>162</sup> *Cal. Dental Ass’n*, 526 U.S. at 763-64. The court of appeals based its ruling on language from the *Board of Regents* case when it stated “that the Commission had properly applied an abbreviated, or ‘quick look,’ rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry.” *Id.* at 763 (quoting *Bd. of Regents*, 468 U.S. at 109-10) (internal quotation marks omitted).

<sup>163</sup> *Id.* at 769-70.

<sup>164</sup> *Id.* (quoting *Bd. of Regents*, 468 U.S. at 109).

<sup>165</sup> *Id.* at 770 (quoting *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 692 (1978)) (internal quotation marks omitted).

<sup>166</sup> *Id.*

<sup>167</sup> See Kober, *supra* note 12, at 66.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *supra* Part II.C.2 (describing the implementation of the BCS). The BCS agreement also contains an agreement with the American Broadcasting System for exclusive rights to the Rose Bowl game. See Carroll, *supra* note 57, at 1264 n.171. That portion of the agreement is of little importance to the analysis since the arrangement is vertically related to the BCS. See *id.* Vertical arrangements do

these groups play an instrumental part in the execution of the college football postseason: the conferences produce conference champion teams as an output and the bowl games produce the games and offer a good to the consumer.<sup>171</sup> The stated goal of the BCS is to combine the efforts of the conferences and the bowl games to produce both a national champion and more competitive, higher quality bowl games.<sup>172</sup> Furthermore, the BCS contains aspects of a horizontal agreement since it involves the six conferences agreeing to subject their champions to the BCS agreement while the bowl games traditionally compete to bring the best teams in order to have compelling match-ups each season.<sup>173</sup> In short, the bowls have traditionally competed against each other to bring in the best teams, but by agreeing to distribute them in an organized manner, they have subverted the free market.

While there is certainly a horizontal agreement, the BCS operates on the level of a vertical agreement as well.<sup>174</sup> The vertical agreement is manifested in the relationship between the producers (the conferences) and the good to be sold (the bowl games).<sup>175</sup> This vertical arrangement is important as courts emphasize the type of arrangement in determining which level of scrutiny to apply to the case.<sup>176</sup> Through its antitrust jurisprudence, the courts have shown that horizontal conduct limiting competition has a greater likelihood of being treated as a per se violation; vertical agreements are most likely to be analyzed under the Rule of Reason.<sup>177</sup> Since the BCS contains both horizontal and vertical elements, the total agreement will be analyzed under each of the three tests.

### 3. *The BCS and the Per Se Rule*

Per se review would be inappropriate in a BCS antitrust case. As stated in Part IV.B.1., per se analysis is only applicable when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”<sup>178</sup> Despite the clarity of the statement, courts have been hesitant in applying the Per Se Rule, especially when there are significant procompetitive justifications for entering into potentially restraining agreements.<sup>179</sup> If the non-BCS schools brought an antitrust case against the BCS, the likelihood of a court

---

not warrant per se termination. *See id.* (citing *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993) (“[A] purely vertical arrangement, by which . . . a supplier or dealer makes an agreement exclusively to supply or serve a manufacturer, is not a group boycott.”)).

<sup>171</sup> *See* Carroll, *supra* note 57, at 1264.

<sup>172</sup> *See* BCS Chronology, *supra* note 15.

<sup>173</sup> *See* Carroll, *supra* note 57, at 1264.

<sup>174</sup> *See id.* at 1265.

<sup>175</sup> *See id.*

<sup>176</sup> *See id.* (citing *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 348 n.18 (1982) (“[H]orizontal restraints are generally less defensible than vertical restraints.”)); *U.S. Healthcare, Inc.*, 986 F.2d at 594 (noting that vertical restraints are not condemned as per se violations of §1 of the Sherman Act because the incentives for such agreements are usually “benign” towards the competitive process, among other reasons).

<sup>177</sup> *See* Carroll, *supra* note 57, at 1265.

<sup>178</sup> *See supra* Part IV.B.1; *Broad: Music, Inc.*, 441 U.S. at 19-20.

<sup>179</sup> *See* Carroll, *supra* note 57, at 1267.

not hearing the procompetitive justifications in light of the Rule of Reason Test is minimal. If, however, the court did examine the validity of an antitrust suit under the Per Se Rule, it most likely would do so under the guise of the group boycott test.<sup>180</sup>

Under the group boycott test, the BCS would not constitute a per se violation regardless of whether there is a boycott or not. With the BCS, there are several procompetitive justifications that prevent the court from drawing a “confident conclusion about the agreement’s anticompetitive effects.”<sup>181</sup> Some of these procompetitive justifications include the dual aims of creating a national championship game, competitive BCS bowl games, and to generate interest amongst fans.<sup>182</sup> Because there are procompetitive justifications, the trial court would be required to conduct further analysis. This conclusion is further bolstered by the result in *Board of Regents*.<sup>183</sup> In *Board of Regents*, the Supreme Court found that horizontal restraints were necessary in order for the NCAA to organize intercollegiate athletics.<sup>184</sup> This statement by the Court only adds to the notion that the Per Se Rule would be inapplicable in BCS antitrust litigation.

#### 4. *The BCS and the Quick-Look Analysis*

Similar to the Per Se Test, the quick-look test attempts to expedite the examination of the party charged with an antitrust violation.<sup>185</sup> Under the quick-look test, the court considers whether the procompetitive justifications are significantly outweighed by the anticompetitive effects; if they are significantly outweighed, the court will rule that there is an antitrust violation.<sup>186</sup> Like in the case of a per se examination, the procompetitive effects and the anticompetitive effects here are both numerous. Because the procompetitive justifications could outweigh the anticompetitive effects, a quick-look analysis would be short sighted and detrimental to determining whether the spirit of the Sherman Antitrust Act had been violated.

#### 5. *The BCS and the Rule of Reason*

The battle over whether the BCS is an antitrust violation is certain to be determined under the Rule of Reason analysis. Both those in favor of the BCS and those against the BCS have laid forth several arguments for why the BCS, as currently structured, may or may not constitute a violation of the Sherman Antitrust Act. While the original formulation of the BCS was challenged by Cowen and the Presidential Commission in 2003 and resulted in changes to the

---

<sup>180</sup> See 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.J. 285 (2008).

<sup>181</sup> See Carroll, *supra* note 57, at 1267. See *infra* Part IV.B.5.a. (discussing procompetitive justifications).

<sup>182</sup> See *supra* Part II.C.2 and accompanying footnotes 57-58.

<sup>183</sup> See Carroll, *supra* note 57, at 1267.

<sup>184</sup> See *Bd. of Regents*, 468 U.S. at 101-03.

<sup>185</sup> See Schmit, *supra* note 68, at 241.

<sup>186</sup> See *id.* at 241-42; see *infra* Part IV.B.1 and accompanying notes 161-71.

Series,<sup>187</sup> the current form of the BCS has not yet been addressed in a legal or legislative sense.

As examined in Part IV.B.1., the Rule of Reason Test weighs the strength of each parties' competing arguments against one another.<sup>188</sup> The first determination the court will make is whether the restraint has significant anticompetitive effects.<sup>189</sup> If the court finds that the charging party's allegation of anticompetitive effects is met, the court will shift the burden to the party charged with the antitrust violation.<sup>190</sup> Once the burden is shifted, the party charged with the antitrust violation, the BCS and NCAA in this instance, must show that the procompetitive justifications enhance competition rather than inhibit it.<sup>191</sup> If the party charged can show that the procompetitive justifications for the restrictions enhance competition, then the charging party must show that there is at least one less restrictive alternative in order for the court to determine that there is an antitrust violation.<sup>192</sup> In order to determine whether or not the BCS arrangement can withstand Rule of Reason analysis, this paper will look first at the anticompetitive effects of the BCS, to be followed by the procompetitive justifications for the restraint, and then whether any less restrictive alternatives exist.

#### a. Anticompetitive Effects of the BCS

In 2003, the United States House of Representatives invited prominent members of the collegiate athletic world to appear before the House Committee on the Judiciary ("Committee") in order to hear debate on aspects of the BCS that potentially violate antitrust law.<sup>193</sup> Throughout the hearing, the Committee solicited the opinions of then-President of the NCAA Myles Brand, Big 10 Commissioner Jim Delaney, Cowen, and Steve Young, a former collegiate football player at Brigham Young University.<sup>194</sup> It became apparent, from those opposed to the BCS, that there were two broad classes of anticompetitive effects that the arrangement imposes upon those from outside of the six BCS conferences.<sup>195</sup> The first of the anticompetitive classes is that there have been recruiting barriers erected between those teams within the six BCS conferences and those teams from conferences that are not guaranteed a BCS Bowl.<sup>196</sup> The second broad argument proffered by opponents of the BCS states that there has been economic damage

---

<sup>187</sup> See *supra* Part II.C.2 and accompanying notes 69-78.

<sup>188</sup> See Schmit, *supra* note 68, at 242.

<sup>189</sup> See *supra* Part II.C.2 and accompanying notes 151-60.

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series*, 10th Cong. 2-3 (2003) (statement of Rep. F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary).

<sup>194</sup> See *id.* at 5. In addition to playing quarterback at Brigham Young, Young led the San Francisco 49ers to three Super Bowl championships, won two NFL Most Valuable Player awards, attained his Juris Doctor from BYU in 1994, and is an NFL analyst for ESPN. See *id.*

<sup>195</sup> See Schmit, *supra* note 68, at 243.

<sup>196</sup> See *id.*



and disparities suffered by those schools outside of the BCS.<sup>197</sup>

In his testimony, Cowen stated that he believed that the recruitment of the most talented high school football player is paramount to establishing a successful collegiate program.<sup>198</sup> While it is hard to quantify this, his statement follows a logical progression that has been confirmed throughout history. First, the BCS agreement only affords a practical opportunity to play in the BCS National Championship Game to two teams from the six BCS conferences.<sup>199</sup> Additionally, as currently configured, the BCS only offers ten spots total for its five games, with six of the spots already guaranteed to the six conference champions.<sup>200</sup> That leaves only four at large births to be divided between the remaining BCS conference teams and the non-BCS conference teams. While it is possible for these spots to be filled by non-BCS conference teams, the practical reality is that, at most, two teams from non-BCS affiliated conferences are able to receive bids to one of the BCS Bowls, and no teams have a practical opportunity to make the BCS National Championship Game.<sup>201</sup>

For coaches, the exposure a team receives from playing in one of these bowl games is invaluable.<sup>202</sup> The BCS Bowl Games are all played during the highly visible holiday season and are broadcast nationwide.<sup>203</sup> Not only do the teams featured in the game become highly visible, the conferences that they belong to are well exposed.<sup>204</sup> Such exposure allows coaches from the BCS conferences to gain a recruiting advantage as they can use this as leverage against non-BCS schools; this directly influences the amount of higher talented recruits to choose BCS affiliated schools over non-BCS affiliated schools.<sup>205</sup> While this may not be as harmful in a one year vacuum, the BCS and recruiting do not operate as a one shot deal. When the best players choose the best teams and then the best teams get better, a cycle is created in which the non-BCS schools are continually unable to recruit the best players.<sup>206</sup>

In a similar vein, coaches searching for jobs follow the same logic. Coaches, like players, want to win conference championships, BCS Bowl Games, and national championships. The only practical way to win a BCS Bowl Game or a national championship is to do so from within the BCS system. In his testimony, Cowen argued that the BCS had created artificial barriers that “limit access to bowl games and championship competition,” such that the non-BCS schools have

---

<sup>197</sup> See *id.* at 244.

<sup>198</sup> See H. Comm. on the Judiciary, *supra* note 193, at 19-20 (statement of Dr. Scott Cowen).

<sup>199</sup> See *id.*

<sup>200</sup> See BCS Chronology, *supra* note 15.

<sup>201</sup> See H. Comm. on the Judiciary, *supra* note 193, at 19-20 (statement of Dr. Scott Cowen).

<sup>202</sup> See Schmit, *supra* note 68, at 243.

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*

<sup>205</sup> See *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Judiciary Comm.*, 108th Cong. (2003) (statement of Sen. Orrin Hatch) (“One of the biggest recruiting hurdles for non-BCS teams is that coaches from the BCS conferences are able to tell potential recruits that, if they attend a non-BCS school, they will never play in a national championship game.”).

<sup>206</sup> See Schmit, *supra* note 68, at 243-44.

“become virtual training grounds for future BCS coaches.”<sup>207</sup>

The second argument put forth by the opponents of the BCS is that the BCS has created an ever widening financial gap between the BCS schools and the non-BCS schools.<sup>208</sup> In the first five years of the BCS, the sixty three BCS schools earned and shared approximately \$500 million. During that same time period, the fifty three non-BCS schools shared a mere \$17 million.<sup>209</sup> The disparity exists because of the format of the BCS, the revenue sharing amongst only the conferences that are represented in the games, and the cycle created when the teams with money get more and the teams without money continue to be left behind. Furthermore, this lack of shared revenue has a trickledown effect: the non-BCS schools do not receive as much money which leads to a hindered ability to upgrade facilities, spend more money on coach and staff personnel, or spend money on the recruitment of players.<sup>210</sup> Additionally, the institutions outside of the BCS potentially need to reallocate funding from general or academic funds to pay for athletics.<sup>211</sup> Lastly, the BCS schools see both a higher number of applicants which can make the institution far more selective, with the goal of becoming a more prestigious academic institution.<sup>212</sup>

In response to the testimony of Cowen and his Presidential Coalition of Athletics Reform, the BCS modified its agreement in an attempt to improve access for non-BCS schools.<sup>213</sup> These responses included adding a fifth BCS Bowl Game, the BCS Championship Game, changing the automatic-qualifying criteria to make it more likely that a team from outside the BCS would qualify for a BCS game, and revising the revenue sharing plan.<sup>214</sup> The changes have had a positive

---

<sup>207</sup> See H. Comm. on the Judiciary, *supra* note 193, at 20 (statement of Dr. Scott Cowen). The most illustrative coach to follow this path has been Urban Meyer at the University of Florida. He has won two national championships at Florida since leaving the University of Utah. Urban Meyer, Head Football Coach, <http://web.coachurbanmeyer.com/index2.php?page=yes> (last visited Jan. 16, 2010). Utah plays in the MWC, which is not a part of the BCS, while Florida plays in the SEC. *Id.* Since he arrived at Florida, he has won two national championship games and, following the 2009 regular season, won the Sugar Bowl as an at large bid. *Id.* Both of his Florida Gator teams won national championships even after losing a regular season game en route to their championship. *Id.* While he was at Utah, he led the 2004 Utah Utes to the 2005 Fiesta Bowl, which his team won, to cap off an undefeated season. *Id.* Despite finishing the season undefeated, the Utes were never considered for the BCS Championship game. *Id.* After Meyer left for Florida, Utah received another at large BCS bid after finishing the 2008 regular season undefeated. See Glier, *supra* note 3. In that game, the Utes beat the University of Alabama in the Sugar Bowl, but were never considered for the BCS Championship game. *Id.*

<sup>208</sup> See H. Comm. on the Judiciary, *supra* note 193, at 19 (statement of Dr. Scott Cowen).

<sup>209</sup> See *id.*

<sup>210</sup> See *id.* at 31 (statement of Steve Young).

<sup>211</sup> See *id.* (postulating that money from the general coffers that would normally be “allocated to the building of classrooms and libraries, salaries for excellent faculty, and for the support of scholarship and research, must be funneled into Athletics in order to give them any shot at competing against the [BCS schools]. In turn, this scenario allows the BCS schools a superior chance at providing all the necessary athletic facilities to perpetuate their football programs and the necessary funding for facilities, faculty and research.”).

<sup>212</sup> Matt Egan, *Sports Business: BCS Selection Process Spurs Debate*, FOXBUSINESS, Dec. 30, 2007, <http://www.themarketingarm.com/media/news/139>.

<sup>213</sup> See BCS Chronology, *supra* note 15; see also *supra* Part II.C.2 and accompanying notes 69-78.

<sup>214</sup> See *id.* The new revenue sharing plan would guarantee the non-BCS conferences would split nine percent of the annual BCS net revenue. *Id.* In addition, the non-BCS teams that do make a BCS

impact on allowing more non-BCS teams to qualify for BCS games,<sup>215</sup> but it has yet to produce a team to compete in the BCS Championship Game or to bring economic equality to the non-BCS schools.<sup>216</sup> It is apparent that the changes to the BCS have helped even the playing field between the BCS schools and the non-BCS schools, but the anticompetitive effects still exist.

#### b. Procompetitive Justifications for the BCS

Since the anticompetitive effects are persistent, under the Rule of Reason analysis, it is important for the BCS to put forth its arguments as to why the arrangement actually improves the market of college football. According to the BCS, the arrangement is designed to create a national championship game between the top two rated teams, to create exciting and competitive match-ups among eight other teams, to provide more access to the major bowls, to provide greater television exposure, and to also produce more postseason revenue than before.<sup>217</sup>

The single greatest procompetitive justification put forth by the BCS is that it creates a true national champion. Before the Bowl Coalition and the Bowl Alliance were formed in the 1990s, there was never a true attempt at matching up the first and second best teams in the country in order to play a postseason national championship game.<sup>218</sup> Instead, each polling service determined their own national champion and there were several years in which there were multiple teams that called themselves national champions.<sup>219</sup> With the advent of the Bowl Coalition and Bowl Alliance, there was an incomplete attempt at uniting the

---

game would still earn their share of the revenue for appearing in a game that would then be shared amongst teams from its conference in the same manner as the BCS teams. *Id.*

<sup>215</sup> Stewart Mandel, *Behind the BCS: How Boise State-TCU Match-up Was Made Possible*, SPORTS ILLUSTRATED, Jan. 1, 2010, available at [http://sportsillustrated.cnn.com/2010/writers/stewart\\_mandel/01/01/fiesta/1.html](http://sportsillustrated.cnn.com/2010/writers/stewart_mandel/01/01/fiesta/1.html). Under the old BCS system, the 1998 Tulane University, 1999 Marshall University, 2000 Texas Christian University, and 2003 Miami of Ohio University teams would have qualified for the BCS. *Id.* In 2004, the University of Utah became the first non-BCS team to crash the BCS under the Top 6 standard when it beat the Pittsburgh Panthers in the Fiesta Bowl 35-7. *Id.* The game carried the lowest television rating of any BCS game up to that point. *Id.* In 2006, the new BCS agreement took hold and the Boise State University Broncos garnered a birth into the Fiesta Bowl where it stunned the University of Oklahoma in overtime. *Id.* Since then the 2007 University of Hawaii Warriors, 2008 Utah Utes, 2009 Boise State Broncos, and 2009 Texas Christian University Horned Frogs have appeared in BCS games. *Id.* 2009 marked the first time that two non-BCS teams have made it to a BCS game in the same season. *Id.* The identifying feature of each of these non-BCS bowl game participants is that they were all undefeated before being selected to their BCS games. *Id.*

<sup>216</sup> Gregg Easterbrook, *The BCS Doesn't Always Give Us a Clear National Champ...and That's OK*, ESPN, Dec. 4, 2007, <http://sports.espn.go.com/espn/page2/story?page=easterbrook/071204>. All teams within the BCS conferences receive at least \$1.5 million a year and can receive \$2 million if their conference sends two teams to a BCS game. *Id.* Additionally, Notre Dame receives \$1.3 million every season when it does not make a BCS game. *Id.* The conferences that do not send a team to the BCS get ranked based on their season performance. *Id.* They then receive a pool of money to split amongst their teams in amounts that decrease with a decreased ranking. *Id.* Easterbrook cited the MAC as an example and stated that each team in the conference would receive only \$200,000. *Id.* After the 2008 regular season, the University of Washington received more money after finishing the year 0-12 than the Sugar Bowl Champion, Utah Utes who finished the season 13-0. What's Wrong With the BCS?, Playoff PAC, <http://www.playoffpac.com/wrong/default.aspx> (last visited Jan. 15, 2010).

<sup>217</sup> BCS, BCS Background, <http://www.bcsfootball.org/bcsfb/about> (last visited Jan. 15, 2010) [hereinafter BCS Background].

<sup>218</sup> See *supra* Part II.C.1 and accompanying notes 34-41.

<sup>219</sup> See *id.*

conferences that were most likely to produce national championship caliber teams.<sup>220</sup> When it was realized that the Bowl Alliance would not continually produce national championship match-ups, it was discarded in favor of the BCS.<sup>221</sup>

At the conclusion of every regular season since 1998, the BCS has matched up two teams in a game dubbed the BCS Championship Game.<sup>222</sup> First, and most importantly, the BCS was able to join the Big 10 and Pac 10 conferences in the new system.<sup>223</sup> Part of the problem with the Bowl Coalition and Bowl Alliance was that the twenty one teams from the two conferences were obligated to play in the Rose Bowl if they were champions of their conference, thus they could not meet the top ranked teams from the other power conferences.<sup>224</sup> In order to solve this problem, the BCS agreed to allow the winners of the Big 10 and Pac 10 to play each other whenever there was not a conflict with the BCS Championship Game and the other traditional conference-bowl tie-ins would be abolished.<sup>225</sup>

In order to choose these two teams, the BCS concocted its own ranking system.<sup>226</sup> The system is responsible for both choosing the match-up in the title game as well as to help determine which teams will play in the other BCS Bowl Games.<sup>227</sup> The ranking system was designed to be an objective system that pairs two teams based on statistical data.<sup>228</sup> In practice, the ranking system has provided a measure of objectivity, but by no means has it been flawless.<sup>229</sup> While the rankings have periodically been shrouded in controversy, it has produced a match-up between two teams that have been named the national champion at the conclusion of the game.<sup>230</sup> Despite all of the potential flaws and shortcomings, the BCS has delivered the unique product of a national championship game and in an effective and meaningful way.<sup>231</sup>

In addition to fulfilling the goal of creating a national championship game, proponents of the BCS claim that the BCS promotes competition in collegiate football, helps to level the playing field, and increases public interest;<sup>232</sup> these effects help college football generate more revenue. One of the loudest rallying points for the proponents of the BCS is that the system requires teams to be either flawless or nearly flawless in their record at the end of the regular season.<sup>233</sup> Since the inception of the BCS, only one national championship game participant has

---

<sup>220</sup> *See id.*

<sup>221</sup> *See supra* Part II.C.2 and accompanying notes 51-61.

<sup>222</sup> *See id.*

<sup>223</sup> *See id.*

<sup>224</sup> *See id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See supra* Part II.C.2. and accompanying notes 51-61.

<sup>227</sup> *See id.*

<sup>228</sup> *See id.*

<sup>229</sup> *See id.* The BCS ranking system underwent significant changes throughout the first manifestation of the BCS agreement.

<sup>230</sup> *See id.*

<sup>231</sup> *See Kober, supra* note 12, at 74.

<sup>232</sup> *See id.* at 74-78.

<sup>233</sup> *See id.* at 74-75.

had greater than one loss entering the game and no at large team has had more than four losses before entering any other BCS game.<sup>234</sup> Furthermore, the only way for BCS conference teams to ensure their participation in the system is to win their conference championship.<sup>235</sup> Moreover, teams outside of the automatic qualifying BCS conferences are forced to schedule games against a higher level of competition in order to score maximum number of points in the computer polls.<sup>236</sup> The system arguably provides the procompetitive justification that the BCS enhances the regular season as well as the BCS Bowl Games.

One of the key aspects of the BCS is that it does share revenue amongst all teams from all eleven conferences.<sup>237</sup> Within the first eight years of the BCS, the non-BCS schools received over \$40 million as part of the agreement.<sup>238</sup> The funds that they received were a mandatory dispersal regardless of whether the conference they belonged to was represented in any capacity of the BCS games.<sup>239</sup> The proponents of the BCS claim that this distribution of funds, while not completely equal, gives those teams outside of the BCS a bite at an apple that they would not otherwise be able to attain.<sup>240</sup> By allowing teams from outside of the BCS to receive funds they would not otherwise be able to attain, the agreement provides a revenue sharing plan that only benefits teams that otherwise would have little to no shot at making a BCS game.

Finally, proponents of the BCS point out that the public as a whole has shown more interest in college football after the implementation of the BCS than

---

<sup>234</sup> See BCS, Alliance & Coalition Games Year-by-Year, <http://www.bcsfootball.org/bcsfb/timeline> (last visited Jan. 16, 2010). LSU won the BCS Championship game after the 2007 regular season after coming into the game with an 11-2 record. *Id.* In total, there have only been nine automatic qualifying conference champions with three or more losses after the regular season. *Id.* By restricting the teams to those with a minimal number of losses, the BCS creates an extremely competitive atmosphere amongst collegiate teams. Teams recognize that one loss, especially in a conference game, can mean the difference between being included in a BCS game and being excluded. For instance, in the first year of the BCS agreement, UCLA entered its final game of the season against the Miami Hurricanes undefeated and number two in the BCS rankings. *Id.* After having their September meeting postponed due to Hurricane Georges, the UCLA Bruins lost to the aptly named Hurricanes 49-45 costing them a place in the BCS Championship Game. *Id.*

<sup>235</sup> See *supra* Part II.C.2 and accompanying notes 66-75.

<sup>236</sup> An interesting case for this is the 2009 Boise State University Broncos. The Broncos began the season with a nationally televised win against the Oregon Ducks on the opening night of the college football season. Associated Press, *Postgame Punch Mars No.14 Boise State's Commanding Win Over No. 16 Oregon*, Jan. 16, 2010, <http://espn.go.com/ncf/recap?gameId=292460068>. The momentum from that game propelled the Broncos to an undefeated season in which they secured an at large bid to the 2010 Fiesta Bowl in which the team beat the TCU Horned Frogs. Associated Press, *Boise State Beats TCU in Fiesta Bowl*, BCS, Jan. 4, 2010, <http://www.bcsfootball.org/cfb/story/10559502/Boise-State-beats-TCU-in-Fiesta-Bowl>. In that same season, the Oregon Ducks won the Pac 10 conference and earned an automatic berth in the Rose Bowl. Associated Press, *Pryor Leads Ohio State Over Oregon in Rose Bowl*, BCS, Jan. 1, 2010, <http://www.bcsfootball.org/cfb/story/10553890/Pryor-leads-Ohio-State-over-Oregon-in-Rose-Bowl>. It was these types of regular season, out of conference match-ups that the BCS hoped would result from the knowledge that teams needed to play a strong, complete schedule in order to maximize the chances of getting a bid to a BCS bowl.

<sup>237</sup> See BCS Chronology, *supra* note 15.

<sup>238</sup> See Kober, *supra* note 12, at 75.

<sup>239</sup> See *id.*

<sup>240</sup> See *id.* Under the traditional bowl tie in system, the teams not contracted to play in the most high profile bowls – the ones that comprised the BCS – would have received no monetary compensation whatsoever since they would never have the opportunity to play in those games. *Id.*

before it.<sup>241</sup> The growing amount of interest around college football should not be discarded as an irrelevant procompetitive justification. In *Hennessey*, the Fifth Circuit stated that there is true value in the increase of public interest in college football.<sup>242</sup> The Supreme Court affirmed the notion that public interest is a valid procompetitive justification in *Board of Regents*.<sup>243</sup> While the NCAA does not play a part in the BCS agreement, the validity of public interest as a procompetitive justification is still undeniable.

Since the implementation of the BCS, in person attendance at college football games increased from 27.6 million to 37.4 million in 2009.<sup>244</sup> Furthermore, in 2009, the BCS Championship Game captured an audience of 26.8 million people.<sup>245</sup> The BCS compares favorably to the championship contests in other sports as the 2009 NCAA Men's Basketball Championship received only 17.6 million viewers and the World Series between the Philadelphia Phillies and New York Yankees received only 19.3 million viewers.<sup>246</sup> In addition, the proliferation of sports talk radio, the growth of ESPN, the growth of the internet, and simple word of mouth have also contributed countless hours and programming space to college football that was unimaginable just twenty years ago. Public interest certainly has grown and provides an additional procompetitive justification for restricting access to the BCS.

### c. Less Restrictive Alternatives

With the BCS and its member conferences able to show several procompetitive justifications, the onus is on the court to weight both sides of the argument and to undertake consideration of whether there are any less restrictive alternatives.<sup>247</sup> Throughout the history of the BCS, several factions have produced plans that would lessen the restrictive nature of the BCS. The most prominent alternative is to create some form of a playoff. This section will discuss some of the basic arguments or aspects of these plans that could potentially be less restrictive.

Because the stated goal of the BCS was to create a decisive national championship game between the two best teams in the country each season,<sup>248</sup> Cowen presented a potential eight- or sixteen-team playoff system that would include a greater number of contenders.<sup>249</sup> He surmised that the playoff system would allow more teams access to a championship game, would generate

---

<sup>241</sup> *See id.* at 77.

<sup>242</sup> *Hennessey*, 564 F.2d at 1154.

<sup>243</sup> *Bd. of Regents*, 468 U.S. at 117.

<sup>244</sup> Bill Hancock, *Who Needs a Football Playoff? Every Game Counts in the BCS*, TENNESSEAN, Jan. 3, 2010, <http://www.tennessean.com/article/20100103/SPORTS060407/1030327/Who-needs-a-football-playoff?-Every-game-counts-in-BCS>.

<sup>245</sup> *See id.*

<sup>246</sup> *See id.* It is important to note that the BCS Championship Game saw a team from Gainesville, Florida and Norman, Oklahoma while the World Series saw its teams come from Philadelphia, Pennsylvania and New York City, New York.

<sup>247</sup> *United States v. Brown Univ.*, 5 F.3d 658, 679 (3rd Cir. 1993).

<sup>248</sup> *See BCS Background*, *supra* note 217.

<sup>249</sup> *See H. Comm. on the Judiciary*, *supra* note 193, at 49 (statement of Dr. Scott Cowen).

excitement similar to that of the NCAA Men's Basketball Championship Tournament, and could still incorporate the traditional bowl games into its structure.<sup>250</sup> By implementing a playoff system, the restrictive nature of the BCS in terms of crowning a national champion would be diminished.

There have been several arguments made in opposition of a playoff system by the proponents of the BCS that enhance the notion that the agreement is the best possible arrangement. Proponents of the BCS system believe that a playoff system will have detrimental effects on the student-athletes in direct contrast to the mission of the NCAA as it will take those students out of the classroom for a longer period of time.<sup>251</sup> Furthermore, the proponents of the BCS believe that adding too many games would create anticompetitive effects as it would inundate the market with more, lower quality football games that would not be as attractive to television networks, advertisers or other revenue generating sponsors.<sup>252</sup> Finally, proponents state that there would be contention over deciding which teams make the playoffs and which teams are excluded.<sup>253</sup>

#### d. Analysis of the Viability of a BCS Antitrust Violation Suit

While some changes were enacted to the BCS in 2004 as a result of the congressional debates, the calls for change to the BCS have grown louder. If the BCS becomes subject to an antitrust violation, there are ample anticompetitive

---

<sup>250</sup> *See id.* While Cowen didn't expand upon the value created by the playoff system, some of the hypothetical arguments are easy to make. First, by having more teams play in what would arguably be more meaningful games, public interest would be increased resulting in higher attendance and viewership ratings. Second, the goal of deciding a national champion would be furthered in a vein similar to that of the annual basketball championships. By including more teams in the championship tournament, there is less of a chance that a deserving, competent, football team would miss out on the opportunity to compete for the championship. For instance, the Auburn University Tigers finished the 2004 regular season undefeated, won the SEC conference, and defeated Virginia Tech in the Sugar Bowl yet was excluded from the BCS Championship Game in favor of the USC Trojans and the Oklahoma Sooners. Associated Press, *Auburn Holds Off Virginia Tech in Sugar Bowl*, NBC SPORTS, Jan. 4, 2005, [http://nbcsports.msnbc.com/id/6783376/ns/sports-college\\_football/](http://nbcsports.msnbc.com/id/6783376/ns/sports-college_football/). This problem would have been wholly solved if Auburn was included in the playoff system as they could have continued winning throughout the playoff.

<sup>251</sup> *See* H. Comm. on the Judiciary, *supra* note 193, at 49 (statement of Dr. Scott Cowen).

<sup>252</sup> *See id.* at 50. The corollary to this argument is that, by having teams play either three or four postseason games instead of just one, fans of the schools involved will be less likely to make separate trips for each game meaning that with less fans from the competing teams flooding the city, those host markets will not make as much money off the games as they had under the BCS system.

<sup>253</sup> Playoff Problem, <http://playoffproblem.com/wordpress/?p=88> (last visited Jan. 18, 2010). After naming Bill Hancock as the executive director of the BCS, the BCS has begun reaching out to both proponents and opponents using new social media. One of the websites that the BCS advocates is PlayoffProblem.com which looks at various playoff proposals and how they would create controversy far greater than the BCS. Under a system which uses objective rankings, teams could feel like the rankings are unfair and that they are being excluded because of a bias in the rankings. Additionally, if there were a selection committee, some teams excluded could point to a potential subjective bias in determining which teams should be included in the playoff. One problem not acknowledged by the BCS or PlayoffProblem.com is that all other sports in the National Collegiate Athletic Association have selection committees that determine which teams qualify for the National Collegiate Athletic Association Championships. This problem is consistently addressed by the selection committees as they use both objective and subjective criteria to determine which at large teams should make their respective championship tournaments. The problem is substantively the exact same one facing the BCS or National Collegiate Athletic Association if a playoff system were imposed.

effects as well as procompetitive justifications to warrant a look into whether or not there are less restrictive alternatives. A case would likely be decided on whether or not the opponents of the BCS could prove that the proposed anticompetitive effects are a result of the BCS arrangement and not of other sources. First, the major powers of college football have always had more money, resources, talented players, and media attention than those teams from the non-BCS conferences; the BCS hasn't changed any of that. Additionally, those bringing the suit would need to prove that it is the BCS that has caused the negative impact on recruiting, the disinterest from top coaching candidates, and lesser media exposure that they claim. If the opponents of the BCS cannot prove that there has been a negative impact, they cannot win. Again, not only would the opponents of the BCS be required to assertively prove these points, they would also need to disprove the notion that these negative effects were either not inexistence or were much more subdued prior to the BCS agreement. It is not enough to assert that they are behind the BCS conferences; they have always been behind and will need to prove that the BCS has put them so far behind that, if the system were to continue, they would be forced out of Division I FBS football.

In addition to proving that the BCS has drastically hindered the non-BCS conference teams, the opponents of the BCS would need to produce a comprehensive plan for a less restrictive alternative. The plan would most likely need to incorporate existing aspects of the traditional bowl system, an objective ranking system, and a playoff system that would not interfere with the welfare of the NCAA student athletes. While there are several hypothetical plans that have been bandied about,<sup>254</sup> none have addressed the economic impact of a playoff system. Whether a playoff plan can continue to generate the kinds of revenue that the BCS creates for both the BCS conferences and the non-BCS conferences is unknown and would be extremely speculative.

While saying that the rich get richer off the BCS and that a playoff is what America wants is the easy answer, it is clear that the BCS generates serious revenue streams for all FBS teams. It is highly doubtful that an antitrust violation of the BCS would be successful on the merits.

### *C. Further Developments*

On January 29, 2010, the United States Justice Department responded to Senator Orrin Hatch's request for an investigation in to the legality of the BCS.<sup>255</sup> The letter stated that the Justice Department would review the request and other materials and then determine whether there should be an investigation into whether the BCS violates antitrust laws.<sup>256</sup> While the letter does state that the Justice Department is willing to consider an antitrust case, the fact that the Justice Department states that there are other alternatives is extremely telling about the potential merits for a successful antitrust suit.

---

<sup>254</sup> See *supra* Part VI.5.c and accompanying notes 247-53.

<sup>255</sup> Frederic J. Frommer, *Federal Government Weighing Action on BCS*, ASSOCIATED PRESS, Jan. 29, 2010, <http://rivals.yahoo.com/NCAA/football/news?slug=ap-bcs-congress&prov=ap&type=lgns>.

<sup>256</sup> *Id.*



In the letter, the Justice Department states that some of the other options for solving the BCS “include encouraging the NCAA to take control of the college football postseason; asking a governmental or non-governmental commission to review the costs, benefits and feasibility of a playoff system; and legislative efforts aimed at prompting a switch to a playoff system.”<sup>257</sup> While none of these options are exactly new, the fact that they are being mentioned with increased frequency means that, even though an antitrust suit may be far off, other means of enacting change to the BCS may be plausible.

#### V. CONGRESS’ 2009 ANTITRUST DEBATE

Long before the Justice Department responded to Senator Hatch’s request and made it clear that an antitrust lawsuit is far off and other alternatives should be sought, Congress began searching for new avenues to end the BCS and to create a more credible national championship. Congressional scrutiny ratcheted up following the 2008 regular season and has continued through the 2009 regular season.

During the 2008 regular season, it became apparent that the 2004 changes to the BCS did not solve all of the problems of creating a true, decisive national champion. At the end of the regular season, only one team finished undefeated, the Utah Utes.<sup>258</sup> Despite being undefeated, it was the Oklahoma Sooners and the Florida Gators that topped the BCS Standings at the end of the regular season.<sup>259</sup> Both teams entered the game with one loss, but they had both won their conference championship games.<sup>260</sup> Despite being well qualified, University of Texas partisans justifiably were upset at the Longhorns exclusion from the BCS; they missed out on playing in the Big 12 Conference Championship Game because they fell one spot behind Oklahoma in the last regular season BCS Standings.<sup>261</sup> During the regular season, Texas defeated the University of Oklahoma on a neutral

---

<sup>257</sup> *Id.*

<sup>258</sup> ESPN, 2008 College Football Rankings – Week 16 (Dec. 7), [http://espn.go.com/collegefootball/rankings/\\_/year/2008/week/16](http://espn.go.com/collegefootball/rankings/_/year/2008/week/16).

<sup>259</sup> *See id.*

<sup>260</sup> Pat Forde, *Controversy Constant Along Annual Twisting BCS Path*, ESPN, Dec. 7, 2008, [http://sports.espn.go.com/espn/columns/story?columnist=forde\\_pat&id=3753351&sportCat=nfc](http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=3753351&sportCat=nfc).

<sup>261</sup> *See id.* Both Oklahoma and Texas finished the regular season with one conference loss. *Id.* Additionally, Texas Tech finished the regular season with one loss. *Id.* All three teams play in the Big 12 South Division. *Id.* Each season, the winner of the Big 12 South meets the winner of the Big 12 North to determine the conference champion. *Id.* During the regular season, Texas beat Oklahoma 45-35, Texas Tech beat Texas on Texas Tech’s last offensive play of the game, and Oklahoma beat Texas Tech to create a three way tie at the top of the division. *Id.* The conference tie breaker states that the fifth determinant in a three way tie situation would be the ranking of teams in the final BCS standings poll at the end of the regular season. Big 12, Tiebreaker Procedures, [http://www.big12sports.com/ViewArticle.dbml?DB\\_OEM\\_ID=10410&ATCLID=1546006](http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=1546006) (last visited Jan. 18, 2010). In the final regular season poll, Oklahoma narrowly edged out Texas by a 0.0181 margin. *See* Forde, *supra* note 260. Despite beating Oklahoma on the field at a neutral site, Texas was left out of the conference championship game and then the BCS Championship Game. *Id.* Further controversy would have been sparked if Oklahoma would have lost the conference championship game and either the University of Alabama or the University of Texas would have been next in line to play Florida, despite neither winning their conference.

site by ten points.<sup>262</sup> After Oklahoma won the conference championship, they moved on to play Florida in the BCS Championship Game.<sup>263</sup> This controversy provided political fuel for legislators to become enamored with the thought of either changing the BCS system or passing legislation blocking the effects of the agreement.

Following the 2009 regular season more controversy surrounded the BCS. Five teams finished the regular season undefeated: (1) the University of Alabama Crimson Tide, (2) the University of Texas Longhorns, (3) the University of Cincinnati Bearcats, (4) the Boise State Broncos, and (5) the Texas Christian University Horned Frogs.<sup>264</sup> With five undefeated teams, the only way to determine which teams were going to play in the BCS Championship Game was through the BCS rankings.<sup>265</sup> The rankings determined that Alabama should play Texas.<sup>266</sup> The other three teams did qualify for a BCS game, but none of the three had an opportunity to win a national championship. Under a playoff system, each of these five teams would have had an opportunity to play each other in order to win a championship; instead, only two of those teams were able to play for the title.<sup>267</sup>

With these two recent seasons marred with controversy, Congress has sought to directly and indirectly force college football into a playoff postseason format. The rest of this section will examine proposals that are currently being examined in various house committees and the potential impact they can have on the BCS.

#### A. House Resolution 1120

On January 15, 2009, Representative Neil Abercrombie, from the state of Hawaii, reintroduced a resolution that denounces the BCS, calls for a playoff system, brings parity to all NCAA teams, and demands that the United States Justice Department bring an antitrust suit against the BCS.<sup>268</sup> Once the resolution was introduced into the House of Representatives, it was referred to both the House Judiciary Committee and the House Education and Labor Committee.<sup>269</sup> The resolution has not moved out of either committee nor moved to the House for

---

<sup>262</sup> See *id.*

<sup>263</sup> See *id.*

<sup>264</sup> See 2009 College Football Rankings – Week 15, *supra* note 87.

<sup>265</sup> See *supra* Part II.C.2 and accompanying notes 62-63.

<sup>266</sup> See Thamel, *supra* note 70.

<sup>267</sup> At the beginning of the season, Texas was ranked second in the USA Today poll, Alabama was ranked fifth, Boise State was ranked sixteenth, TCU was ranked seventeenth, and Cincinnati was unranked. ESPN, 2009 College Football Rankings – Preseason, [http://espn.go.com/college-football/rankings/\\_/week/1](http://espn.go.com/college-football/rankings/_/week/1) (last visited Jan. 18, 2010). With such a big lead in the polls, it was inevitable that Texas and Alabama would end up in the championship game so long as they remained undefeated.

<sup>268</sup> See H.R. Res. 68, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.RES.68.IH.> The resolution was originally submitted to the House of Representatives on April 17, 2008, less than five months after the University of Hawaii was not selected to play in the BCS Championship Game despite finishing the regular season undefeated.

<sup>269</sup> See *id.*

a vote.<sup>270</sup>

While the resolution is high in rhetoric, it is not much in substance. The resolution merely states widely held facts about the BCS and NCAA Division I FBS football and then makes demands without much force behind them. Despite the ineffectiveness of the resolution and the fact that it has died in committee, the demands of the resolution were addressed in the Judiciary Department's letter to Senator Hatch. Despite lacking teeth, the demands of the resolution have been repeated in other potential legislation and correspondence.

### B. *College Football Playoff Act of 2009*

On January 9, 2009, Representative Joe Barton<sup>271</sup> reintroduced a bill he originally introduced in December of 2008 that, if passed, would make it:

[u]nlawful for any person to promote, market, or advertise a post-season [NCAA] Division I [FBS] Subdivision football game as a championship or national championship game, unless the game is the final game of a single elimination post-season playoff system for which all NCAA Division I FBS conferences and unaffiliated Division I FBS teams are eligible.<sup>272</sup>

Additionally, the bill would make it unlawful for anyone to sell or advertise any merchandise that refers to a particular game as a championship or national championship game, unless the game comports with the single elimination postseason format.<sup>273</sup> Violations of the College Football Act of 2009 would be treated as a violation of the Federal Trade Commission Act.<sup>274</sup>

After being introduced into the House, the bill was referred to the Subcommittee on Commerce, Trade and Consumer Protection, a subset of the House Committee on Energy and Commerce.<sup>275</sup> On December 9, 2009, the bill was given approval in the Subcommittee and is currently awaiting its fate in the full committee.<sup>276</sup>

---

<sup>270</sup> See *id.*

<sup>271</sup> Barton is a representative from the football crazed state of Texas. Joe Barton, *Rep. Barton's BiPartisan Bill Works to Find "True" College Football Champion*, OFFICE OF JOE BARTON, Jan. 14, 2009, <http://joebarton.house.gov/NewsRoom.aspx?FormMode=Detail&ID=453>. Despite being a graduate from Texas A&M, a direct rival of the University of Texas Longhorns, Barton recognized that "[c]onsumers, whether the millions who watched the game on TV or the lucky few who saw it in person, were being bamboozled. The BCS championship game is not a championship game under any sensible interpretation of the manner in which sports champions are determined." *Id.*

<sup>272</sup> See H.R. Res. 390, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.390>.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.* The Federal Trade Commission Act regulates unfair or deceptive acts or practices in commerce. Federal Trade Commission Act, 15 U.S.C. § 57a(a)(1)(B) (2006).

<sup>275</sup> See H.R. Res. 390, *supra* note 272.

<sup>276</sup> See *id.* The subcommittee approval was not without controversy. Representative John Barrow from Georgia stated: "[w]ith all due respect, I think [Congress has] more important things to spend [its] time on." *Subcommittee OKs College Playoff Bill*, ESPN, <http://sports.espn.go.com/ncf/news/story?id=4727426> (last visited Feb. 10, 2010). In addition to Barrow, BCS Executive Director Bill Hancock said, "[w]ith all the serious matters facing [the United States], surely Congress has more important issues than spending taxpayer money to dictate how college football is played." *Id.* In response, Representative Bobby Rush, a co-sponsor of the bill from Illinois, replied that Congress "can walk and

While the bill has been praised for its direct aim at the current BCS, the bill is not without potential pitfalls. The most obvious flaw with the bill is that it does not create a new system or implement change to the system that has created any inequities. By relying upon the marketing and promoting of the game and its merchandise under the guise of a national championship, the bill only attacks the perceived underlying problem of the BCS, the lack of a single-elimination playoff system, instead of addressing the inherent unfairness that the BCS has created. The problems that the non-automatic qualifying schools face are not discussed in any substantive way.

Despite these concerns, the real problem Barton attempts to address is that of giving the fans what they desire: a playoff. Despite this, and to paraphrase the worn out cliché, Barton is simply arguing semantics with the BCS. By disallowing the BCS to use the phrase national championship, the actual contest and agreement can continue relatively unimpeded under a different title. In order to create substantive change in the BCS, the bill needs to do more to break up the BCS than to simply try and eliminate the designation of national championship from the game's title.

### C. *Championship Fairness Act of 2009*

One week after the College Football Playoff Act was reintroduced into the House, Representative Gary Miller of California introduced the Championship Fairness Act of 2009.<sup>277</sup> The Championship Fairness Act would prohibit institutions of higher education from being “eligible to receive any Federal funds for any fiscal year during which the institution has a football team that participates in the [NCAA] Division I Football Bowl Subdivision, unless the national championship game of such Subdivision is the culmination of a playoff system.”<sup>278</sup> In addition to eliminating the distribution of federal funds to all FBS schools if there is no playoff system, the Act states the bowl system can continue if it either incorporates current bowls into the playoff system or creates a playoff system completely outside of the current bowl system.<sup>279</sup> Since its introduction into the House on January 16, 2009, the bill has been stuck in the House Committee on Education and Labor.<sup>280</sup>

Unlike the College Football Playoff Act, the Championship Fairness Act specifically requires the institutions playing major Division I football to institute a playoff system. By employing congressional spending power, the bill is able to effectively coerce universities and colleges to implement a playoff system.<sup>281</sup> The

---

chew gum at the same time.” *Id.*

<sup>277</sup> See H.R. Res. 559, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.599.IH>.

<sup>278</sup> See *id.*

<sup>279</sup> See *id.*

<sup>280</sup> See *id.*

<sup>281</sup> At the 2009 Association of Public and Land-Grant Universities annual conference, several panelists addressed the need for additional federal funding if public schools throughout the nation are to remain competitive. Jennifer Epstein, *Funding Publics*, INSIDE HIGHER EDUC., Nov. 16, 2009, <http://www.insidehighered.com/news/2009/11/16/publics>. With the current state of the economy, public

bill has teeth that would force university presidents and athletic directors to take notice and quickly scramble to implement a playoff system if it were to ever be passed.

While it may be difficult to implement a playoff system under short notice, it would not be impossible. The FCS has shown that it is possible for schools to opt into a playoff system to determine a championship in football with minimal harm done to the student-athlete. Each year, the FCS crowns a champion in a sixteen team tournament.<sup>282</sup> While the revenue streams and rewards are much smaller in the FCS, it is possible for a tournament to take place. Furthermore, the Act allows for the incorporation of the current bowl games into the tournament.<sup>283</sup> If the expanding number of bowl games and the escalating television contracts for Division I football are any indication, fans would still tune into all the bowl games, sponsors would still line up to support the non-tournament bowl games, and the television networks would still broadcast the non-tournament games.<sup>284</sup> While the revenue from these games would certainly be diminished, it is not inconceivable that the revenue from the playoff games would more than make up the difference. The cries that a tournament would negatively impact the bottom line of institutions playing FBS college football are hollow.<sup>285</sup>

While it is extremely plausible that the Championship Fairness Act would

---

school budgets are becoming increasingly tighter and funding from the federal government has become instrumental in allowing public universities to remain solvent. *Id.* With the majority of BCS schools being public or land-grant universities, the Championship Fairness Act would have a tremendous impact on those schools that are benefitting the most from the BCS arrangement. *Id.*

<sup>282</sup> Under the FCS system, there are eight automatic bids handed out to the champions of the Big Sky Conference, Colonial Athletic Association, Gateway Football Conference, Mid-Eastern Athletic Conference, Ohio Valley Conference, Patriot League, Southern Conference, and Southland Conference. Inside the FCS Playoffs, <http://www.printereagle.younce.net/playoffs/inside.html> (last visited Feb. 16, 2010). The other eight playoff spots and seeds are determined by a committee of athletic directors from FCS schools. *Id.* The process is extremely similar to that of the National Collegiate Athletic Association Men's Basketball Tournament and other National Collegiate Athletic Association sports. *Id.*

<sup>283</sup> For instance, if the BCS were converted into an eight game tournament, the BCS Championship Game would still be the championship game and the four other BCS bowls would be able to serve as either first or semifinal round games. Additionally, the remainder of the bowls would still be played as a reward to those teams who did not make the BCS.

<sup>284</sup> In August 2008, ESPN agreed to a fifteen year deal to broadcast SEC football for \$2.25 billion. Dave Matter, *Big 12 TV Contract Frustrates Missouri*, COLUM. DAILY TRIB., Sept. 18, 2009, at B1, available at <http://www.columbiatribune.com/news/2009/sep/18/big-12-tv-contract-frustrates-missouri/>. In addition to the agreement with ESPN, the SEC has an additional fifteen year, \$825 million agreement with CBS. *Id.* Additionally, the Big 10 has a ten year, \$1 billion package deal with ESPN and a 25-year, \$2.8 billion deal with the Big Ten Network. *Id.* Furthermore, the Big 12 has signed a contract with ESPN for \$480 million through 2016 and a deal with Fox Sports Net for \$78 million through 2012. *Id.* In addition to the escalating television contracts, the number of bowl games has increased three fold in the past thirty years. In 1970, there were only eleven bowls. Dale Van Every, *A Brief History of College Bowl Games*, COLLEGE-FOOTBALL.SUITE101, Dec. 13, 2008, [http://college-football.suite101.com/article.cfm/history\\_of\\_college\\_bowl\\_games](http://college-football.suite101.com/article.cfm/history_of_college_bowl_games). In 1990, there were nineteen bowl games and in 2000, the number had increased to twenty five. *Id.* At the end of the 2008 season, there were thirty four total bowl games. *Id.*

<sup>285</sup> Just before publication, Yahoo Sports columnist Dan Wetzel released a new book called *Death to the BCS*. In the book, the authors chronicled just how much money they estimate could be made if a playoff were installed and what format would work best. DAN WETZEL ET AL., *DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES* (2010) (chronicling how much money could be made if a playoff system replaced the bowl system).

coerce the FBS into a tournament, the repercussions of not implementing a tournament are extremely high. For this reason and others, the bill has not moved out of committee. The political costs to legislators would be extremely high if they supported the bill and a playoff fails to materialize. The damage done to universities has the potential to be devastating. Under the current economic climate, state sponsored universities and colleges are already having enough trouble with budgets and funding that further cuts would be a doomsday scenario for most politicians.

As of the writing of this article, the House bill as currently situated has not been introduced into the Senate. As the months continue to pass, the likelihood of the Championship Fairness Act being enacted into law are becoming remote. Despite it being the best option of the three congressional proposals, the outlook for congressional action looks dubious at best.

## VI. CONCLUSION

It is apparent that, at least for the time being, an antitrust suit looks untenable and congressional action looks to be too daunting. The question now becomes what is next for the BCS? As it is currently construed, the BCS agreement runs through the end of the 2013 regular season and is unlikely to be substantively reformulated before the contract runs.<sup>286</sup> This means that the next step for the non-BCS conferences is to wait out the agreement, become such strong football playing conferences that the other BCS conferences will need to recognize their football prowess and allow them to sit at the BCS table, or to find some other solution.

By showing sustained success on the football field, the Mountain West Conference has attempted to force its way into the BCS. In 2009, the Mountain West submitted a proposal to the BCS to petition for a playoff system.<sup>287</sup> The proposal called for an eight team playoff in which each participant was either an automatic qualifier or selected by a selection committee.<sup>288</sup> The selection committee would be composed of a representative from each of the eleven conferences and would also be tasked with seeding the eight teams selected.<sup>289</sup> In addition to the playoff and selection committee aspects of the proposal, if a conference had a strong enough showing over a sustained period of time, the conference regular season champion would automatically qualify for the tournament.<sup>290</sup> As a result, each conference would be able to qualify for the tournament and the automatic qualifiers would be based strictly on the merits of the conferences. While the terms of the revenue sharing from this new

---

<sup>286</sup> See BCS Chronology, *supra* note 15.

<sup>287</sup> ESPN, *MWC Reveals Playoff Proposal to BCS*, ESPN, March 5, 2009, <http://sports.espn.go.com/nfl/news/story?id=3952542>. The proposal called for an eight team playoff system and all conferences with a .400 win percentage against the current automatic qualifying leagues over the previous two-year period would automatically have their champion qualify for the tournament. *Id.* Under this proposal, the Mountain West would have automatically qualified for the tournament at the end of the 2008 regular season. *Id.*

<sup>288</sup> See *id.*

<sup>289</sup> See *id.*

<sup>290</sup> See *id.*

arrangement were not made available, if we assume *arguendo* that the money would be split in a manner similar to that of the current BCS arrangement,<sup>291</sup> each conference that automatically qualifies would receive the same share of money. This means that the Mountain West would no longer be treated as a second class citizen with a smaller appearance payout, but would take an equal share. This would also apply to any other current non-BCS conferences that can meet the threshold to qualify automatically. The complaints of the non-BCS conferences would be muted because all teams and conferences would be able to prove themselves on the football field. But like the other attempts to change the BCS, the proposal was summarily dismissed by the BCS conference representatives.

Because the BCS will look to sublimate any proposals by the non-automatic qualifying conferences in order to retain the status quo, individual teams have sought out their own solutions. During the summer of 2010, college football seemed poised for a seismic shift. Multiple reports surfaced, and it was confirmed, that the Pac 10 had invited seven schools to fill six new slots and that the Big 10 had been actively courting the University of Texas, the University of Nebraska and potentially the University of Missouri.<sup>292</sup> While the move to sixteen teams did not fully develop for the Pac 10, the conference did add the University of Colorado and the University of Utah.<sup>293</sup> Additionally, Nebraska accepted an invitation from the Big 10 in order for the conference to expand to the minimum of twelve teams needed in order to stage a conference playoff game.<sup>294</sup> As a result of Utah's defection from the MWC, the conference invited Boise State University in order to help boost the conference's chances to automatically qualify under the BCS standards.<sup>295</sup> Additionally, Brigham Young University defected from the MWC to

---

<sup>291</sup> Every BCS conference represented under the current arrangement receives the same amount of money for participation while the non-BCS conferences receive money only if they qualify for a game. Additionally, they receive far less money than the BCS conferences.

<sup>292</sup> See Carlton, *supra* note 25. Current speculation is just that – speculation. But under some theories, the biggest prize in conference expansion would be the University of Texas Longhorns, which is a current member of the Big 12. George Schroeder, *To Make Expansion Worthwhile, Pac 10 Must Try to Land Texas*, SPORTS ILLUSTRATED, Feb. 12, 2010, [http://sportsillustrated.cnn.com/2010/writers/george\\_schroeder/02/12/pac-10-expansion/index.html](http://sportsillustrated.cnn.com/2010/writers/george_schroeder/02/12/pac-10-expansion/index.html). Because the University of Texas is such a big catch, it could negotiate a move into either the Big 10 or the Pac 10. *Id.* The result would be a catastrophic shift of power in the Big 12 and it would severely hinder the prestige of the conference. *Id.* Additionally, it is speculated that the University of Colorado would also be included in a move to the Pac 10. *Id.* That would again rob the Big 12 of a team that would need to be replaced. If that were to happen, the Big 12 would likely replace those two teams with teams from the Mountain West. *Id.* The result would be a much weaker Mountain West as the Big 12 would poach the top teams from the conference. *Id.* Furthermore, the Pac 10 could simply expand only using Mountain West teams or Boise State University out of the WAC. *Id.* While this is highly unlikely and does not make very much practical sense, the possibilities exist.

<sup>293</sup> See Henderson, *supra* note 25; see Wodraska, *supra* note 25.

<sup>294</sup> See Reed, *supra* note 20.

<sup>295</sup> See Katz, *Nevada, Fresno*, *supra* note 24. The BCS has implemented a procedure in which non-automatic qualifying conferences can attain automatic qualifier status. Associated Press, *Mountain West Making Strides Toward Automatic BCS Bowl Bid*, USA TODAY, Apr. 28, 2010, available at [http://www.usatoday.com/sports/college/football/2010-04-21-mountain-west-bcs\\_N.htm](http://www.usatoday.com/sports/college/football/2010-04-21-mountain-west-bcs_N.htm). The BCS examines each conference in respect to the automatic qualifying conferences. If the non-automatic qualifying conference can outperform the automatic qualifying conferences in (1) average ranking of highest-ranked team; (2) average conference ranking, and (3) top twenty five performance ranking, the non-automatic qualifying conference will be guaranteed to have its champion qualify for the BCS. BCS

become an independent;<sup>296</sup> the MWC summarily replaced the Cougars with the University of Nevada and Fresno State University.<sup>297</sup>

The net effect of this conference realignment may signal the end of the BCS. Both the commissioners of the Big 10 and Pac 10, Jim Delaney and Larry Scott, respectively, have seemingly fired a warning shot to the rest of college football. Both commissioners overtly stated that they were expanding their conferences to improve their profile, yet, when examined critically, it appears that the root of the decision lies more at the feet of economics than athletics.<sup>298</sup> The traditional heavy Big 10 and Pac 10 will open the doors to newcomers in order to cash in on a conference title game.<sup>299</sup> The move will generate new revenue streams as athletic department budgets tighten.<sup>300</sup> Furthermore, by bringing new television sets into their television footprint, the conferences have created a more attractive package for television executives and advertisers to consider in the next round of contracts.<sup>301</sup>

The need for these revenue streams is simple: athletic departments are not running at peak efficiency. In their book *Death to the BCS*, authors Dan Wetzel, Josh Peter, and Jeff Passan state that “athletic departments of the ninety-nine public schools in Division I [FBS] needed a combined \$826 million in subsidies just to balance their books in 2008.<sup>302</sup> By those numbers, first reported in *USA Today*, the average public school athletic department is operating at over an \$8 million deficit. Furthermore, the amount of subsidies needed has increased twenty percent in the three years prior to 2010 and does not appear to be letting up.<sup>303</sup> In an era where football and basketball coaches routinely make over \$1 million and athletic directors can earn similar salaries with bonuses, college football is not only struggling to sustain itself, but is no longer the cash cow that can provide enough revenue for entire athletic departments.

With athletic departments all over the country facing tremendous deficits, it will not be long before athletic directors and conference commissioners will need to find new sources of revenue simply to survive. Obviously the status quo is no longer sufficient; new options will need to be created and old options re-examined. In their book, Wetzel, Peter and Passan propose a sixteen team playoff and surmise that the overall revenues from their playoff system would at least triple what is

---

Selection Procedures, <http://www.bcsfootball.org/news/story?id=4819597> (last visited Oct. 26, 2010).

<sup>296</sup> See Katz, *BYU*, *supra* note 24.

<sup>297</sup> See Katz, *Nevada, Fresno*, *supra* note 24.

<sup>298</sup> John Wilner, *Pac 10 Expansion: Thoughts on the Divisions, Revenue Projections, CEO Dynamic and More*, SAN JOSE MERCURY NEWS, Oct. 22, 2010, available at <http://blogs.mercurynews.com/collegesports/2010/10/22/pac-10-expansion-thoughts-on-the-divisions-revenue-projections-ceo-dynamic-and-more/>; see also Dennis Dodd, *'Large Dozen' Would Bring Big Ten Title Game, More Money*, CBSSPORTS, Dec. 15, 2009, <http://www.cbssports.com/collegefootball/story/12665737/large-dozen-would-bring-big-ten-title-game-more-money>.

<sup>299</sup> The Big 10 and Pac 10 were the last of the automatic qualifying conferences to join in with the others to finally create the BCS as they had traditionally kept a firm grasp on the Rose Bowl. See BCS Chronology, *supra* note 15.

<sup>300</sup> Wilner, *supra* note 298.

<sup>301</sup> *Id.*

<sup>302</sup> See WETZEL, ET AL., *supra* note 285, at 165.

<sup>303</sup> See *id.*



currently being experienced under the current BCS and bowl systems.<sup>304</sup> Even if the revenue figures proposed are on the optimistic side, it is probable that a playoff system would bring in significantly more revenue. That revenue would allow athletic directors to balance their budgets without dipping into the school's general fund and to potentially bring back programs that have been sacrificed in recent years.

While this is just one proposal, it proves that there might be other alternatives available to conference commissioners that generate more revenue. And if the economic circumstances remain the way they are, conference commissioners, athletic directors, and especially university presidents will be forced to reevaluate their positions. This intense look at the current situation and examination of the potential revenue that a playoff could generate is the best opportunity for college football to move away from the BCS and crown its champion through a playoff system.

In the end, the opponents of the BCS and the proponents of a playoff system face a long, uphill, and uncertain route to changing the system. For all practical aspects, change to the BCS is highly unlikely under either the judicial or legislative systems. Despite its many flaws and imperfect determination of a national champion, it appears that the BCS will continue on relatively unimpeded for years to come unless the economic situation becomes so dire that change is necessary to save athletic departments and football programs. Until that happens though, it appears that an antitrust suit would not be prudent and that Congress will do little more than spew rhetoric while the teams on the field continue to play under the BCS' rules.

---

<sup>304</sup> See *id.*