

Tulsa Law Review

Volume 39
Issue 1 *2002-2003 Supreme Court Review*

Fall 2003

Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law

Jasen R. Corns

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Jasen R. Corns, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 *Tulsa L. Rev.* 167 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol39/iss1/8>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

COMMENTS

PIGSKIN PAYDIRT: THE THRIVING OF COLLEGE FOOTBALL'S BOWL CHAMPIONSHIP SERIES IN THE FACE OF ANTITRUST LAW

TABLE OF CONTENTS

I.	THE PREGAME: AN INTRODUCTION	168
II.	THE DEVELOPMENT OF THE BOWL CHAMPIONSHIP SERIES	169
A.	Forward Pass: The Bowl Games' Evolution into the BCS.....	169
B.	Paydirt: The Current BCS Structure	174
C.	Blitz: The Relationship between the BCS and the NCAA.....	177
III.	ANTITRUST IN AMATEUR SPORTS	179
A.	The Hall of Fame: Major Legal Developments	179
B.	Hand-off: Is the BCS Governed by Antitrust Laws?	181
IV.	APPLYING ANTITRUST LAW TO THE BCS.....	182
A.	The Playbook: The History and Purposes of the Sherman Act	182
B.	Calling the Play: Determining the Proper Level of Review	183
C.	Interference: The BCS as a Group Boycott.....	186
D.	Sacked: The Effects of the BCS under a Rule of Reason Analysis	187
V.	LESS RESTRICTIVE ALTERNATIVES AND POSSIBLE SOLUTIONS	199
A.	The Option: Less Restrictive Alternatives	199
B.	Hail Mary: The Unlikely Possibility of Litigation.....	201
C.	The Reverse: Non-Legal Solutions.....	204
VI.	FINAL SCORE: THE BCS VIOLATES ANTITRUST LAW	205

College football envelops all of us . . . Its spirit has the power to lead whole communities toward a common cause.

Richard D. Schultz, former NCAA Executive Director.¹

The entire essence of America is the hope to first make money—then make money with money—then make lots of money with lots of money.

Paul Erdman, economist and author.²

I. THE PREGAME: AN INTRODUCTION

From either a faithful or a cynical perspective, college football is certainly an all-American institution. To a believer, college football epitomizes the communal spirit of this nation: hundreds of thousands of citizens coming together to support their favorite amateur sports teams, with games played on autumn Saturdays in an unrivaled atmosphere of passion and pageantry. To a cynic, college football is also certainly all-American: a profitable big business tainted by greed and corruption, dominated by an illegal, trade-restraining monopoly. The cynic is aware there is money to be made in the big business of college football; that the mightiest powers have acted to ensure they get the lion's share, leaving the uninvited to share the table scraps. Both perspectives—that of the faithful and that of the cynic—are accurate.

The latter perspective's accuracy today is largely a product of college football's Bowl Championship Series (BCS), a party created by the elite, serving the elite, and inviting only the elite to share the biggest paychecks of the profitable post-season bowl games. Self-invited to the party are the six most powerful conferences in college football, along with mighty Notre Dame³ (an independent team not affiliated with a conference⁴), four bowl games,⁵ and the ABC television network.⁶ Not invited to the party are nearly half of the NCAA Division I-A

1. *Game Day USA: NCAA College Football* 19 (Eastman Kodak/Thomasson-Grant 1990).

2. Rayne Wolfe, *Reality Reinforces Erdman's Dark Lecture*, Press Democrat (Santa Rosa, Cal.) E1 (Jan. 18, 2001) (available in 2001 WL 5865928); Quoteland.com, Inc., *Quotations by Author* <http://www.quoteland.com/author.asp?AUTHOR_ID=370> (accessed Oct. 21, 2003).

3. See NCAA, *NCAA 2002-2003 Postseason Football Handbook* 8-9 (NCAA 2002) (available at <http://www.ncaa.com/library/handbooks/football/2002/d1a_postseason.pdf>).

4. ESPN, *College Football, Teams* <<http://sports.espn.go.com/ncl/teams>> (accessed Nov. 14, 2003).

5. NCAA, *supra* n. 3, at 8.

6. See generally Sharon Ginn, *BCS Extends Contract with ABC*, St. Petersburg Times (Fla.) 2C (Jan. 28, 2000) (available in archives at <<http://www.sptimes.com>>); Kevin McNamara, *College Football's Roads Run through Providence*, Providence Journal (R.I.) D01 (Sept. 20, 2002) (available in 2002 WL 22522157); Steve Wieberg, *A Better BCS?: Officials Quietly Begin Review of the Format*, USA Today C03 (Oct. 22, 2002) (available in 2002 WL 4735917); Steve Wieberg, *BCS: Spelling It All Out; Like It or Not, Here's Why College Football's System Is the Way It Is*, USA Today C1 (Dec. 11, 2001) (available in 2001 WL 5478316); World-Herald Press Services, *ABC, BCS Not Planning Playoff*, Omaha World-Herald 3C (Dec. 11, 2001) (available in 2001 WL 9592988).

college football teams,⁷ forced to sit on the outside looking in, not allowed to share the vast riches generated by the four BCS bowl games.⁸

In that the BCS is an agreement among powerful entities that unreasonably restrains trade, excludes entry, and limits competition in a multi-million dollar business, its existence violates the core principles of federal antitrust laws. Its continued survival, in the face of well-settled antitrust law, is a testament to the power of the haves who created the BCS and the lack of muster⁹ among the have-nots who suffer its consequences. This comment will: (1) examine the historical development of the BCS, (2) recognize the clear precedent that such an amateur sports entity is subject to antitrust law, (3) apply antitrust principles and analysis to the BCS, and (4) consider less restrictive alternatives and possible solutions to the problematic BCS.

II. THE DEVELOPMENT OF THE BOWL CHAMPIONSHIP SERIES

A. *Forward Pass: The Bowl Games' Evolution into the BCS*

The modern college football bowl structure is the result of nearly seventy years of evolution, with several major developments sparking a radical overhaul in the past quarter century. But to understand the modern structure, it is helpful to first understand the historical context of college football's bowl games.

The first post-season college football game was played in 1894 between Notre Dame and the University of Chicago.¹⁰ By the early 1930s, dozens of post-season games were played each year, partly in an effort to help the faltering Depression-era economy.¹¹ The inception of the Orange and Sugar Bowls in 1935 is considered to have ushered in the modern bowl era.¹² As the bowl games became staples, a bowl game invitation became traditionally viewed as an honor, saluting a team's successful regular season while simultaneously marketing the game to new audiences.¹³ As the bowl games grew in popularity, they took on a more significant role in college football, becoming more important to all involved parties as money-making, prestige-building opportunities, while at the same time

7. *Infra* nn. 60-64 and accompanying text.

8. *Infra* nn. 79-83 and accompanying text (discussing distribution of BCS revenues).

9. Telephone interview with Craig Thompson, Commr., Mt. W. Conf. (Sept. 5, 2002); Telephone Interview with Duff Tittle, Assoc. Athletic Dir., Brigham Young U. (Sept. 6, 2002); see *infra* nn. 294-306 and accompanying text.

10. See Sen. Subcomm. on Antitrust, Bus. Rights & Competition of the Comm. on Jud., *Hearing to Examine Antitrust and Competitive Issues within the College Football Bowl Alliance, which Consists of the Southeastern Athletic Conference, the Big 12, the Atlantic Coast Conference, and the Big East, as well as the University of Notre Dame*, 105th Cong. 41 (May 22, 1997) (testimony of NCAA Executive Director Cedric W. Dempsey) [hereinafter *1997 Antitrust Hearing*].

11. *Id.* at 43-44.

12. *Id.* at 44.

13. That bowls reward teams for successful seasons is inherently evidenced by the fact that teams are only eligible for bowl invitations if they have successful regular seasons. See NCAA, *supra* n. 3, at 7. The desire to market college football to new audiences via bowl games is similarly self-evident, yet affirmed by Dempsey's testimony in the 1997 Senate hearing. See *1997 Antitrust Hearing*, *supra* n. 10, at 43-44.

becoming more regulated by the NCAA.¹⁴ In 1951 the NCAA implemented a certification process for the existing bowl system designed to protect the student-athletes and the universities.¹⁵ The certification process, still in effect, requires bowls to meet certain conditions regarding game rules, conditions, marketing, and pay-out to participants.¹⁶

In time, the bowl games evolved from post-season games considered separate and irrelevant to the regular season into a spectacle of games that culminated the regular season. The bowls, once played after the national championship was determined by voted polls, were now being played to help determine the final polls and the national champion.¹⁷ As the popularity of the bowls, and college football as a whole, grew, so did television's popularity and increasing capacity to broadcast sporting events.¹⁸ The potential for revenue generated by televising college football games—particularly the popular bowl games—increased exponentially.¹⁹ Naturally, different players in the college football market wanted a piece of the revenue pie, which had been exclusively controlled by the NCAA.²⁰ Meanwhile, a handful of the nation's most prominent college football programs gradually stood out from the crowd, garnering more recognition and television exposure than most other programs.²¹ An elite class

14. See Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior* 42-43 (U. Chi. Press 1992); *1997 Antitrust Hearing*, *supra* n. 10, at 44.

15. See *1997 Antitrust Hearing*, *supra* n. 10, at 44.

16. *Id.*; NCAA, *2002-03 NCAA Division I Manual* § 18.7.2, 310 (NCAA 2002) (available at <http://www.ncaa.com/library/membership/division_i_manual/2002-03/2002-03_ncaa_d1_manual.pdf>); *id.* at § 30.09, 370-71; NCAA, *supra* n. 3, at 33-38.

17. For years, the two predominant polls—the United Press International coaches' poll (now known as the USA TODAY/ESPN coaches' poll) and the Associated Press (AP) writers' poll—conducted their final polls before the bowl games were played. The AP conducted a post-bowl poll after the 1965 season, then returned to the previous method for two years, then resumed its post-bowl poll for good after the 1968 season. The UPI began waiting until the bowl games had been played before conducting its final poll after the 1974 season. Ralph Hickok, *HickokSports.com*, *Sports History, College Football National Champions, History* <<http://www.hickoksports.com/history/cfchamps.shtml>> (updated Jan. 12, 2003).

18. Fleisher, Goff & Tollison, *supra* n. 14, at 51-55.

19. *Id.*

20. See *NCAA v. Bd. of Regents of U. of Okla.*, 468 U.S. 85, 89-94 (1984).

21. Keith Dunnivant, *The Forty-Year Seduction: How Television Manipulated College Football's Evolution from Sport to Big Business* 82-83 (Solovox 1997). Dunnivant explains how the NCAA relaxed its rule limiting each college football team to one television appearance per season. The NCAA, "under pressure from the networks," would allow "as many as three appearances [per team] by the early 1970s." *Id.* Dunnivant notes:

As a result, a TV Aristocracy emerged. Despite the mandated bones thrown to secondary teams as part of the patronage game, an elite group including Notre Dame, Alabama, Texas, Arkansas, Ohio State, Michigan, Southern Cal, Oklahoma and Nebraska always appeared as often as the limits would allow.

The same programs dominated the bowl selections, which represented additional national TV games.
Id. at 83.

was established, capable of generating more money than their peers and thus rewarded with special treatment.²²

In that battle for television revenues, five key developments transformed the college football bowl structure. First, a group of sixty-three college football programs joined together in 1976 to form the College Football Association in a bid for more autonomy than the powerful NCAA decision makers were willing to give.²³ The CFA's fight for autonomy eventually manifested in its attempt to negotiate its own television deal independent of the NCAA.²⁴ In 1981, the CFA entered into its own television agreement with the NBC television network despite the NCAA's threat to discipline any CFA members complying with that contract.²⁵ Though the CFA won a court injunction preventing the NCAA from disciplining such schools for participating in the contract, most CFA members nonetheless backed out of the contract under NCAA pressure.²⁶ While ultimately futile, the effort signified a desire among many college football programs to reap greater profits from their increasingly popular product.

Second, in the pivotal 1984 case of *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court ruled that the NCAA was violating the Sherman Antitrust Act,²⁷ unreasonably restraining the trade of college football by limiting television appearances and not allowing schools to negotiate their own television contracts.²⁸ Specifically, the Court held that the NCAA's television plan "[restrained] price and output" of college football games,²⁹ preventing schools from benefiting from the market demand for their football product.³⁰ The rationale supporting the decision has been reinforced by the increased television revenues and quality of play in the two decades after the decision.³¹ After *Board of Regents*, the NCAA no longer controlled college football television negotiations;³² the CFA and individual conferences began negotiating their own deals with television networks.³³ The long-term effect of the *Board of Regents* decision was to deregulate the college football television structure.³⁴ Schools enjoyed greater power to independently negotiate, but at the same time lost the

22. *Id.*

23. See *Bd. of Regents*, 468 U.S. at 94-95; Dunnivant, *supra* n. 21, at 113-14. The CFA was born out of a December 1976 meeting in Denver, at which representatives of many of college football's major powers met in an effort to join together to fight what was perceived to be intrusive power wielded by the NCAA. *Id.* at 113.

24. Dunnivant, *supra* n. 21, at 126-27.

25. *Bd. of Regents*, 468 U.S. at 95.

26. *Id.*

27. 15 U.S.C. § 1 (2000).

28. *Bd. of Regents*, 468 U.S. 85, 120 (1984); *infra* nn. 111-14 and accompanying text.

29. *Bd. of Regents*, 468 U.S. at 104.

30. *Id.* at 120.

31. Fleisher, Goff & Tollison, *supra* n. 14, at 51-55.

32. See Dunnivant, *supra* n. 21, at 159-61; see generally *Bd. of Regents*, 468 U.S. 85.

33. Dunnivant, *supra* n. 21, at 159-61. The Big Ten and Pac-10 had not joined the CFA, voicing concerns that the CFA was motivated by greed and would eventually injure college football, and sided with the NCAA throughout the feud and *Board of Regents* suit. *Id.* at 148-59. After *Board of Regents*, the two conferences negotiated for television rights separately from the CFA. *Id.* at 160.

34. *Id.* at 159-61, 166, 198, 216.

security that had been provided by the NCAA's role as collective negotiator.³⁵ In fact, in the immediate aftermath of *Board of Regents*, college football programs' newfound television negotiating power actually resulted in far fewer profits than the NCAA-negotiated plan had been producing.³⁶ Such financial insecurity prompted schools to search for newer and stronger revenue sources.³⁷ Eventually, and ironically, the CFA's fight for independence from the NCAA would result in the death of the CFA itself, as the CFA members with the most attractive television appeal would soon turn their back on the CFA family in independent pursuit of more revenue.³⁸

The third major development occurred in 1990, when the University of Notre Dame broke away from the CFA to negotiate its own deal with NBC.³⁹ Notre Dame's independent action created a trickle-down effect in which football's major powers fought to strengthen their own pieces of the television revenue pie.⁴⁰ The 1990s saw the reshaping, merging, and independent negotiating of several major conferences in an effort to increase the marketability of their football product.⁴¹ For example, the most prominent football programs of the Southwest Conference merged with the Big 8 Conference to form the Big 12 Conference in 1996, leaving the less-prominent Southwest Conference schools to fend for themselves.⁴² The Southwest Conference disbanded, and its four uninvited leftovers eventually joined less-prestigious conferences.⁴³ The conference makeovers also saw major conferences create conference championship games, which were immediate revenue successes.⁴⁴ At the same time, bowl games were also fighting harder to bolster their own financial strength, jockeying for more appealing dates, and landing powerful corporate sponsorships.⁴⁵

Fourth, the trend to negotiate independently manifested itself in two short-lived predecessors to the BCS: the College Football Bowl Coalition and the Bowl Alliance. The Coalition, which began in 1992, was an agreement among four bowl

35. *Id.* at 159-61.

36. Dunnavant, *supra* n. 21, at 159-61.

37. *Id.* at 167-68.

38. *Id.* at 216. The CFA agreement was dissolved in the summer of 1996 as many CFA members were competing against each other in television negotiations. *Id.* Chuck Neinas, a principal player in the creation of the CFA and its fight against NCAA control, lamented the death of the CFA, stating, "We have become a victim of our own success." *Id.* (internal quotations omitted).

39. See Dunnavant, *supra* n. 21, at 200-01.

40. It was noted:

"Notre Dame pulling away forced us all to look at the situation and decide what was in our best interests," said Cecil "Hootie" Ingram, then Alabama's athletic director. "There were other folks offering us pretty good deals to go out on our own. We had to look out for ourselves."

Id. at 206.

41. Dunnavant, *supra* n. 21, at 209-15; Fleisher, Goff & Tollison, *supra* n. 14, at 63-64.

42. Christof Spieler, Seema Chandra & Angelique Siy, *The Thresher Online, The Death of a Conference: When It All Came Down to It, Money Beat Tradition* <<http://www.rice.edu/projects/thresher/issues/83/951201/Features/Story02.html>> (Dec. 1, 1995).

43. *Id.*

44. Dunnavant, *supra* n. 21, at 214-15.

45. *Id.* at 177-89.

games and fifty-six teams (teams in five major conferences and independent Notre Dame) to orchestrate the placement of Coalition teams into the premier bowl games.⁴⁶ The remaining bowl games quickly became regarded as “Tier Two” bowls,” less prestigious than the Coalition bowls.⁴⁷ After just three years, in an effort to pit the top two teams against each other for a national championship game, the Coalition metamorphosed into the Bowl Alliance. The Alliance, born in 1995, was an agreement among four powerful conferences and Notre Dame, along with the Orange, Sugar, and Fiesta Bowls,⁴⁸ that all but assured the annual national championship game would involve members of their exclusive club. But one problem remained: the Big Ten and Pacific Ten (Pac-10) conferences refused to join the Coalition or the Alliance, opting to instead maintain their tie-in with the tradition-laden Rose Bowl.⁴⁹

Fifth, after seeing their non-participation in the Alliance hurt their opportunities for national championships, the Big Ten and Pacific Ten conferences ended their automatic tie with the Rose Bowl and joined the party.⁵⁰ In 1994, undefeated Nebraska of the Big 8 Conference finished the season ranked first in the nation after beating Miami in the Orange Bowl, while undefeated Penn State of the Big Ten Conference finished second after winning the Rose Bowl, where it was contractually obligated to play.⁵¹ That Penn State and Nebraska were unable to meet, due to Penn State’s Big Ten obligation to play in the Rose Bowl, sparked momentum to end the traditional Rose Bowl conference ties.⁵² Such desire was magnified in 1997, the last season of the Alliance, when two teams, unable to play each other, were forced to share the national championship. That year, undefeated Michigan narrowly defeated Pacific Ten champion Washington State in the Rose Bowl,⁵³ while undefeated Nebraska routed Tennessee in the Orange Bowl.⁵⁴ Nebraska was crowned the champion in the

46. The Coalition was principally an agreement among four bowls—the Orange, Sugar, Fiesta and Cotton Bowls—and five conferences—the Atlantic Coast (ACC), Big East, Big 8, Southwest, and Southeastern (SEC)—along with independent Notre Dame. *1997 Antitrust Hearing*, *supra* n. 10, at 32-35; Richard Billingsley, *ESPN, College Football, The Road to the BCS has been a Long One* <<http://espn.go.com/nct/s/historybcs.html>> (Oct. 21, 2001).

47. *2cuz.com, Bowl Coalition: A Brief History* <<http://www.2cuz.com/champs/bowlcoalition.html>> (accessed Oct. 21, 2003).

48. *1997 Antitrust Hearing*, *supra* n. 10, at 35. The four conferences in the Alliance agreement were the Big 12, SEC, ACC, and Big East. *Id.* The Southwest Conference, which had been a party to the Coalition, was disbanded when four of its members joined the Big 8 to form the Big 12. *Supra* n. 42 and accompanying text. The Big Ten and Pac-10 were participants in the Alliance agreement, but “could not commit their champions because those teams [remained] contractually committed to play in the Rose Bowl.” *1997 Antitrust Hearing*, *supra* n. 10, at 35.

49. *1997 Antitrust Hearing*, *supra* n. 10, at 32, 35.

50. *Id.* at 32, 36.

51. *Id.* at 36; Peter Schilling, *SJS College Football Extravaganza, NCAA: The Timeline, 1994: Major Tom (Coming Home)* <<http://www.geocities.com/colosseum/bleachers/8757/timeline1994.htm>> (accessed Oct. 21, 2003).

52. *1997 Antitrust Hearing*, *supra* n. 10, at 36.

53. *SJS College Football Extravaganza, NCAA: The Timeline, 1997: Two of Us* <<http://www.geocities.com/colosseum/bleachers/8757/timeline1997.htm>> (accessed Oct. 20, 2003).

54. *Id.*

coaches' poll, while Michigan finished atop the sportswriters' poll.⁵⁵ That was the last time the Big Ten and Pacific Ten were locked into the Rose Bowl.⁵⁶ The Bowl Alliance was reworked, giving birth to the Bowl Championship Series in 1998.⁵⁷

Now, all major players in the college football world were members of the exclusive club, all but guaranteed to keep the national championship among its members. The BCS era had begun.

B. *Paydirt: The Current BCS Structure*

The Bowl Championship Series began in 1998, structured to annually match the nation's top two college football teams in a national championship bowl game.⁵⁸ The arrangement is set to run through the bowl games following the 2005 season.⁵⁹ The BCS agreement is among the sixty-two schools comprising the Atlantic Coast, Big Ten, Big 12, Pac-10, Big East, and Southeastern conferences, and independent Notre Dame;⁶⁰ the Orange, Sugar, Fiesta, and Rose bowls;⁶¹ and the ABC television network.⁶² The remaining fifty-four schools in the 117-school Division I-A football club⁶³ are not parties to the BCS agreement.⁶⁴ The four BCS bowls alternate hosting the national championship game, with the other three bowls hosting the other three BCS games.⁶⁵ ABC signed a seven-year, \$525 million dollar deal in 1998 to televise the BCS games,⁶⁶ then re-worked the deal in

55. *Id.*

56. Billingsley, *supra* n. 46.

57. *Id.*

58. ESPN, *Bowl Championship Series, About the BCS* <<http://espn.go.com/abcsports/bcs/about>> (accessed Oct. 20, 2003).

59. *Id.*

60. NCAA, *supra* n. 3, at 8-9. Along with independent Notre Dame, these sixty-two college football programs are parties to the BCS agreement via their six respective conference affiliations: ACC: Clemson, Duke, Florida State, Georgia Tech, Maryland, North Carolina State, North Carolina, Virginia, Wake Forest; Big 12: Baylor, Colorado, Iowa State, Kansas, Kansas State, Missouri, Nebraska, Oklahoma, Oklahoma State, Texas, Texas A&M, Texas Tech; Big East: Boston College, Miami, Pittsburgh, Rutgers, Syracuse, Temple, Virginia Tech, West Virginia; Big Ten: Illinois, Indiana, Iowa, Michigan, Michigan State, Minnesota, Northwestern, Ohio State, Penn State, Purdue, Wisconsin; Pacific Ten: Arizona, Arizona State, California, Oregon, Oregon State, Stanford, UCLA, USC, Washington, Washington State; Southeastern: Alabama, Arkansas, Auburn, Florida, Georgia, Kentucky, LSU, Mississippi, Mississippi State, South Carolina, Tennessee, Vanderbilt. ESPN, *supra* n. 4.

61. NCAA, *supra* n. 3, at 8.

62. *Supra* n. 6.

63. *Infra* nn. 86-90 and accompanying text (discussing the structure of the NCAA Division I-A).

64. See NCAA, *supra* n. 3, at 9.

65. Football Writers Assn. of Am., *BCS Guide* 15-16 (available at <http://www.sportswriters.net/fwaa/news/bcsguide02.pdf>).

66. SportsLine.com, Inc., *CBS SportsLine, College Football, Super Alliance Takes Shape Next Year* <<http://cbs.sportslines.com/ul/page/covers/football/jan98/superalliance1598.htm>> (Jan. 5, 1998).

2000, adding about \$400 million to the package.⁶⁷ The new deal with ABC runs through the 2005 season, including the bowl games in January 2006.⁶⁸

The pool of teams eligible for a BCS invitation consists of champions of the six BCS conferences and teams that have won at least nine games and are ranked in the top twelve in the final BCS standings.⁶⁹ Two BCS spots are reserved for “at-large” eligible teams.⁷⁰ Division I-A independents or champions of four mid-tier Division I-A conferences will earn an at-large BCS invitation if “ranked sixth or higher in the final BCS standings, unless more than two teams meet this criteria.”⁷¹ “Should more than two teams” meet this criteria, the BCS bowls will have their choice from that group.⁷² The local appeal of potential invitees is a factor in determining the at-large invitations.⁷³ And at all times, Notre Dame has special rules giving it easier access to an at-large BCS berth.⁷⁴

The BCS standings, the brainchild of former Southeastern Conference commissioner Roy Kramer,⁷⁵ are formulated by a statistical rating system

67. Ginn, *supra* n. 6. That the contract is on solid ground is evidenced by comments of parties to the agreement. “The contract’s in place,” [said] ABC vice president Mark Mandel. . . . ‘This is the way it’s going to be. . . .’” Rudy Martzke, *ABC Spells Out Miami’s Dominance in Game*, USA TODAY C2 (Jan. 4, 2002) (available at <<http://www.usatoday.com/sports/comment/martzke/2002-01-04-martzke.htm>>).

68. ESPN, *supra* n. 58.

69. NCAA, *supra* n. 3, at 8.

70. *Id.* at 9.

71. *Id.* The four mid-tier conferences whose champions will be guaranteed a slot in a BCS game upon being ranked sixth or higher in the final BCS standings, unless more than two teams meet that criteria, are the Mid-American Conference (MAC), Mountain West Conference, Western Athletic Conference (WAC), and Conference USA. *Id.* at 8. Members of those four conferences, as of the 2003 season, were: Conference USA: Army, Cincinnati, East Carolina, Houston, Louisville, Memphis, South Florida, Southern Miss, Texas Christian, Tulane, Alabama-Birmingham; Mid-American: Akron, Ball State, Bowling Green, Buffalo, Central Florida, Central Michigan, Eastern Michigan, Kent State, Marshall, Miami (Ohio), Northern Illinois, Ohio, Toledo, Western Michigan; Mountain West: Air Force, Brigham Young, Colorado State, New Mexico, San Diego State, UNLV, Utah, Wyoming; WAC: Boise State, Fresno State, Hawaii, Louisiana Tech, Nevada, Rice, San Jose State, Southern Methodist, Tulsa, Texas-El Paso. ESPN, *supra* n. 4. The three Division I-A independents (excluding BCS member Notre Dame) receiving the same treatment are: Connecticut, Navy, and Troy State. *Id.* The Sun Belt Conference is the only Division I-A conference with no provision catering to its potential BCS entries. See NCAA, *supra* n. 3, at 8-9. Its members are: Arkansas State, Idaho, Louisiana Lafayette, Louisiana Monroe, Middle Tennessee State, New Mexico State, North Texas, and Utah State. ESPN, *supra* n. 4. These conference structures, though, are far from permanent. During the 2003 season alone, several conferences announced restructuring plans that included the loss of some programs and the addition of others. See ESPN, *Two Schools Will Join in 2005* <<http://espn.go.com/ncaa/news/2003/1110/1658487.html>> (accessed Nov. 12, 2003). Conferences planning changes include: Conference USA, the Big East, the Atlantic Coast, the Mid-American, and the Western Athletic conferences. *Id.*

72. NCAA, *supra* n. 3, at 8.

73. See *id.* at 9. For instance, the Orange Bowl, played in Miami, has a logical preference to invite in-state teams such as Miami, Florida State, or Florida, when possible, as opposed to teams from farther away. BCS rules allow for such “regional consideration” when selecting at-large teams. *Id.* The local interest, attendance, and revenues would obviously benefit from having a team with a local following participating.

74. See *id.*; *infra* nn. 226-37 and accompanying text (discussing special BCS rules for Notre Dame).

75. Billingsley, *supra* n. 46. While Kramer is generally credited with creating the BCS, it is more accurate to say he spearheaded the movement, collaborating with the commissioners of the other five BCS conferences and others. Charles Bloom, former director of media relations for the SEC, is credited with creating the mathematical formula that determines the BCS standings. *Id.*

compiled annually by the National Football Foundation and College Football Hall of Fame.⁷⁶ The system, which has been tweaked after each BCS season to date has ended with some controversy surrounding the selections,⁷⁷ measures several factors, including national coaches' and writers' polls, computer rankings, schedule strength, won-loss records, and quality wins.⁷⁸

The BCS has been a revenue phenomenon. The four BCS games played after the 2001-2002 season generated nearly \$100 million in revenue.⁷⁹ Of that revenue, more than \$94 million was divided among the six BCS conferences, averaging over \$15.7 million per conference.⁸⁰ That money is distributed to participating conferences, which in turn split it among their own members.⁸¹ A small chunk of the BCS windfall is paid to the thirteen lower-tier Div. I-A and I-AA conferences. After the 2001-2002 bowls, those thirteen conferences split \$4.2

76. NCAA, *supra* n. 3, at 9.

77. Dennis Dodd, *CBS SportsLine.com, NCAA Football, History of the BCS* <http://cbs.sportline.com/u/ce/multi/0,1329,5466459_56,00.html> (June 25, 2002).

78. NCAA, *supra* n. 3, at 10-11; Dodd, *supra* n. 77. Pages 9-11 of the NCAA Postseason Football Handbook explain the BCS formula, which factors five components and produces a final statistical measurement of each team. For the poll component, the two major polls are averaged together. For example, if a team was ranked No. 1 in one poll and No. 2 in the other, it would receive 1.5 points. The computer rankings component currently consists of eight computer rankings, formulated by the following: Jeff Sagarin, *The Seattle Times*, Peter Wolfe, Richard Billingsley, Wes Colley, Kenneth Massey, David Rothman, and Matthews/Scripps Howard. The computer component disregards a team's highest and lowest rankings and averages together the intermediate six. The schedule strength component is determined by the cumulative won-loss records of a team's opponents and the opponents' opponents. The won-loss component is factored by assigning one point to a team for each loss. The quality win component rewards, to varying degrees, victories over opponents ranked in the top ten in the weekly BCS standings. All five components are added together for a total rating. The team with the lowest point total ranks first in the BCS standings. NCAA, *supra* n. 3, at 9-11.

As explained in Dodd's article, the formula has undergone several minor tinkering. Notably, victory margin is no longer a factor, the computer rankings have varied, and the definition of "quality wins" has changed from being wins over top fifteen BCS teams to wins over top ten teams. Dodd, *supra* n. 77.

79. NCAA, *2001-02 BCS Revenue Distribution* <http://www1.ncaa.org/membership/postseason_football/bcsrevdist> (accessed Oct. 22, 2002) (copy on file with *Tulsa Law Review*). Total BCS revenue from the 2001-02 bowls was \$98,441,000, up from \$95,389,078 in 2000-01. *Id.* The bulk of that revenue—\$61,445,000 in 2001-02 and \$57,000,000 in 2000-01—came from television and title sponsorships, while the remainder came from each of the four individual BCS bowls. *Id.*

80. *Id.* Participants in the four 2002-03 BCS bowls were expected to each receive between \$11.78 and 14.67 million. ESPN, *supra* n. 58.

81. Each of the six BCS conferences has its own formula for distributing BCS revenues. The Big East distributes its BCS revenue based on several factors, including final conference rank and television appearances. Currently, a Big East BCS participant nets approximately \$4 million, with the remainder of the conference's BCS revenue divided among the other conference football programs. Telephone Interview with Rob Carolla, Big E. Dir. Comm. (Nov. 7, 2002). The Southeastern Conference gives \$1.7 million to its participating team, as well as a travel allowance, then splits the remainder into equal shares for each school and the conference office. Telephone Interview with Charles Bloom, SEC Media Rel. Dir. (Nov. 7, 2002). The Atlantic Coast Conference gives the participating team a travel allowance based on the bowl, ranging from \$1.6 million to \$2 million for the 2002-2003 bowls, then divides the remainder in equal portions for each team. Telephone Interview with Mike Finn, ACC Asst. Comm. (Nov. 7, 2002). Similarly, the Big Ten divides its net share equally among its eleven teams. Telephone Interview with Scott Chipman, Big Ten Assoc. Dir. Comm. (Nov. 7, 2002). The Big 12 also divides its net share equally among its twelve teams. Telephone Interview with Tim Allen, Big-12 Assoc. Comm. (Nov. 22, 2002). The Pac-10 also divides its net share equally among its ten teams. Telephone Interview with Ben Jay, Pac-10 Asst. Comm. (Nov. 22, 2002).

million of BCS revenue, averaging \$323,000 per conference.⁸² Perhaps the most effective way to understand these numbers is through this figure: though BCS games made up just four of the twenty-five bowl games played in 2001-2002, the eight BCS participants took home ninety-three percent of the overall bowl profits.⁸³

The huge revenue generated by the four BCS games stands in stark contrast to the dollars generated by non-BCS bowls. The twenty-one non-BCS bowl games played in the 2001-2002 season generated a total of \$56.5 million for their forty-two participating teams,⁸⁴ compared to the nearly \$100 million⁸⁵ generated by the four BCS games.

C. *Blitz: The Relationship between the BCS and the NCAA*

The postseason bowls are a convergence of separate entities—college football programs, bowl games, and the BCS—legally independent of each other, cooperating in temporary relationships, operating under the bylaws of the National Collegiate Athletic Association.

The NCAA is a voluntary, unincorporated association of about 1,200 schools, conferences, and ancillary organizations, through which intercollegiate athletic issues are governed.⁸⁶ General NCAA rules govern member institutions in such issues as recruiting, admissions, eligibility, standards of amateurism, program size, and limitations on practices and games.⁸⁷ The NCAA schools are divided into divisions based on size and scope, with national exposure increasing in proportion with the division level.⁸⁸ Division I-A, consisting of 117 member football programs, is the most prominent level of NCAA sports.⁸⁹ Each of the 117

82. NCAA, *supra* n. 79. The BCS conference revenue sharing plan will distribute over \$40 million to non-participating BCS schools over the duration of its 1998-2005 term. ESPN, *supra* n. 58. Also, the BCS annually pays \$100,000 to the National Football Foundation and College Hall of Fame for calculating and administering the BCS standings. *Id.*

83. Eric Crawford, *Crunch Time: Elite College Programs Get Richer as Rest Incur Debts Trying to Keep Up*, *Courier-Journal* (Louisville, Ky.) C1 (July 14, 2002) (available in 2002 WL 20245244).

84. NCAA, *Total Non-BCS Distribution to Participating Teams and Conferences* <http://www1.ncaa.org/membership/postseason_football/nonbsrevidis> (accessed Oct. 23, 2002) (copy on file with *Tulsa Law Review*). The twenty-one non-BCS bowls in 2001-2002 were: the Alamo, Citrus, Cotton, Galleryfurniture.com (now known as the Houston Bowl), Gator, GMAC, Holiday, Humanitarian, Independence, Insight.com, Las Vegas, Liberty, Motor City, Music City, New Orleans, Outback, Peach, Seattle, Silicon Valley, Sun, and Tangerine bowls. *Id.*

85. NCAA, *supra* n. 79.

86. NCAA, *NCAA Online, What Is the NCAA?* <http://www.ncaa.org/about/what_is_the_ncaa.html> (accessed Oct. 20, 2003). The NCAA was established in 1906 in response to concern over numerous injuries and deaths in minimally-regulated college football games that often turned violent. *1997 Antitrust Hearing, supra* n. 10, at 43; Fleisher, Goff & Tollison, *supra* n. 14, at 37-40.

87. NCAA, *NCAA Online, The National Collegiate Athletic Association's Purposes Are:* <<http://www.ncaa.org/about/purposes.html>> (accessed Oct. 21, 2003); *see 1997 Antitrust Hearing, supra* n. 10, at 43-46; Fleisher, Goff & Tollison, *supra* n. 14, at 46-51.

88. NCAA, *NCAA Online, What's the Difference between Divisions I, II and III?* <http://www.ncaa.org/about/div_criteria.html> (accessed Oct. 21, 2003). Division I-A members must sponsor at least fourteen sports and meet requirements of gender equality, participation, scheduling, and attendance. *Id.*

89. *See* NCAA, *Sports Sponsorship Summary* <http://www1.ncaa.org/membership/membership_svcs/sponsummary> (updated Oct. 21, 2003).

Division I-A college football programs is considered an active member of the NCAA, with a right to “compete in NCAA championships, to vote on legislation and other issues before the Association, and to enjoy other privileges of membership designated in the constitution and bylaws of the Association.”⁹⁰

The bowl games themselves are privately-owned entities that invite programs to play in their games, which must satisfy NCAA requirements.⁹¹ The NCAA bylaws only allow programs to compete in certified bowl games, meaning the game has to meet several conditions and requirements set forth in the bylaws.⁹² Only “deserving winning teams”—defined as having won at least six games against Division I-A opponents and having more wins than losses—are eligible for bowl invitations, per NCAA bylaws.⁹³ The bylaws also ensure that bowl games follow the NCAA’s rules and regulations and that schools are fairly compensated for their participation.⁹⁴ In effect, the bowls are free to invite teams, do their own scheduling and negotiate television and other marketing deals. Beyond that, the NCAA, though not directly involved in operating the games, effectively regulates the bowls from the sidelines.

The BCS itself is similarly wholly independent of the NCAA.⁹⁵ Speaking to a Senate Judiciary Committee investigating the antitrust implications of the Bowl Alliance, the predecessor to the BCS, in 1997, NCAA Executive Director Cedric W. Dempsey described the relationship between the NCAA and the Alliance as an “evolving cooperative relationship, not a legal binding arrangement.”⁹⁶ In that the Alliance was simply the second in an as-of-yet three-part evolution of the agreement controlling the premier bowl games,⁹⁷ and in that the relationship between the NCAA and bowls has not undergone any significant structural change since that hearing, it is an inescapable deduction that Dempsey’s description is equally applicable to the relationship between the NCAA and BCS today as it was to the relationship between the NCAA and Alliance in 1997.

The BCS is an agreement among sixty-three college football teams (the six aforementioned conferences and Notre Dame), the four BCS bowls, and the ABC television network.⁹⁸ The remaining fifty-four NCAA Division I-A college

90. NCAA, *NCAA Active Member Definition* <<http://www.ncaa.org/about/active.html>> (accessed Oct. 21, 2003).

91. *1997 Antitrust Hearing*, *supra* n. 10, at 46.

92. NCAA, *supra* n. 16, at § 18.02.4, 305; NCAA, *supra* n. 3, at 33-38.

93. NCAA, *supra* n. 3, at 7.

94. See NCAA, *2003-04 NCAA Division I Manual* §§ 18.01.2, 18.02.4, 327 (NCAA 2003) (available at <http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf>).

95. NCAA, *Frequently Asked Questions* <http://www1.ncaa.org/membership/postseason_football/faq> (accessed Oct. 21, 2003). Answering the question, “Why doesn’t the NCAA administer a Division I-A Football Championship,” the NCAA replied, in part: “It should be noted that the competitions created by the Bowl Championship Series are not considered as part of the NCAA championship program, nor are they administered by an NCAA committee or national office staff.” *Id.*

96. *1997 Antitrust Hearing*, *supra* n. 10, at 44.

97. See generally *supra* nn. 46-58 and accompanying text (discussing the creation of the College Football Bowl Coalition and its evolution into the Bowl Alliance and ultimately the Bowl Championship Series).

98. See generally *supra* nn. 66-68 and accompanying text (discussing ABC’s deal to televise BCS games).

football programs, considered non-participating BCS institutions, are not parties to the agreement.⁹⁹ They receive minimal portions of the BCS revenue¹⁰⁰ and, though not formally excluded from participating in BCS games, have never been invited to participate.¹⁰¹

III. ANTITRUST IN AMATEUR SPORTS

A. *The Hall of Fame: Major Legal Developments*

A series of federal cases in the past thirty years has left no doubt that sports leagues and organizations, including amateur sports entities, are subject to federal antitrust law. Courts have consistently held the NCAA subject to federal antitrust law, particularly in matters of revenue, in a line of cases beginning with *Hennessey v. NCAA*¹⁰² in 1977.

In *Hennessey*, two assistant coaches at the University of Alabama sued the NCAA in protest of a bylaw limiting the number of assistant coaches employable at one time.¹⁰³ While the NCAA did prevail, the Fifth Circuit court recognized that the NCAA is indeed subject to federal antitrust law,¹⁰⁴ and that a Rule of Reason analysis weighing the anti-competitive effects of the NCAA's act against its pro-competitive effects¹⁰⁵ is proper in determining whether the NCAA has violated antitrust law.¹⁰⁶ The court rejected the NCAA's argument that its status as a non-profit organization exempted it from antitrust litigation.¹⁰⁷ The court recognized that the NCAA, as evidenced by its multi-million dollar annual budget and multi-million dollar annual television contracts, was engaged in a large business venture.¹⁰⁸ The court was guided by an earlier Supreme Court antitrust opinion that held, "Congress intended to strike as broadly as it could in § 1 of the Sherman Act,"¹⁰⁹ and that to construct an exemption as wide as the NCAA suggested would contradict that intent.¹¹⁰

The seminal case gauging the NCAA's antitrust liability in the context of television revenues is the 1983 decision *NCAA v. Board of Regents of the University of Oklahoma*.¹¹¹ There, the Supreme Court determined the NCAA had

99. See generally *supra* nn. 63-64 and accompanying text.

100. *Supra* n. 82 and accompanying text.

101. *Infra* n. 190 and accompanying text.

102. 564 F.2d 1136 (5th Cir. 1977).

103. *Id.* at 1141.

104. *Id.* at 1149.

105. *Infra* nn. 147-72 and accompanying text (discussing the Rule of Reason judicial analysis).

106. *Hennessey*, 564 F.2d at 1151.

107. *Id.* at 1148-49. The argument that non-profit organizations were exempt from Section 1 of the Sherman Act was laid to rest in the Supreme Court decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

108. *Hennessey*, 564 F.2d at 1149 n. 14. The Court characterized the NCAA as "engaged in a business venture of far greater magnitude than the majority of 'profit-making' enterprises." *Id.*

109. *Goldfarb*, 421 U.S. at 787.

110. *Hennessey*, 564 F.2d at 1149.

111. 468 U.S. 85.

violated the Sherman Act by not allowing college football programs to independently negotiate for television contracts, unreasonably restraining the trade of televised college football.¹¹² Using a Rule of Reason analysis, the court found that the NCAA's acts of limiting the number of televised games and setting the price of television rights resulted in more anti-competitive effects than pro-competitive effects for college football programs, which were unable to negotiate their own such deals in response to consumer demand for their product.¹¹³ Such "[r]estrictions on price and output," the Court held, are precisely the types of restraint of trade subject to federal antitrust law.¹¹⁴

In the 1998 case of *Law v. NCAA*,¹¹⁵ the Tenth Circuit prevented the NCAA from restricting compensation for employees of member institutions.¹¹⁶ The court held that the NCAA's restriction of coaches' compensation was an unreasonable restraint of trade because it limited competition for coaching salaries and did not, as the NCAA had alleged, "level an uneven playing field" among member schools.¹¹⁷ The court, citing *Board of Regents*, also held that the NCAA had a burden, which it failed to meet, of "showing that the procompetitive justifications for a restraint on trade outweigh its anticompetitive effects."¹¹⁸

The common theme in such modern cases, in which federal courts have held the NCAA to be within the scope of federal antitrust law, is commerce. Courts have recognized that NCAA sports, while amateur in nature, are indeed a big business. In that context, where the NCAA attempted to control commercial matters affecting its members—matters of television contracts, salaries, jobs, etc.—it has been held subject to antitrust law.¹¹⁹ Conversely, in a string of cases in which the NCAA wielded its authority over non-commercial matters—i.e. cases involving participant eligibility, contest conditions, standards of amateurism, personnel matters, equipment regulations, etc.—courts have found the NCAA actions to be outside the scope of antitrust law.¹²⁰

112. *Id.* at 106-07.

113. *Id.*

114. *Id.* at 107-08.

115. 134 F.3d 1010 (10th Cir. 1998).

116. *Id.* at 1012.

117. *Id.* at 1024.

118. *Id.*

119. Fleisher, Goff & Tollison, *supra* n. 14, at 15; *supra* nn. 102-18 and accompanying text.

120. See e.g. *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998), *vacated in part on other grounds*, 525 U.S. 459 (1999); *Banks v. NCAA*, 977 F.2d 1081, 1093-94 (7th Cir. 1992); *Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1287 (D. Kan. 1999); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998); *Gaines v. NCAA*, 392 F. Supp. 738, 745 (M.D. Tenn. 1990); Fleisher, Goff & Tollison, *supra* n. 14, at 15. Acts of discipline by other sports leagues have also survived antitrust suits. In *Manok v. Southeast District Bowling Assn.*, the court upheld a bowler's suspension for manipulating handicaps. 306 F. Supp. 1215, 1218-21 (C.D. Cal. 1969). In *Molinas v. NBA*, the court upheld the suspension of a basketball player for gambling. 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961). In *Cooney v. American Horse Shows Assn.*, the court upheld suspensions for alcohol and drug abuse. 495 F. Supp. 424, 430 (S.D.N.Y. 1980). Sports leagues' rules and regulations governing play have also survived antitrust litigation. See e.g. *Brookins v. Intl. Motor Contest Assn.*, 219 F.3d 849, 853 (8th Cir. 2000); *Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979); *Gunter Harz Sports, Inc. v. U.S. Tennis Assn.*, 511 F. Supp. 1103 (D. Neb. 1981), *aff'd*, 665 F.2d 222 (8th Cir. 1981).

B. Hand-off: Is the BCS Governed by Antitrust Laws?

While the above cases make it clear that the NCAA is subject to federal antitrust law, it has not been judicially resolved whether the BCS is as well. But the language and rationales used by courts in applying antitrust law to the NCAA and other entities offer strong indication that courts would similarly hold the BCS agreement subject to antitrust law.

The BCS agreement—a financially-driven agreement to orchestrate the highest-revenue bowl games and their television contract¹²¹—is in the same category of commercially-driven NCAA actions that have been deemed subject to antitrust law.¹²² The BCS is a joint-selling arrangement, selling the product of the four premier college football bowl games to television, sponsors, and, in turn, the buying public. In *Board of Regents*, the Supreme Court deemed the television arrangement in question a “joint-selling arrangement” created for the purpose of marketing the premier college football games,¹²³ much like the BCS agreement today.

In *Board of Regents*, the district court described the NCAA’s control of college football as “those of a ‘classic cartel’ with an ‘almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public.’”¹²⁴ This “classic cartel” language describes the nature of the BCS’s control today as well as it did the NCAA’s control some twenty years ago. The BCS, borrowing language from the *Board of Regents* opinion, has “almost absolute control over the supply of”¹²⁵ the premier college football bowl games made available to the networks, advertisers, and viewing public. Just as left-out college football programs had no say as to their television opportunities and revenues prior to *Board of Regents*, left-out college football programs today again have no say as to their television opportunities and revenues when it comes to the sport’s most lucrative payday.

The language from another successful antitrust action against a sports league—albeit a professional league—also provides an unambiguous framework for analysis of whether the BCS is subject to federal antitrust law. In *Los Angeles Memorial Coliseum Commission v. National Football League*,¹²⁶ involving a dispute over the NFL’s ability to prevent a team from relocating, the Ninth Circuit held the NFL subject to antitrust law.¹²⁷ The court rejected the NFL’s defense that it is a single entity and therefore fails to meet the prima facie federal antitrust

121. See *supra* nn. 58-85 and accompanying text.

122. See generally *supra* nn. 102-18 and accompanying text.

123. *Bd. of Regents*, 468 U.S. at 103, 110-13.

124. *Id.* at 96 (quoting *Bd. of Regents of the U. of Okla. v. NCAA*, 546 F. Supp. 1276, 1300 (W.D. Okla. 1983)).

125. *Id.*

126. 726 F.2d 1381 (9th Cir. 1984).

127. *Id.* at 1387-90.

element of being a contract, combination, or conspiracy.¹²⁸ The court, while recognizing “the singular nature of the NFL” and the commonality of interest among its members, found that the league is in fact not a single entity, but an association of separate, independent members.¹²⁹ The court found it significant that the different teams operated as “separate business entities whose products have an independent value,”¹³⁰ that each team was independently owned and managed, that profits and losses varied widely among teams despite some revenue sharing, and that teams competed with one another off the field, in acquiring personnel, in marketing, and for fan support.¹³¹ Similarly, the BCS is an association of separate, independent members with products of independent values, independently owned and managed, with varying profits and losses, competing with one another on and off the field. While operating independently, BCS teams are still bound by the BCS agreement, as all NCAA teams are bound by the NCAA and as NFL teams are bound by the NFL. This common cord, though, does not make for a single entity.

Recognizing the similarities in structure between the BCS and the NCAA, and even the NFL, and the ease with which well-settled language implicating the NCAA and NFL for antitrust violations can be applied to the BCS, it is reasonable to conclude the BCS would similarly be held subject to federal antitrust law. But being held subject to federal antitrust law is merely one step toward determining the legality of the BCS. The next step is determining whether the BCS could ultimately be found to be in violation of federal antitrust law.

IV. APPLYING ANTITRUST LAW TO THE BCS

A. *The Playbook: The History and Purposes of the Sherman Act*

The Sherman Antitrust Act, passed by Congress in 1890, is a federal statute that prohibits any “contract, combination . . . or conspiracy[] in restraint of trade or commerce”¹³² and any monopoly of, “or attempt to monopolize, . . . trade or commerce.”¹³³ The intent of the act, according to the Supreme Court, is to prevent “restraints to free competition in business and commercial transactions which [tend] to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services.”¹³⁴ In the sense that every contract could be deemed a restraint of trade, the Supreme Court has

128. *Id.* The contract, combination, or conspiracy language arises from Section 1 of the Sherman Act, which holds that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal.” 15 U.S.C. § 1 (2000).

129. *NFL*, 726 F.2d at 1389-90.

130. *Id.* at 1389 (quoting *L.A. Mem. Coliseum Commn. v. NFL*, 519 F. Supp. 581, 584 (C.D. Cal. 1981)).

131. *Id.* at 1389-90.

132. 15 U.S.C. § 1.

133. 15 U.S.C. § 2.

134. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

interpreted the Sherman Act to prohibit only “unreasonable” restraints of trade.¹³⁵ The rationale behind the Sherman Act “is that regulation of private profit is best left to the marketplace rather than private agreement[s].”¹³⁶ The Supreme Court has held that “[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”¹³⁷

There are two primary sections of the Sherman Act.¹³⁸ Section 1 prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States”¹³⁹ A Section 2 violation occurs when an entity monopolizes, or attempts or conspires to monopolize, “any part of the trade or commerce among the several States”¹⁴⁰ A Section 2 offense has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . .”¹⁴¹ Conduct violating one or both sections can take different forms, such as price-fixing, collusion, unlawful mergers, monopolies, and exclusionary practices.¹⁴² While the two sections have been constructed to be legally distinct,¹⁴³ yet also linked,¹⁴⁴ the essence of any antitrust analysis is ultimately the same: is the contested action anticompetitive?¹⁴⁵ However, as the two sections are separate means to the same end, it is appropriate to pursue the avenue most efficiently traveled in this context. While a Section 2 attack on the BCS has merit, it is Section 1 that provides the most appropriate path. Section 1 is, as argued by Seventh Circuit Judge Richard A. Posner, “sufficiently broad to encompass any anticompetitive practice worth worrying about”¹⁴⁶

B. *Calling the Play: Determining the Proper Level of Review*

In analyzing antitrust claims, regardless of which section of the Sherman Act is applied, courts have traditionally adopted one of two levels of review: (1) the quick “per se” approach, or (2) the more thorough Rule of Reason analysis.¹⁴⁷

135. *Stand. Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 87 (1911).

136. *NFL*, 726 F.2d at 1397.

137. *N.P. Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958).

138. Richard A. Posner, *Antitrust Law* 33 (2d ed., U. Chi. Press 2001).

139. 15 U.S.C. § 1.

140. *Id.* § 2.

141. *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

142. See generally e.g. Posner, *supra* n. 138.

143. See *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1940).

144. *Stand. Oil Co.*, 221 U.S. at 60-62. “[A] consideration of the text of the second section serves to establish that it was intended to supplement the first. . . .” *Id.* at 60.

145. Posner, *supra* n. 138, at 193.

146. *Id.* at 259.

147. See Ernest H. Schopler, *Refusals to Deal As Violations of the Federal Antitrust Laws* (15 U.S.C.S. §§ 1, 2, 13), 41 A.L.R. Fed. 175 (1979). Schopler wrote of the “two general rules established by the United States Supreme Court” regarding federal antitrust law:

The first is the *rule of reason*, read by the court into § 1 of the Sherman Act (15 USCS § 1), under which the term “restraint of trade” means only those acts, contracts, agreements, or combinations which prejudice public interest by unduly restricting competition or unduly

The choice of analysis typically depends on the egregiousness of the claimed antitrust violation: the more pernicious the circumstances, the less analysis is performed.¹⁴⁸ But regardless of the chosen analysis, “the essential inquiry remains the same—whether or not the challenged restraint enhances competition.”¹⁴⁹

A *per se* approach is applied when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”¹⁵⁰ The *per se* rule strikes practices that “are entirely void of redeeming competitive rationales” without an elaborate analysis.¹⁵¹ Horizontal price fixing (an agreement among competitors to set prices) is a classic example of a *per se* violation.¹⁵² When an action is deemed a *per se* violation of antitrust laws, the violation is conclusively presumed to be unreasonable.¹⁵³

While minimal analysis is conducted in a *per se* approach, a Rule of Reason analysis weighs the restraint’s anti-competitive effects against its pro-competitive effects,¹⁵⁴ condemning an action if it is found to unreasonably interfere with competition.¹⁵⁵ Because the survival of competitive team sports inherently requires some collaboration among competitors and some restraints on competition, such a weighing of anti-competitive and pro-competitive effects is necessary in cases involving team sports.¹⁵⁶ But even the Rule of Reason approach, as demonstrated by the Supreme Court, can “be applied in the twinkling of an eye,”¹⁵⁷ should an exhaustive analysis be deemed unnecessary. Such a truncated approach would then omit steps otherwise taken in an exhaustive analysis.

One such step ripe for omission here is the analysis into whether the BCS has sufficient market power¹⁵⁸ to be held subject to antitrust violation. Often in Rule of Reason cases, plaintiffs use a market analysis to establish the restraint’s anti-competitive effects.¹⁵⁹ Such analysis involves an attempt to define the

obstructing the course of trade, or which injuriously restrain trade either because of their inherent nature or effect, or because of their evident purpose.

The second is the doctrine of *per se* illegality, under which certain agreements or practices, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Id. at 184-85 (emphasis added) (citation omitted).

148. *See id.*

149. *Bd. of Regents*, 468 U.S. at 104.

150. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979).

151. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994).

152. *See Bd. of Regents*, 468 U.S. at 99-100.

153. *Id.* at 100; *U.S. v. Topco Assoc., Inc.*, 405 U.S. 596, 607 (1972).

154. *Law*, 134 F.3d at 1016-17.

155. *Id.*

156. Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 278-79 (Basic Books 1978).

157. *Bd. of Regents*, 468 U.S. at 110 n. 39 (quoting Phillip Areeda, *The “Rule of Reason” in Antitrust Analysis: General Issues* 37-38 (Fed. J. Ctr. 1981)) (internal quotations omitted).

158. The Supreme Court has defined “market power” as the ability to raise prices above those “that would be charged in a competitive market.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n. 46 (1984).

159. ABA Section of Antitrust Law, *Antitrust Law Developments*, vol. 1, 67 (Debra J. Pearlstein et al., eds., 5th ed., ABA 2002).

relevant market and then consider whether the defendant has sufficient market power to have an anti-competitive effect.¹⁶⁰ But such a market analysis, as consistently demonstrated by courts, is not necessary in an examination of potential litigation against sports associations such as the BCS. Courts have squarely rejected the NCAA's attempts to demonstrate that its alleged lack of market power precludes it from being subject to antitrust law.¹⁶¹ Moreover, courts have found such an absence of market power irrelevant in light of agreements that are anti-competitive.¹⁶²

Rather than trying to prove the elusive concept of market power, a refined modern approach is to instead establish that the defendant has monopoly power, particularly in instances of exclusionary practices¹⁶³ such as those of the BCS. Judge Posner argues that the two elements of establishing an antitrust violation in the form of exclusionary practices should be: (1) "that the defendant has monopoly power,"¹⁶⁴ "a term that properly connotes a degree of control over price and output that far exceeds the minimal market power possessed by most sellers of nonfungible goods and services,"¹⁶⁵ and (2) "that the challenged practice is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor."¹⁶⁶ The BCS meets both prongs. The agreement gives BCS parties a level of control over the price and output of the premier college football bowl games far greater than any control wielded by non-BCS schools,¹⁶⁷ and it effectively excludes competitors of arguably equal or greater value.¹⁶⁸

A Rule of Reason analysis abbreviated in such a manner—omitting thorough analysis of certain issues, i.e. whether the defendant has market power, or even monopoly power—has been termed by some a "quick look rule of reason"¹⁶⁹ analysis, deemed to apply when a per se approach is inappropriate, but where "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."¹⁷⁰ This was the approach taken by the Supreme Court in *Board of Regents*,¹⁷¹ a rare instance of a plaintiff winning a Rule of Reason case.¹⁷² In the analysis of the antitrust implications of the BCS,

160. *Id.* at 67-68.

161. *Law*, 134 F.3d at 1020; *Bd. of Regents*, 468 U.S. at 109-11.

162. *Bd. of Regents*, 468 U.S. at 109-10; *Chi. Prof. Sports Ltd. Partn. v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992); *Law*, 134 F.3d at 1020. And in *Federal Trade Commission v. Superior Court Trial Lawyers Assn.*, Justice Stevens wrote that "proof of market power" is not a required element of a per se antitrust violation. 493 U.S. 411, 435-36 (1990).

163. Posner, *supra* n. 138, at 194-96.

164. *Id.* at 194.

165. *Id.* at 195-96.

166. *Id.* at 194-95.

167. This is self evident in that BCS members control the bylaws of the BCS and negotiate its television contract. NCAA, *supra* n. 16, at §§ 4.5.1-4.5.2, 26-27.

168. *Infra* nn. 189-217 and accompanying text (discussing the anticompetitive effects of the BCS, with examples of worthy non-BCS teams being excluded from BCS games).

169. *Law*, 134 F.3d at 1020.

170. *Bd. of Regents*, 468 U.S. at 109 (quoting *Natl. Socy. of Prof. Engrs. v. U.S.*, 435 U.S. 679, 692 (1978)) (internal quotations omitted).

171. 468 U.S. at 109.

172. Posner, *supra* n. 138, at 31.

where adverse competitive effects on non-BCS schools are obvious¹⁷³ and market power is not determinative,¹⁷⁴ though clearly demonstrated by the ABC contract and the lack of a similar substitutable product,¹⁷⁵ such a “Quick Look” Rule of Reason analysis would again be appropriate.

C. Interference: The BCS as a Group Boycott

The antitrust implications of the BCS can be examined on another, albeit related, avenue via a group boycott approach. Federal courts have consistently disallowed group boycotts,¹⁷⁶ defined by courts as “concerted refusals by traders to deal with other traders.”¹⁷⁷ Courts have rejected the defense that the group agreements should be allowed because they were reasonable in their specific circumstances,¹⁷⁸ or that they did not have damaging effects,¹⁷⁹ or that the victim of the agreement was a lone merchant whose business failure did not substantially affect the economy.¹⁸⁰ The vivid bottom line is that courts strongly frown upon group boycotts.

As in any antitrust context, a court must determine which level of analysis is the appropriate tool by which to examine a group boycott. Boycotts that are inherently anti-competitive have been held to be per se violations of antitrust law.¹⁸¹ The Supreme Court strictly applied a per se analysis to group boycotts for decades, striking down numerous concerted refusals to deal as Section 1 violations.¹⁸² But modernly, some group boycotts have been subjected to the more flexible Rule of Reason analysis.¹⁸³ The Supreme Court spelled out the distinction in a 1985 case, identifying several examples of actions triggering a per se analysis.¹⁸⁴ Included were cases in which the boycotting entities had “a dominant position in the relevant market,”¹⁸⁵ making joint efforts to disadvantage

173. See generally *supra* nn. 79-85 and accompanying text (comparing the distribution of BCS revenue to BCS schools and non-BCS schools); see generally *infra* nn. 245-74 and accompanying text (discussing the perpetual anticompetitive effect of the BCS).

174. *Supra* nn. 158-62 and accompanying text.

175. *Bd. of Regents*, 468 U.S. at 111-12.

176. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

177. *Id.*

178. See *Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc.*, 303 F. Supp. 128 (N.D. Miss. 1969).

179. In *Fashion Originators' Guild of America, Inc. v. FTC*, the Supreme Court rejected an agreement deemed to be a group boycott despite the fact that it did not fix prices, limit production, or lower quality. 312 U.S. 457 (1941).

180. *Klor's*, 359 U.S. at 213. Justice Black, writing the majority opinion, held that a monopoly “can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.” *Id.*

181. *U.S. v. Gen. Motors Corp.*, 384 U.S. 127, 145 (1966); *White Motor Co. v. U.S.*, 372 U.S. 253, 259-60 (1963).

182. See generally e.g. *Fed. Mar. Commn. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *Klor's*, 359 U.S. 207; *Fashion Originators' Guild of Am.*, 312 U.S. 457; *E. Sts. Retail Lumber Dealers' Assn. v. U.S.*, 234 U.S. 600 (1914).

183. *FTC v. Ind. Fedn. of Dentists*, 476 U.S. 447, 458-59 (1986); *N.W. Wholesale Stationers, Inc. v. P. Stationery & Printing Co.*, 472 U.S. 284, 293-95 (1985).

184. *N.W. Wholesale Stationers*, 472 U.S. at 294.

185. *Id.*

competitors by denying or persuading others to deny competitors key relationships needed to compete, and by cutting off access to a market that would help the boycotted entity to better compete.¹⁸⁶ Where such elements exist, the court said, “the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.”¹⁸⁷ That those definitions apply to the BCS is the inherent idea of this article. A group boycott approach is merely another weapon in the arsenal that could be wielded against the BCS. But again, regardless of the weapon chosen, the rules of the battle would be the same: analyzing whether the BCS unreasonably restrains competition.¹⁸⁸

D. Sacked: The Effects of the BCS under a Rule of Reason Analysis

Under a Rule of Reason approach, an analysis of whether the BCS violates antitrust law is essentially an analysis of whether the effects of the BCS—an agreement among college football entities and a television network—are more anti-competitive than pro-competitive.¹⁸⁹ The crux of the argument that the BCS agreement is anti-competitive is that it restrains the trade of college football by limiting competition for berths in the prestigious and profitable BCS bowl games. The agreement gives its elite members access to its games while excluding all others. And in excluding the non-members, in refusing to deal with them, in denying them access to the pinnacle of the sport, it diminishes the non-members’ stature and decreases their opportunity to compete, succeed and profit. The effect is perpetual, with the gap between the haves and have-nots increasing endlessly.

There is no more effective way to begin this realization than to look at the facts. In the eleven years that the Coalition-Alliance-BCS agreement has been in place, controlling which teams play in the most profitable bowl games, all ninety-two participants in the elite bowl games have been members of the agreement.¹⁹⁰

186. *Id.*

187. *Id.*

188. *See Bd. of Regents*, 468 U.S. at 104; Posner, *supra* n. 138, at 193.

189. *See Bd. of Regents*, 468 U.S. at 103-104.

190. *See NCAA, Official 2002 NCAA Football Records* 324-28 (NCAA 2002) (available at <http://www.ncaa.org/library/records/football_records_book/2002/321-412a.pdf>). The Coalition bowls of the 1992 to 1994 seasons were the Orange, Sugar, Fiesta, and Cotton Bowls. *Supra* n. 46. The Orange Bowl teams in the Coalition years were Nebraska, Florida State, and Miami. NCAA, *supra* n. 190, at 325. The Sugar Bowl teams in the Coalition years were Alabama, Miami, Florida, West Virginia, and Florida State. *Id.* The Cotton Bowl teams in the Coalition years were Notre Dame, Texas A&M, Southern Cal, and Texas Tech. *Id.* The Fiesta Bowl teams in the Coalition years were Syracuse, Colorado, Arizona, Miami, and Notre Dame. *Id.* at 327. The Alliance bowls of the 1995 to 1997 seasons were the Orange, Sugar, and Fiesta Bowls. *Supra* n. 48 and accompanying text. The Orange Bowl teams in the Alliance years were Florida State, Notre Dame, Nebraska, Virginia Tech, and Tennessee. NCAA, *supra* n. 190, at 325. The Sugar Bowl teams of the Alliance years were Virginia Tech, Texas, Florida, Florida State, and Ohio State. *Id.* The Fiesta Bowl teams of the Alliance years were Nebraska, Florida, Penn State, Texas, Kansas State, and Syracuse. *Id.* at 327. The BCS bowls of the 1998 to 2002 seasons have been the Orange, Sugar, Fiesta, and Rose Bowls. NCAA, *supra* n. 3, at 8. The Orange Bowl teams of the BCS years have been Florida, Syracuse, Michigan, Alabama, Oklahoma, Florida State, Florida, Maryland, Southern Cal, and Iowa. NCAA, *supra* n. 190, at 325; ESPN, *2002-2003 College Football Bowls* <<http://sports.espn.go.com/ncl/bowls02/index>> (accessed Nov. 9, 2003). The Sugar Bowl teams of the BCS years have been Ohio State, Texas A&M, Florida State, Virginia Tech, Miami, Florida, Louisiana State, Illinois, and Georgia. NCAA, *supra* n. 190, at 325; ESPN, *supra* n. 190. The Fiesta Bowl teams of the BCS years have been Florida State, Tennessee,

The BCS programs made the rules, much to the chagrin of the excluded programs,¹⁹¹ and annually reap the riches bestowed by the same rules. The remaining fifty-four schools have been the appointed lower class, not invited to the table when the agreements were made and not once tasting the unparalleled benefits accorded the self-appointed elite class.

The obvious counterargument is that no non-BCS teams have merited an invitation. But—forgetting for a moment the argument that the BCS structure itself inherently decreases the chances for non-BCS members to succeed and achieve such merit—there have already been stunning examples of the reality of the unwritten members-only policy of the BCS.

In 1998, Tulane went a perfect 12-0, finishing as one of just two undefeated teams in Division I-A, along with national champion Tennessee.¹⁹² Tulane had dominated its regular season, scoring between forty-two and seventy-two points in eight of eleven games, and winning ten games by double-digit margins of victory.¹⁹³ Yet Tulane, a member of the non-BCS Conference USA, was sent to the lower-tier Liberty Bowl,¹⁹⁴ which it won in a rout,¹⁹⁵ while eight BCS teams went to the four prestigious BCS games.¹⁹⁶

In 1999, Marshall went a perfect 13-0, finishing as one of just two undefeated teams in Division I-A, along with national champion Florida State.¹⁹⁷ As Tulane had the year before, Marshall dominated its regular season, posting a road win at the ACC's Clemson along the way.¹⁹⁸ Yet Marshall, a member of the non-BCS Mid-American Conference, was sent to the lower-tier Motor City Bowl,¹⁹⁹ which it won in a rout,²⁰⁰ while eight BCS teams went to the four prestigious BCS games.²⁰¹

In 2001, the Brigham Young University Cougars won their first twelve games and stood with eventual national champion Miami as the only two undefeated

Nebraska, Oregon State, Notre Dame, Oregon, Colorado, Miami, and Ohio State. NCAA, *supra* n. 190, at 327; ESPN, *supra* n. 190. The Rose Bowl teams of the BCS years have been UCLA, Wisconsin, Stanford, Purdue, Miami, Nebraska, Washington, Washington State, and Oklahoma. NCAA, *supra* n. 190, at 324; ESPN, *supra* n. 190. Some of those teams are listed once in each period despite appearing in that bowl multiple times during that period. Each of those teams is and has been a member of the Coalition-Alliance-BCS agreement. *Supra* n. 60 and accompanying text.

191. See generally 1997 Antitrust Hearing, *supra* n. 10; U.S. H. Reps., *Comm. on Jud., Statement of Chairman James Sensenbrenner, Jr.* <<http://www.house.gov/judiciary/sensenbrenner090403.htm>> (Sept. 4, 2003) [hereinafter *Statement of Rep. Sensenbrenner*].

192. See College Football Poll.com, *Final 1998-1999 Season Congrove Computer Rankings* <http://www.collegefootballpoll.com/1998_archive_computer_rankings.html> (accessed Nov. 12, 2003).

193. See Tulane Football, *1998 Season In Review* <<http://www.fansonly.com/schools/tul/sports/m-footbl/spec-rel/072999aab.html>> (accessed Oct. 26, 2002).

194. See *id.*

195. *Id.* Tulane beat BYU 41-27 in the Liberty Bowl. *Id.*

196. *Supra* n. 190.

197. See 2cuz.com, *1999 Final Standings* <<http://www.2cuz.com/seasons/1999.html>> (accessed Oct. 24, 2003).

198. College Football Data Warehouse, *Marshall Yearly Results* <http://cfbdatawarehouse.com/data/div_ia/mac/marshall/yearly_results.php?year=1995> (accessed Oct. 24, 2003).

199. *Id.*

200. See *id.*

201. *Supra* n. 190.

teams remaining in college football.²⁰² The Cougars, in the week before their final game, were ranked twelfth in the BCS standings.²⁰³ Teams ranked in the top twelve earn, under BCS bylaws, the right to be “considered” for a BCS invitation.²⁰⁴ But that week, on the Monday night before BYU’s final regular-season game, BCS officials notified Cougar head coach Gary Crowton that his undefeated team had been eliminated from BCS consideration.²⁰⁵ The premature elimination was not an anomaly, but reflective of a pattern that began with the inception of the Bowl Coalition.²⁰⁶ Paul Hoolahan, executive director of the BCS-member Sugar Bowl, admitted that marketing issues were influential in the decision to eliminate undefeated BYU before the end of the 2001 regular season.²⁰⁷ That some programs have reputations for “traveling” better than others—bringing more fans, who drop more money into the bowl game and its surrounding community—is no secret.²⁰⁸ But denying certain programs an opportunity to compete and improve based on such off-field marketing considerations, rather than on-field merit, is in furtherance of profits for BCS members, not overall competition throughout college football.

The decision hit BYU hard. Besides the financial effects—the Cougars were sent to the Liberty Bowl, with a payout of \$1.3 million,²⁰⁹ compared to a BCS payout of about ten times that much²¹⁰—the program was not given the chance to earn the prestige and recruiting boost that comes with playing in a top-tier bowl game.²¹¹ Duff Tittle, Associate Athletic Director for Communications at BYU,

202. Tim Korte, *USA TODAY*, *College Football, Memo to BYU Fans: Forget about That BCS Game* <<http://www.usatoday.com/sports/collegefootball/2001-12-030byu-bcs.htm>> (Dec. 4, 2001).

203. *Id.*

204. *Supra* n. 69 and accompanying text (discussing eligibility requirements for BCS games).

205. Korte, *supra* n. 202. The decision irked many, including the BYU community. *Id.* “They can say what they want about our schedule,” [BYU Athletic Director Val] Hale said. “The fact is that if we go 13-0, we belong at their party and they know it.” *Id.*

206. In addition to the examples offered in the discussion, another example is Louisville’s premature exclusion from the Coalition bowls in 1993. *1997 Antitrust Hearing, supra* n. 10, at 24. Louisville was 7-1, ranked No. 13, and had just beaten Coalition members Arizona State and Texas in consecutive games. *Id.* The program was building strength: two years earlier, before the Coalition began, Louisville won ten games and routed future Coalition member Alabama 34-7 in the Fiesta Bowl. *Id.* But in 1993, 7-1 Louisville had to sign a bowl agreement with a second-tier bowl because it lacked Coalition status. *Id.* Another example is the exclusion of BYU from the Alliance in 1996. *Infra* nn. 214-18.

207. Korte, *supra* n. 202. Hoolahan reflected on the decision to not invite BYU to a BCS game: “Would people travel to New Orleans from Utah? That’s a pretty good distance.” *Id.* (internal quotations omitted). He further remarked, “[I]t would be extremely difficult for BYU...” *Id.* (internal quotations omitted).

208. *1997 Antitrust Hearing, supra* n. 10, at 22. Senator Bennett noted:

The assumption is, and may well be true, that BYU fans do not drink and party to the degree that a host city might prefer traveling fans to do. The coach of BYU has been quoted as saying, “Our fans come to town with a \$50 bill in their pocket and the Ten Commandments, and they leave without having broken either one.” . . . BYU fans generally have the image of not being a hard-drinking bunch, and host cities want visiting fans to be a partying crowd.

Id.

209. NCAA, *supra* n. 79.

210. *Supra* n. 80 and accompanying text.

211. *See generally supra* nn. 248-51 and accompanying text.

said the Cougar community was frustrated by the perceived slight.²¹² “They put in their own poll systems that make it impossible to meet their criteria. . . . If we finish in the top six, we automatically get in. . . . But in 1996 we didn’t get in.”²¹³

In 1996, fifth-ranked BYU was passed over for an invitation to a top-tier Bowl Alliance game in favor of lower-ranked teams with inferior won-loss records.²¹⁴ The 13-1 Cougars, along with 10-2 Wyoming, met all the criteria to earn an at-large invitation to an Alliance game that year.²¹⁵ But BYU was sent to a lower-tier bowl, while Wyoming was not invited to any bowl.²¹⁶ The exclusion was not only costly to BYU, but to its Western Athletic Conference: instead of WAC schools sharing an \$8 million Alliance bowl payout, the conference “received about \$1.1 million of the \$2 million payment”²¹⁷ BYU received from its appearance in the non-Alliance Cotton Bowl.

The 1996 controversy prompted the U.S. Senate to hold a subcommittee hearing on the antitrust implications of the Alliance the following spring.²¹⁸ Senator Mitch McConnell told the committee:

[T]here is substantial evidence that the most powerful conferences and the most powerful bowls have entered into agreements to allocate the post-season bowl market among themselves and to engage in a group boycott of non-Alliance teams and bowls. The effect of these agreements is to ensure that the strong get stronger while the rest get weaker.

My message today is very simple. The opportunity to compete in college football should be based on merit, not membership in an exclusive coalition.²¹⁹

Though the hearing provided a brief spotlight on the antitrust issues of the selection process for the premier bowl games, it did not formally result in changes.²²⁰ Rather, the Senate encouraged the parties to work out a suitable agreement on their own.²²¹ The hearings, along with the growing public controversy, resulted in changes to the selection system manifesting in the

212. Telephone Interview with Duff Tittle, *supra* n. 9.

213. *Id.*

214. 1997 *Antitrust Hearing*, *supra* n. 10, at 10. The automatic BCS entry for top-six teams was not in place in 1996, but was added in the ensuing furor over BYU’s exclusion. Matt Jacob, *Las Vegas Review-Journal*, *WAC Teams Celebrating a Done Deal* <http://www.reviewjournal.com/lvrj_home/1997/Jun-25-Wed-1997/sports/5607792.html> (June 25, 1997).

215. 1997 *Antitrust Hearing*, *supra* n. 10, at 10.

216. *Id.* at 10, 16. In its bowl game, BYU defeated BCS member Kansas State of the Big 12 Conference. NCAA, *supra* n. 190, at 325.

217. 1997 *Antitrust Hearing*, *supra* n. 10, at 17.

218. See generally 1997 *Antitrust Hearing*, *supra* n. 10.

219. *Id.* at 9.

220. Dodd, *supra* n. 77.

221. *Id.* During the course of the hearing, the Alliance invited the Western Athletic Conference and Conference USA—the two conferences which had been applying the bulk of the pressure on the Alliance—into the agreement under special rules. Under this modified Alliance agreement, the WAC or Conference USA champion would receive an Alliance bowl spot if ranked sixth or higher in the nation. And if no team from either conference qualified, each program in both conferences would receive roughly \$100,000 from the Alliance. See Jacob, *supra* n. 214; NCAA Register, *Governmental Affairs Report* <http://www.ncaa.org/databases/register/register_19970901/govaffairs.html> (accessed Oct. 24, 2003).

formation of the BCS in 1998.²²² But the BCS offers no better protection than the Alliance for programs not invited to join the elite club. The system's perfect record of inviting only members to the elite games has continued since the inception of the BCS. The exclusion of undefeated Tulane in 1998,²²³ undefeated Marshall in 1999²²⁴ and then-undefeated BYU in 2001²²⁵ demonstrate the continued anti-competitive, exclusionary nature of the agreement.

Another example is the special treatment expressly afforded to marketable Notre Dame at the expense of other schools; per BCS bylaws, Notre Dame has an easier path into the BCS bowls than any other team,²²⁶ inherently making it that much harder for a non-BCS team to gain that same berth. The special treatment given to Notre Dame, arguably college football's most popular television draw,²²⁷ is indisputable. Where every other team is guaranteed a BCS berth if it is ranked in the top six of the BCS standings, the bylaws provide that "Notre Dame shall qualify provided it is ranked in the top 10 in the BCS standings or has a record of at least nine wins, not including exempted games."²²⁸ Conceivably, then, Notre Dame could receive a BCS invitation with a 9-3 regular season record and a ranking outside of the top fifteen or twenty, while a non-BCS team could be excluded despite being 12-0 or 11-1 and ranked much higher. That special treatment reared its head in the 2000-2001 season, in which eleventh-ranked Notre Dame was controversially invited to the BCS Fiesta Bowl, while higher ranked teams with better records were passed over, notably 11-1 Virginia Tech, the fifth-ranked team in the nation.²²⁹ In the end, the skepticism, and the perception that Notre Dame's invitation was based not on merit but on the profits its appearance would generate for the decision-making inviters, was reinforced by the teams' respective performances in their bowl games. In the Fiesta Bowl, Notre Dame was beaten 41-9 by Oregon State²³⁰ and paid about \$11 million.²³¹ Virginia Tech

222. Dodd, *supra* n. 77.

223. *Supra* nn. 192-96 and accompanying text.

224. *Supra* nn. 197-201 and accompanying text.

225. Korte, *supra* n. 202.

226. NCAA, *supra* n. 3, at 9.

227. Dunnavant, *supra* n. 21, at 192.

228. NCAA, *supra* n. 3, at 9.

229. The BCS selection of No. 11 Notre Dame over No. 5 Virginia Tech was the source of much controversy across the college football landscape after the 2000 regular season. Notre Dame went 9-2 in the regular season, including narrow wins in three home games by a combined score of just eleven points, averaged thirty-one points per game and played a schedule ranked twenty-sixth-toughest in the nation. Virginia Tech went 11-1, with its only loss coming on the road at eventual No. 2 Miami, averaged over forty points per game and played a schedule ranked thirteenth-toughest in the nation. See generally Associated Press, *CNN Sports Illustrated, Festive Atmosphere: Oregon State, Notre Dame Meet in Unexpected Matchup* <http://sportsillustrated.cnn.com/football/college/2000/bowls/news/2000/12/03/fiesta_oregonst_notredamc_ap/> (updated Dec. 30, 2000); Randy King, *Fiesta Bowl Snubs Hokies* <http://www1.roanoke.com/sports/vt_football/2473.html> (Dec. 4, 2000); Will Stewart, *TechSideline.com, BCS Bowls Snub Tech; Hokies Gator-Bound* <<http://www.techsideline.com/news/2000/20001203news.htm>> (Dec. 3, 2000).

230. College Football Poll, *CFP, 2000 Bowl Results* <http://www.collegefootballpoll.com/2000_archive_bowls.html> (accessed Oct. 22, 2003).

231. NCAA, *supra* n. 79.

was sent to the non-BCS Gator Bowl, where it routed Clemson 41-20,²³² but was paid about \$1.6 million.²³³

The special treatment for Notre Dame resurfaced in 2002. Notre Dame started the 2002 season with a win in the Kickoff Classic, one of the few unique games annually played before the regular season officially starts.²³⁴ Such “preseason” games had always been considered exempt.²³⁵ But that rule was overturned after Notre Dame’s win—an unprecedented move—allowing the victory to count toward the nine-game BCS requirement.²³⁶ It was another example of the BCS powers making decisions benefiting their own and increasing their profit potential. When the decision was made, changing that long-standing rule and improving the odds of popular Notre Dame making a BCS bowl game, the chances of reaching a BCS game conversely decreased for several non-BCS programs enjoying stellar seasons.²³⁷ Those non-BCS teams were and are competing with the realization that, regardless of their continued success, the BCS party has no invitations for them.

232. College Football Poll, *supra* n. 230.

233. NCAA, *supra* n. 84.

234. NCAA, *supra* n. 190, at 410.

235. NCAA, *supra* n. 16, at 253.

236. Associated Press, *ESPN College Football, Notre Dame Now Five Wins from Qualifying for Bowl* <<http://espn.go.com/ncl/news/2002/1002/1440445.html>> (updated Oct. 3, 2002) [hereinafter AP, *Notre Dame Five Wins from Qualifying*]; Associated Press, *ESPN College Football, BCS Considers Kickoff Classic to Be ‘Exempt’* <<http://espn.go.com/ncl/news/2002/0924/1436265.html>> (updated Sept. 26, 2002) [hereinafter AP, *BCS Considers Kickoff Classic*]. Those two articles go on to explain how Notre Dame argued that because the game was rescheduled from its original August 24 date to August 31 on account of a conflict with the school’s freshman orientation, it was actually played after many other teams had begun their regular seasons and was thus not, in effect, a “preseason” game. AP, *BCS Considers Kickoff Classic*, *supra* n. 236. The six BCS commissioners approved of the rule reversal. Before this ruling, all previous nineteen Kickoff Classics and every other “preseason” game had been considered exempt. AP, *Notre Dame Five Wins from Qualifying*, *supra* n. 236.

237. While Notre Dame was 6-0 when it received special treatment regarding its win in an exempt game, several non-BCS schools also having successful seasons had no reason to expect similar special help into a BCS game. For example, Air Force was also 6-0 when Notre Dame received its help; logically, then, Air Force saw its chance for that same BCS berth decrease with the boost given to Notre Dame. See ESPN, *College Football Teams, Air Force 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=2005&year=2002>> (accessed Oct. 22, 2003). The odds also diminished for 5-0 Bowling Green, which was on its way to an 8-0 start. ESPN, *College Football Teams, Bowling Green 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=189&year=2002>> (accessed Oct. 22, 2003). The odds also narrowed for 5-1 Boise State, which was on its way to an 11-1 start. ESPN, *College Football Teams, Boise State 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=68&year=2002>> (accessed Oct. 22, 2003). The odds also narrowed for 4-1 Marshall, which was on its way to a 6-1 start. ESPN, *College Football Teams, Marshall 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=276&year=2002>> (accessed Oct. 22, 2003). The odds also decreased for Colorado State, which was on its way to an 11-2 season, a top fifteen ranking and a Mountain West Conference championship. ESPN, *College Football Teams, Colorado State 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=36&year=2002>> (accessed Oct. 22, 2003). The odds also decreased for Hawaii, which was on its way to a 9-2 mark. ESPN, *College Football Teams, Hawaii 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=62&year=2002>> (accessed Oct. 22, 2003). Colorado State and Air Force are in the Mountain West Conference; Bowling Green and Marshall in the Mid-American Conference; Boise State and Hawaii in the Western Athletic Conference. ESPN, *supra* n. 4. None of those three conferences are BCS conferences. *Supra* n. 60 and accompanying text.

Whether it is the exclusion of non-BCS teams from competition for BCS bowl game berths or special competitive advantages given by the BCS to certain programs and not others, the result is an anti-competitive effect on those not receiving the generous treatment afforded certain elite parties. Accordingly, the BCS, like its predecessors, has not escaped the scrutiny of public debate. Both houses of Congress held hearings during the 2003 season to examine the antitrust implications of the BCS.²³⁸ Seven witnesses, all with close ties to the college football bowl system, testified about the effects of the BCS.²³⁹ But the committees, echoing the sentiment of the 1997 hearing, both expressed reluctance to intervene.²⁴⁰ Four days later, university presidents representing both BCS and non-BCS conferences met in Chicago to discuss the concerns.²⁴¹ The parties agreed to continue the dialogue, “explore options” and meet again in New Orleans on November 16, 2003.²⁴²

Whether the debate occurs at conferences, at hearings, in the media or at the water cooler, there are two recurring arguments in defense of the exclusive practices of the BCS: (1) that the non-BCS teams are simply inferior, so their exclusion from the top-tier games has the pro-competitive effect of producing a higher-quality product for the betterment of college football,²⁴³ and (2) that any anti-competitive effects are outweighed by the pro-competitive effect of creating a college football national championship game.²⁴⁴

The first pro-competitive argument, that non-BCS teams are simply inferior, is arrogant and problematic for several reasons. First, as in any sport, success is cyclical. While the New York Yankees have enjoyed unparalleled success in major league baseball, there is no denying that upstart teams, such as the Arizona

238. *Statement of Rep. Sensenbrenner, supra n. 191*; U.S. Sen., *Hearings, BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field* <<http://judiciary.senate.gov/hearing.cfm?id=973>> (Oct. 21, 2003).

239. U.S. H. Reps., *Comm. on Jud., Statement of Steve Young on the Issue of Fundamental Fairness and the Bowl Championship Series (BCS)* <<http://www.house.gov/judiciary/young090403.htm>> (Sept. 4, 2003); U.S. H. Reps., *Comm. on Jud., Testimony of Scott S. Cowen*, <<http://www.house.gov/judiciary/cowen090403.htm>> (Sept. 4, 2003); U.S. H. Reps., *Comm. on Jud., Statement of Myles Brand, NCAA President* <<http://www.house.gov/judiciary/brand090403.htm>> (Sept. 4, 2003); U.S. H. Reps., *Comm. on Jud., Statement of James E. Delany* <<http://www.house.gov/judiciary/delany090403.htm>> (Sept. 4, 2003); U.S. Sen., *Hearings, BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field, Statement of Harvey S. Perlman* <http://judiciary.senate.gov/testimony.cfm?id=973&wit_id=2778> (Oct. 29, 2003); U.S. Sen., *Hearings, BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field, Statement of Keith R. Tribble* <http://judiciary.senate.gov/testimony.cfm?id=973&wit_id=2777> (Oct. 29, 2003); U.S. Sen., *Hearings, BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field, Written Testimony of Coach LaVell Edwards* <http://judiciary.senate.gov/testimony.cfm?id=973&wit_id=2779> (Oct. 29, 2003).

240. *Statement of Rep. Sensenbrenner, supra n. 191*; U.S. Sen., *Hearings, BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field, Statement of the Honorable Orrin G. Hatch* <http://judiciary.senate.gov/member_statement.cfm?id=973&wit_id=2628> (Oct. 29, 2003) [hereinafter *Statement of Sen. Hatch*].

241. BCSFootball.org, *BCS Newsroom, BCS/Coalition Joint Statement* <<http://www.bcsfootball.org/news030908.shtml>> (accessed Oct. 23, 2003).

242. *Id.*

243. *See generally 1997 Antitrust Hearing, supra n. 10*, at 25.

244. *See id.* at 36-38.

Diamondbacks in 2001 or the Anaheim Angels in 2002, can, with good management and talented players, eventually climb from inferiority to championship caliber. In college football, current powers such as Miami and Florida State were so inferior in the 1970s that had the BCS been created then, they would no doubt have been left out of the party and denied the chance to reach the heights they have since achieved.²⁴⁵ Today, the question is rhetorical: What future Miami or Florida State is being denied the opportunity to similarly rise to that level? Second, the purported gap in quality is not uniform reality. There have been numerous instances when non-BCS teams have had successes against prominent BCS opponents.²⁴⁶ Third, any such gap between BCS members and non-members is at least in part a result of the exclusive BCS arrangement itself and the resulting disparity in competitive opportunity between the haves and have-nots.

The argument that non-BCS programs are simply inferior is inextricably linked to the “weak schedule” theory, that any successful regular seasons by non-BCS members are more indicative of schedules that are not nearly as challenging as those played by BCS members.²⁴⁷ But that alleged inferior schedule is a byproduct of the BCS itself, not a justification for it. The principal effect of the

245. Dunnivant, *supra* n. 21, at 93. Today, Miami and Florida State are two of the premier programs in the country, reaching the national championship game a combined ten times since the 1991 season. NCAA, *supra* n. 190, at 399. But that hasn’t always been the case. Miami, for example, went 8-24 in the 1975-77 seasons. See U. Miami, *Official Athletic Site of the University of Miami, Football History* <http://www.fansonly.com/auto_pdf/p_hotos/s_schools/mifl/sports/m-footbl/auto_pdf/211-238pg03Records> (accessed Nov. 12, 2003). Florida State, meanwhile, went 4-29 from 1973-75. See FSU Athletics, *The Record Book, Year-By-Year Record* <http://graphics.fansonly.com/photos/schools/fsu/sports/m-footbl/auto_pdf/FSUYear-By-Year.pdf> (accessed Nov. 12, 2003).

246. In just one day of the 2003 season—September 20—three unranked teams from the non-BCS Mid-American Conference (MAC) upset three highly-ranked BCS teams: Marshall won at No. 6 Kansas State, Toledo beat No. 11 Pittsburgh, and Northern Illinois won at Alabama. ESPN, *College Football* <<http://sports.espn.go.com/ncl/scoreboard?season=2&week=5&year=2003>> (accessed Oct. 23, 2003); ESPN, *College Football Teams, Alabama 2003 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=333>> (accessed Nov. 10, 2003). There was nearly a fourth, as unranked Bowling Green of the MAC nearly won at Ohio State, the defending national champion. ESPN, *College Football, Allen’s Pick Ices Bowling Green* <<http://sports.espn.go.com/ncl/recap?gameId=232630194>> (accessed Oct. 23, 2003).

There were several similar results in 2002. Non-BCS Louisville defeated No. 4 Florida State, a perennial BCS power, 26-20. ESPN, *College Football Teams, Louisville 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=97&year=2002>> (accessed Oct. 30, 2003). Non-BCS Colorado State began its season with road wins at Virginia, of the BCS-member ACC, and at Colorado, the reigning champion of the BCS-member Big 12 Conference. ESPN, *College Football Teams, Colorado State 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=36&year=2002>> (accessed Oct. 24, 2003). Non-BCS Bowling Green routed Missouri and Kansas, two teams from the BCS-member Big 12 Conference. ESPN, *College Football Teams, Bowling Green 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=189&year=2002>> (accessed Oct. 24, 2003). Non-BCS Air Force won at California, a BCS-member Pacific-10 Conference school. ESPN, *College Football Teams, Air Force 2002 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=2005&year=2002>> (accessed Oct. 24, 2003).

In 2001, non-BCS team Fresno State defeated Colorado, Oregon State, and Wisconsin—BCS teams that have each played in BCS or Alliance bowl games—by a combined score of 100-66. ESPN, *College Football Teams, Fresno State 2001 Schedule/Results* <<http://sports.espn.go.com/ncl/teamsched?teamId=278&year=2001>> (accessed Oct. 24, 2003).

247. See e.g. Gene Wojciechowski, *ESPNMAG.COM, Mississippi State, Sherrill Now Big Players in BCS* <http://espn.go.com/magazine/geno_20011104.html> (Nov. 5, 2001).

BCS is the creation of two tiers of college football programs: the BCS tier and the non-BCS tier. That two-tier system is self-perpetuating. The financial windfall from being a BCS member strengthens BCS football programs, infusing those programs with money, resources, prestige, and appeal to top high school players.²⁴⁸ In that BCS football programs operate with larger budgets than their non-BCS peers, their chances of success are facilitated where their peers' are stunted. Transylvania University economics professor Daniel Fulks says BCS football programs spend an average of \$7 million a year, generating \$13 million in revenue,²⁴⁹ while the average non-BCS team "spends about \$3 million and barely breaks even."²⁵⁰

Such benefits facilitate a program's efforts to continue success. Such a strong foundation for success, both in tangible financial profits and intangible prestige boosts, in turn makes a BCS football program more likely to recruit the top athletes, hire and pay the best coaches, maintain the best facilities, and consistently compete for the highest level of on-field success in college football, earning a spot in one of the four BCS bowl games. While this cycle continues annually, non-BCS programs are simultaneously mired in their own negative cycle, trying to compete with lower budgets, less resources, less prestige, and less

248. Fleisher, Goff & Tollison, *supra* n. 14, at 26-27. Fleisher, Goff, and Tollison noted:

The competitive tools utilized by rival members of cartels, while often appearing frivolous and fanciful, ultimately play a crucial role. They determine each member's actual share of the cartel profits.

[C]ompetitive expenditures to attract athletes and consumers not prohibited by the NCAA are quite large. Physical capital expenditures stand out among all others. Schools build elaborate stadiums, scoreboards, sky boxes, locker rooms, training facilities, and athletic dormitories, as well as stocking them with expensive furnishings and equipment. . . .

The schools with the most plush and spacious facilities, the smoothest recruiters, and the most successful programs dominate on the playing field, television appearances, alumni dollars, and, ultimately, cartel returns.

Id.

At the 1997 Senate hearing, Senator McConnell testified, "What is the effect of the Alliance agreements? Well, the already strong Alliance teams get stronger while the non-Alliance teams are relegated to a future of, at best, mediocre, second-class status." *1997 Antitrust Hearing, supra* n. 10, at 11. Similarly, Senator Robert Bennett (R-Utah) testified at the hearing:

Well, you say [the Alliance-affiliated teams and conferences] earned it; they are the best teams in the country, they are the best conferences in the country, they earned the best money in the country. This becomes, if I may, a self-licking ice cream cone. Why are they the best teams in the country? Because they can buy the best coaches and the best facilities, and they have the best farm club effect.

Id. at 13. And Ron Cooper, then Louisville head coach, testified at the hearing:

To deny access impacts every student-athlete, man or woman, at each of these institutions. It also has a negative impact on all areas of the football program as well as the entire athletic department. We could be disadvantaged in attracting the top caliber student-athletes to our football program which then results in a decline in fan interest, loss of ticket revenues, television opportunities, parking, concessions, royalty incomes and a decrease in fund-raising opportunities.

Id. at 26.

249. Crawford, *supra* n. 83.

250. *Id.*

appeal to top high school recruits. The gap between the haves and have-nots is continually widening.²⁵¹ And once not invited to the party for the elite, the chance for the uninvited to achieve elite status is all but impossible.²⁵² In addition to never being invited to compete in a BCS bowl game, no non-BCS team or conference has ever been invited into the BCS agreement, regardless of any level of success achieved since the arrangement.²⁵³

Being left out is costly, as BCS members rake in millions each year from the BCS pot while non-BCS teams collect the pot's nominal leftovers.²⁵⁴ Such success is contagious: BCS schools operate with overall athletic budgets that are significantly larger than those of their non-BCS opponents. The average overall athletic budget for BCS schools in 2000 was \$28.7 million, compared to an overall Division I average of \$11.2 million.²⁵⁵ Perhaps that explains why in the 2001-2002 school year, BCS conference members won thirty of the thirty-five Division I team championships.²⁵⁶

251. BYU's Duff Tittle summarized this effect in a telephone interview. *Supra* n. 9. He stated:

When the College Football Association was done away with and they brought this BCS thing in, the gap between the schools that have the money and those who didn't became a canyon, and it's getting worse every time. . . . If you look at the Sears Director's Cup over the last few years, which identifies the best college athletic programs in the nation, us and Princeton are the only two schools that end up on that top twenty-five on a year-in and year-out basis that aren't BCS schools. To me, that's an indication that money that's flowing into these programs is making a difference. When you're competing for bowls, to go from 12, 13 million dollars to our best bowl option, 1.25 million, we're barely covering our cost to go to those bowls. . . . We can lose money going to a bowl game.

Id.

252. Regardless of the success, or lack thereof, achieved by teams since the inception of the Coalition-Alliance-BCS agreement, membership in that club has remained essentially the same. *See supra* nn. 46-60 and accompanying text. There are two exceptions. When the Southwest Conference and Big 8 Conference merged to form the Big 12 Conference, four less-prominent Southwest schools were no longer invited to the agreement. *Supra* n. 42 and accompanying text. And after the 1997 season, the Big Ten and Pac-10 finally accepted their longstanding invitation to join the agreement. *Supra* n. 50 and accompanying text.

253. *Supra* nn. 60 and accompanying text.

254. *Supra* nn. 79-85 and accompanying text (discussing distribution of BCS revenues). A comparison of recent bowl payouts for Notre Dame, perhaps the epitome of the BCS privileged, and BYU, perhaps the epitome of the BCS uninvited, is telling. Notre Dame received nearly \$11 million for its controversial berth in the 2000-2001 BCS Fiesta Bowl, where it was routed 41-9 by Oregon State. *Supra* nn. 229-30 and accompanying text. BYU, eliminated from the BCS in December 2001 despite being one of the nation's two undefeated teams, received a Liberty Bowl payout of \$1.3 million. *Supra* nn. 202-09 and accompanying text (discussing BYU's treatment in 2001); NCAA, *supra* n. 84.

255. Frank Fitzpatrick, *Philadelphia Enquirer*, *How Football Money Factors into NCAAs* <<http://www.philly.com/mlid/inquirer/2002/03/24/sports/2925497.htm>> (Mar. 24, 2002). Fitzpatrick wrote:

Just how football revenue translates into basketball success is difficult to track. However, experts say, the relationship can be seen in several areas: in bigger, better basketball facilities that, in turn, help produce even more revenue and lure the best recruits and coaches; in the ready-made bases of fans and donors that accomplished football programs have built; and in increased media exposure.

Id.

256. Crawford, *supra* n. 83.

There is an argument that the two-tier effect is exactly what the framers of the BCS intend.²⁵⁷ A new NCAA bylaw, taking effect in August 2004,²⁵⁸ may have the effect of making official the current degraded status of programs deemed non-BCS worthy by BCS members themselves. The changes sets stricter minimum standards to remain in Division I-A, requiring that schools: (1) average a home-game attendance of at least 15,000 fans,²⁵⁹ (2) offer a minimum of 200 scholarships across their athletic program,²⁶⁰ (3) fund ninety percent of the maximum amount of football scholarships,²⁶¹ or about seventy-seven scholarships,²⁶² and (4) play at least five home games each season against I-A teams.²⁶³ The proposal is seen by many as a further attempt by the haves to exclude the have-nots from the increasing revenue pie.²⁶⁴ John Swofford, an influential member of the NCAA oversight committee examining the proposal²⁶⁵ and also, tellingly, the former coordinator of the BCS and current commissioner of the BCS-member Atlantic Coast Conference,²⁶⁶ has publicly endorsed the changes, even warning the proposed criteria “probably will be strengthened.”²⁶⁷

Therein lies much of the problem; an inherent conflict of interest among the makers of decisions regarding the structure and future of the BCS and college football as a whole. That conflict was intensified when, in 1997, in the middle of the Alliance/BCS transformation, the NCAA Division I-A bureaucracy underwent a major overhaul.²⁶⁸ The one-school, one-vote method of approving legislation was replaced by a system based on conference representation.²⁶⁹ The

257. Mark Zeigler and Ed Graney have noted:

One theory is that the BCS is first trying to create a “superconference” of 50 or 60 teams that would compete for that national championship every year—and hoard its riches—while the remaining Division I-A schools are relegated to a lower level. It’s simple economics: Less is more. Fewer people sitting at the table means bigger slices of the pie.

Mark Zeigler & Ed Graney, *San Diego Union-Tribune, Battling ‘The Cartel’* <http://www.signonsandiego.com/sports/college_football/collegeseries/> (Nov. 13, 2001).

258. NCAA, *supra* n. 16, at §§ 20.9.6.3-20.9.6.4, 338.

259. *Id.* at § 20.9.6.3, 338.

260. *Id.*, at § 20.9.6.4(b), 338.

261. *Id.* at § 20.9.6.4(a), 338.

262. Dennis Dodd, *CBS SportsLine.com, Standards to Be Raised for Division I-A Schools* <http://cbs.sportline.com/u/ce/multi/0,1329,5217473_56,00.html> (accessed Oct. 24, 2003).

263. NCAA, *supra* n. 16, at § 20.9.6.2, 335.

264. Zeigler & Graney, *supra* n. 257. The following was noted concerning the change:

The San Jose States of the world are terrified. . . . Half the 13-team Mid-American Athletic Conference would be gone, as would the entire Sun Belt Conference.

“That’s a further attempt to make an elite group of 40, 50, 60 teams instead of the (117), which I think is devastating to college football,” says San Jose State athletic director Chuck Bell. “What’s the point, other than greed?”

Id.

265. *Id.*

266. *Id.*; Student Advantage, Inc. and the ACC, *This Is The ACC* <<http://theacc.ocsn.com/this-is/acc-this-is.html>> (accessed Oct. 24, 2003).

267. Zeigler & Graney, *supra* n. 257 (internal quotations omitted).

268. NCAA, *Division I Information* <http://www1.ncaa.org/membership/governance/division_I/index.html> (accessed Oct. 24, 2003).

269. *Id.*

restructuring called for the creation of several legislative committees, which report to cabinets, which report to the decision-making Management Council, which, finally, reports to the Board of Directors.²⁷⁰ The Management Council consists of “athletics administrators and faculty athletics representatives empowered to make recommendations to the Board”²⁷¹ The role of the Management Council is pivotal: it adopts bylaws and rules, subject to ratification from the Board of Directors, makes recommendations to the Board, interprets bylaws and specifically “[r]ecommends championships policies”²⁷² to the Board. The partisan interests of the influential Council are self-evident: of the twenty-seven Division I-A Management Council members during the 2002 football season, twenty were from BCS schools²⁷³ that could lose millions annually if the BCS were replaced. “Nothing will change,” said NCAA Division I Chief of Staff David Berst, “unless the institutions themselves desire it.”²⁷⁴ So goes the cycle; the current system perpetuates the two-tier effect that results in the gap in quality that BCS proponents in turn cite as a justification for their exclusionary practices.

The other argument often cited in support of the BCS is that it has had the pro-competitive effect of creating a No. 1 vs. No. 2 national championship game.²⁷⁵ But the emptiness of such an argument is visible after only brief inspection. It is not an unreasonable or incomprehensible notion that the operating minds of college football—as individual teams, conferences, bowl games and the NCAA—could devise a formula less-complicated than the multi-faceted BCS formula that would result in the top two teams meeting for the championship, as is done in every other collegiate and professional level of major sports. For instance, the top two teams in the final BCS standings, as the standings are currently formulated, could meet in the championship game, with all other teams and bowls marrying on terms governed by NCAA bylaws and the free market. What made such a No. 1 vs. No. 2 match-up infrequent in the years preceding the Coalition, Alliance, and BCS were the contractual tie-ins between certain conferences and bowls.²⁷⁶ Those contractual barriers no longer exist, as a result of the modern efforts of college football programs, discussed herein, to independently seek greater profits.²⁷⁷ So it

270. *Id.*

271. *Id.*

272. NCAA, *supra* n. 16, at § 4.5.2, 27.

273. NCAA, *2003 Division I Management Council Roster* <http://www1.ncaa.org/eprise/main/membership/governance/committee_rosters/d1_mgmt_council_roster> (accessed Oct. 24, 2003).

274. David Williams, *The Nando Times*, *NCAA Has No Control of BCS, but Should* <<http://www.nando.com/sports/story/193795p-1880935c.html>> (Dec. 13, 2001) (copy on file with *Tulsa Law Review*).

275. Dennis Dodd, *CBS SportsLine.com*, *Earth to Fans: No College Playoff Anytime Soon* <<http://www.sportsline.com/b/page/pressbox/0,1328,4648473,00.html>> (Dec. 6, 2001). Dodd quoted Harriman Cronk, chairman of the Rose Bowl football committee: “We’re basically giving the public what they want, and that is No. 1 and 2 playing for the national championship.” *Id.*

276. *1997 Antitrust Hearing*, *supra* n. 10, at 33-36. BCS architect Roy Kramer testified that before the Coalition, “the bowl system had matched the top two teams against one another only nine times in 45 years.” *Id.* at 36 (internal quotations omitted).

277. *Supra* nn. 23-56 and accompanying text (discussing college football programs’ move toward independence from NCAA regulation, which partly resulted in the reformation of conferences and conference affiliations with particular bowl games).

is misleading to solely credit the existence of the BCS for the No. 1 vs. No. 2 national championship match-up available now. Should the BCS disappear today, a No. 1 vs. No. 2 national championship match-up would still be viable. In fact, with the national appetite whetted for such an annual match-up, it would not just be viable: it would be demanded.

V. LESS RESTRICTIVE ALTERNATIVES AND POSSIBLE SOLUTIONS

A. *The Option: Less Restrictive Alternatives*

It is proper to begin any discussion of possible solutions to such an antitrust dilemma with a consideration of what less-restrictive alternatives are available to the parties.²⁷⁸ One such alternative is, as just discussed, to simply pit the top two teams against one another in a national championship game, without the larger BCS agreement seizing all eight spots in the top four bowl games to dominate the bulk of the bowl-game revenues. The simple means to that end would be to place the top two teams, from an agreed-upon formula, in a national championship game. The remaining teams and bowls would exist in a form similar to their existences prior to the financially-driven inception of the Coalition-Alliance-BCS beast, with open-market bargaining among conferences, bowls and television networks.

Whether the existing BCS mathematical formula or a new one would more appropriately determine the top two teams is outside the scope of this comment. But it is a reasonable common-sense assumption that the same experts who created the complex BCS formula, or others, could formulate a rational plan to have the two highest ranked teams meet in a championship game, as is already done without including six other teams in the big-profit BCS party. Despite the apparent marketing success of the BCS, it is illogical to think that, after more than 100 years of passionate college football interest, fans would simply lose interest in their beloved sport, favorite team, and Saturday ritual because the short-lived phrase "BCS" no longer preceded the official title of a few bowl games. The teams, bowls, games, and drama would be the same. The only differences would be that all teams would be realistic candidates for all bowls, and the enormous profits would no longer be reserved for the elite decision-making programs.

The alternative, though, that has generated the most ardent support in recent years has been a post-season playoff.²⁷⁹ There have been several proposals,

278. *NFL*, 726 F.2d at 1396 ("As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the 'possibility of less restrictive alternatives' which could serve the same purpose. This is a pertinent factor in all rule of reason cases." (quoting *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1080 (1982) (Rehnquist, J., dissenting in denial of certiorari))).

279. See generally e.g. Trev Alberts, *SI.com*, *The Alberts Plan: We Know BCS Is a Disaster; Now It's Time to Do Something* <http://sportsillustrated.cnn.com/inside_game/trev_alberts/news/2001/12/10/trev_plan/> (updated Dec. 17, 2001); Michael MacCambridge, *ESPN*, *College Football, Apocalypse Now (Playoff Later)* <<http://espn.go.com/nfl/s/2001/1206/1290920.html>> (Dec. 6, 2001); Michael Murphy, *HoustonChronicle.com*, *Another Option: Eight-Team Playoff Could Appease Growing BCS Disenchantment*, <<http://www.chron.com/cs/CDA/story.hts/sports.murphy/1191370>> (Dec. 29, 2001) (copy on file with *Tulsa Law Review*).

formal and informal, in the past twenty-five years to conduct a playoff between a predetermined number of teams qualifying via rankings or a merit-based formula.²⁸⁰ The playoff approach has been supported by U.S. senators,²⁸¹ coaches and administrators,²⁸² and national college football pundits.²⁸³ Under a playoff scenario, each Division I-A team would be equally eligible to qualify for the playoffs by merit. One such proposal would have the top eight teams make the playoffs, playing in four different bowl games in the first round.²⁸⁴ The four winners would meet in two other bowl games in the semifinals, with the two semifinal winners meeting in the championship bowl game.²⁸⁵ Participating teams would receive a significant share of the per-game revenues, with the remainder distributed in a fair manner.²⁸⁶

One common counterargument to a playoff is that it would have an anti-competitive effect on college football by decreasing the number of postseason bowl games, teams competing in bowls and overall profits generated by bowls.²⁸⁷ But that logic is flawed, as there is no need to do away with the existing bowls that are not part of the playoff.²⁸⁸

Another concern frequently voiced about playoffs is the amount of classroom time it would take away from student-athletes.²⁸⁹ But that logic is also weak for at least two obvious reasons: (1) football playoffs are held at every other level of NCAA competition,²⁹⁰ and (2) regular-season schedules could be shortened accordingly to compensate for any prolonging of a season.²⁹¹

Under either alternative scenario—a No. 1 vs. No. 2 match-up or a playoff—the teams competing at the championship level would hypothetically receive a substantial share²⁹² with the rest of the enormous bowl game, television, and

280. See 1997 Antitrust Hearing, *supra* n. 10, at 37, 44.

281. *Id.* at 11.

282. Third Millennium Sports, *CollegePlayoffs.com, Support, Who Supports a Div. IA College Football Playoff?* <<http://www.collegeplayoffs.com/support.htm>> (accessed Oct. 24, 2003).

283. See e.g. Murphy, *supra* n. 279.

284. *Id.*

285. *Id.*

286. 1997 Antitrust Hearing, *supra* n. 10, at 90.

287. See *id.* at 37.

288. Murphy, *supra* n. 279.

289. 1997 Antitrust Hearing, *supra* n. 10, at 46.

290. *Id.* at 44.

291. The NCAA has exercised its authority to change its limits of the number of games it allows a college football team to play in a season. The regular season expanded to eleven games in 1970, and to twelve in 1999. Steve Wieberg, *Cincinnati Inquirer, Big-Time Football Gets Even Bigger* <http://www.enquirer.com/editions/2002/08/23/spt_big-time_football.html> (Aug. 23, 2002). The NCAA currently allows for a twelfth game in years in which the calendar has fourteen Saturdays between Labor Day weekend and the end of November (2002, 2003, 2008, 2013, 2014, 2019). NCAA, *supra* n. 16, at § 17.11.5.1, 252. The NCAA also allows other exempted games, such as preseason games, conference championship games, and bowl games. *Id.* at § 17.11.5.2, 252-253. In that the NCAA sets the limit and has changed the limit, it is self-evident that the NCAA could again adjust the limit to allow for change in the format of postseason games.

292. One expert at the 1997 Senate hearing suggested \$1 million per participating team under his proposed BCS-free No. 1 vs. No. 2 matchup. 1997 Antitrust Hearing, *supra* n. 10, at 97. Under the hypothetical solutions proposed in this comment, that figure would best be left to negotiation among all Division I-A college football programs.

advertising revenues divided among the rest of Division I-A schools. Such is the method used to divide the enormous windfalls generated by the wildly popular NCAA basketball tournament each spring,²⁹³ which invites the top sixty-five teams in the nation to compete for the championship.²⁹⁴ Unlike the BCS-dominated football structure, the basketball championship is equally open to all deserving comers.²⁹⁵ With all teams, not just the chosen few, given a chance to compete for the championship, that event is a marketing phenomenon.²⁹⁶ The tournament format of the basketball championship is the rule, not the exception: the NCAA conducts playoff systems for all other intercollegiate sports, including its three other levels of football.²⁹⁷

But the concept of a Division I-A playoff, or even a simple No. 1 vs. No. 2 match-up, is a threat to the financial windfall enjoyed by the BCS elite under the current scenario. As Professor Gary Roberts,²⁹⁸ director of the Tulane University Sports Law program, explains, were a playoff to replace the current system, the sixty-three BCS schools “would not be able to hog”²⁹⁹ more than ninety percent of the BCS revenue. “That’s why they keep extending the TV BCS contracts well into the future, and refuse to let the NCAA football issues committee even discuss a playoff—so that a playoff is never possible.”³⁰⁰

An NCAA committee studied the playoff issue in 1994, ultimately holding “that while there was merit to the concept of a playoff, it could not at that time recommend specific legislation to the NCAA Presidents Commission.”³⁰¹

B. *Hail Mary: The Unlikely Possibility of Litigation*

Of course, the ultimate legal solution to college football’s antitrust problem would be litigation. An antitrust action against the BCS could be brought by any party directly injured by the antitrust violation.³⁰² Thus, any member of an NCAA Division I-A school not a party to the BCS agreement—be it a player, coach, administrator, staff member, or other party who would benefit from increased success, prestige and profit for the athletic program—could conceivably bring the action. The action could be brought against any co-conspirator, alone or

293. *Id.*

294. NCAAAsports.com, *Division I Basketball Frequently Asked Questions* <http://www.ncaasports.com/basketball/mens/story/arc_story/24455> (Jan. 22, 2003).

295. *Id.* Thirty-four of the sixty-five spots in the NCAA Division I men’s basketball tournament are awarded to at-large teams that did not earn an automatic bid to the tournament. *Id.*

296. See Andy Gardiner, *Few Arenas Can Handle NCAA Men’s Final Four* <<http://www.usatoday.com/sports/basketba/marchmania/2001mens/stories/2001-04-03-final4-arenas.htm>> (Apr. 3, 2001).

297. *1997 Antitrust Hearing*, *supra* n. 10, at 44.

298. Professor Roberts is a leading advocate of the argument that the BCS violates antitrust law. See *id.* at 91-100; Jon Saraceno, *USA TODAY, Messy BCS Might Not Even Be Legal* <<http://www.usatoday.com/sports/comment/saraceno/2001-12-13-saraceno.htm>> (Dec. 14, 2001).

299. Saraceno, *supra* n. 298.

300. *Id.* (quoting Gary Roberts) (internal quotations omitted).

301. *1997 Antitrust Hearing*, *supra* n. 10, at 44.

302. 15 U.S.C. § 15(a); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1174 (5th Cir. 1976).

together.³⁰³ Thus, it could be brought against any and all parties to the BCS agreement: the sixty-three schools, six conferences, four BCS bowl games, and potentially even ABC. While beyond the scope of this comment, it is a conceivable argument, though an ambitious one, that the ABC television network could also be subject to liability for this exclusionary agreement.³⁰⁴

Were litigation to be brought, Professor Roberts predicts a *prima facie* antitrust case would be established, bringing the ultimate question to a jury to weigh the anti-competitive effects of the BCS against its pro-competitive effects and to consider the availability of less-restrictive alternatives.³⁰⁵ And once a *prima facie* case is established, the burden would be on the defendant BCS partners to convince the jury that the pro-competitive benefits of the contested act “clearly and substantially outweigh [the] negative effects.”³⁰⁶

But the question still remains, what would be the goal of litigation—financial compensation or a judicial order to change the system? Perhaps the most likely litigious approach would be a pursuit of injunctive relief, an injunction voiding the BCS agreement *ab initio*, modifying it or giving all parties a timeframe in which it must be changed to meet certain pro-competitive criteria.

But the likelihood of litigation remains slim. A suit would be a direct challenge to the dominant programs and entities that hold “the tremendous

303. The Supreme Court has held that Section 1 of the Sherman Act “shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.” *Goldfarb*, 421 U.S. at 788 (quoting *U.S. v. S.E. Underwriters Assn.*, 322 U.S. 533, 553 (1944)).

304. Though beyond the scope of this article, the potential exists for an argument that if the BCS were found to violate antitrust law, the liable parties would include ABC. ABC contracts to support, finance, conduct, and market the BCS games, and thus is an active, willing, and able partner facilitating the agreement and its inherent breach of antitrust law. There is no disputing that the ABC Sports family has a significant impact on BCS selections: ABC commentators lobby for particular BCS inclusions and exclusions, hitting mass audiences via television stations such as ABC and ESPN, magazines such as ESPN The Magazine, ESPN Radio and other outlets. And there can be little doubt that ABC has a logical self-interest in the placement of popular teams in the BCS games it televises; its profits are naturally affected by the marketability and ratings successes of its BCS telecasts. So ABC benefits financially from the BCS agreement and it influences which teams play in its BCS games. “To the extent ABC helps to determine who is in the BCS and which teams play in which bowls, they are legitimately a co-conspirator in the anticompetitive conduct.” E-mail from Gary Roberts, Sports Law Program Dir., Tulane U., to Jasen Corns (Apr. 1, 2002) (copy on file with *Tulsa Law Review*).

Conversely, though, ABC could also pitch itself as a potential plaintiff, most likely under the theory that because of the improper BCS agreement among schools, conferences, and bowls, it is forced to pay monopoly premiums for the BCS games. *Id.*

305. *1997 Antitrust Hearing*, *supra* n. 10, at 92. Professor Roberts predicts a *prima facie* antitrust case would be made, surviving a legal challenge on a motion as a matter of law and ultimately reaching a jury:

[I]t would be decided by a jury in a protracted rule of reason trial after extended discovery. As any experienced antitrust practitioner knows, verdicts in such cases are unpredictable. However, my own judgment is that because the plaintiff(s) would probably choose the forum, because the equities are strongly against the Alliance, because the relevant standards of proof probably favor the plaintiff(s), and because a good plaintiffs’ lawyer could easily portray the Alliance power-brokers as arrogant and greedy, the odds in favor of a jury finding the Alliance to violate the rule of reason are quite good.

Id.

306. *Id.* at 96.

coercive political and economic power”³⁰⁷ in college football. Litigation, taken on by “second-tier” schools already at a disadvantage because of their inferior financial position and lesser resources, would be daunting, expensive, lengthy, and politically dangerous.³⁰⁸ Perhaps that best explains why, after leading the cavalry challenging the Alliance in the 1990s, WAC commissioner Karl Benson accepted the Alliance’s offer to pull up camp and join the Alliance in a limited capacity, rather than pursue litigation.³⁰⁹ There is a danger in taking on such a challenge against college football’s controlling powers, as the dominant programs are in positions to make decisions directly affecting the potential plaintiffs’ success, status, and future in Division I-A.³¹⁰ The perceived after-effect of the 1984 *Board of Regents* case, where Oklahoma and Georgia mounted a successful challenge against the NCAA, have not been forgotten; within months, the football programs at both Oklahoma and Georgia were subjected to intensive NCAA investigations and ultimately placed on damaging probations for violations such as improper transportation and issuance of complimentary tickets.³¹¹

BCS victims have done little to dispel the perception that they simply lack the muster to take on this daunting legal challenge. Mountain West Conference commissioner Craig Thompson declined offers from several attorneys wanting to take on the challenge, including many wishing to provide pro bono representation for the conference.³¹² Thompson cited three reasons for declining litigation. First, he said the conference did a “ cursory look ” and was dissuaded by the theory that, since they’ve received a small share of the BCS profits and have attended BCS meetings as non-voting parties, “we’d be deemed to be part of the BCS, accepting the BCS structure.”³¹³ Second, he cited a lack of public sentiment that the conference has actually been harmed.³¹⁴ Finally, he cited the cost of litigation.³¹⁵ “It would be very expensive to take that challenge. At this point, there’s nothing to indicate that you’d win this lawsuit.”³¹⁶

307. *Id.* at 99.

308. Dennis Dodd, *CBS SportsLine.com, NCAA Football, New Standards For I-A Membership Raise Red Flags* <<http://cbs.sportsline.com/b/page/pressbox/0,1328,5338874,00.html>> (May 15, 2002). San Diego State Athletic Director Rick Bay spoke of the fear of taking legal action against BCS powers. “There is fear at a personal level. If you’re part of something like that, your chances of becoming an [athletic director] or president at a BCS school is minimized.” *Id.* (internal quotations omitted). Tulane’s Gary Roberts was “booted off” the Sugar Bowl Committee shortly after testifying at the 1997 Senate hearing. Saraceno, *supra* n. 298.

309. *See supra* n. 221.

310. *1997 Antitrust Hearing, supra* n. 10, at 99.

311. *See NCAA, Major Infractions Cases* <<http://www.ncaa.org/enforcefrontF.html>> (accessed Nov. 11, 2002). Public reports of the infractions are available by searching the NCAA website. The public report of the Oklahoma investigation indicates that the investigation began in the 1984-85 academic year. *Id.*

312. Telephone Interview with Craig Thompson, *supra* n. 9.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

Count BYU's Hale among the litigation leery.³¹⁷ He favors patience, continuing to watch as recurring BCS controversies ultimately create an insurmountable demand for change.³¹⁸ "I hope this is just the first of many years where we're knocking on the door,"³¹⁹ he told the Associated Press in December 2001. "If we're at the door enough times, it will eventually cave in. People will see the system for what it is and they won't stand for it."³²⁰

C. *The Reverse: Non-Legal Solutions*

Given the slim odds that a lawsuit will be filed against the BCS, a more realistic approach may be to consider the non-legal solutions that might lead to fair resolution. One option is to seek intervention from the U.S. Congress, as college football has done in the past.³²¹ Another is to seek intervention from the NCAA, which retains the power to adopt rules which its member programs and bowl games must follow.

Congress has displayed the interest to intervene in this issue, as attested by the 1997 U.S. Senate subcommittee hearing on the antitrust implications of the Bowl Alliance and the 2003 U.S. House and Senate committee hearings on the antitrust implications of the BCS.³²² At each hearing, Congress expressed its dismay with the exclusionary practices of the Alliance/BCS.³²³ Nonetheless, Congress did not formally act after any of the hearings, opting to trust the parties to resolve the problems on their own.³²⁴ But in that the same parties are as excluded today as they were five and ten years ago,³²⁵ Congress can no longer rely on the BCS parties to rectify the problem they created and continue to maintain. The time is ripe for Congress to intervene, this time with force.

The second entity in position to rectify is the NCAA. The most immediate change the NCAA could make is to change the constituency of its influential Membership Council, allowing for stronger representation of non-BCS schools

317. See ESPN, *ESPN College Football, It's the Liberty Bowl, Not the BCS, for Cougars* <<http://espn.go.com/ncf/news/2001/1203/1289391.html>> (updated Dec. 5, 2001).

318. *Id.*

319. *Id.* (internal quotations omitted).

320. *Id.* (internal quotations omitted).

321. See generally 1997 Antitrust Hearing, *supra* n. 10; Statement of Rep. Sensenbrenner, *supra* n. 191; Statement of Sen. Hatch, *supra* n. 240.

322. See generally 1997 Antitrust Hearing, *supra* n. 10; Statement of Rep. Sensenbrenner, *supra* n. 191; Statement of Sen. Hatch, *supra* n. 240.

323. For instance, in the 1997 hearing Senator Robert F. Bennett told Alliance/BCS architect Roy Kramer that Congress had trusted Kramer and his colleagues when they were putting the Alliance together and that they had "failed. That is why we don't trust you now. It is as simple as that." 1997 Antitrust Hearing, *supra* n. 10, at 77. At the 2003 House hearing, Representative Ric Keller (R-Fla.) said that "[t]he BCS 'is like having a large family and only offering a few of the kids dessert and telling the rest to hurry up and go to bed.'" Liz Clarke, *House Members Listen in on Debate over the BCS*, Washington Post D1 (Sept. 5, 2003) (internal quotations omitted).

324. *Supra* nn. 220-22, 240-42 and accompanying text.

325. See generally *supra* n. 190 and accompanying text (noting that every participant in a Coalition-Alliance-BCS game has been a party to the agreement).

than the Council's current BCS-heavy make-up allows.³²⁶ Then, when proposals such as the one that prompted the upcoming tightening of the requirements of Division I-A membership arise,³²⁷ the decision will be made not only by those who stand to benefit from a certain result, but by a fair cross-section of Division I members.³²⁸ The Management Council could immediately begin to rectify the exclusionary practices of the BCS. An obvious starting place would be the BCS formula. For instance, the Council could require that the formula account more for win-loss records and less for components that inherently favor current BCS members, such as "Quality Wins" and "Strength of Schedule."³²⁹ It could also erase the special rules that ease Notre Dame's path into a BCS game at the expense of any non-BCS hopeful. Above all, though, a Council with a representative make-up could be the impetus for college football to embrace one of the less restrictive alternatives discussed earlier: a playoff or a simple No. 1 vs. No. 2 championship game.

The most likely alternative, though, is for the BCS parties to simply modify the current BCS structure in an attempt to pacify the non-BCS conferences. One popular suggestion is to add a fifth BCS bowl game, guaranteeing one "spot to the highest-ranked non-BCS league champion."³³⁰ Such a solution, while appealing in its simple process, offers little in the way of real substantive remedies to the underlying unfairness of the BCS and does not preclude the recurrence of similar inequities in the future.

VI. FINAL SCORE: THE BCS VIOLATES ANTITRUST LAW

The Bowl Championship Series, as an agreement among universities, college athletic conferences, college football bowl games, and a television network, is subject to federal antitrust laws. It is a self-serving agreement among an elite group of dominant college football entities that unreasonably keeps the enormous financial revenues generated by college football's four premier bowl games to its own members, excluding all uninvited college football entities and denying them access to that deep pool of program-building revenue. It is a party by the elite, for the elite, and inviting only the elite. It restrains the trade of college football, annually stifling the competitive abilities and opportunities of the uninvited non-elite, making the anti-competitive, exclusionary effect of the agreement one of a perpetual nature.

326. See generally *supra* nn. 268-74 and accompanying text (discussing the BCS-heavy constituency of the rule-making NCAA Management Council).

327. *Supra* nn. 258-67 and accompanying text (discussing the modified requirements for Division I-A eligibility, which take effect in 2004).

328. Current NCAA bylaws call for the Management Council's Division I-A members to consist predominantly of representatives of BCS conferences. NCAA, *supra* n. 16, at 26. It is urged here that the NCAA amend that bylaw so the Management Council constituency is more representative of the entire Division I population.

329. *Supra* n. 78 and accompanying text (discussing the current BCS statistical rating system).

330. Tom Shatel, *Omaha.com, Sports, First Downs, Second Guesses* <http://www.omaha.com/index.php?u_pg=38&u_sid=850576> (Sept. 10, 2003).

Barring outside intervention, the BCS is not going anywhere. It is phenomenally profitable for all parties to the agreement—the teams, conferences, bowls, and television network—and is contracted to run at least through 2005.³³¹ Any decision to pull the plug on the deal would have to be made by the same parties who benefit from its very existence.

A well-crafted federal antitrust litigation could be expected to generate a Rule of Reason analysis, ultimately resulting in a jury's simple weighing of the anti-competitive effects of the BCS against its pro-competitive effects. At that stage, a jury may be persuaded to decide that the anti-competitive effects of the BCS are greater than the pro-competitive effects, and thus rule that the agreement violates antitrust law.³³² But given the daunting circumstances surrounding potential litigation, a more realistic solution may be a non-litigious one, such as intervention by Congress or the NCAA.

Regardless of the avenue chosen, the trip is one that should be taken in the interest of fair competition in a multi-million dollar industry.

*Jasen R. Corns**

331. ESPN, *supra* n. 58.

332. See Posner, *supra* n. 138, at 103.

* J.D. Candidate, University of Tulsa College of Law (expected May 2004); B.S., University of Nebraska-Omaha (2001).