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D. Kent Meyers

Ira Horowitz

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PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS WORKS OCCASIONALLY: *BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA v. NCAA*, A CASE IN POINT

D. KENT MEYERS* & IRA HOROWITZ**

The Court considers the result achieved by plaintiffs as an historic one; that by their prevailing in the lawsuit, plaintiffs have conferred a benefit upon a significant industry and a large segment of the public.¹

I. Introduction

Sometimes private enforcement of the antitrust laws brings about results that benefit significant elements of our society. While this is not the norm, it is a desirable result and one contemplated by the drafters of the antitrust laws. This article will present just such a situation.

Two private plaintiffs² joined together to bring a suit against a "classic cartel" and asked only for injunctive relief. No damages for injury to the plaintiffs' business or

* Shareholder and Director of Crowe & Dunlevy, Oklahoma City, Oklahoma; Adjunct Professor of Law at University of Oklahoma College of Law (Antitrust Law). B.B.A., 1960, J.D., 1964, University of Oklahoma; LL.M., 1976, with an emphasis on Antitrust and Commercial Law, Harvard Law School. Crowe & Dunlevy represented the plaintiffs in the principal case commented on in this article.

** Ho Sin-Hang Visiting Professor of Decision Sciences and Managerial Economics at The Chinese University of Hong Kong, and Graduate Research Professor of Decision and Information Sciences at the University of Florida. B.A., 1955, Johns Hopkins University; Ph.D., 1959, Massachusetts Institute of Technology. Professor Horowitz testified as an expert witness in the principal case commented on in this article.

The authors gratefully acknowledge the help of Ned Lane in completing this article.

1. Board of Regents of the Univ. of Okla. v. NCAA, No. CIV-81-1209-BU (W.D. Okla. Jan. 9, 1985) (order awarding attorneys fees).

2. The University of Oklahoma and the University of Georgia.

property were sought. The sole motivation was to sever the economic bondage that ensnared these two plaintiffs and others similarly situated and to set them free to compete in the market place without the impediments of unlawful restraints of trade.

In *NCAA*, the University of Oklahoma (Oklahoma) and the University of Georgia (Georgia) complained that the National Collegiate Athletic Association (NCAA) was restraining these two Universities' rights to market the television of their football games. Oklahoma and Georgia complained that the actions of the NCAA in binding them, involuntarily, to a television contract with a network(s) of the NCAA's choice and forcing them to sell their television rights for a price fixed by others were wrong. The United States District Court for the Western District of Oklahoma, the Tenth Circuit Court of Appeals, and the United States Supreme Court all agreed. The "classic cartel" was destroyed. Oklahoma and Georgia were set free to pursue their own objectives. The market was opened for vigorous competition. "Suddenly, it was goodbye NCAA, hello freedom."³

This article will explore what has happened to the televising of college football games since this decision and what impact it has had on the universities, the television networks, the advertisers, and the viewing public.

During and shortly after the litigation, many predicted: (1) that live gate attendance would go down; (2) that the termination of the NCAA system would result in saturation of the television market with college football; (3) that the price of advertising during college football game telecasts would correspondingly go down; (4) that the amount paid per exposure to the competing universities would go down; and (5) that money would be lost all around.

It was prophesied that the only person who would gain out of this decision would be the fan.⁴ The fan was sometimes referred to as "Joe Six Pack"⁵ or "Harry Homeviewer in his La-Z-Boy."⁶ One got the impression that it was the height of judicial heresy to tamper with the sacrosanct NCAA for the benefit of someone so lowly as the fan. The discussion of the irony, called both delicious⁷ and sweet,⁸ that the action taken by Oklahoma and Georgia might result in their actually recovering fewer dollars through their own actions in freedom than had been doled out by their NCAA masters under cartel slavery illustrates the mindset of some contemporary writers, that all that really mattered was the amount of economic return. Would these same writers have the same sympathy for OPEC?

Lost in this pro-cartel analysis is the idea that the NCAA was doing something wrong under the antitrust laws and should be stopped. Moreover, the concept that the antitrust laws were a *consumer welfare prescription*⁹ was ignored.

3. Frederick C. Klein, *The TV Game: College Football Fumbles*, WALL ST. J., Sept. 18, 1984.

4. Rudy Martzke, *TV Football Fans Find Heaven*, USA TODAY, Sept. 19, 1984, at 3C.

5. Mark Landler, *The Too-Wide World of Television Sports*, BUSINESS WEEK, Dec. 10, 1990.

6. William Taaffe, *Too Much of a Good Thing*, SPORTS ILLUSTRATED, Oct. 15, 1984, at 78.

7. William Taaffe, *The Supreme Court's TV Ruling: Will the Viewer Benefit Most?*, SPORTS ILLUSTRATED, July 9, 1984, at 9.

8. Taaffe, *supra* note 6, at 79.

9. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

Precisely what Oklahoma and Georgia and Judge Burciaga predicted would happen has happened. As a result of this decision, as will be shown in this article, many universities that play major college football are better off. All competitors are free to make their own economic decisions about their property. Advertisers that choose to advertise during college football games are now paying a price determined by market forces, rather than by noncompetitive backroom agreements. Networks are free to compete for the televising of college football games without the impediment of unlawful cartels and unreasonably exclusionary arrangements. Finally, the fan-consumer is the beneficiary. The fan has a much broader selection of college football to watch on over-the-air, cable, and pay-per-view television than was imagined back in the early Eighties. As a result of this decision, the output is up and the price is down. That is what competition is all about.

This did not come about as a result of any governmental intervention, class action, or multidistrict litigation. This came about because two private plaintiffs had the courage, tenacity, and ability to stop an unlawful system without seeking to personally enrich themselves through treble damage recovery.

II. The Sherman Act — Legislative History

The Sherman Act was enacted in 1890 in a sea of controversy concerning the concept that "big is bad." The mood of the times was to try to control the growth of big business. Whether the purpose of imposing control was for the benefit of the consuming public or smaller competitors is not entirely clear. The latter, however, seems to be the more likely justification than the former.¹⁰ While the Sherman Act¹¹ bears the name of its original author, Senator John Sherman of Ohio, it did not have his support when it was ultimately signed into law.¹² The Sherman Act, birthed in controversy about its ultimate purpose, remains so embroiled today.

A. Public and Private Enforcement

The theory behind the enforcement scheme of the Sherman Act is that several parties may be involved either simultaneously or in seriatim. Those several parties are: (1) the United States Department of Justice; (2) the Federal Trade Commission; and (3) private parties.

Moreover, the enforcement may either be civil or criminal. The governmental authorities pursue the criminal prosecutions and, where appropriate, civil enforcement. Private parties participate through civil enforcement only.

The Sherman Act has been called the "comprehensive charter of economic liberty."¹³ With this lofty motive, public enforcement seems logical. It may be fairly asked why private enforcement would be either desirable or proper, when public enforcement is a ready alternative? This article points out that, as a practical matter,

10. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

11. 15 U.S.C. §§ 1-7 (1994).

12. 1 JULIAN O. VON KALINOWSKY, *ANTITRUST LAWS AND TRADE REGULATION*, § 2.02, at 2-36 n.123 (1991).

13. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

private enforcement is occasionally the only vehicle available to protect an industry or a large segment of the consuming public.

B. Department of Justice

The Department of Justice may enforce both the criminal and civil aspects of the Sherman Act.¹⁴ While the usual remedy sought by the Department of Justice is injunctive relief, the government may also recover damages for harm it has sustained. The government, however, may not seek damages for wrongs done to private parties. The damages that the government may seek are limited to its actual damages rather than treble damages.¹⁵ Furthermore, the criminal enforcement by the Department of Justice can result in felony convictions for convicted defendants. Significant fines and prison terms may be imposed.¹⁶

C. Federal Trade Commission Enforcement

The Federal Trade Commission may enforce the antitrust laws from a civil context only. It may enforce provisions of the Clayton Act¹⁷ and is the principal agency in charge of enforcing the Federal Trade Commission Act.¹⁸ One of its major missions is to protect consumer welfare through injunctive relief.¹⁹ While it may enforce the Sherman Act, it typically defers to the Department of Justice to carry out these activities.

D. Private Parties

Private parties are entitled to enforce the antitrust laws through sections 4 and 16 of the Clayton Act.²⁰ This civil private enforcement can result in treble damages, injunctive relief, and one-way attorneys' fees.²¹ The treble damage remedy has been described as "designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement."²² Treble damages are expected not only to redress grievances of a private party but also to "aid in achieving the broad social object of the statute."²³ Punishment and deterrence are two of the

14. E. THOMAS SULLIVAN & HERBERT HOVANKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 73 (2d ed. 1989).

15. *Id.* at 74.

16. *Id.*

17. *Id.* at 75. The Clayton Act, 15 U.S.C.A. §§ 12-27 (West 1996), was enacted to combat price discrimination, price fixing, economic boycotts, and other anticompetitive acts.

18. SULLIVAN & HOVANKAMP, *supra* note 14, at 75. The Federal Trade Commission Act, 15 U.S.C.A. §§ 41-77 (West 1996), established the Federal Trade Commission to prevent individuals and businesses from using unfair methods of competition or unfair or deceptive acts affecting commerce.

19. *Id.*

20. *Id.* at 77.

21. Under 15 U.S.C. § 26, attorney's fees are awardable only to a successful plaintiff, not to the prevailing party.

22. *Wineberg v. Sinclair Ref. Co.*, 48 F. Supp. 203, 205 (E.D.N.Y. 1942); *see also United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

23. *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955); *see also Borden*, 347 U.S. at 518.

objectives of the treble damage remedy.²⁴ Whether or not treble damages actually promote effective deterrence or result in sham litigation is the subject of much dispute and beyond the scope of this article.²⁵ Suffice it to say that the combination of treble damages, injunctive relief, and one-way attorneys' fees provides significant impetus to private enforcement. Further, the statute of limitations is suspended under certain circumstances for private parties when a government investigation of the same conduct is pending.²⁶

Since World War II, private antitrust enforcement has exploded. Most scholars believe the reason to be the treble damage remedy.²⁷ A number of authors have been critical of this "explosion" referring to it as a waste of resources.²⁸ The ratio of private enforcement litigation to public enforcement litigation has varied from a low of ten-to-one (private versus public) to twenty-to-one.²⁹

It has been suggested that private enforcement is every bit as effective as public enforcement where the injury involved is of sufficient size or gravity to warrant filing the suit and incurring the attendant costs.³⁰ Former San Francisco Mayor Joseph Alioto, a widely known antitrust lawyer, put it this way:

I have had some attorneys tell me, "You think you're the Attorney General." I say, "No, I'm not the Attorney General, but I'm like him in this case because Congress has said that the Attorney General doesn't have enough men to handle this type of litigation, so it wants a lot of private people to do some of it, and the courts have specifically said that the purpose of the private treble damage action is to multiply the enforcement agencies." That's their language, not mine! "To multiply the enforcement agencies."³¹

E. Private Equitable Relief

Injunctive relief in favor of the private plaintiff did not become available by statute until 1964 pursuant to 15 U.S.C. § 26. That section provides:

24. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICES* § 17.3, at 599 (1994).

25. In this connection, see Charles A. Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17 (1983); Alfred L. Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 287 (1973); Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980); William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405 (1985).

26. 15 U.S.C. § 16(i) (1994).

27. Stephen C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1001 (1986).

28. As an example of such criticism, see generally *id.*

29. *Id.* at 1003.

30. Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 416 (1970).

31. *Workshop III: Government Enforcement And Private Actions*, 42 A.B.A. ANTITRUST L.J. 208 (1973).

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.³²

Although treble damages receive the most attention from prospective litigants and commentators, injunctive relief will often afford a private plaintiff a more flexible remedy to ensure the plaintiff's future economic viability.³³ Not only can private parties be protected through careful use of injunctive relief, but public purposes may be served as well.³⁴ The injunction may be used to prohibit retaliation by an unhappy defendant after the termination of the current litigation.³⁵

The Chancellor's foot may be large indeed when it comes to injunctive relief in antitrust cases.³⁶ The specific fact situation that would spawn the filing of the litigation can be corrected as well as broad segments of the industry.³⁷ The government has routinely used injunctive relief in the vast preponderance of government-initiated cases.³⁸ Private plaintiffs seem to be taking advantage of injunctive relief at an ever-increasing rate.

Typically, the elements that a private plaintiff must show to be entitled to injunctive relief are: (1) a violation of the antitrust laws; (2) that has caused competitive injury (injury to the public); and (3) that has likewise caused injury to the plaintiff (causation).³⁹ If the wrong committed is a per se violation of the antitrust laws, then the public injury is presumed and does not have to be proven with specificity.⁴⁰

32. John J. Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344, 345, 361.

33. Everette MacIntyre, *Antitrust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22, 22.

34. *Id.* at 39.

35. *Id.*

36. Flynn, *supra* note 32, at 344.

37. *Id.*

38. *Id.* at 348.

39. *Id.* at 363.

40. *Id.* at 364.

Against this backdrop, Oklahoma and Georgia initiated litigation against the NCAA. A conscious decision not to seek monetary damages was made for several reasons. First, and most important, was that the two institutions involved did not want to seek damages that in essence would be paid by the other institutions that are members of the NCAA. It was the unlawful framework of the NCAA television controls that needed correcting. Second, the two institutions wanted the overriding motive behind their initiation of this litigation to be clear: an unlawful cartel-like agreement should be stopped. Third, both institutions hoped that the economic result of this litigation would be *ultimately* to their benefit. This, however, was not their principal motivation.

III. The Litigation

On September 15, 1982, Oklahoma and Georgia instituted an action⁴¹ alleging a violation of sections 1 and 2 of the Sherman Act. The only named defendant was the NCAA. The only relief sought was an injunction.

A. The Economic Issues

An antitrust case involves a variety of economic issues, some of which will be matters of dispute and others of which will be matters to which both sides are willing to stipulate. In *NCAA*, there were four major economic issues upon which the protagonists and their experts failed to agree: (1) What constitutes price fixing and the relationship between price fixing and output restrictions; (2) The relevant product market for antitrust purposes; (3) Whether the NCAA's television plan constituted a group boycott; and (4) Whether the television contracts between the NCAA and ABC were procompetitive and output enhancing, or anticompetitive and output reducing. We discuss each of these issues, and the plaintiffs' and defendant's economic arguments, in turn.

1. Price Fixing

(A) The university-plaintiffs argued that both the total compensation for the television package and the amounts to be paid for each class of game were fixed by contract. In principle, the price of a game was only a "suggested" price to be negotiated upwards or downwards by the participants. In practice, however, ABC had always paid a uniform price that never deviated from the suggested price.⁴² Moreover, even after the 1982 addition of a second network game, the ground rules for the bidders precluded price competition for any game. Priority in the choice of games was determined by "control" dates, coin flips, and other artifices designed to allocate games between the two networks, at the suggested price.

Assuredly, the fact that there is one price in the market for a well-defined homogeneous product does not in and of itself imply price fixing. In a purely competitive market, one in which a nondifferentiable good is traded and in which

41. Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

42. *Id.* at 1289.

everybody knows what everybody else is about, it would be anticipated that all sellers will charge the same price and all buyers will pay the same price. College football games, however, do not comprise a nondifferentiable good. In contemporary terms, college football fans would not be indifferent to watching the telecast of a game between the Akron Zips and Northern Illinois, say, and one between Nebraska and Penn State. Yet, under the NCAA-network agreements, had such games been telecast on the same day in different regions of the country, each of the four participants would receive the same rights payments. This would have been true regardless of the number of stations carrying each of the games. The universities thus argued that these equal payments constituted price fixing, precisely because they failed to reflect the freely determined price differences the games would have commanded when marketed as differentiated goods in a market that obeyed the laws of supply and demand.⁴³

A second aspect to any price-fixing agreement is a restriction on output. So long as the quantities buyers are willing to buy only increase when the price of the product is reduced, a price fixed above the freely determined price will necessarily result in a lower output than in a competitive market. The plaintiffs argued that it was indisputable that the existing contracts effected a less-than-competitive market output of college football telecasts. Under these contracts, except for the occasional part-time overlap, only one game was televised in any section of the country at a given time on a given fall Saturday, and at most two games were televised on any one day. Given the freedom to do so, Oklahoma and Georgia by themselves stood ready and willing to provide viewers alternative options and greater output of football telecasts, and a lengthy line of other potential suppliers, headed by Notre Dame, formed directly behind them. Thus, even though some sixty games a year had been telecast (nationally and regionally) under the existing contract,⁴⁴ an even greater number would have been telecast without the contract and, equally tellingly, viewer preference would have played a greater role in determining which games were telecast and where.

(B) The NCAA countered by observing that most if not all sellers "fix" price in the strict sense that they quote a price for which they are willing to sell their products. In many industries, these prices are nonnegotiable "take it or leave it" prices, and, indeed, this is a common business practice. Thus, it is not necessarily true that a cooperative agreement to provide a product, in this case a television program by the name of *NCAA Football*, at a "suggested" price is a price-fixing arrangement. Rather, the NCAA argued, the price agreement is ancillary to the provision of the product. Any television program is sold at a particular price per episode, or a price for the entire package; this is just normal business practice where a television series is concerned. *NCAA Football* is just another television series, comparable to *60 Minutes* or *Dallas*.

The NCAA also made the tie between price fixing and output restrictions. It argued, however, that *NCAA Football* was simply a partnership arrangement effected solely to produce a distinctive product that no one of the participants could produce on its own. A football game is, after all, a cooperative endeavor. The typical

43. *Id.* at 1293.

44. *Id.* at 1289-90.

arrangement in the broadcast industry for the sale of such a product, a television series, is to give exclusive rights to the buyer. That is certainly the case with a *60 Minutes* or a *Dallas*. In this context of exclusivity, it would necessarily be true that a restricted amount of the television program, *NCAA Football*, will be on the air. But in the larger scheme of things, any such restriction is trivial when compared to the totality of available television programming. After all, the NCAA suggested, *NCAA Football* can at best only be made available on sixteen fall Saturdays out of the annual total of 365 days on which viewers have access to an ample number of alternative network and local programs for much of the day.⁴⁵

2. Market Definition

The litigants agreed upon the United States as the relevant geographic market. Agreement on the relevant product market was another matter. And, it was readily apparent from their arguments on the price-fixing issue that how the product market was defined would be critical in validating their positions on (a) whether the network contracts resulted in a restriction of output and (b) whether the NCAA monopolized "the market" through its television controls.

(A) The universities proffered televised college football as the relevant product market. They supported this definition on a variety of grounds, all of which were nested in the lack of substitutability between a college football game televised on a fall Saturday afternoon and any other television programming.

A football game is a perishable commodity. The television tape of a game has relatively little value once the result is known. A live televised game is a unique commodity that viewers, particularly those with full-time jobs, cannot freely substitute for television programs such as *60 Minutes* or *Dallas* that are broadcast in the evening or during the work week. Indeed, a college football telecast on a Saturday afternoon is not even freely substitutable for a professional football telecast on a Sunday afternoon, to say nothing of the cartoon shows and "B" movies that were the commonly available staples on the stations that were not televising games on Saturday afternoons. The plaintiffs supported their theoretical arguments with a variety of empirical data related to broadcast ratings, audience demographics, and television schedules.⁴⁶

The plaintiffs also noted that while the networks are the buyers of the broadcast rights to college football, network demand for those rights is a derived demand, one that is derived from advertisers' demand for time slots that may be used to reach audiences with a particular set of demographic characteristics. That is, the rights are only valuable to broadcasters because advertisers are willing to pay for the privilege of sending their messages to the specific audience that has set aside a Saturday afternoon to watch a college football telecast. This willingness manifested itself in sponsors allocating 5.2% of their advertising budgets to *NCAA Football*, thus spending two-and-a-half times as much per viewer to reach that particular audience than it

45. Defendant's Closing Argument Brief at 6-9, *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (No. 83-271).

46. Plaintiffs' Closing Argument Brief at 13-15, *NCAA* (No. 83-271).

would have cost them to advertise on other network programs, although NCAA football comprised only .0044% of total network programming time.⁴⁷ In effect, because of the uniqueness of the "product," and because the "product" was especially cost effective, sponsors allocated to it a disproportionately large amount of their total expenditures.

(B) The NCAA did not dispute the contention that it is the advertisers' willingness to freely substitute between sponsorship alternatives which is a critical determinant of the relevant product market. Indeed, NCAA based its market definition on this very point. All commercial spots, the defendant suggested, are fungible. Any differences in the value of those spots that are attributable to demographics, the times in which they are broadcast, etc., are compensated for by "the market." Television programs attracting audiences of half the size of *NCAA Football*, but with essentially the same demographics, would cost sponsors half as much for the same time allocation. Advertisers will, therefore, substitute freely between one thirty-second spot on *NCAA Football* and two thirty-second spots on those demographic equivalents. That is why the costs of a football sponsorship tended to move hand in hand with those of other television sponsorships.⁴⁸ The fact that advertisers did spend only 5.2% of their advertising budgets on *NCAA Football* and less than 25% on all televised sports, indicates they must have been freely substituting between that and other options, perhaps even including billboard advertising. In effect, looking at the overall picture, sponsors made relatively little use of *NCAA Football* and televised sports because so many equally appealing and perfectly substitutable advertising alternatives were available to them.

Still further, *NCAA Football* was so insignificant a part of television programming that even with fewer games shown, the void could easily be filled by other programs. With regard to fall sports programming alone, college football's share of the viewers was less than 12%. The latter figure becomes minuscule when year-round sports alternatives are included in the computation. Therefore, in a properly defined market, the NCAA lacked the power to either secure a monopoly or to fix prices. At least, that is what the NCAA argued.

3. Group Boycott

By definition, an economic boycott has economic implications for both those doing the boycotting and those that are boycotted. Since a decision to do business with one set of customers often implies the complementary decision to not do business with others, whether any one such decision constitutes a boycott is not necessarily apparent.

(A) The plaintiffs saw two ways in which the NCAA controls effectuated a group boycott. On the one hand, by giving one, or even two, network(s) the exclusive right to televise college football, and by not permitting its members to televise their games outside of the network contract(s), the NCAA denied any other broadcasters the right to purchase and televise college games.⁴⁹ On the other hand, inasmuch as two teams

47. *NCAA*, 546 F. Supp. at 1321.

48. Defendant's Closing Argument Brief at 6-9, *NCAA* (No. 83-271).

49. Plaintiffs' Closing Argument Brief at 2-3, *NCAA* (No. 83-271).

are required to play a football game and a set of teams are required to play an entire schedule, the threat of sanctions by the NCAA against a school that defied the NCAA's ban on the independent sale of football television rights had the effect of a group boycott against the defiant school.⁵⁰

(B) The NCAA, however, had several justifications for its actions. First, the NCAA alleged that it was attempting to protect its members' gate attendance.⁵¹ Second, it was attempting to maintain a competitive balance that would be destroyed if television revenues were to become concentrated in the hands of the major football powers.⁵² Finally, the NCAA is a voluntary organization whose members are supposed to abide by democratically-arrived-at rules that are designed to serve all members' interests, rather than those of a select few.

4. *The Competitive Aspects of the Contracts*

It is undeniable that the contracts imposed horizontal restraints that to some degree restricted output in some relevant product market. Whether they constituted per se illegal price-fixing agreements is another matter. Once college football is seen to be a unique product that cannot be provided unilaterally by any one school, it is also seen that its provision requires mutual agreement among schools. Any such mutual agreement among otherwise competing entities, however, necessarily implies one or more horizontal restraints. Hence the restraints themselves must be subject to rule-of-reason analysis wherein consumer welfare assumes pride of place and the salient issue for the courts to decide becomes whether the restraints can be justified as procompetitive.⁵³ Three points were raised in this connection, with the litigants taking opposing views on how to interpret such data that was available and that even at a stretch might be viewed as germane.

(A) Reiterating its arguments with respect to the group boycott issues, the NCAA argued that the intent of its television controls was to protect gate attendance at all college football games, whether televised or not, and to enhance competitive balance. The controls represented the collective will of the membership of a voluntary organization. Insofar as competitive balance was enhanced, and insofar as gate attendance was not adversely affected by television football, output as measured by "live" attendance would tend to increase over and above what it would have been in the absence of the controls. Accepting the NCAA's argument that there were no anticompetitive effects of the contracts in its proffered relevant product market, the television controls only resulted in procompetitive effects in the "live" college football market.

In support of these contentions, the NCAA introduced both some early 1950s surveys and some new econometric studies purporting to show the adverse effects that

50. *Id.* at 7-9.

51. Defendant's Closing Argument Brief at 11-13, NCAA (No. 83-271).

52. *Id.* at 14-15.

53. The Supreme Court had adopted this line of argument in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979). For an extended discussion of these issues, see Ira Horowitz, *The Reasonableness of Horizontal Restraints: NCAA, in THE ANTITRUST REVOLUTION* 214 (John E. Kwoka, Jr. & Lawrence J. White eds., 2d ed. 1994).

televised games had on attendance at nontelevised games, particularly at Division II and III schools.⁵⁴ The NCAA also offered testimony to the effect that its television controls prevented the domination of the television market by a few select schools and, as a result, prevented those schools from gaining economic and consequently on-the-field competitive advantage over the others.⁵⁵ Finally, the NCAA contended, *NCAA Football* was actually a new product that could only be offered by the partnership of Division I schools. Thus, the controls resulted in making available to consumers a product that would not otherwise exist.

(B) The plaintiffs had ready counters to the NCAA's positions. The early surveys were outdated and those commissioned expressly for the litigation were flawed. Among other things, since there were football telecasts on every Saturday of the season, there were no control dates enabling a comparison of attendance on days when there was no televised-game competition and days when there was such competition. Thus, there was no probative evidence to demonstrate the alleged adverse effects on live attendance of football telecasts. Rather, the fact that the NCAA and ABC sought to televise the most attractive game in the country or region, the televised game that would be most competitive with a live game, showed the specious nature of the argument.

In regard to maintaining competitive balance, essentially the same set of schools had a history of appearing in both the telecasts and the weekly football rankings of the elite.⁵⁶ With true competitive balance, much greater variety would be seen in the annual lists of the Top 25.

Finally, while in the strictest sense, membership in the NCAA is voluntary, there is little doubt that it would be infeasible for any school desiring to play a college football schedule to do so outside the NCAA's auspices.

Thus, the plaintiffs argued there was only one purpose and effect of the NCAA's television controls: notably, to restrict output — the number of games to be telecast — and to offer the networks exclusivity, so as to raise the price that broadcasters, and ultimately sponsors, would be willing to pay for the television package. These effects, in turn, reduce consumer choice and consumer welfare, and are anticompetitive to boot.

B. The Trial

Walter Byers, the Executive Director of the NCAA, in his testimony at the trial, was asked his opinion about what would happen if the NCAA greatly reduced the restrictions on the colleges and simply allowed them to be on television no more than, for instance, three times per year. His response was that for the NCAA to give up the control that it had and diminish regulations substantially, it would bring about a "hully-gully" situation. It would be the "hully-gully plan."⁵⁷ Byers testified

54. Defendant's Closing Argument Brief at 11-12, *NCAA* (No. 83-271); *NCAA*, 546 F. Supp. at 1295-96.

55. Defendant's Closing Argument Brief at 14, *NCAA* (No. 83-271).

56. *NCAA*, 546 F. Supp. at 1310.

57. Record at 854, *NCAA* (No. CIV-81-1209-BU).

that if the networks were left alone, they would act in a "hully-gully" manner.⁵⁸ This explanation by Byers speaks volumes as to why Oklahoma and Georgia had to sue to get relief. If the czar of college football felt that anything other than the NCAA plan was nonsense, bunk, and baloney, it is clear that compromise was not possible. Therefore, the litigation was the only reasonable course for those seeking freedom from unlawful restrictions.

The trial took approximately one week. It was a trial to the court since only injunctive relief was sought. All the district judges for the United States District Court for the Western District of Oklahoma, the situs of the trial, had disqualified themselves, and Judge Juan Burciaga from New Mexico was sitting by designation.

Some three months after the conclusion of the trial, in a forty-seven-page opinion, the court found that the NCAA was a "classic cartel" that had controlled the price and output of the televising of college football by "commandeering" the rights of the member institutions.⁵⁹

The court noted that the plaintiffs had proven that they had suffered antitrust injury and that the plaintiffs would have realized substantial increased revenues but for the NCAA controls.⁶⁰ The court examined the section 1 violations under both the per se and rule-of-reason tests. The court found that the NCAA had not shown any procompetitive justifications. The court found that the activities under section 1 of the Sherman Act were unlawful under either test.

[The] most pernicious aspect is that under the controls, the market is not responsive to viewer preference. *Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls.* Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.⁶¹

The court made it clear that the plaintiffs had sought no damages; they merely sought relief in order to give them the opportunity to increase their profits through competitive activities.⁶²

The court was prophetic when it predicted that the result of this decision would be more games being shown on television without the NCAA controls stifling the competitive market place.

The court then went on to find the NCAA also guilty of group boycott and monopolizing the market for the sale of college football television rights. The final paragraph of the opinion prior to the issuance of the declaratory judgment and permanent injunction clearly enunciates the court's view of the import of this decision:

58. "Hully-gully" is defined as "nonsense, bunk, baloney." HAROLD WENTWORTH & STUART B. FLEXNER, *DICTIONARY OF AMERICAN SLANG* 275 (1975)

59. *NCAA*, 546 F. Supp. at 1309.

60. *Id.* at 1301.

61. *Id.* at 1318 (emphasis added).

62. *Id.* at 1303.

It is the Court's fond hope and genuine belief that the result of this litigation will be an open and competitive market which will ultimately serve the best interests of the football-playing colleges, the telecasters, television advertisers *and, most importantly*, the viewers of college football television. Congress had determined that free competition will yield this result and that therefore competition shall be the rule of commerce in our nation. By its decision today, the Court gives effect to that rule.⁶³

After the trial court decision, much was written about the impact of this action on the various constituencies. It was difficult to find any article that supports the "rightness" of Oklahoma and Georgia for stopping what everybody ultimately agreed was a classic, unlawful cartel. Somehow, that "rightness" got lost in the scramble for the college football television dollar.

C. The Court of Appeals Decision

The Tenth Circuit affirmed most of Judge Burciaga's decision.⁶⁴ For the first time, the government appeared to become interested in this private enforcement effort. The Department of Justice filed an amicus brief in the Tenth Circuit supporting Oklahoma and Georgia. Considering that this was during the Reagan Era of non-antitrust enforcement, this position was indeed unique.

The government urged the Tenth Circuit not to use a per se test but, rather, to employ a "truncated" rule-of-reason approach. Because of the nature of the restraint on price and output, the government suggested that the utilization of the per se test would be inappropriate.⁶⁵

The government, however, urged the Tenth Circuit to affirm the lower court decision. The government argued that Oklahoma and Georgia showed the anticompetitive nature of the restraints imposed by the NCAA television plan. Also, the government approved and urged affirmance of the injunctive relief granted by Judge Burciaga.

The Tenth Circuit found that the plaintiffs did not have to show standing since only injunctive relief was sought. Therefore, *Brunswick*,⁶⁶ a case involving treble damages, was distinguishable. Also, the court noted: "The plaintiff seeks to compete in a market free from artificial restrictions."⁶⁷ The court found there was standing relying on 15 U.S.C. § 26.

The Tenth Circuit affirmed the finding that the price fixing was per se illegal and was not merely an ancillary restraint. The defendant's argument that the interbrand competition enhancements (*NCAA Football versus Dallas* or *M*A*S*H*) outweighed

63. *Id.* at 1328 (emphasis added).

64. Board of Regents of the Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

65. Brief for the United States as Amicus Curiae at 18, Board of Regents of the Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983) (No. 82-2148), *aff'd*, 468 U.S. 85 (1984).

66. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

67. NCAA, 707 F.2d at 1151 n.4.

the intrabrand restrictions in the NCAA plan was unavailing. As did the trial court, the Tenth Circuit distinguished *Broadcast Music*⁶⁸ from the NCAA situation because of the lack of exclusivity present in *Broadcast Music*.

The Tenth Circuit did not find it necessary to consider the section 2 claim since the affirmance of the section 1 price-fixing claim was an independent justification for granting the injunction.⁶⁹

The majority reversed the finding of a group boycott against the other broadcasters. The court found that the colleges were not in competition with the broadcasters and, therefore, could not engage in a group boycott against them under these facts.

The only relief granted to the NCAA in this circumstance was the remanding of the matter to the trial court for a review of some of the broader aspects of the previously issued injunction. After review of that injunction by the trial court, the injunction remained substantially the same.⁷⁰

The dissent found that the NCAA's plan was not anticompetitive. Rather, it was designed to facilitate the purposes of the NCAA. The dissent lamented the "subjugating the NCAA's educational goals . . . to the purely competitive commercialism of 'every school for itself' approach to television contract bargaining."⁷¹

To no one's surprise, the U.S. Supreme Court granted certiorari and gave its final review of the NCAA plan.

D. The United States Supreme Court Decision

Three football seasons after the action was commenced, the United States Supreme Court rendered its decision.⁷² The score was Oklahoma and Georgia 7, NCAA 2. The Supreme Court affirmed the court of appeals decision.⁷³

The Department of Justice and the Federal Trade Commission inserted themselves into the process at this level. In the opening sentence of the amicus curiae brief in support of affirmance, they stated: "The United States and the Federal Trade Commission, which have primary responsibility for the preservation and promotion of competition through enforcement of the federal antitrust laws, have a substantial interest in ensuring that those laws are interpreted and applied in a manner that promotes competition and consumer welfare."⁷⁴ As the Department of Justice had done at the Tenth Circuit level, the United States again supported affirmance of the rule-of-reason determination in favor of Oklahoma and Georgia.⁷⁵ Because the conduct was not of a type with which the courts had substantial experience and did

68. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

69. *NCAA*, 707 F.2d at 1159 n.16.

70. *Board of Regents of the Univ. of Okla. v. NCAA*, No. CIV-81-1209-BU (W.D. Okla. Oct. 31, 1984) (order reviewing scope of injunctive relief).

71. *NCAA*, 707 F.2d at 1168 (Barrett, J., dissenting).

72. The suit was commenced Sept. 8, 1981, and the Supreme Court decision was rendered June 27, 1984.

73. *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

74. Brief of the United States as Amicus Curiae at 1, *NCAA* (No. 83-271).

75. *Id.* at 3.

not involve a naked restraint, however, the government urged a truncated rule-of-reason approach rather than the application of the *per se* test.⁷⁶

The government pointed out the crucial distinction between *NCAA* and *Broadcast Music*. The distinction was one of *requisite* exclusivity in the production and sale of the product. In its amicus brief, the government states, in part:

In particular, we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges, i.e., how the product would be damaged if colleges were granted the right to contract independently with local stations for the broadcasting of individual games (see Pet. App. 70a). Indeed, the courts below noted this as a major distinction between the present case and *Broadcast Music*, in which, although the performing rights societies organized umbrella sales agreements, individual authors retained the power to sell the performing rights to their compositions on an individual basis (Pet. App. 14a, 93a). Even if it were found to be procompetitive for there to be a weekly NCAA "game of the week" on network television, that would not require that all schools whose games are not selected to be shown in any given week be prevented from selling their television rights to local, regional or national broadcasters.⁷⁷

The government contended that the "most compelling reason" to disregard the arguments of the NCAA was that it had failed to "present a valid efficiency argument."⁷⁸ At this juncture of the litigation, with a procompetitive result clearly in sight, both the Department of Justice and the Federal Trade Commission, the agencies with the "primary responsibility for the preservation and promotion of competition through enforcement of the federal antitrust laws,"⁷⁹ jumped on the universities' bandwagon at the last minute. Because of the "importance of the issues" raised by this case,⁸⁰ one can only wonder why this NCAA scheme had not been the subject of public enforcement prior to this time? What had caused *both* public enforcement agencies to overlook a highly publicized, nonsecret price fixing and output-limitation scheme? Why did it take private enforcement (and private resources) to bring about this result? If these issues were so important, the scheme so public, and the responsibility for preservation and promotion of competition so primary with the Department of Justice and the Federal Trade Commission, where were they during the years that this was proceeding?

Justice Stevens made it clear that the Supreme Court relied heavily on the district court findings concerning the wrongdoing of the NCAA and the total lack of effective justification for its actions. Describing the district court's findings as

76. *Id.*

77. *Id.* at 21 n.20.

78. *Id.* at 23.

79. *Id.* at 1.

80. *Id.*

"unambiguous,"⁸¹ "amply supported,"⁸² "well-supported,"⁸³ and on a "solid basis,"⁸⁴ the Supreme Court praised the work of the district court. The NCAA did not request the Supreme Court to set aside any of the district court's findings.⁸⁵ Rather, the NCAA contended that the previous decisions were wrong as a matter of law.

The Court determined that the NCAA television plan limited output and restricted the right of any institution to make a sale of television rights outside the plan.⁸⁶ This was the heart of Oklahoma and Georgia's contentions, and the district court and the court of appeals also concurred in this finding.

The Supreme Court decided not to apply the per se rule because the industry involved was one in which horizontal controls were necessary if there was to be any product available to sell at all. In other words, if there was not cooperation between the competing teams, their conferences, and other necessary entities, there could be no television rights to sell.⁸⁷ Because of the action taken by the court of appeals regarding the group boycott and section 2 contentions, all that was before the Supreme Court was the section 1 Sherman Act violations dealing with the restriction of output and price fixing.

The Court determined that a rule-of-reason approach should be employed. It affirmed the prior decisions applying the rule of reason. Specifically, it approved the finding that there were no procompetitive efficiencies involved in the NCAA plan.⁸⁸ Indeed, the Court determined that the plan was unresponsive to viewer preferences. It recognized the importance of the protection of the fan in this inquiry.⁸⁹ In this connection, the Court said:

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.* Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.⁹⁰

81. NCAA, 468 U.S. at 119.

82. *Id.* at 111.

83. *Id.* at 119.

84. *Id.* at 112.

85. *Id.* at 98 n.15.

86. *Id.* at 94.

87. *Id.* at 101.

88. *Id.* at 114.

89. *Id.* at 107.

90. *Id.* at 106-07 (citations and footnotes omitted) (emphasis added).

On the issue of market power, the Court made it clear that market power — the power to raise price and/or to restrict output — was not required to be shown in this case because of the naked nature of this restraint. Had the NCAA plan been merely an ancillary restraint, then the plaintiffs would have had the obligation to show market power. Notwithstanding the above, the Court found that the plaintiffs had proven that the NCAA *had* market power. The Court made the same prediction that each Court before it had made: Without the NCAA plan, output will go up.⁹¹ The Court called that a "compelling demonstration" that the NCAA plan is anticompetitive and does not serve any legitimate purpose.⁹²

Finally, the Court held "that the record supports the district court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the nation's life."⁹³

Justice White, joined by Justice Rehnquist, dissented. In a sixteen-page opinion, the NCAA was praised as a valuable, necessary organization. The NCAA plan was praised as essential to protecting live gate attendance as well as equalizing the competitive balance among the college football-playing schools.⁹⁴

The dissent made two predictions that deserve review slightly more than a decade later. These two predictions were:

(1) That college football itself as a product to be sold for television presentation is threatened by *unbridled* competition.⁹⁵ Presumably, "unbridled" means free, fair, and open, not unlawful. The question then becomes: "Has a decade of 'unbridled' competition threatened the viability of college football as a product desirable to televise?"

(2) While noting that the College Football Association had put together a television plan of its own, the dissent predicted "antitrust problems" for the CFA. That prediction, however, is based upon the assumption that the CFA plan will "contain[s] features similar to those condemned as anticompetitive by the Court."⁹⁶

With these rather diverse predictions of freedom versus destruction, increased output versus glut, and increased attention to consumer preferences (the fan) versus destruction of live gate attendance and loss of competitive balance, the colleges set out on the next leg of their economic journey. What was referred to as "college

91. *Id.* at 119.

92. *Id.* at 120.

93. *Id.*

94. *Id.* at 124 (White, J., dissenting).

95. *Id.* at 122 (White, J., dissenting).

96. *Id.* at 127 n.2 (White, J., dissenting). The CFA plan differed in several significant respects from the NCAA plan. Members of the CFA made an outright transfer of the rights to sell television coverage of their games to the CFA. The CFA then conducted the negotiations with the network and made the contracts in typical joint venture fashion. Moreover, unused rights (those games that were not selected by the network) were conveyed back to the CFA members for their own use. This added a nonexclusivity element to the CFA plan that had been missing in the NCAA plan. These distinctions, however, were not mentioned by Justice White in his dissent.

football's biggest fumble" began to bounce around on the economic playing field. Who recovered the "fumble" and what use they made of it is set forth hereafter.

IV. The Immediate Consequences of NCAA

Judge Burciaga determined the relevant product to be live college football television. Through 1981, however, the product demanded by the networks and sold by the NCAA was the exclusive right to live college football television. That exclusive right was the product exchanged in the 1982-85 regular-season over-the-air NCAA-network contracts. These did not differ substantially from their predecessors. The principal difference was that ABC and CBS would share equally in the revenues and coverage. The rules governing the allocation of games were such as to minimize the chances that two games would be televised simultaneously. This would also be true of games cablecast by the Turner Broadcasting System (WTBS). In effect, then, what the seller was selling and what the buyers were buying was time-slot exclusivity for live college football television.

Despite the dual over-the-air coverage, as shown in table 1, there would be only four exposures beyond the twenty-four of the 1980-81 contract. ABC would lose the exclusive right to *NCAA Football* and have only fourteen exposures in 1982-83, but it would pay essentially the same minimum aggregate fee as it previously paid.⁹⁷

TABLE 1. NCAA NETWORK CONTRACTS

Year	No. of Exposures	Min. Agg. Fee	Com. Min's	Price/Exp.	Price/Com. Min.
1978	23	\$29 Million	506	\$1,260,860	\$57,312
1979	23	\$29 Million	506	\$1,260,860	\$57,312
1980	24	\$31 Million	506	\$1,291,660	\$61,261
1981	24	\$31 Million	506	\$1,291,660	\$61,264
1982	28	\$59 Million	728	\$2,107,140	\$81,043
1983	28	\$64 Million	728	\$2,285,710	\$87,912
1984	28	\$68.5 Million	728	\$2,446,420	\$94,093
1985	28	\$72 Million	728	\$2,571,420	\$98,901

A more detailed analysis reveals scheduled ABC payments of an additional 61.22% per exposure (averaged over the average 1978-81 price and the average 1982-85 price) for 36.89% fewer exposures (averaged over the average 23.5 exposures in 1978-81 and its fourteen annual exposures in 1982-85). The latter data imply an arc elasticity of demand of $-.3689/.6122 = -.60 > -1$. That is, ABC's

97. Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1290 (W.D. Okla. 1982), *aff'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

demand for time-slot-exclusive college television football seems to have been relatively inelastic. It is not unreasonable to generalize this inelasticity to industry demand for time-slot-exclusive college television football.

It is also self-evident, as the courts recognized, that unless there is a serious deterioration in live attendance and its accordant gate receipts, the participants' marginal cost of televising a previously scheduled game is zero. This implies an infinite marginal-cost elasticity. An inelastic demand and a highly elastic marginal cost are the two classic economic conditions encouraging the formation and sustenance of a cartel. It would have been surprising in this environment, if a television cartel had not formed! Moreover, in this particular situation, the basic framework for such a cartel, the NCAA, already existed, although its original *raison d'être* ran far afield from those that would impel the emergence of a television cartel. Defections and the formation of competing cartels occurred because some of the other economic conditions required to sustain a cartel did not and do not exist. Most specifically, all college football games do not comprise a standard product. With well in excess of fifty major football-playing schools, the market for their television rights is not concentrated on the sellers' side. There is a potential fringe of small sellers, rapid entry is easily effected and requires less than one-week's notice, and there were few broadcasters that qualified as buyers for either over-the-air or cable network packages. It was, therefore, only a matter of time before the conditions unfavorable to collusion overcame those favorable to it, and that some cartel members would bolt. Indeed, this is precisely what prompted the suit that eventuated in *NCAA*.

While the negotiated CFA-NBC agreement was on hold, sponsors buying two-year packages in the NCAA's 1982-83 contracts would have to pay \$60,000 for a thirty-second spot, or \$120,000 per commercial minute.⁹⁸ Over this period, the average price ABC was to pay the NCAA for a commercial minute would be $.5(\$81,043) + .5(\$87,912) = \$84,500$. With an allowed total of 364 commercial minutes, ABC's projected gross profit on *NCAA Football* would be $$(120 - 84.5) \times (364) = \12.9 million per year. As seen in table 1, under the 1980-81 contract, ABC paid \$61,264 per commercial minute for its permitted total of 506 commercial minutes. Sponsors buying two-year packages paid \$54,000 for a thirty-second spot. Hence, over the previous period, ABC's annual gross profit was $$(108 - 61.3) \times 506 = \23.6 million. While ABC's gross profit on *NCAA Football* declined by 45%, its net profit for Saturday afternoon programming would have declined by a lesser amount, because of production-cost savings and any profits

98. *Radio-TV's Football Tab: \$493.7 Million*, BROADCASTING, Aug. 9, 1982, at 38. As a caveat, except for the data presented before the district court, most of the data relating to the dollar value of contracts, the number of telecasts, the rates charged to sponsors, and the like, are estimates. Upon occasion, different sources provide slightly different estimates, none of which result in substantively different inferences. In the interests of consistency, however, where possible, we rely upon a single source that would seem to be the best source. In particular, for example, where CFA schools and contracts are involved, we rely upon the data provided by the CFA. *Broadcasting* publishes an annual issue devoted to college and professional football, and this issue provides the other principal source for size-of-contract data.

earned on alternative programs it broadcast in the $24 - 14 = 10$ time slots of approximately three hours each that would have been freed up for alternative television programming, in lieu of college football telecasts. Since CBS was also scheduled to price its NCAA package in the vicinity of \$60,000 per thirty seconds, in combination, the two networks would earn approximately the same gross profit from *NCAA Football* as ABC alone had earned under the 1980-81 contract.⁹⁹ Sponsors would pay about 10% more for a thirty-second spot, and viewers would have the opportunity to watch about 17% more network games and 17% more minutes of commercials. These computations notwithstanding, in combination, ABC and CBS were estimated to have lost an annual total of perhaps \$8 million from their 1983 NCAA contracts.¹⁰⁰ Such losses imply that the advertising rates actually received and/or the number of time slots actually sold in the absence of total exclusivity did not live up to the networks' prior demands and expectations.

The NCAA-WTBS two-year cable contract gave the NCAA an additional \$8.8 million per year and WTBS nineteen exposures per year.¹⁰¹ Most of the latter games were Saturday telecasts, with some Thursday night games and a Sunday game thrown in as well. The contract's timing is at least partially explained by noting that in 1980 there were only 15.5 million cable subscribers, or 19.9% of television households;¹⁰² in 1983, these figures were 25 million and 34.0%, respectively.¹⁰³ It would seem that WTBS was buying credibility as much as it was buying a profit source with its purchase. Indeed, in the ensuing years, there has doubtless been a complementing relationship between the increased numbers of cable households, which by 1990 numbered 52 million, or 56.4% of all television homes, and televised sports in general and college television football in particular.¹⁰⁴

Over the 1982-83 period, then, the NCAA and its member schools increased their annual take from the sale of regular-season cable and network television broadcast rights to about \$70.3 million from what had been \$31 million.¹⁰⁵ The sale of local radio rights and those to delayed telecasts added another \$3.5 million to \$10.6 million to the pie,¹⁰⁶ with about 150 schools sharing that pie. The average receipts from regular-season televised football more than doubled from about \$225,000 to

99. Specifically, from the above calculations, both ABC and CBS would earn an annual gross profit of \$12.9 million, giving a total annual gross profit of \$25.8 million. The latter figure is 9.3% greater than the ABC figure of \$23.6 million.

100. Martzke, *supra* note 4, at 3C.

101. NCAA, 546 F. Supp. at 1292; *Radio-TV's Football Tab: \$493.7 Million*, *supra* note 98, at 39.

102. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 556 (1991) [hereinafter 1991 STATISTICAL ABSTRACT].

103. *Id.*

104. *Id.*

105. The \$70.3 million figure is arrived at by adding the \$8.8 million paid by WTBS to \$61.5 million, which is computed from the data in Table 1 as the average of the 1982 and 1983 figures for the over-the-air network contracts.

106. *Radio-TV's Football Tab: \$493.7 Million*, *supra* note 98, at 38; *Broadcasters To Spend \$536 Million on Football*, BROADCASTING, Aug. 8, 1983, at 40.

a little more than \$500,000 per school.¹⁰⁷ But not everybody was a winner under the new arrangements.

Subject to the previously noted caveat about attendance, there is no cost to the participants for having their games televised. Thus, the NCAA member schools as a group were better off to the pleasant tune of about \$40 million under the 1982-83 contracts than they were in 1980-81. On the surface, fans of televised football, particularly those residing in cable households, also benefitted. The total number of exposures jumped from the earlier total of twenty-four to forty-seven, and due to the networks' increasing reliance on regional telecasts, the number of games shown increased from fifty-one in 1981 to seventy-six in 1983.¹⁰⁸ Thus, approximately one out of every seven games played was televised someplace. Viewer choice was enhanced. Looking below the surface, sponsors do not spend \$60,000 for thirty seconds of time unless they expect that expenditure to generate at least as much in future profits. Whether consumers of the products promoted ultimately pay some of the costs of the sponsorships through higher product prices is, at a minimum, an arguable issue.

ABC, CBS, WTBS, and, most critically, the potential sponsors of the games were guaranteed time-slot exclusivity with respect to televised college football and its audiences. This guarantee initially helped maintain the value of the broadcast rights. Thus, while ABC did lose exclusivity to college football, its management apparently believed that the part of the loaf it did retain was better than none, as it was willing to share the telecasts with CBS. ABC was not in the best of all bargaining positions. Management wanted college football to diversify its fall-weekend programming package at a time when its network competitors, NBC and CBS, had the rights to the Sunday telecasts of professional (NFL) football. Subject only to the "winner's curse,"¹⁰⁹ CBS and Turner would be better off than before, having added what appeared to their managements to be an attractive programming option to offer potential sponsors. NBC and the fledgling cable sports network, ESPN, would seem to have been clear losers; more college football was being televised and they were left out in the cold.

The sixty-two member schools comprising the CFA recognized they would still be better off financially in 1982-83 if they did not have to share even soon-to-be-enhanced televised football revenues with the some ninety other Division I football-

107. The computations are rough approximations obtained as follows. The NCAA lists 148 institutions as sharing in football television revenues, *Institutions Sharing in Revenue, 1980*, NAT'L COLLEGIATE ATHLETIC ASS'N, Dec. 2, 1980, at 1-2. Adding \$3.2 million in radio and delayed television rights, *Radio-TV's Football Tab: \$493.7 Million*, *supra* note 98, at 38, to the \$31 million paid by ABC (Table 1) and dividing by 148 gives a figure of \$231,000. Similarly, adding $\$(3.5 + 10.6)/2 = \7.05 million to \$70.3 million and dividing by 148 gives a figure of \$523,000.

108. The figures on exposure are taken by adding the 19 exposures on WTBS to the data provided in Table 1. The 51-game and 76-game figures are from *The Growth of College Football*, SIDELINES, Oct. 1990, at 3.

109. Under "winner's curse," the winning bidder, by paying more than the second highest bidder, is "cursed" in the sense of having paid "too much," or more than the product is worth to anybody else in the market.

playing colleges of the NCAA. With the thought becoming father to the deed, the CFA signed a four-year, \$180 million contract with NBC that would assure each member at least \$1 million and two telecasts, thus doubling what the NCAA contract promised.¹¹⁰ Put otherwise, \$45 million a year divided sixty-two ways translates into a lot more money for the recipients than does \$70 million divided 150 ways. And the agreement would permit a school as many as seven appearances in two years.¹¹¹

The CFA-NBC agreement was in many ways comparable to the NCAA's contracts with ABC and CBS. The agreement called for fourteen national telecasts and thirty-two regional telecasts.¹¹² It also called for at least eleven Saturday-night telecasts in 1982 and six to twelve prime-time telecasts in subsequent seasons.¹¹³ But the agreement could only promise NBC the right of first refusal to over-the-air time-slot exclusivity for the televised home football games of a subset of Division I-A schools.¹¹⁴ Thus, while the agreement threatened to deny *NCAA Football* the home games of most of the major football powers, excepted from these were the home games of the Big Ten and Pacific Ten teams. In fact, ABC and CBS had escape clauses in their contracts with the NCAA precisely because of the threat.¹¹⁵ At a minimum, then, had the CFA-NBC contract been allowed to proceed, the NCAA would surely have been forced to accept severely reduced payments for its television program, one that would have featured the Big Ten and the Pacific Ten. The agreement also raised the specter of competing telecasts and competing sellers' cartels.

In point of fact, and although the NCAA was cut out of the dealing, the specter became a reality in 1984 with the Supreme Court's pro-CFA decision.¹¹⁶ The CFA television cartel went forward first with an over-the-air version of *NCAA Football*, repackaged as *CFA Football*. This package called for thirteen exposures of at least twenty games at a price of \$12 million, rather than \$45 million or even \$31 million.¹¹⁷ Now, however, ABC rather than NBC was the buyer. ABC had been willing to pay at least \$13 million for a limited number of games. The CFA, however, preferred to exchange a lower fee for increased television exposure. The CFA also sold a fifteen-exposure cable package to ESPN for \$9.3 million, which was more in line with the NCAA's earlier contract with WTBS.¹¹⁸ By 1984, almost 40% of the 84 million television households accessed cable.¹¹⁹ When the

110. *CFA Moves into NCAA Turf with Game Agreement*, BROADCASTING, Aug. 17, 1981, at 88.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

117. *Cross-Over Lawsuit Filed: Action Hopes to Force CFA Schools to Play on CBS TV*, SIDELINES, Sept. 1984, at 1-2 [hereinafter *Cross-Over Lawsuit Filed*].

118. See *supra* notes 101-04.

119. 1991 STATISTICAL ABSTRACT, *supra* note 102, at 556.

final bill was paid, ABC and ESPN contributed \$22.4 million to the CFA's coffers.¹²⁰

The NCAA's 1982-83 over-the-air and cable contracts gave the approximately 150 member schools an average of $\$70 \text{ million}/150 = \$467,000$ with such football-playing powers as Notre Dame and Michigan being well above the average, and such lesser lights as Toledo and Tennessee-Chattanooga being well below it. A school appearing in a game televised nationally by ABC received approximately \$500,000; a school appearing in a regional telecast received approximately \$400,000.¹²¹

The CFA, which originally planned to take \$5.3 million off the top of its 1984 contracts to give each of its now sixty-three members \$84,500, ended up giving each member \$100,000.¹²² In addition, a school appearing in a national game received about \$275,000; a school appearing in a regional game or an ESPN telecast received at least \$200,000.¹²³ As under the NCAA program, each school was permitted a limited number of appearances. Thus, initially at least, even the elite among the CFA powers were doubtless worse off under the new contract than under the old.

Left out of the CFA program, Turner Broadcasting settled for a twelve-game, \$6 million to \$8 million contract with the Southeastern Conference (SEC).¹²⁴ In this and other conference packages, schools that actually appeared in a televised game would ordinarily receive a double share in the final division of the spoils. Conference packages had been made feasible by NCAA. The CFA network contracts only gave the networks the right of first refusal to any CFA game; the rest were up for grabs and complete time-slot exclusivity was a thing of the past.¹²⁵

The more prominent football-playing schools within a conference would likely earn more from a conference package than would their less prominent brethren. Such differences would nonetheless be less pronounced than would be the case under an NCAA or CFA package, absent a conference sharing rule for broadcast rights. Thus, on average, the SEC's ten members reaped at least twice as much from selling their broadcast rights in 1984 as they had in 1983, earning approximately $\$100,000 + \{[\$22.4 - 6.3]/63 = \$256,000\}$ from the CFA's over-the-air and cable contracts, and another \$700,000 from the conference package.¹²⁶ As a group, the

120. *Cross-Over Lawsuit Filed*, *supra* note 117, at 1-3.

121. *Board of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1290 (W.D. Okla. 1982), *aff'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

122. *Cross-Over Lawsuit Filed*, *supra* note 117, at 2-3. The \$5.3 million figure is arrived at by taking 25% of the total of the \$12 million that was expected to be paid by ABC and the \$9.3 million that was expected to be paid by ESPN. As noted above, the actual total ended up being \$22.4 million.

123. *Id.*

124. *A New Spin on the Football*, BROADCASTING, Aug. 6, 1984, at 41; Press Release from Paul Kagan Associates, 1984 Pay TV Sports (Aug. 3, 1984) (on file with author).

125. *Cross-Over Lawsuit Filed*, *supra* note 117, at 1-3.

126. As noted in *supra* note 122 and accompanying text, each CFA school received \$100,000 from the pool, which reduces the initial total of \$22.4 million that remains to be divided up among the 63 members by \$6.3 million; or, the members would average $(\$16.1 \text{ million})/63 = \$256,000$ from the remainder. In addition, the SEC members would average about $(\$7 \text{ million})/10 = \$700,000$ from the

CFA members' total 1984 take of about \$34 million fell more than 10% short of their 1983 take of \$38 million to \$40 million.¹²⁷

The \$34 million is the sum of the CFA's ABC and ESPN contracts, the SEC-WTBS contract, and other agreements reached by individual conferences and teams with syndicators such as Raycom, Metrosports, and Katz Sports, plus the additional payments made to CFA teams that appeared in so-called crossover games such as Nebraska-UCLA, Notre Dame-Southern California, and Penn State-Iowa, that were televised as part of other individual conference packages, beyond the CFA package.

In the former regard, a syndicator acts as a broker that buys the secondary rights to a team's or a conference's games and then resells those rights to individual stations or networks. In the latter regard, for about \$10 million, CBS was able to assure itself of another fourteen-game package in its 1984 weekend schedule by gaining the right of first refusal to the Big Ten and Pacific Ten home games (at a cost of \$9.5 million).¹²⁸ These pacts gave those member schools an average of \$475,000.¹²⁹ For these schools, then, their newfound freedom from the NCAA's control was a financial push. An additional \$400,000 a game was paid a school participating in a CBS-televised crossover game in which the courts forced a reluctant CFA school to play against its scheduled Big Ten or Pacific Ten opponent.¹³⁰

The Big Ten, the Pacific Ten, and some smaller conferences comprised by teams outside the CFA also had syndicated packages that added both games and perhaps another \$10 million to the television pie.¹³¹ As a result of all of this, television viewers who in 1983 had available a total of seventy-six games, saw that total expanded to 206 games in 1984.¹³² Assuredly, because the preponderance of these games were televised regionally and because many were available only via cable, "dishless" viewers could only choose among a subset of the games. Nevertheless, by any criteria, viewer and consumer choice was greatly enhanced.

The increased output and the inability to guarantee time-slot exclusivity for the telecasts meant that the buyers would be paying about \$55 million, as opposed to the previous \$70 million.¹³³ The sixty-three members of the CFA would be dividing \$34 million among themselves, rather than the \$45 million promised in the 1982-83 contract with NBC.¹³⁴ The networks televising the games also began to feel the effects of competing games and potentially fractionated audiences through their advertising rates. Now ABC and CBS would only be able to charge sponsors

WTBS contract, the \$7 million figure being the midpoint of the estimated range for that contract.

127. *TV Revenue May Be More Than Expected: Figures Could Match \$34.9 Million of 1982*, SIDELINES, Nov. 1984, at 1 [hereinafter *TV Revenue*]. This article also asserts that CFA members received \$34.9 million from the 1982 NCAA packages. *Id.*

128. *A New Spin on the Football*, *supra* note 124, at 41.

129. *Id.* at 15. With 20 Big Ten and Pacific Ten teams, \$9.5 million/20 = \$475,000.

130. *TV Revenue*, *supra* note 127, at 1.

131. *A New Spin on the Football*, *supra* note 124, at 41.

132. *The Growth of College Football*, *supra* note 108, at 3.

133. *Id.*

134. *A New Spin on the Football*, *supra* note 124, at 41.

\$27,500 for a thirty-second slot, rather than the previous \$60,000.¹³⁵ Exclusivity really is a valued property, and, in what may have turned out to be an unwelcome surprise to some of the CFA membership, competition really does work. When an insufficient number of new buyers enters a market, an upward shift in supply effected by the entrance of new seller cartels into that market, combined with a downward shift in the extant individual buyers' demand curves effected by the elimination of exclusivity, will result in lower unit prices.

Confronted with the expanded choices in televised games, Division I-A fans responded with a 1% increase in attendance, from 25.4 million in 1983, to 25.8 million in 1984.¹³⁶ Indeed, attendance at all college football games, including those of the "minor players," increased between 1983 and 1984 from 36.3 million to 36.65 million, an all-time high that surpassed the 36.5-million figure of 1982 and one that has not since been surpassed!¹³⁷ And, to put these figures in better perspective, between 1970 and 1975, attendance increased from 29.5 million to 31.7 million, with a further increase to 35.6 million occurring by 1980.¹³⁸

While the NCAA might have argued that the promotional effect of the limited television exposure of *NCAA Football* was to increase live football attendance during the 1970s, relaxing the controls in 1984 did nothing to reverse the trend.

Any preliminary conclusions to be drawn from all of this would be extremely tenuous because in 1984 the principal protagonists had precious little time to organize their efforts. The Supreme Court handed down its decision in late June, and "fall" football seasons started around Labor Day. A truer test of the initial effects of removing the controls came with the 1985 and 1986 contracts.

In 1985, fifty-two CFA members agreed to participate in two-year agreements the organization signed with ABC and ESPN that were worth an average of \$27.5 million per season.¹³⁹ This was approximately \$5 million more than the 1984 contracts were worth to the sixty-three participating schools. The eight schools of the Atlantic Coast Conference (ACC), together with the University of Miami, Army, and Navy, who had participated in the 1984 agreement, opted to go it on their own.¹⁴⁰ In the new agreement, the participation pool increased to an annual average of \$135,000 per school.¹⁴¹ The restrictions imposed on individual schools' appearances included having ABC provide two appearances per season to teams from the Big Eight, the SEC, the Southwest Conference (SWC), the Western

135. *Id.*

136. *Attendance Shows Little Change*, SIDELINES, Sept. 1989, at 11.

137. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 252 (1993) [hereinafter 1993 STATISTICAL ABSTRACT]; U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 229 (1986) [hereinafter 1986 STATISTICAL ABSTRACT].

138. 1986 STATISTICAL ABSTRACT, *supra* note 137, at 229.

139. *52 Schools Agree to Join TV Package*, SIDELINES, Feb. 1985, at 2; *TV Pacts Worth More Per School: ABC, ESPN Sign 2-Year Agreements*, SIDELINES, April 1985, at 1 [hereinafter *TV Pacts Worth More Per School*].

140. *52 Schools Agree to Join TV Package*, *supra* note 139, at 2.

141. *TV Pacts Worth More Per School*, *supra* note 139, at 1.

Athletic Conference (WAC), and Northern and Southern Independents.¹⁴² Each school's appearances on ABC and ESPN were limited to four per season and two "wild card" appearances on ABC.¹⁴³

Including payments for other conference packages, syndication, and pay television, it was estimated that total television revenues received by the fifty-two participants would average about \$36.5 million a year, compared to the \$34 million divided among sixty-three schools in 1984.¹⁴⁴ This is an increase of 12.8% in the average rights payments to each of the fifty-two 1985-86 participants, which reached about \$700,000 a year.

In 1984, the eight ACC schools sat squarely on the left side of that year's average; each received the minimum participation fee of \$100,000. By opting out of the agreement and joining the Big Ten and Pacific Ten on CBS with their own \$3.5 million two-year deal, the ACC schools more than doubled their previous receipts, averaging \$220,000 a year.¹⁴⁵ This figure was dwarfed by the Big Ten schools, which are estimated to have averaged \$900,000 a year from that conference's packages with CBS and TBS.¹⁴⁶ The Pacific Ten schools also dwarfed the ACC schools, averaging about \$700,000 a year from the conference's CBS and TBS packages.¹⁴⁷

The University of Miami was also a big winner, signing a two-year deal with CBS under which for about \$2 million the network would televise three or four of Miami's 1985-86 home games.¹⁴⁸ The SEC teams would seem to have taken the biggest hit, with their average payments from the conference package with WTBS falling to about \$250,000.¹⁴⁹ Alone among these conference schools, however, the SEC schools also participated in the CFA's packages, so that their annual payments again averaged in the neighborhood of \$1 million.¹⁵⁰ Pulling this together, broadcasters would pay an annual total of at least $(\$36.5 + 1.75 + 7.0 + 9.0 + 1) = \55.25 million to the principal players. This figure was only slightly more than they paid in 1984 and still considerably less than they paid the NCAA in 1983 for the rights to college television football.¹⁵¹ With the erosion of time-slot exclusivity and the increase in the viewers' options, thirty-second spots on ABC's *CFA Football* were priced at \$45,000 and \$42,000 in 1985 and 1986, respectively, down from \$60,000 in 1982-83.¹⁵² In 1986, CBS paid \$575,000 to televise a Big Ten Michigan-Iowa game that cost \$1.2 million to televise in 1983.¹⁵³

142. *Id.*

143. *Id.*

144. *Id.*

145. *Football Rights in 1985 Hit \$530 Million*, BROADCASTING, Aug. 5, 1985, at 33.

146. *Id.*

147. *Id.* at 34.

148. *Colleges Rethinking Football Packages*, BROADCASTING, Feb. 4, 1985, at 37.

149. *Id.*

150. *Id.*

151. *See supra* tbl. 1.

152. *A New Spin on the Football*, *supra* note 124, at 41; *Football Rights in 1985 Hit \$530 Million*, *supra* note 145, at 33.

153. Hal Lancaster, *Colleges Scrambling to Avoid Loss In a Glutted TV Football Market*, WALL ST.

In 1984, there were close to sixty exposures on ABC, CBS, WTBS, and ESPN, and a total of about 206 games in all, or almost one out of every three games played was televised.¹⁵⁴ By 1986, the number of exposures approached ninety, principally as a result of a three-package, forty-game offering that WTBS either broadcast or syndicated.¹⁵⁵ Cable's USA network also got in on the act, carrying its own twelve-game package.¹⁵⁶ The total number of televised games, however, actually fell to about 150 in 1985 and to about 100 in 1986.¹⁵⁷ The narrowing of the gap between the number of exposures and the number of games telecast was caused by some double-dipping wherein the same game might be televised over more than one outlet. Despite the increased number of exposures and the fact that 45.6% of all households now had access to cable, total attendance at Division I-A football games in 1986 was virtually identical to that in 1984, although the average attendance per game dipped by .5%.¹⁵⁸ Attendance at all football games dropped by 340,000 between the 1984 peak year and 1985 (.9%), recovering 76,000 (.2%) of the loss in 1986.¹⁵⁹ These data are insufficient to lead to the conclusion that the spread of television football was starting to take its toll on live attendance, but the colleges saw in them an ominous warning signal.

It seems apparent, then, that the initial effects of the elimination of the NCAA's cartel-imposed controls and the price fix were exactly what economic theory would have predicted: even with the emergence of several smaller sellers' cartels in the form of individual conferences, rivalry among them would result in buyers paying a lower price for the product, college football broadcast rights, for what might well be a greater amount of product, college football exposures. Some sellers, notably those football-playing schools that were not football powers belonging to either the CFA, the Big Ten, or the Pacific Ten, suffered more short-term financial losses from the television cartel's breakup than did the major powers. But if the latter schools anticipated enormous gains in football revenues as a result of not having to share the football-generated wealth with the former schools, the early signs were that they would be in for a major disappointment. The historic growth in football television revenues had abated. Unfortunately for both the sellers and the buyers,

J., Sept. 23, 1986, at 37 (based on information provided by Michigan's Athletic Director, Don Canham).

154. The "close to 60" figure comes from adding a WTBS 12-game package and a 15-game ESPN package, *A New Spin on the Football*, *supra* note 124, at 41, to the 13 exposures in the CFA-ABC contract, *Cross-Over Lawsuit Filed*, *supra* note 117, at 1, and about 15 exposures in the CBS contract with the Big Ten and Pacific Ten, *Football Rights in 1985 Hit \$530 Million*, *supra* note 145, at 33, and then allowing for the fact these are the lower bounds on the actual number of exposures. The total number of telecasts is taken from *The Growth of College Football*, *supra* note 108, at 3. There were 606 games played in 1984. *Attendance Shows Little Change*, *supra* note 136, at 11.

155. *The Growth of College Football*, *supra* note 108, at 3; *Football Rights Hit \$570 Million in 1986*, BROADCASTING, Aug. 4, 1986, at 56-58.

156. *Football Rights in 1985 Hit \$530 Million*, *supra* note 145, at 33; *Football Rights Hit \$570 Million in 1986*, *supra* note 155, at 56-58.

157. *The Growth of College Football*, *supra* note 108, at 3.

158. 1991 STATISTICAL ABSTRACT, *supra* note 102, at 556; *Attendance Shows Little Change*, *supra* note 136, at 11.

159. 1993 STATISTICAL ABSTRACT, *supra* note 137, at 252.

the market was working rather well. Only the final consumer seemed to be benefiting.

V. Other Litigation

It was not long after the Supreme Court's decision in the *NCAA* case that others got involved in litigating about the propriety of plans to televise college football.

A. *UCLA v. Nebraska and USC v. Notre Dame*

The University of Southern California, the University of California, the Pacific Ten Conference, and the Big Ten Conference brought an action against ABC, the College Football Association, the University of Nebraska, and Notre Dame alleging that the agreement entered into by the College Football Association members covering the televising of their games, particularly with reference to "cross-over"¹⁶⁰ games, violated the antitrust laws and constituted a group boycott as well as price fixing.¹⁶¹ The plaintiffs sought a mandatory injunction to require the defendants to consent to the televising of the Nebraska-UCLA game and the Notre Dame-USC game.¹⁶²

The trial court granted a preliminary injunction restraining ABC and the CFA from interfering with the televising of these games and the defendants appealed.¹⁶³ The circuit court affirmed.¹⁶⁴ The Ninth Circuit majority determined that the plaintiffs had shown a likelihood of success on the merits in light of the Supreme Court's decision in *NCAA*.¹⁶⁵ The circuit court majority noted that the CFA and ABC had none of the accoutrements relating to the staging of the college football game that was possessed by the NCAA.¹⁶⁶ The court suggested that the ABC-CFA contract appeared to constitute "classic horizontal restraints unadorned by any organic relationship to the character and quality of the product."¹⁶⁷ The opinion also indicated that the features of the ABC-CFA contract had output limitation effects.¹⁶⁸

While paying lip service to *Broadcast Music, Inc. v. CBS*,¹⁶⁹ the court found no distinction between the NCAA plan condemned by the U.S. Supreme Court and the ABC-CFA plan. The court affirmed the issuance of the preliminary injunction, and the games proceeded and were televised according to the plaintiffs' desires.¹⁷⁰

160. A cross-over game is one in which a member of the CFA is playing a team not affiliated with the CFA television plan. Nebraska and Notre Dame were subscribers to the plan and UCLA and USC were not.

161. *Regents of the Univ. of Cal. v. American Broadcasting Cos.*, 747 F.2d 511 (9th Cir. 1984).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 516.

166. *Id.* at 517.

167. *Id.*

168. *Id.*

169. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

170. *American Broadcasting*, 747 F.2d at 522.

The dissent noted that there were significant procompetitive aspects to the ABC-CFA plan.¹⁷¹ Judge Beezer likened the ABC-CFA restrictions to the vertically imposed territorial restrictions considered by the Supreme Court in *Continental TV, Inc. v. GTE Sylvania, Inc.*¹⁷² and commended them as procompetitive and not in violation of section 1 of the Sherman Act.¹⁷³ The dissent also discussed similarities between the CFA-ABC pact and *Broadcast Music*.¹⁷⁴ Interestingly, neither side made a particular mention of the fact that the CFA pact was not exclusive in the same sense as had been the NCAA arrangement. In the CFA arrangement, a team could join the CFA or not, participate in the CFA television pact or not, and even if a participant, still could sell its rights to televise its college football games in time spots other than those occupied by the CFA contract without fear of sanction or retribution. This most significant distinction between the CFA pact and the NCAA arrangement was apparently overlooked. The antitrust consequences of such a distinction, however, are enormous.

B. *AITTS v. CFA*

Litigation in this area was also initiated by the Association of Independent Television Stations and Sports View Company in two actions filed in the Western District of Oklahoma against the College Football Association, the Big Eight Conference, American Broadcasting Company, ABC Sports and Entertainment, and Sports Programming Network, Inc.¹⁷⁵ These two cases were consolidated, and, once again, the Honorable Juan Burciaga was assigned to preside. The basic thrust of the complaints of the plaintiffs in these two consolidated cases was the same as in *University of California*. In essence, the plaintiffs contended that the CFA pact suffered from the same infirmities as the NCAA plan, and, therefore, the plaintiffs were entitled to relief which constituted treble damages, injunctive relief, and attorneys' fees. The plaintiffs contended that the CFA arrangement violated sections 1 and 2 of the Sherman Act and constituted tortious interference with contractual and business relations.¹⁷⁶

Judge Burciaga, in a forty-eight-page opinion, denied Plaintiffs' Motions for Summary Judgment and discussed the CFA Plan in great detail. He compared it to the NCAA plan. In essence, Judge Burciaga held that the CFA plan did not on its face have the same impediments as the NCAA plan and summary judgment should not be granted.¹⁷⁷ The tenor of his lengthy opinion and the critical analysis he

171. *Id.* at 526 (Beezer, J., dissenting).

172. 433 U.S. 36 (1977).

173. *American Broadcasting*, 747 F.2d at 526 (Beezer, J., dissenting).

174. *Id.*

175. Those two actions are: (1) *Association of Indep. Television Stations, Inc. v. College Football Ass'n*, CIV. No. 84-2283-JB (W.D. Okla. filed 1984); and (2) *Sports View Co. v. College Football Ass'n*, CIV. No. 84-2367-JB (W.D. Okla. filed Sept. 21, 1984).

176. *Association of Indep. TV v. College Football Ass'n*, 637 F. Supp. 1289, 1291 (W.D. Okla. 1986).

177. *Id.* at 1305-08.

carried out so discouraged the plaintiffs of ever having any success in pursuing their claims that the cases were abandoned after this decision.

It is not an overstatement to suggest that Judge Burciaga approved the CFA plan and, in essence, said: "This is what I was referring to as being an appropriate plan when I disapproved the NCAA plan." Basically, from 1986 until 1990, the CFA television plan proceeded without successful interruption.

C. F.T.C. v. C.F.A.

In September 1990, the Federal Trade Commission brought a complaint against the College Football Association and Capital Cities/ABC, Inc. alleging violation of section 5 of the Federal Trade Commission Act.¹⁷⁸ The complaint alleged that the College Football Association agreement violated section 5 of the Federal Trade Commission Act in that it restricted competition in the marketing of college football telecasts. The complaint further charged that the competition among schools in the marketing of college football telecasts had been impeded as had competition among telecasters. Finally, the complaint alleged that consumers had been deprived of the selection of college football games that would have otherwise been available in a competitive environment. With the sounds of "saturation" still ringing in the colleges' ears, here was the Federal Trade Commission contending that the CFA pact was limiting output.

Although it took almost four years, the Federal Trade Commission finally dismissed the complaint with prejudice as to the College Football Association.¹⁷⁹ The complaint against Capital Cities/ABC was also dismissed without prejudice by the Commission.¹⁸⁰ In essence, the Commission found that it lacked jurisdiction over the College Football Association.¹⁸¹ The Commission affirmed the ruling of the administrative law judge in dismissing the complaint because the College Football Association was a nonprofit organization and, as such, was exempt from Federal Trade Commission regulation.¹⁸²

D. Law v. NCAA

A byproduct of the NCAA decision is the *Law v. NCAA*¹⁸³ case. Here, the Restricted Earnings Coach Rule was attacked by several coaches as being violative of the antitrust laws in that it constituted price fixing.¹⁸⁴ The NCAA had required in all Division I sports other than football that each institution designate one of its coaches as a restricted earnings coach. This coach could not earn more than \$16,000 during the year.¹⁸⁵ This rule was challenged as being violative of the

178. College Football Ass'n, No. 9242 (Fed. Trade Comm'n Sept. 5, 1990) (initiation).

179. College Football Ass'n, No. 9242 (Fed. Trade Comm'n June 16, 1994) (order dismissing complaint).

180. *Id.*

181. *Id.*

182. *Id.*

183. 901 F. Supp. 1394 (D. Kan. 1995).

184. *Id.* at 1398.

185. *Id.* at 1400.

Sherman Act, as interpreted by the NCAA.¹⁸⁶ The court found that a per se approach was not appropriate in dealing with the NCAA's role in regulating college athletics.¹⁸⁷

For now, at least, the antitrust challenges seem to be at an end. The framework established by the College Football Association and mimicked by the conferences seems to be judicially recognized as free from competitive disadvantage. If ever tested under the rule of reason, it is relatively safe to predict that a television plan similar to the College Football Association Plan with its lack of exclusivity will be found to be more procompetitive than anticompetitive.

VI. Current Conference Packages and Realignment

Between 1980 and 1983, the number of television households grew by 9.2%; the number of cable households grew by 86.7%.¹⁸⁸ In the subsequent three-year period from 1983 to 1986, the respective growth rates were 3.6% and 39.3%.¹⁸⁹ On the one hand, these statistics imply that any increase in the over-the-air broadcasters' demand for the rights to college television football subsequent to NCAA would be minor when compared with the comparable pre-NCAA period. The effects of a slowdown in the growth of the potential audience could only be exacerbated by the elimination of exclusivity in the provision of the product. On the other hand, the statistics also imply that the demand for those rights by cable systems would continue to increase. Thus, by the time 1987 rolled around, with the exception of the dedicated football fan, all of the various parties with an interest in the telecasting of collegiate football were taking a second look at what NCAA and the greater accessibility of cable systems had wrought.

Thanks to: (1) CFA contracts with ABC and ESPN; (2) the Big Ten-Pacific Ten contract with CBS (up to twenty-nine appearances) and the network's supplementary contract with the ACC (up to seven appearances), the University of Miami contract (for one or two games), and Army-Navy contract for their game; (3) WTBS contracts to televise eleven early afternoon SEC and Big Ten games in the Southeast and Midwest, respectively, and its supplementary contract with the Big Ten, the Pacific Ten, and the ACC for another dozen or so prime-time games; and (4) syndicators such as: (i) Raycom, which had packages of eleven games each for the Big Eight and the SWC to be televised in their respective regions of interest, (ii) TEN, which had a twelve-game package of Boston College, Pittsburgh, and Syracuse games to distribute to the Northeast, (iii) Summit Sports, which packaged eleven military academy games, (iv) Jefferson Pilot, with a package of at least

186. *Id.* at 1398.

187. *Id.* at 1404. After employing a rule of reason analysis, the court determined that the restricted earnings coach rule to be violative of the Sherman Act by prohibiting the free operation of a market responsive to demand. *Id.* at 1405. The court determined that the NCAA had not met its burden to establish the pro competitive aspect of this rule, and therefore, granted plaintiff's motion for summary judgment on the issue of liability. *Id.* at 1410.

188. 1991 STATISTICAL ABSTRACT, *supra* note 102, at 556.

189. *Id.*

eleven ACC games, and (v) the USA Network, which would pick up selected games from the Raycom, TEN, and Jefferson Pilot packages, on a typical fall Saturday afternoon, a dedicated college football fan living in the eastern time zone could start watching the games over lunch and continue to do so, with minimal breaks, through and well beyond dinner. Only the range of starting and ending times might have differed for fans in the Western Time Zone. Even Public Broadcasting got into the act with a package of Ivy League games. Further, pay-per-view television had become an increasingly feasible option for making individual games available in particular communities, especially in college towns.

If, however, the broadcasters and the schools were starting to show somewhat less enthusiasm for the disappearance of the controls on college football telecasts, there were good reasons. The broadcasters discovered, as they must all along have anticipated, that due to: (1) the fractionating of audiences among games that no longer had time-slot exclusivity; (2) the fact that even dedicated fans were selective in choosing among the various options offered to them; and (3) the fact that, thanks to the "remote," a fan could easily switch from one televised game to another during a timeout and a commercial, games were less saleable to sponsors. As a result, broadcasters were losing money on their college football agreements.¹⁹⁰

The schools involved in conference packages discovered that by offering their games in more than one package, not only did they risk overexposure and its deleterious effects on the value of their broadcast rights, they also risked alienating season-ticket holders who did not appreciate last-minute changes in starting times at a telecaster's whim, nor did they appreciate being forced to sit through lengthy and unnecessary timeouts imposed on them by television sponsors. Under these circumstances, athletic directors suspected season-ticket holders were beginning to have second thoughts about making a commitment to pay \$15-\$20 to see a game that, if it turned out to be an "important" game, would in all likelihood be available for viewing, free of charge, in the friendly confines of one's own home.

In this setting, even before the 1986 season got under way, the CFA signed a pair of right-of-first-refusal four-year agreements, to begin in 1987, with CBS, which replaced ABC as the CFA's over-the-air outlet, and ESPN, which continued as its cable outlet.¹⁹¹ The agreements were worth about \$130 million for the four years, or an average of \$32.5 million a year. All sixty-three CFA members agreed to participate in the agreements. This meant that each school would receive an estimated \$125,000 annually from the participation pool. The remaining \$24.6 million would leave an average of \$390,000 for television appearances, averaged over the sixty-three schools. Thus, the contract would provide an overall annual average of about \$515,000 per team. This figure would rise slightly if any member school was on NCAA probation for a serious violation, one that the NCAA had determined merited a television sanction that banned the school from appearing in a televised game.¹⁹² Even neglecting the effects of inflation on the value of the

190. *Football Rights Hold Line at \$570 Million*, BROADCASTING, Aug. 3, 1987, at 40.

191. *CFA Review of ESPN and CBS Agreement*, SIDELINES, Sept. 1987, at 10.

192. In a subsequent ruling in October 1984, Judge Burciaga in effect gave the NCAA carte blanche

dollar, network television revenues once again failed to grow. Indeed, the CFA now guaranteed its members that these revenues would not grow, at least not through the CFA, for at least another five years.

In order to simply maintain the participants' average payoff, the CFA had to expand the number of exposures. In 1987, CBS was to televise an average of fifteen to seventeen mid-afternoon (eastern time) games on sixteen dates and one prime-time game each season.¹⁹³ ESPN was to televise twelve late-afternoon games that would overlap the CBS games, as well as fifteen prime-time games each season.¹⁹⁴ Time-slot exclusivity, even within the CFA package, was starting to erode. CBS essentially picked up ABC's tab and would be paying \$15 million a year, a modest \$2 million increase.¹⁹⁵ ESPN increased its total commitment to \$69.5 million, with planned increases of about \$1 million a year from the initial 1987 payment of \$15.75 million, a \$3.75 million increase over 1986.¹⁹⁶ ESPN was also scheduled to televise an additional eleven games late Saturday evenings and on Thursday evenings in packages with less prominent football-playing schools.

After bidding on and failing to get the CFA contract, ABC picked up the Big Ten-Pacific Ten contract that formerly belonged to CBS.¹⁹⁷ ABC and the conferences agreed to a four-year deal that would initially pay them \$12 million for their rights, which was exactly what CBS had paid in 1986 for right-of-first-refusal packages that included the ACC.¹⁹⁸ The 1987 rates for a thirty-second spot on ABC or CBS were in the neighborhood of \$38,000, continuing their downhill slide from the 1982-83 figure of \$60,000.¹⁹⁹ The effects of competing telecasts and the proliferation of games in general continued to take its toll.

Although WTBS continued with its ten- to twelve-game SEC package, it had lost an acknowledged "millions of dollars" on its three 1986 packages.²⁰⁰ Because of these losses, WTBS abandoned its other two packages, both of which involved the

to apply television sanctions to schools that it found guilty of having committed non-television-related violations. Four schools that had been so sanctioned by the NCAA in 1984, Arizona, Kansas, Clemson, and Mississippi, chose to observe the bans placed on them in the 1984 season, prior to the judge's ruling, and thus became eligible to participate in 1985 television packages; Southern California, Wisconsin, and Illinois chose not to observe the NCAA prohibitions placed on them, as a result of which they became ineligible to participate in the 1985 Pacific Ten and Big Ten packages. The University of Florida was banned from participating in the CFA's 1985 package. *4 Teams Face Ban From TV During 1985, SIDELINES*, Dec. 1984, at 3.

193. *CFA Review of ESPN and CBS Agreement*, *supra* note 191, at 10.

194. *Id.*

195. *Football Rights Hold Line at \$570 Million*, *supra* note 190, at 39-40.

196. *Id.*

197. *Id.*

198. *Id.* at 39. In the spring of 1989, these contracts, which included rights to the Rose Bowl, were extended through the 1996-97 season. *Broadcast, Cable Battle for the Ball*, BROADCASTING, Aug. 14, 1989, at 40. To put regular-season rights and Bowl-game rights into perspective, "in the second year of a nine-year deal with the Pac Ten and Big Ten conferences, ABC will pay \$13 million for a package of 23 to 24 regular season games and approximately \$10 million for rights to the Rose Bowl." *Id.*

199. *Football Rights Hold Line at \$570 Million*, *supra* note 190, at 40; *Radio-TV's Football Tab: \$493.7 Million*, *supra* note 98, at 38.

200. *Football Rights Hold Line at \$570 Million*, *supra* note 190, at 40.

Big Ten. The USA network also decided to drop college football from its schedule.²⁰¹ The Pacific Ten, the Big Eight, and Penn State decided against syndicating games. PBS viewers, however, could once again enjoy Ivy League football, Raycom continued to package SWC games, Jefferson Pilot continued to package ACC games, and with RCM Inc. packaging Big Ten games, it was estimated that the average Big Ten school would increase its television take from \$900,000 to \$1.1 million.²⁰²

In 1987, about ninety games, one out of every seven played, were telecast nationally on ABC, CBS, ESPN, and WTBS alone;²⁰³ additional games were televised in different parts of the country through syndication. Football fans did not exactly stay away from the stadia in droves: attendance at the college football games increased by 70,000 (.2%).²⁰⁴ Attendance at Division I-A games did decrease by 1.2%; but ten fewer games were played in 1987 than in 1986, and the average attendance per game actually increased by .4%.²⁰⁵ Under the onslaught of competition from a wide variety of televised "big time" football alternatives, attendance at non-Division I-A games, which the NCAA had argued was a particular source of concern that it was seeking to protect through its controls, increased by 3.7%.²⁰⁶

Moreover, and although the supporting data are unavailable, we harbor the strong suspicion that average ticket prices were on a monotonic long-term upward trend that continues to this day. The elimination of the NCAA's television controls may well have adversely affected its members' total television receipts, the average receipts of schools whose teams would ordinarily not be ranked in the Top 25, and the network profits realized from televising college football. But for the fans the results would seem to have been completely on the plus side of the ledger.

Because of the four-year network contracts, the only differences between 1987 and the 1988-90 years arose from changes in the schools' and syndicators' views towards syndicating packages of games and, most particularly, the appearance of SportsChannel (SCA, backed by NBC and Cablevision) and Prime Sports Network (PSN), with which it merged under the Liberty Sports umbrella towards the end of 1993. These so-called "premium" cable outlets sought college football packages, often combining with other broadcasters and/or syndicators in the packaging process in order to make such packages economically viable. In 1988, for example, SCA (New York) carried eight games of a Jefferson Pilot Eastern Independents syndicated package and four games from Raycom's SWC package.²⁰⁷ On the West Coast, PSN offered a package of Los Angeles football powers' games (Southern

201. *Id.*

202. *Id.* at 42.

203. *Id.* at 39-42.

204. 1991 STATISTICAL ABSTRACT, *supra* note 102, at 556.

205. *Attendance Shows Little Change*, *supra* note 136, at 11.

206. Subtracting Division IA attendance figures, *Attendance Shows Little Change*, *supra* note 136, at 11, from total attendance, 1993 STATISTICAL ABSTRACT, *supra* note 137, at 252, yields non-Division IA attendance figures of 10,596,000 and 10,991,000 for 1986 and 1987, respectively.

207. *Football Rights Pass \$600 Million*, BROADCASTING, Aug. 15, 1988, at 44.

California and UCLA), along with games of the University of Hawaii, San Diego State, and the Big West Conference. Florida's Sunshine Network carried the Jefferson Pilot packages of Eastern Independents and the ACC and many other games, including twelve from Raycom's Big Ten package. Both Home Team Sports (HTS) and Madison Square Garden (MSG) also carried Raycom's Big Ten package. By 1989, competition for the secondary rights to the games reached the point that the Prime-ESPN venture signed a six-year, \$66-million contract with the Pacific Ten.²⁰⁸ With this contract in its stable, in 1990, PSN could offer thirty-three live telecasts of Pacific Ten, SWC, and Big Eight games, in particular. MSG offered thirteen live telecasts of Pacific Ten and SWC games. SCA was offering its viewers principally regional favorites, featuring Notre Dame nationally, as well as Florida, Miami, Syracuse, the Big Ten, and the Big West.²⁰⁹ With it all, in news that was by now old hat, attendance remained stable, averaging 36.2 million for the 1988-90 period, despite a 2.4% dip in 1988 and again increasing to 36.6 million in 1991.²¹⁰ Athletic Directors would not seem to have taken too seriously their previously professed concerns about the impact of television on attendance and gate receipts. Between 1983 and 1993, total capacity at the stadia of 108 Division I-A schools increased by 264,000 or 4.9%.²¹¹

Over and above what was taking place in regards to syndication and the development of premium-channel sports networks, 1990 was a watershed year for college football television for two not-unrelated reasons. First, perennial football power and CFA member Notre Dame, the largest television draw and the one school with a national following, signed a five-year, \$30 million agreement with NBC that gave this heretofore college football-starved network exclusive rights to its home games.²¹² Second, in June, it was agreed that the powerful Eastern independent, Penn State, would join the Big Ten, and a month later a long-time SWC member, the University of Arkansas, agreed to join the SEC, where it would soon be able to welcome a Southern independent, the University of South Carolina, as the SEC's twelfth and newest member.²¹³ The latter couplings provide an unmistakable portent for the future: conference loyalties and/or tradition taking a back seat to the attraction of the television dollar, as conference television cartels form and conferences accordingly realign. The express purpose of these cartels is to offer broadcasters a supply of attractive sports television packages, primarily in basketball and football, that at a minimum can be regionally syndicated to a large number of television households that constitute a cartel's constituency. The former development offered an unmistakable signal that some schools and some conferences, besides Notre Dame, the Big Ten, and the Pacific Ten, might in the future compete on their own as sellers in the college football television market.

208. *Broadcast, Cable Battle for the Ball*, *supra* note 198, at 41.

209. *Id.* at 42.

210. 1993 STATISTICAL ABSTRACT, *supra* note 137, at 252.

211. Susan Hiller, *Increasing Capacity, A Look at Division I-A Football Stadiums*, *SIDELINES*, Mar. 1994, at 8.

212. *Football '90: More Players Carry \$1 Billion Ball*, *BROADCASTING*, Aug. 13, 1990, at 34.

213. *Id.*

Notre Dame's deal was announced shortly after the CFA negotiated a 50% increase in its payments from ESPN and ABC, which replaced CBS as the CFA's over-the-air partner in entering into a five-year agreement valued at \$570 million per season.²¹⁴ This was the first really substantive increase in rights revenues secured by the CFA. To put this increase in perspective, however, the National Football League's new network contracts that became effective in 1990 raised the league's annual rights revenues by 73%.²¹⁵ And from 1987 to 1990, the number of television homes increased by 5.8%, with the number of cable households increasing by 23.8%.²¹⁶ To put the duo of contracts in further perspective from a somewhat different angle, ESPN was 80% owned by ABC's parent corporation, Capital Cities/ABC.²¹⁷ Capital Cities was, therefore, acquiring the exclusive rights to CFA football. And to put these contracts in yet further perspective, as noted above, ABC had already locked up the Big Ten-Pacific Ten schools in an agreement that would pay them an average of \$17 million a year through 1996. Capital Cities and ABC, therefore, had managed to once again acquire the exclusive over-the-air national network rights to all major college football. Furthermore, Capital Cities managed to accomplish the latter for a total payment of a little less than \$60 million — or almost exactly what CBS and ABC had agreed would be the "minimum aggregate fee" in the 1982 agreements with the NCAA!²¹⁸ Assuredly, the approximately \$20 million that ESPN would pay the CFA, Big Ten, and Pacific Ten teams was a little more than twice what the NCAA's 1982-83 contract with WTBS was worth annually. But that contract only called for nineteen exposures a year, spread over 150 schools; ESPN, by contrast, would be televising forty-eight games to be chosen from an eighty-team football elite, with the potential to reach 53% more households than did cable in 1983.²¹⁹ Thus, the sale of broadcast rights was doubtless becoming more profitable to the schools than it had been, but whether it was more profitable to the majority of football-playing schools than it once had been, including the majority of the eighty-three, is not self-evident from the aggregate data.

An additional sobering consideration is that once the Notre Dame agreement became a reality, the CFA had to accept a \$50 million reduction for a five-year package that would no longer include the Fighting Irish.²²⁰ As a result, in 1991, the remaining sixty-two CFA participants would divide \$60 million between them, giving the members an average payment of about \$1 million, with every member guaranteed at least \$225,000.²²¹ Layered on top of all of this were the revenues

214. *CFA, ABC & ESPN Set For 1991 Season*, SIDELINES, Mar. 1990, at 3.

215. *Football '90: More Players Carry \$1 Billion Ball*, *supra* note 212, at 34.

216. 1991 STATISTICAL ABSTRACT, *supra* note 102, at 556.

217. Richard Sandomis, *FTC Loses a Round on Televised Football*, N.Y. TIMES, Aug. 7, 1991, at B9.

218. *See supra* tbl. 1.

219. 1991 STATISTICAL ABSTRACT, *supra* note 102, at 556; 1986 STATISTICAL ABSTRACT, *supra* note 141, at 229.

220. *College Football and Television*, SIDELINES, Sept. 1993, at 4.

221. *Id.*

generated through the sale of syndication rights, primarily through conference packages. Thus, a school such as the SEC's University of Mississippi, which in 1983 earned \$743,000 in rights revenues, earned about \$1.9 million for those rights in 1994, a 156% increase.²²² Ole Miss historically fields good football teams that threaten to appear in the Top 25, but that rarely make good on the threat. Its experience would, therefore, seem to offer a reasonable exemplar of the average school in a football-oriented conference.

In 1988-89, Notre Dame received \$1.53 million from the CFA contracts.²²³ Under the NBC contract, Notre Dame and its opponents would divide \$1.2 million a game for each of five home games. Notre Dame was thus guaranteed \$3 million a year for the broadcast rights to its home football telecasts alone. Given a schedule that usually includes visits to one or more of Michigan, Michigan State, and Purdue of the Big Ten, Southern California of the Pacific Ten, and a University of Miami, Tennessee, or Florida State, in 1990, the prospects of Notre Dame's earning perhaps as much as an additional \$1 million through cross-over telecasts must have appeared eminently bright. In 1992, however, the ratings for NBC's telecasts of Notre Dame games were described as "unusually weak," with the result that the network aspired to selling its 1993 thirty-second spots for \$50,000.²²⁴ In 1992, ABC sold its spots for about \$65,000, which was just about what it charged in 1983.²²⁵

Even in 1990, it seemed doubtful that any school other than Notre Dame could successfully sustain a one-school package of its games. In 1995, as the football team's fortunes continue to slide, carrying with them the television ratings of its games, it seems doubtful that even Notre Dame can continue to sustain a one-school package of its games. The more relevant issue is what the realigned and resultingly stronger conferences will be able to achieve by way of rights revenues for their members, especially since the number of television homes was virtually unchanged from 1990 to 1993, the most recent year for which data are available, while the number of cable television homes has increased by less than 9% during this time.²²⁶

The SEC has now expanded to twelve teams that segment into two divisions. This structure is used to justify an end-of-the-season football playoff game between the two division leaders, a game that has national appeal and, as a consequence, is a valuable television property. Eleven schools now comprise the Big Ten, and the ACC has added football power Florida State in becoming a nine-team league. The Big East, which contained a mix of some traditional football powers such as Syracuse and Pittsburgh and some traditional basketball powers such as Seton Hall

222. William Taaffe, *The Supreme Court's TV Ruling: Will the Viewers Benefit Most?*, SPORTS ILLUSTRATED, July 9, 1984, at 147; Associated Press, *NCAA Hits Ole Miss with Stiff Penalties*, GAINESVILLE SUN, Nov. 18, 1994, at 1C.

223. Richard Sandomis, *Notre Dame Scores a \$38 Million Touchdown on Its TV Deal*, N.Y. TIMES, Aug. 25, 1991, § 8, at 9.

224. Christopher Stern, *TV-Radio Rights in '93: The Billion Dollar Ticket*, BROADCASTING & CABLE, Aug. 16, 1993, at 27.

225. *Id.*; *Radio-TV's Football Tab: \$493.7 Million*, *supra* note 98, at 38.

226. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 567 (1994).

and Georgetown, added the University of Miami. For the past two decades, the Hurricanes have consistently been one of the best football teams in the nation. The SWC will soon be history, becoming the first major conference to fall victim to the emergence of new television cartels. The defection of Arkansas was merely a precursor to the defections of the University of Texas (Austin), Baylor, Texas A&M, and Texas Tech to the Big Eight, which in 1996 becomes the Big Twelve. The Big Twelve members have adopted a two-division structure leading to a saleable-to-television end-of-the-season playoff. Of the other current SWC members, Rice, Texas Christian, and Southern Methodist will join the WAC, and the University of Houston is poised to align with such geographically proximate schools as Tulane and Memphis State.

At the end of 1995, the Big Ten and the Pacific Ten pacts with ABC and ESPN expired. The CFA's pact with ABC and ESPN also expired at the end of the 1995 season. The SEC has already announced that it will sell its games to CBS rather than participate in any new CFA pact.²²⁷ In 1986, ABC will televise select Big 12 and Pacific 10 games (as will the cable network FX) and will also televise certain Big 10, ACC, and WAC games.²²⁸ ESPN (now owned by Disney) will televise sixty-two games from a variety of conferences, while ESPN2 will carry sixteen Division I games.²²⁹ The eight football schools of the Big East have contracted with CBS for their games. For the purpose of acting as a supplier in the college football television market, the CFA has thus been bereft of its football-playing elite, that elite having done to the CFA precisely what the CFA had attempted to do to the NCAA over a decade earlier. As a result, the CFA announced that it will not have a television plan after 1995.²³⁰

Also, left out in the cold until recently, when ABC picked up the rights to its games, was the WAC, one of whose members, San Diego State, has been earning approximately \$1.5 million as its share of the CFA contract. The WAC is not a premiere football conference, and San Diego State is scarcely a perennial, or even an occasional, football power. One may infer from this that the Alabamas, Michigans, Miamis, and Nebraskas of this football-playing world will be guaranteed rights payments in considerable excess of \$1.5 million from their future conference packages, with pay-per-view revenues from individual games providing the icing on the cake.

In the latter regard, since 1992, ABC has been offering games that it is televising over the air in one region, on a pay-per-view basis in other regions. ABC projected that 20,000 to 40,000 of the 20 million outlets that can exercise a pay-per-view option will do so for these games, which initially carried a "suggested retail price" of \$8.95 per game.²³¹ The cable operators retain about 45% of the price on any sale, with the remainder being divided between the distributor, the network, and the

227. Debra Blum, *The Big Scramble*, CHRON. OF HIGHER EDUC., Mar. 16, 1994, at 1.

228. *Where the Sports Are*, BROADCASTING & CABLE, May 13, 1996, at 41-44.

229. *Id.*

230. *FTC Dismisses Case Against CFA and Capital Cities/ABC*, SIDELINES, Sept. 1994, at 3.

231. *ABC To Offer Pay Per-View*, SIDELINES, July/Aug. 1992, at 12.

television cartels with which it has agreements.²³² This particular source of rights revenues can only grow in the future, a future that apparently will not include the CFA, the competitive market and the theory of cartels having claimed yet another victim.

VII. Conclusion

In reflecting upon the NCAA decision a decade after the fact, Donnie Duncan, former Athletic Director at the University of Oklahoma, and presently the associate commissioner in charge of football of the Big 12, views the decision as having had both positive and negative consequences.²³³

On the plus side of the ledger, Duncan suggests that the public has benefitted in that there is more televised college football and, therefore, greater viewer choice. The authors suggest that the latter result from the fact that the number and games to be telecast are determined through free-market forces, rather than through the backroom decisions of an illegal cartel.

On the minus side of the ledger, Duncan points to the changed conference structures that have not necessarily been in the best interests of even the casual college football fan. The health of any conference depends upon healthy rivalries, which really means ongoing and traditional rivalries: Michigan-Ohio State, Texas-Texas A&M, Oklahoma-Nebraska, Florida-Georgia, Duke-North Carolina, Southern Cal-UCLA, and, yes, even Harvard-Yale. While it is too soon to make a final determination, it is not at all unlikely that these conference realignments may have fostered unnatural alliances that while seeming to make economic sense in the short term, will not evolve into the healthy rivalries that make a conference viable in the long term. Duncan has the further concern that consolidation of historically powerful football schools into the same conference cuts down the number of powerhouses that can reign as conference champions and therefore limits the number available to qualify for automatic bids to the leading postseason Bowl games, which are always financial blockbusters. In the SEC, for example, for the past few years highly regarded Alabama and Florida have eliminated one another from an automatic Sugar Bowl bid in the SEC conference championship game, and in 1994, newcomer Penn State ran roughshod over the Big Ten's erstwhile pretenders to the Rose Bowl. For its part, Florida State has lost only one ACC football game during its three-year membership, relegating its conference brethren, like those of Penn State, to also-ran status and, at best, second-class bowls.

Like other observers, Duncan is unsure of what the future holds for college football, live and over the air, but, on balance, he remains confident that the health of the game today is good. There remains considerable enthusiasm for the sport nationwide, and its growth has been continuing.

232. *Id.*

233. Interview with Donnie Duncan, Director of Athletics, University of Oklahoma, in Norman, Okla. (Mar. 30, 1995).

One may correctly surmise from our analysis that Justice White's two predictions in his *NCAA* dissent were incorrect. First, his belief that college football would be threatened by unbridled competition was a serious misapprehension.²³⁴ A decade's worth of experience reveals that college football is even better off than when he made that prediction.

Justice White's second prediction, notably, that a successor CFA plan or other similar plans would suffer the same fate as the *NCAA* plan, has also proved to be far off the mark.²³⁵ Repeated challenges to *Broadcast Music*-type plans have been unsuccessful. The major college football-playing schools have learned how to compete with each other in the packaging and marketing of the broadcast rights to their games in the context of a free-market economy. Moreover, they have done so without violating the antitrust laws, which is something the *NCAA* could never seem to learn.

As a result of *NCAA*, a market affecting millions of football fans and thousands of athletes, and one that generates enormous sums of money, is now competitive instead of subject to cartel control. Private enforcement of the antitrust laws has succeeded for the fan-consumer and for student-athletes who now get greater television exposure than they would have dreamed imaginable prior to *NCAA*.

Assuredly, the financial fate of the market participants cannot be accurately predicted. A market that is subject to illegal horizontal restraints is much more predictable than one that is free. Our laws will not tolerate the former and demand the latter. Is this hully-gully? Hardly. This is the free market in operation. *Sic bicultus disintegrat*.

234. See *supra* note 95 and accompanying text.

235. See *supra* note 96 and accompanying text.

