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## Antitrust & the Bowl Championship Series

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Nathaniel Grow\*

### ABSTRACT

This Article analyzes the potential antitrust liability of the Bowl Championship Series (“BCS”), college football’s current system for selecting the participants of both the national championship game as well as other highly desirable post-season bowl games. The BCS has recently been attacked by various politicians and law enforcement officials, who allege that the system constitutes an illegal restraint of trade due to its preferential treatment of universities from traditionally stronger conferences, at the expense of teams from historically less competitive conferences. Meanwhile, the academic literature considering the antitrust status of the BCS is mixed, with most recent commentaries concluding that the BCS alleviated any antitrust concerns when it revised its selection procedures in 2004.

Contrary to these recent scholarly analyses, this Article argues that the BCS remains vulnerable to antitrust attack on two primary grounds. First, the BCS continues to be susceptible to an illicit group boycott claim, insofar as it distributes revenue unequally and without justification to the detriment of universities from the historically less competitive conferences. Second, the BCS can be attacked as an illegal price fixing scheme, both by enabling formerly independent, competing conferences and bowl games to collectively determine the amount of revenue to be distributed to BCS participants, as well as by eliminating any competition between certain BCS bowls for the sale of their broadcast rights to television networks. However, the BCS appears less susceptible to a claim of illegal tying, despite its collective marketing of the television broadcast rights for the BCS bowl games, because television networks are not actually coerced into purchasing the broadcast rights to an unwanted bowl game. Therefore, although the outcome of any antitrust trial is notoriously difficult to predict, this Article concludes that the BCS remains quite vulnerable to antitrust attack.

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\* Assistant Professor of Legal Studies, Terry College of Business, University of Georgia. The author would like to thank Kassi Hamner for her research assistance, and Alan Fishel for his constructive feedback.

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### I. INTRODUCTION

It has been declared “flawed”<sup>1</sup> and “unfair,”<sup>2</sup> a “joke,”<sup>3</sup> a “fraud,”<sup>4</sup> and an “abomination.”<sup>5</sup> Senator Orrin Hatch of Utah has called it “un-American,”<sup>6</sup> while Representative Joe Barton of Texas has likened it to “communism.”<sup>7</sup> It is the Bowl Championship Series, or “BCS,” the system through which college football’s annual national champion is crowned. Created through an elaborate series of agreements between various collegiate conferences and post-season bowl games,<sup>8</sup> the BCS uses a system of human polls and computer rankings to select not only the two participants in the national championship game, but also the teams that will

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<sup>1</sup> Barker Davis, *Same Old Song for BCS: One-loss Mix Likely to Bring Controversy*, WASH. TIMES, Nov. 27, 2006, at C04.

<sup>2</sup> Tim Stephens, *BCS is ‘Un-American’*, ORLANDO SENTINEL, Mar. 26, 2009, at C3.

<sup>3</sup> Randall Mell, *BCS Most Likely to Remain Joke*, PITT. POST-GAZETTE, Dec. 11, 2004, at B-2.

<sup>4</sup> *Id.*

<sup>5</sup> Mark Bradley, *SEC Championship: Result Exposes BCS as a No. 1 Abomination*, ATLANTA JOURNAL-CONST., Dec. 9, 2001, at 12D.

<sup>6</sup> Stephens, *supra* note 2, at C03.

<sup>7</sup> Nick Canepa, *Congress Takes Shot at Righting BCS Wrong*, S.D. UNION-TRIB., May 7, 2009, at D-1.

<sup>8</sup> See *Bowl Championship Series FAQ*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809793> (last accessed Oct. 5, 2010). (discussing various agreements).

play in four of the other most prestigious bowl games.<sup>9</sup> In the process, the BCS not only controls access to the most desirable post-season games, but also decides which conferences and universities will receive the significant guaranteed financial payments that accompany an invitation to a BCS bowl game, payouts that can surpass \$19 million for a single bowl appearance.<sup>10</sup>

Because the selection of teams to participate in BCS bowls has rarely been without controversy—especially with respect to the selection of teams to play for the national championship—the system has been criticized frequently since its inception in 1998.<sup>11</sup> This criticism predominantly alleges that major college football’s system for determining a champion lacks the fairness of the systems used by other collegiate and professional team sports, which crown their champions via multi-team, post-season playoff tournaments.<sup>12</sup> Such critics include President Barack Obama, who vowed shortly after his election to “throw his weight around” to convince college football to adopt a playoff system.<sup>13</sup>

While the lack of a playoff is probably the most frequent complaint levied against the BCS, the system faces perhaps more serious criticism on another front. Specifically, various politicians and law enforcement officials are increasingly suggesting that the BCS constitutes an anti-competitive and illegal restraint of trade in violation of federal antitrust law. For example, Senator Hatch directly accused the BCS of violating the Sherman Antitrust Act during recent Senate Judiciary Committee hearings,<sup>14</sup> while Utah Attorney General Mark Shurtleff has threatened to

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<sup>9</sup> *BCS Selection Procedures*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4819597> (last accessed Oct. 5, 2010) (discussing the calculation of the BCS standings).

<sup>10</sup> See *Bowl Championship Series Five Year Summary of Revenue Distribution 2005-06 through 2009-10*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/a547f60042494ced83f8d7132e10b8df/BCS++Revenue+Distribution+by+Conference+2009-10.pdf?MOD=AJPERES&CACHEID=a547f60042494ced83f8d7132e10b8df> (last accessed Nov. 8, 2010).

<sup>11</sup> See David Scott Moreland, Comment, *The Antitrust Implications of the Bowl Championship Series: Analysis Through Analogous Reasoning*, 21 GA. ST. U. L. REV. 721, 724 (2005) (“Since its inception, the BCS has been a ‘constant source of debate and controversy.’” (quoting Don Markus, *Judiciary Discussions Increase Chances for Change in BCS System; Playoff Still Isn’t Likely to be Seriously Considered*, BALT. SUN, Sept. 5, 2003, at 10D)).

<sup>12</sup> See, e.g., Katherine McClelland, Comment, *Should College Football’s Currency Read “In BCS We Trust” or is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 174–75 (2004).

<sup>13</sup> Michael Wilbon, *When the President-Elect Talks, The BCS Should Listen*, WASH. POST, Nov. 19, 2008, at E01 (quoting President Obama’s statements on the television program 60 Minutes).

<sup>14</sup> Associated Press, *Hatch Calls for BCS Investigation*, ESPN.COM,

initiate legal proceedings against the BCS under antitrust law.<sup>15</sup> Even the U.S. Department of Justice has acknowledged that it is exploring the possibility of launching its own antitrust investigation of the system.<sup>16</sup>

Critics of the BCS typically allege that the system violates antitrust law through its favoritism of universities belonging to six of the traditionally most powerful, so-called “BCS Conferences,”<sup>17</sup> at the expense of universities competing in the historically less successful, so-called “non-BCS Conferences.”<sup>18</sup> Specifically, under the current BCS selection procedures, the champion of each of the six BCS Conferences is guaranteed a berth in a BCS bowl game regardless of its place in the final BCS rankings, while champions of non-BCS Conferences must finish in the top sixteen of the BCS Standings in order to be eligible for an automatic bid.<sup>19</sup> Even then, only the highest ranking non-BCS Conference champion is guaranteed an invitation to a BCS bowl; other highly ranked champions are left to hope that they are selected for one of the four at-large invitations given to teams not qualifying for an automatic BCS bid.<sup>20</sup>

In addition to this competitive disparity, the non-BCS Conferences are

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<http://sports.espn.go.com/ncf/news/story?id=4311694> (last accessed Oct. 5, 2010).

<sup>15</sup> Chris Rizo, *Bowl Championship Series Could Face Multistate Action*, LEGAL NEWS LINE, <http://www.legalnewslines.com/news/224840-bowl-championship-series-could-face-multistate-action> (last accessed Oct. 5, 2010). This is not the first time that Attorney General Shurtleff has rattled his sabre with respect to the BCS. See Joe Drape, *B.C.S. To Explore a More Inclusive System*, N.Y. TIMES, Nov. 17, 2003, at D4 (noting that in 2003 Shurtleff threatened to “ask the antitrust committee of the National Association of Attorneys General to ‘open an investigation to examine whether or not competition is restrained and consumers are harmed under the current B.C.S. arrangement’”).

<sup>16</sup> Frederic J. Frommer, *Federal Government Weighing Action on BCS*, ASSOCIATED PRESS, Jan. 30, 2010, available at <http://www.timesfreepress.com/news/2010/jan/30/federal-government-weighing-action-bcs-football-ga/>.

<sup>17</sup> The Atlantic Coast (“ACC”), Big East, Big Ten, Big Twelve, Pacific Coast (“Pac-10”), and Southeastern (“SEC”) Conferences are generally considered the “BCS Conferences.” See Adam Kilgore, *For Hokies, Some Heavy Lifting; Virginia Tech to Face Kansas With a Struggling Conference on Its Back*, WASH. POST, Jan. 3, 2008, at E01 (referring to those six as the BCS Conferences).

<sup>18</sup> The non-BCS Conferences include Conference USA (“C-USA”), as well as the Mid-American, Mountain West, Sun Belt, and Western Athletic (“WAC”) Conferences. *Is there a true No. 1*, WASH. POST, Aug. 30, 2006, at H08 (noting same). Rather than using the BCS and non-BCS Conference classifications, the BCS instead prefers to distinguish between Automatic Qualifying (“AQ”) and non-Automatic Qualifying (“non-AQ”) conferences, depending on whether the conference is guaranteed an annual BCS bowl bid. *BCS Conferences*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809755> (last accessed Oct. 5, 2010). This Article will nevertheless use the more widely adopted BCS and non-BCS Conference terminology.

<sup>19</sup> *BCS Selection Procedures*, *supra* note 9.

<sup>20</sup> *Id.*

also disadvantaged financially, as the BCS pays each BCS Conference a guaranteed payment of over \$19 million per season for its participation in a BCS bowl game.<sup>21</sup> In comparison, a total of only \$24 million was split between the five non-BCS Conferences following the 2009–10 season, despite the fact that two teams from non-BCS Conferences were among the ten teams that participated in BCS bowl games.<sup>22</sup> Critics allege that this annual disparity in revenue enables the BCS Conferences to maintain significant advantages with respect to facilities, coaching, and recruiting, all of which serve to perpetuate their competitive advantage over the non-BCS Conferences on the football field.<sup>23</sup>

Despite this inequity, skeptics question whether curing the ills of major college football warrants governmental intervention, especially given the many problems currently facing the nation.<sup>24</sup> However, considering that the BCS has been estimated to have an economic impact of over \$1.2 billion per year,<sup>25</sup> and given that some consider the BCS to be “perhaps the most economically and politically powerful cartel since the Sherman Act was passed in 1890,”<sup>26</sup> the legality of the BCS is a significant issue, and one that increasingly appears headed for either a judicial or political resolution.

With the status of the BCS uncertain under federal antitrust law, a number of academic legal analyses have addressed the issue over the years,<sup>27</sup> predominantly focusing on whether the BCS’s discrimination

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<sup>21</sup> *Bowl Championship Series Five Year Summary of Revenue Distribution 2005-06 through 2009-10*, *supra* note 10.

<sup>22</sup> *The BCS Is ...*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809716> (last accessed Oct. 5, 2010).

<sup>23</sup> *See infra* notes 169–171 and accompanying text.

<sup>24</sup> *See BCS Response to DOJ Letter*, BCSFOOTBALL.ORG (Jan. 29, 2010), available at <http://www.bcsfootball.org/news/story?id=4870960> (quoting Bill Hancock, the Executive Director of the Bowl Championship Series).

<sup>25</sup> *The BCS Is ...*, *supra* note 22. Overall, college football is estimated to be a \$2 billion per year industry. Michael Ozanian, *The Business Of College Football*, FORBES (Aug. 13, 2008), available at [http://www.forbes.com/2008/08/13/coach-football-ncaa-biz-cz\\_mb\\_0813coachland.html](http://www.forbes.com/2008/08/13/coach-football-ncaa-biz-cz_mb_0813coachland.html).

<sup>26</sup> McClelland, *supra* note 12, at 205 (quoting Gary R. Roberts, then-Director of the Sports Law Program at Tulane Law School).

<sup>27</sup> *See, e.g.*, M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235 (2004); Jasen R. Corns, Comment, *Pigskin Paydirt: The Thriving of College Football’s Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167 (2003); Lafcadio Darling, Note, *The College Bowl Alliance and the Sherman Act*, 21 HASTINGS COMM. & ENT. L.J. 433 (1999); Brett P. Fenasci, Comment, *An Antitrust Analysis of College Football’s Bowl Championship Series*, 50 LOY. L. REV. 967 (2004); Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW. J. 97 (2003); Timothy Kober, Comment, *Too Many Men on the Field: Why Congress Should Punt on the Antitrust Debate Overshadowing Collegiate Football and the Bowl*

against the non-BCS Conferences constitutes an unlawful group boycott. Initially, the commentators were split with regards to the legality of the system.<sup>28</sup> Articles concluding that the BCS did not violate antitrust law generally argued that the pro-competitive benefits of the BCS—most specifically its creation of a national championship game—outweighed the harm inflicted on the non-BCS Conferences under a rule of reason analysis.<sup>29</sup> In contrast, those arguing against the BCS disagreed with that balancing, asserting that the creation of a championship game does not warrant the discriminatory treatment of the non-BCS Conferences.<sup>30</sup> However, following modifications to the BCS selection procedures in 2004, which granted the non-BCS Conferences greater access to BCS bowl games,<sup>31</sup> subsequent academic analyses have overwhelmingly concluded that the current system does not violate antitrust law.<sup>32</sup>

This Article diverges from the existing literature in two ways. First,

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*Championship Series*, 15 SETON HALL J. SPORTS & ENT. L. 57 (2005); McClelland, *supra* note 12; Moreland, *supra* note 11; Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365 (2009); Christopher Pruitt, *Debunking a Popular Antitrust Myth: The Single Entity Rule and Why College Football's Bowl Championship Series Does Not Violate the Sherman Antitrust Act*, 11 TEX. REV. ENT. & SPORTS L. 125 (2009); C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285 (2008); Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219 (2007); K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57 (1999); Jodi M. Warmbrod, Comment, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go For an Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333 (2004). See also Andrew Zimbalist, *The BCS, Antitrust and Public Policy*, ANTITRUST BULLETIN, available at <http://www.smith.edu/econ/workingpaper/pdfs/Zimbalist1.pdf> (last accessed Oct. 8, 2010) (discussing the BCS from an economist's perspective).

<sup>28</sup> Among the articles determining that the BCS violated antitrust law were Corns, *supra* note 27; Hales, *supra* note 27; McClelland, *supra* note 12; Wallace, *supra* note 27. See also Roger I. Abrams, *Sports Law Issues Just Over the Horizon*, 3 VA. SPORTS & ENT. L.J. 49, 58 (2003) (stating that opponents of the BCS would “have a strong antitrust violation claim,” despite not fully analyzing the issue). Meanwhile, among the articles to conclude that the BCS did not run afoul of antitrust law were Carroll, *supra* note 27; Fenasci, *supra* note 27; Kober, *supra* note 27; Warmbrod, *supra* note 27.

<sup>29</sup> See generally Carroll, *supra* note 27; Fenasci, *supra* note 27; Kober, *supra* note 27; Warmbrod, *supra* note 27.

<sup>30</sup> See generally Corns, *supra* note 27; Hales, *supra* note 27; McClelland, *supra* note 12; Wallace, *supra* note 27.

<sup>31</sup> See generally *BCS Chronology*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4819366> (last accessed Oct. 8, 2010).

<sup>32</sup> See, e.g., Nixon, *supra* note 27; Pruitt, *supra* note 27; Rogers, *supra* note 27. But see Schmit, *supra* note 27 (arguing that the modified BCS continues to violate antitrust law).

contrary to the most recent works, this Article argues that a plausible group boycott case can still be asserted against the BCS despite the modifications made to its selection procedures, because the BCS withholds the full financial benefits of participation in BCS bowl games from non-BCS Conference teams—a factor overlooked by the existing analyses. Second, and perhaps more significantly, this Article argues that the existing literature has generally overlooked other potential bases for asserting that the BCS violates federal antitrust law. Specifically, prior analyses have largely failed to consider potential price fixing or tying claims against the BCS, the former of which provides an especially strong point of attack for critics of the BCS.

Accordingly, although the outcome of an antitrust trial is typically difficult to predict,<sup>33</sup> this Article concludes that the BCS remains quite susceptible to attack under federal antitrust law. Specifically, Part II begins by providing the necessary factual context for an antitrust analysis of the BCS, namely a review of the history of post-season college football bowl games and the evolution of the BCS. Part III then presents a brief summary of the relevant provisions of federal antitrust law. Part IV applies these various antitrust theories to the BCS, concluding that the system remains vulnerable to an antitrust challenge on several grounds. Finally, Part V provides a brief recap of the Article's main points and conclusion.

## II. HISTORY OF THE COLLEGE FOOTBALL BOWL SYSTEM AND THE BCS

### *A. The Evolution of the Bowl System*

The National Collegiate Athletic Association (“NCAA”) is the regulatory body for 22 different intercollegiate sports, including college football.<sup>34</sup> The NCAA divides its member institutions into several divisions, with those universities participating at the highest levels of athletic competition designated as Division I.<sup>35</sup> In the case of college

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<sup>33</sup> See, e.g., Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1422–29 (2009) (discussing the unpredictability of antitrust trials under the rule of reason standard).

<sup>34</sup> McClelland, *supra* note 12, at 175. See also Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift From Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2–3 (2000) (noting that the NCAA regulates major college football).

<sup>35</sup> Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA’s Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 70 (2006); Michael J. Nichols, *Time for a Hail Mary? With Bleak Prospects of Being Aided by a*

football, Division I is further subdivided into two separate classifications, Football Bowl Subdivision (“FBS”—formerly known as I-A) and Football Championship Subdivision (“FCS”—formerly known as I-AA).<sup>36</sup> The FBS is widely considered the competitively stronger of the two Division I football subdivisions.<sup>37</sup>

In addition to belonging to the NCAA, most universities also belong to a conference of eight or more other colleges.<sup>38</sup> These conferences coordinate a number of athletic competitions between their members,<sup>39</sup> culminating in the crowning of an annual conference champion in each of the sports sponsored by the conference. The conferences are also responsible for distributing the proceeds of various sources of conference revenue, such as television agreements and bowl game participation payments, to their member universities.<sup>40</sup>

Of all the sports officially sanctioned by the NCAA—including football at the FCS, Division II, and Division III levels—FBS football is the

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*College Version of the NFL’s Rooney Rule, Should Minority College Football Coaches Turn Their Attention to Title VII Litigation?*, 8 VA. SPORTS & ENT. L.J. 147, 149–50 (2008).

<sup>36</sup> NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2009-2010 NCAA DIVISION I MANUAL § 20.1.1.2 (July 2009), available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

Prior to 2006, FBS teams were referred to as Division I-A, while FCS teams were labeled I-AA. See Rogers, *supra* note 27 at 286 n.5 (citing David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM, Dec. 15, 2006, <http://sports.espn.go.com/nfc/columns/story?id=2697774>).

<sup>37</sup> Josh Martin, *The Fairness Doctrine: The BCS of American Politics*, 60 MERCER L. REV. 1393, 1394 n.4 (2008).

<sup>38</sup> See Gregg L. Katz, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345, 348 (2006) (“Within the larger framework of the NCAA, entities known as conferences provide further structure to intercollegiate athletics. Conferences are associations of NCAA-member schools that conduct competitions among their members and determine a conference champion in one or more sports.”). Presently, 117 of the 120 FBS schools belong to a conference. See 2009 NCAA College Football Standings, ESPN.COM, <http://espn.go.com/college-football/standings/> (last accessed Jan. 12, 2010). Only the University of Notre Dame (“Notre Dame”), the United States Naval Academy (“Navy”), and the United States Military Academy (“Army”) remain independent of any conference affiliation. *Id.* See also Leslie Bauknight Nixon, *Playoff or Bust: The Bowl Championship Series Debate Hits Congress (Again)*, 21 ST. THOMAS L. REV. 365, 369–70 (2009) (noting same).

<sup>39</sup> See Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 298 n.150 (2008) (“a sizeable portion of most college football teams’ schedules are set by the team’s respective conference”).

<sup>40</sup> See Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 511–13 (2008) (discussing sources and distribution of conference revenues).



only one that does not culminate its season with a championship playoff tournament.<sup>41</sup> Instead, FBS has traditionally delegated the duty of selecting its national champion to various human polls, in which groups of journalists and football coaches rank the top 25 teams in the nation, with the top ranked team at season's end proclaimed the national champion.<sup>42</sup>

The FBS has maintained this unique system in deference to its long-standing tradition of post-season bowl games.<sup>43</sup> The college football bowl game tradition dates back to 1894, when the University of Chicago hosted Notre Dame in a post-season exhibition game.<sup>44</sup> Since then a number of bowl games have come and gone,<sup>45</sup> with a total of 35 games featuring 70 different teams scheduled to be played between mid-December 2010 and early-January 2011.<sup>46</sup> Each of these bowl games is a privately owned entity, typically formed to increase tourism in the host city.<sup>47</sup> Every bowl game is certified by—but ultimately independent from—the NCAA,<sup>48</sup> and seeks to draw the best available teams to play in its game, primarily by offering to pay schools an appearance fee ranging from \$750,000 to over \$19 million.<sup>49</sup> Not only do universities thus benefit from the bowl system through these guaranteed payments, but they also receive significant exposure insofar as practically every bowl game is nationally televised.<sup>50</sup>

Despite these benefits, the traditional bowl system was not without its faults. Most notably, prior to the formation of the BCS, the bowl system was rarely able to orchestrate a post-season game between the two top ranked teams in the nation. Indeed, between 1968 and 1997, only nine out of the thirty seasons ended with the first and second ranked teams meeting in a post-season bowl game.<sup>51</sup> This unsatisfying outcome was the result of a series of contractual relationships formed between individual bowl games and conferences.<sup>52</sup> These contractual agreements allowed a bowl game to guarantee itself a quality opponent from a particular conference, and gave

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<sup>41</sup> See McClelland, *supra* note 12, at 175 (noting that the NCAA offers eighty-seven championship playoffs in twenty-two sports, but not in FBS football).

<sup>42</sup> Carroll, *supra* note 27, at 1244.

<sup>43</sup> *Id.* at 1245.

<sup>44</sup> Warmbrod, *supra* note 27, at 336.

<sup>45</sup> Hales, *supra* note 27, at 101.

<sup>46</sup> See Richard Sandomir, *It's the Stadium. It's the Pinstripe Bowl.*, N.Y. TIMES, Mar. 9, 2010, at B15.

<sup>47</sup> Hales, *supra* note 27, at 101 n.23.

<sup>48</sup> Corns, *supra* note 27, at 178; Wallace, *supra* note 27, at 64.

<sup>49</sup> Carroll, *supra* note 27, at 1246.

<sup>50</sup> See *id.* at 1246 (noting that “increased exposure for a school and its football program” is one of the incentives to participate in a bowl game).

<sup>51</sup> *Id.* at 1251.

<sup>52</sup> See, e.g., Kober, *supra* note 27, at 60.

the conferences long-term agreements that ensured quality allotments of bowl game opportunities for their member universities. However, because these agreements often required the two top ranked teams to play in different, predetermined bowl games, a season ending showdown between the number one and two teams could only occur by happenstance. As a result, nearly one-quarter of the seasons from 1954 through 1997 ended with a “split” national championship, in which the competing polls ranked different universities number one in the country.<sup>53</sup>

In order to address this shortcoming of the traditional bowl system, the College Bowl Coalition (“Bowl Coalition”) was formed in 1992.<sup>54</sup> The Bowl Coalition was created through a set of agreements between five major conferences—the ACC, Big East, Big Eight, SEC, and Southwestern Conferences—-independent Notre Dame, and four marquee bowl games—the Orange, Sugar, Fiesta, and Cotton Bowls—with the goal of pairing the two top ranked teams in a post-season bowl game every year.<sup>55</sup> However, because the Bowl Coalition maintained traditional ties between certain conferences and bowl games, it failed to consistently create a national championship game between the two top ranked teams. For example, under the Bowl Coalition framework, the champion of the SEC was committed to play in the Sugar Bowl, while the champion of the Big Eight was committed to the Orange Bowl.<sup>56</sup> Thus, in any season where the champions of the SEC and Big Eight were ranked first and second, a national championship game would remain elusive. Moreover, because neither the Big Ten nor Pac-10 belonged to the Bowl Coalition, no championship game was possible in years where the champion of one of those conferences was among the nation’s two top ranked teams.<sup>57</sup>

In light of the limitations of the Bowl Coalition, the system was modified in 1994 and renamed the Bowl Alliance.<sup>58</sup> Under the Bowl Alliance, the champions of the participating conferences were no longer obligated to play in a specific bowl game. Instead, the champions of the ACC, Big East, Big Twelve (a combination of the former Big Eight and Southwestern Conferences), and SEC were guaranteed to play in one of the Orange, Sugar, or Fiesta Bowls,<sup>59</sup> with the two remaining slots available to any team in the country that had won at least eight games.<sup>60</sup> As a result, the

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<sup>53</sup> Carroll, *supra* note 27, at 1249.

<sup>54</sup> McClelland, *supra* note 12, at 177–78.

<sup>55</sup> Darling, *supra* note 27, at 437.

<sup>56</sup> *Id.* at 438.

<sup>57</sup> Schmit, *supra* note 27, at 228.

<sup>58</sup> *Id.* at 229.

<sup>59</sup> Wallace, *supra* note 27, at 62.

<sup>60</sup> Darling, *supra* note 27, at 439.

Bowl Alliance was able to arrange a championship game anytime the two top ranked teams in the nation belonged to one of the four participating conferences.

However, because the champions of both the Big Ten and Pac-10 remained committed to playing in the Rose Bowl,<sup>61</sup> the Bowl Alliance was also unable to guarantee a national championship game whenever the champion of one of those conferences was ranked first or second in the country. Just such a scenario arose during the 1997 season, when the University of Nebraska (“Nebraska”) and University of Michigan (“Michigan”) were ranked first and second in the polls following undefeated regular seasons. Michigan, as the champion of the Big 10, was committed to play the Pac-10 champion in the Rose Bowl, while Nebraska headed to the Orange Bowl.<sup>62</sup> After both Michigan and Nebraska won their bowl games, the coaches’ poll ranked Nebraska number one, while the Associated Press’s (“AP”) poll placed Michigan first, resulting in yet another split national championship.<sup>63</sup>

#### *B. The Formation and Development of the Bowl Championship Series*

The failure of both the Bowl Coalition and Bowl Alliance to reliably create number one versus number two championship bowl games motivated the formation of the BCS in 1998.<sup>64</sup> In particular, the BCS improved upon the Bowl Alliance by adding the Big Ten, Pac-10, and Rose Bowl to the existing agreements between the Bowl Alliance’s participating conferences and bowl games.<sup>65</sup> Like the Bowl Alliance, the BCS did not tie together particular conferences and bowls, but rather guaranteed the champions of its six member conferences a bid to one of the four BCS-affiliated bowls, thus enabling the BCS to guarantee a championship game between the first and second ranked teams every year.<sup>66</sup>

The initial BCS selection procedures were based on teams’ rankings in the final BCS Standings, which were compiled by combining four elements: (i) the pre-existing AP and coaches’ polls, (ii) the average of three separate computer ranking systems (the Sagarin, Seattle Times and New York Times ratings), (iii) teams’ win-loss records, and (iv) teams’ strength-of-schedule, based on both the records of a team’s opponents as well as its opponents’

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<sup>61</sup> Warmbrod, *supra* note 27, at 346.

<sup>62</sup> Corns, *supra* note 27, at 173.

<sup>63</sup> *Id.* at 173–74.

<sup>64</sup> Moreland, *supra* note 11, at 724.

<sup>65</sup> Fenasci, *supra* note 27, at 970.

<sup>66</sup> Schmit, *supra* note 27, at 230–31.

opponents.<sup>67</sup> The teams ranked first and second in the final BCS Standings were selected to play in the national championship game, which rotated annually among the four BCS bowls.<sup>68</sup> Next, the remaining champions of the six BCS Conferences were guaranteed a spot in one of the other BCS bowl games. Teams from non-BCS Conferences were only guaranteed an invitation to one of the BCS bowls if they ranked sixth or better in the BCS Standings,<sup>69</sup> while Notre Dame would qualify if it either won at least nine games or finished at least tenth in the final BCS Standings.<sup>70</sup> If any of the eight potential BCS bowl spots remained unclaimed after the automatic selections were made, the BCS bowls could pick the remaining participants from a pool of “at-large” teams, drawn from any university that won at least nine games in the regular season and finished twelfth or higher in the final BCS Standings.<sup>71</sup> However, no more than two schools from a single conference were eligible to appear in BCS games in a single season.<sup>72</sup>

In addition to securing their champions bids to the most prestigious bowl games, the BCS Conferences also realized significant financial benefits from the new agreement. At the time of its formation, the BCS signed an initial television agreement with ABC Sports worth an estimated \$730 million over eight years for the exclusive rights to broadcast the four BCS bowl games,<sup>73</sup> approximately two and a half times the previous annual rate paid for the broadcast rights to the same four games.<sup>74</sup> The proceeds of this broadcast agreement were primarily divided among the six BCS Conferences. For example, during the 2001–02 season, the four BCS bowl games generated nearly \$100 million in revenue, of which over \$94 million was divided among the six BCS Conferences.<sup>75</sup> Although the four BCS bowl games made up only a small fraction of the twenty-five total bowl games played that season, the BCS participants nevertheless received 93% of the total bowl revenues.<sup>76</sup>

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<sup>67</sup> *BCS Chronology*, *supra* note 31. The formula for the BCS Standings has since been frequently modified, and presently includes only a mix of human and computer rankings. See *BCS Selection Procedures*, *supra* note 9.

<sup>68</sup> Fenasci, *supra* note 27, at 970–71.

<sup>69</sup> *Id.* at 971.

<sup>70</sup> Pruitt, *supra* note 27, at 141.

<sup>71</sup> Fenasci, *supra* note 27, at 971.

<sup>72</sup> See *BCS Selection Procedures*, *supra* note 9 (“No more than two teams from a conference may be selected, regardless of whether they are automatic qualifiers or at-large selections, unless two non-champions from the same conference are ranked No. 1 and No. 2 in the final BCS Standings.”).

<sup>73</sup> Schmit, *supra* note 27, at 231.

<sup>74</sup> Zimbalist, *supra* note 27, at 7.

<sup>75</sup> Corns, *supra* note 27, at 176.

<sup>76</sup> *Id.* at 177.

Despite the promise of the BCS to provide a national championship game each year between the nation's top two teams, the BCS has not been without controversy. For example, during the 2000–01 season, the University of Oklahoma (“Oklahoma”) and Florida State University (“Florida State”) were the two top ranked teams in the final BCS Standings, and thus selected to play for the national championship, despite the fact that Florida State had lost earlier in the year to the University of Miami (“Miami”), the third ranked team in the BCS Standings, causing many fans to believe that Miami should have been selected for the title game over Florida State.<sup>77</sup> Similarly, during the 2001–02 season, Miami and Nebraska faced each other for the national championship, even though Nebraska had lost to the University of Colorado (“Colorado”) in the regular season finale, resulting in Colorado being ranked ahead of Nebraska in both the AP and coaches’ polls.<sup>78</sup> In 2003–04, the University of Southern California (“USC”) was ranked first in both the AP and coaches’ polls, yet finished third in the final BCS Standings.<sup>79</sup> As a result, USC was not selected to play in the Sugar Bowl (that year’s BCS championship game), and ultimately split the national title with Sugar Bowl champion Louisiana State University—the exact outcome the BCS was created to avoid.<sup>80</sup> The controversy continued the next year when Auburn University (“Auburn”) failed to be selected for the 2004–05 championship game, despite finishing the season undefeated.<sup>81</sup> Most recently, the selection of participants for the 2009 BCS National Championship Game generated controversy after five different schools finished the regular season undefeated;<sup>82</sup> ultimately, the University of Alabama (“Alabama”) and the University of Texas were selected to compete for the title. In response to these controversies, the BCS has continually tweaked the formula for calculating the BCS Standings.<sup>83</sup>

While the selection of teams for the BCS National Championship Game has generally drawn the most criticism, the selections for the other

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<sup>77</sup> Hales, *supra* note 27, at 123.

<sup>78</sup> *Id.* at 124.

<sup>79</sup> Liz Clarke, *Football Title Game Omits No. 1; Computer Formula Disagrees With Both Major College Polls*, WASH. POST, Dec. 8, 2003, at A1.

<sup>80</sup> McClelland, *supra* note 12, at 203–04.

<sup>81</sup> Rogers, *supra* note 27, at 291.

<sup>82</sup> See Fred Bowen, *With Perfect Records, Which Team is Best?*, WASH. POST, Dec. 3, 2009, at C09 (discussing controversy).

<sup>83</sup> See *BCS Chronology*, *supra* note 31 (documenting changes). Presently, the BCS Standings are calculated by equally weighting three components: “the USA Today Coaches Poll, the Harris Interactive College Football Poll and an average of six computer rankings (Anderson & Hester, Richard Billingsley, Colley Matrix, Kenneth Massey, Jeff Sagarin and Peter Wolfe).” *Bowl Championship Series FAQ*, *supra* note 8.

BCS bowl games have also not gone without controversy. Specifically, during the initial years of the BCS, no team from a non-BCS Conference was selected to participate in a BCS bowl game. For example, Tulane University (“Tulane”) finished the 1998–99 season undefeated and was ranked eleventh in the nation, but did not receive a bid to any of the BCS bowls.<sup>84</sup> Similarly, Marshall University went undefeated the next season—one of only two teams in the country to accomplish the feat—but was forced to play in the Motor City Bowl after being passed over by the BCS.<sup>85</sup> In 2001, Brigham Young University (“BYU”) entered the final game of the regular season undefeated and ranked twelfth in the BCS Standings, only to be informed by BCS officials that the team would not be considered for an at-large invitation to a BCS bowl.<sup>86</sup> Two years later, Boise State University (“Boise State”), Miami University (Ohio), and Texas Christian University (“TCU”) were all similarly denied invitations to BCS bowl games despite outstanding regular season performances.<sup>87</sup>

Following this series of snubs, the non-BCS Conferences decided to work together to obtain greater access to the BCS bowl games. Led by Tulane President Scott Cowen, the non-BCS Conferences formed the Presidential Coalition for Athletics Reform (“Presidential Coalition”), seeking to compel the BCS to modify its selection procedures.<sup>88</sup> The Presidential Coalition ultimately persuaded Congress to become involved, with both the House and Senate Judiciary Committees holding hearings in 2003 regarding the legality of the BCS under antitrust law.<sup>89</sup> Although both Committees generally appeared to side with the non-BCS Conferences, it became apparent that Congress would only step in if other avenues for reform failed.<sup>90</sup>

Despite the lack of Congressional action, the BCS nevertheless succumbed to the Presidential Coalition’s political pressure,<sup>91</sup> and implemented a series of reforms to the BCS structure in 2004 that became effective for the 2006 season.<sup>92</sup> Perhaps most significantly, the BCS Conferences formally included the non-BCS Conferences as parties to the various BCS agreements,<sup>93</sup> granting the non-BCS Conferences a single

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<sup>84</sup> Rogers, *supra* note 27, at 290-91.

<sup>85</sup> Corns, *supra* note 27, at 188.

<sup>86</sup> Schmit, *supra* note 27, at 233.

<sup>87</sup> *Id.* at 234.

<sup>88</sup> *Id.*

<sup>89</sup> Carroll, *supra* note 27, at 1239.

<sup>90</sup> *Id.* at 1239–40.

<sup>91</sup> Schmit, *supra* note 27, at 234.

<sup>92</sup> See *BCS Chronology*, *supra* note 31.

<sup>93</sup> See *id.* (noting the “landmark” agreement including “the chief executive officers

voting position on the eight member BCS Presidential Oversight Committee.<sup>94</sup> In addition to inviting the non-BCS Conferences to participate in the governance of the BCS, the 2004 revisions also included a number of modifications to the BCS's operating procedures. First, the BCS created a new, fifth BCS bowl game to serve as the BCS National Championship Game.<sup>95</sup> This doubled the number of BCS at-large slots from two to four, and thus increased the chances that a non-BCS school would be selected for a BCS bowl game. Second, the BCS made it easier for schools from non-BCS Conferences to earn guaranteed invitations to BCS bowls, with non-BCS teams no longer needing to finish in the top six of the final BCS Standings to guarantee a BCS bowl invitation, as under the original rules. Rather, the new procedures specified that the highest ranked champion of a non-BCS Conference would receive a guaranteed bid so long as it either: (i) ranked in the top twelve of the final BCS Standings, or (ii) ranked in the top sixteen of the final standings and ahead of at least one champion from a BCS Conference.<sup>96</sup> Third, the BCS agreed to reevaluate which conferences would be allotted guaranteed, automatic bids to BCS bowls, implementing new standards to evaluate all eleven FBS conferences every four years based on their on-field performance.<sup>97</sup> Under the new procedures, a minimum of five and maximum of seven conferences will qualify for automatic BCS invitations.<sup>98</sup> Finally, the existing BCS members agreed to share a greater percentage of BCS revenues with the non-BCS Conferences.<sup>99</sup>

The revised procedures quickly resulted in greater access to BCS bowls for non-BCS Conference teams. In 2004–05, the University of Utah (“Utah”) from the Mountain West Conference was selected to play in the Fiesta Bowl, while Boise State was similarly selected for the Fiesta Bowl in 2006–07.<sup>100</sup> In 2007–08 the University of Hawaii from the WAC was picked to play in the Sugar Bowl, as was Utah in 2008–09.<sup>101</sup> Most recently, Boise State and TCU faced each other in the Fiesta Bowl during

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representing all 11 Division I-A conferences and Notre Dame”).

<sup>94</sup> See *Hearing on the Bowl Championship Series: Money and Other Issues of Fairness for Publicly Financed Universities*, House Comm. On Energy and Commerce, 111th Cong. 3 (2009) (statement of Gene Bleymaier, Director of Athletics, Boise State University) (explaining the current voting system) [hereinafter *Bleymaier Congressional Statement*].

<sup>95</sup> Pruitt, *supra* note 27, at 141.

<sup>96</sup> *BCS Chronology*, *supra* note 31.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *BCS, Alliance & Coalition Games, Year-by-Year*, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809942> (last accessed Oct. 8, 2010).

<sup>101</sup> *Id.*

the 2009–10 season.<sup>102</sup>

Despite this increased access, critics of the BCS still argue that the system treats teams from the non-BCS Conferences unfairly. These criticisms are two-fold. First, although non-BCS teams have received greater access to BCS bowl games in recent years, no non-BCS team has been selected to play in the national championship game. For example, although Utah was the only university to finish the 2008–09 regular season undefeated,<sup>103</sup> the University of Florida and Oklahoma were instead selected to play for the national championship.<sup>104</sup> Utah had to settle for handily defeating Alabama—a team that had been ranked first for much of the season—in the Sugar Bowl.<sup>105</sup> Similarly, both Boise State and TCU were passed over for a berth in the 2009–10 national championship game despite both finishing the regular season undefeated.<sup>106</sup>

Second, the current BCS system can also be criticized insofar as it unevenly distributes revenue among the participating conferences. Specifically, even when a non-BCS team qualifies for a BCS bowl game, its conference receives a significantly smaller share of BCS revenues than do the six BCS Conferences. For example, following the 2009–10 season, each BCS Conference received a payout of at least \$19.7 million, with the Big Ten and SEC each receiving \$24.2 million by virtue of having had two teams selected to participate in BCS bowls.<sup>107</sup> In contrast, even though non-BCS schools Boise State and TCU both qualified to play in BCS bowls, the non-BCS Conferences received a total of only \$24 million to be split between five different conferences, a disparity that the commissioner of the non-BCS Mountain West Conference previously declared to be “grossly inequitable.”<sup>108</sup>

As a result of these criticisms, the BCS continues to be the subject of significant scrutiny. As noted above, in the last two years the Senate Judiciary Committee has held hearings regarding the BCS,<sup>109</sup> while Utah’s Attorney General and the U.S. Department of Justice have both acknowledged that they are exploring the possibility of litigation or antitrust

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<sup>102</sup> *Id.*

<sup>103</sup> See 2008 College Football Standings, COLLEGEFOOTBALLPOLL.COM, [http://www.collegefootballpoll.com/2008\\_archive\\_standings.html](http://www.collegefootballpoll.com/2008_archive_standings.html) (last accessed Oct. 8, 2010).

<sup>104</sup> BCS, Alliance & Coalition Games, Year-by-Year, *supra* note 100.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Bowl Championship Series Five Year Summary of Revenue Distribution 2005–06 through 2009–10, *supra* note 10.

<sup>108</sup> *Id.*

<sup>109</sup> Hatch Calls for BCS Investigation, *supra* note 14.



investigations against the BCS.<sup>110</sup> Therefore, the legality of the BCS under antitrust law remains a hotly contested issue, one that may be headed towards a judicial resolution.

### III. A BRIEF OVERVIEW OF THE RELEVANT ANTITRUST LAW PROVISIONS

Federal antitrust regulation began with the enactment of the Sherman Antitrust Act of 1890,<sup>111</sup> the statute that provides the most likely basis for an antitrust attack against the BCS. The Sherman Act contains two primary provisions combating anticompetitive conduct: Sections One and Two.

Section One of the Sherman Act provides that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”<sup>112</sup> Because a single party cannot contract, combine, or conspire with itself, this prohibition has been interpreted to require an agreement between multiple entities.<sup>113</sup> Moreover, because a literal reading of the provision—condemning “every” contract, combination, or conspiracy in restraint of trade—would outlaw practically all contracts, courts have subsequently limited the applicability of Section One.<sup>114</sup> Specifically, courts have held that in order for a plaintiff to assert a viable claim under Section One, three elements must be established: (i) that an agreement was entered into, (ii) that the agreement unreasonably restrains trade, and (iii) that the agreement affects interstate commerce.<sup>115</sup> In addition to these three requisite elements, courts increasingly also expect a plaintiff to demonstrate how the challenged restraint harms consumer welfare.<sup>116</sup>

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<sup>110</sup> Rizo, *supra* note 15; Frommer, *supra* note 16.

<sup>111</sup> 15 U.S.C. §§1–7 (2006). *See also* Rogers, *supra* note 27, at 292 (noting that federal antitrust law was “first enacted in 1890”).

<sup>112</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

<sup>113</sup> *See, e.g.*, Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust’s Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1776 (1999).

<sup>114</sup> Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 570 (2009).

<sup>115</sup> *See, e.g.*, Carroll, *supra* note 27, at 1258; Marc Edelman, *Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 640 (2009).

<sup>116</sup> *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (“it is competition, not competitors which the [Sherman] Act protects”). *See also* Douglas H. Ginsburg, *Essays in Honor of Judge Robert H. Bork: I. Competition Law and the Free Market: The Antitrust Paradox: A Policy at War with Itself: Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J. L. & PUB. POL’Y 449, 451 (2008) (finding that the consumer welfare model of antitrust law had become conventional wisdom in the federal courts by 1977); Rogers,

Should a claim be asserted against the BCS under Section One, neither the first nor third requisite elements are likely to be contested, as the BCS readily admits it was formed through a series of contractual agreements,<sup>117</sup> contracts which are clearly interstate in nature.<sup>118</sup> With respect to the second element, courts have identified various categories of agreements that may unreasonably restrain trade. Of these, the scholarship to date considering the BCS has predominantly focused on one form of restraint, the group boycott, based on the BCS's perceived favoritism of the BCS Conferences at the expense of the non-BCS Conferences.<sup>119</sup>

As the Supreme Court has explained, a group boycott claim typically alleges that competitors have conspired to cut off a rival's "access to a supply, facility, or market necessary to enable the boycotted firm to compete."<sup>120</sup> Such a boycott will generally be found unreasonable, and thus unlawful, when it is "not justified by plausible arguments that [it was] intended to enhance overall efficiency and make markets more competitive."<sup>121</sup>

Although group boycotts typically arise when multiple entities collectively refuse to deal at all with the aggrieved party, a complete boycott is not required to state a valid claim. For example, in the 1959 case of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,<sup>122</sup> the Supreme Court considered a group boycott claim brought by a San Francisco department

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*supra* note 27, at 295 ("antitrust law has evolved in the last three decades into what is a largely consumer welfare driven model. Under this model, to prove an antitrust offense, one must prove consumer harm rather than simply proving harm to a competitor"). *But see* C. Paul Rogers III, *Symposium: Evolution and Change in Antitrust Law: Foreword: Consumer Welfare and Group Boycott Law*, 62 S.M.U. L. REV. 665 (2009) (discussing the uneven way in which the consumer welfare requirement is applied in group boycott cases).

<sup>117</sup> *Bowl Championship Series FAQ*, *supra* note 8. Of note, the BCS includes agreements among competing conferences and bowl games, making the system both a horizontal and vertical restraint. Carroll, *supra* note 27, at 1264–65. One commentator has recently argued that the BCS constitutes a single entity under antitrust law, and is thus immune from a Section One claim. *See* Pruitt, *supra* note 27. This claim was based largely on the Seventh Circuit Court of Appeal's opinion in *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008), a decision recently overruled by a unanimous Supreme Court. *See* *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010). Following the Supreme Court's rejection of the single entity argument by the National Football League ("NFL"), courts are unlikely to grant the BCS single entity status.

<sup>118</sup> *See, e.g.*, Carroll, *supra* note 27, at 1259 (noting that the effect on interstate commerce factor is not at issue in an antitrust analysis of the BCS).

<sup>119</sup> *See, e.g.*, Rogers, *supra* note 27, at 294 ("The most likely substantive § 1 violation applicable to the BCS is an unlawful boycott or concerted refusal to deal.").

<sup>120</sup> *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 294 (1985).

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

<sup>122</sup> 359 U.S. 207 (1959).

store alleging that a competing store had convinced a number of name brand appliance manufacturers to “sell to [plaintiff] only at discriminatory prices and highly unfavorable terms,” if at all.<sup>123</sup> The Court held that the agreed upon refusal to deal with the plaintiff “at the same prices and conditions made available to [its competitor],” “plainly” alleged a boycott.<sup>124</sup> Thus, a showing that the plaintiff was subjected to disparate commercial treatment, even if not rising to the level of an all-out refusal to deal, is sufficient for asserting a group boycott claim.<sup>125</sup>

While a potential group boycott claim has received the most attention to date in antitrust analyses of the BCS, the BCS is also susceptible to different claims under Section One. Because the BCS was formed through a series of agreements between various football conferences and bowl games, it is vulnerable to challenge as an agreement not to compete among competitors. Specifically, as will be discussed below,<sup>126</sup> the BCS is arguably guilty of illegal price fixing by collectively establishing the amounts to be paid to conferences for their participation in BCS bowl games, and also by eliminating any competition between certain BCS bowls for the sale of their broadcast rights to television networks.<sup>127</sup> Generally speaking, “antitrust law condemns [agreements] in which competitors set prices collectively rather than letting competition determine price and output.”<sup>128</sup> Indeed, the Supreme Court has declared that horizontal price fixing agreements—i.e., price fixing agreements between competitors—are “the paradigm of an unreasonable restraint of trade” under Section One of the Sherman Act.<sup>129</sup>

Another potential antitrust claim against the BCS is that it constitutes an impermissible tying agreement insofar as the BCS collectively markets four of the five BCS bowl games, including the national championship

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<sup>123</sup> *Id.* at 209.

<sup>124</sup> *Id.* at 212–13.

<sup>125</sup> See Jonathan M. Joseph, *Hospital Joint Ventures: Charting a Safe Course Through a Sea of Antitrust Regulations*, 13 AM. J. L. AND MED. 621, 631 (1988) (finding that some courts have considered differences in reimbursements by health insurance companies to preferred versus non-preferred providers to be “an illegal refusal to deal under Section 1 of the Sherman Act and therefore find this form of differential reimbursement a restraint of trade”). See also A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1248 (2005) (noting that conduct that “weakens . . . or excludes” rivals is anticompetitive).

<sup>126</sup> See *infra* Part IV.B.

<sup>127</sup> See Zimbalist, *supra* note 27, at 38.

<sup>128</sup> Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1226 (2008).

<sup>129</sup> Nat’l Collegiate Athletic Ass’n. v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 (1984).

game, as a single package to television networks.<sup>130</sup> Tying agreements violate Section One when four elements are present: (i) two or more separate products are grouped together, (ii) the seller conditions the sale of one product on the sale of the other product, (iii) the seller has sufficient economic power to force purchasers to buy both tied products, and (iv) the seller actually coerces the buyer to purchase both tied products.<sup>131</sup> With respect to the final element—actual coercion—courts typically require proof that the buyer was an “unwilling purchaser of the allegedly tied product[.]”<sup>132</sup> Thus, to prove a tying claim a plaintiff must show that it was forced to buy a product it did not want in order to purchase the desired product. Simply having to buy a product that one “does not ‘want as much’” as the tied product is generally not enough.<sup>133</sup>

In Section One cases, courts will typically consider the characterization of the allegedly anticompetitive conduct at issue when deciding which standard of review to apply. For instance, some categories of restraints—including horizontal price fixing—have been found to “always or almost always . . . restrict competition and decrease output” and thus are usually considered *per se* illegal.<sup>134</sup> Conversely, because courts have determined that other categories of restraints—including some tying agreements—may at times promote competition, the legality of these activities is judged under the more flexible rule of reason.<sup>135</sup>

The rule of reason—first endorsed by the Supreme Court in Justice Brandeis’ landmark 1918 decision in *Chicago Board of Trade*<sup>136</sup>—generally involves a three-step process. First, the court will require the plaintiff to prove that the challenged restraint has an adverse effect on competition in a relevant market.<sup>137</sup> Second, should the plaintiff succeed, the burden shifts to the defendant to demonstrate that the restraint possesses procompetitive benefits.<sup>138</sup> Finally, if the defendant successfully establishes that that the

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<sup>130</sup> Specifically, the BCS collectively sells the broadcast rights for the Fiesta, Orange and Sugar Bowls, and the BCS National Championship Game. *ESPN, BCS Agree to Four-year Deal for Television, Radio, Digital Rights*, ESPN.COM, <http://sports.espn.go.com/ncf/news/story?id=3710477> (Nov. 19, 2008). Meanwhile, the Rose Bowl maintains its own broadcasting agreement with ABC. *Id.*

<sup>131</sup> Leslie, *supra* note 113, at 1850–51. See also Feldman, *supra* note 114, at 577–78 (discussing tying agreements generally).

<sup>132</sup> *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 192 (2d Cir. 1992).

<sup>133</sup> *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 2004 U.S. Dist. Lexis 5411, at \*22 (S.D.N.Y. March 30, 2004).

<sup>134</sup> *Broad. Music, Inc., v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

<sup>135</sup> See Feldman, *supra* note 114, at 578 (noting same).

<sup>136</sup> *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918).

<sup>137</sup> See, e.g., Edelman, *supra* note 115, at 647.

<sup>138</sup> Carroll, *supra* note 27, at 1260–61.

restraint has significant redeeming competitive qualities, the court will finally consider whether the asserted procompetitive benefits could be achieved through less restrictive means.<sup>139</sup>

Although the BCS is susceptible to attack as a horizontal price fixing scheme—a category of restraint traditionally condemned as *per se* illegal—most commentators have nevertheless concluded that any antitrust claim against the BCS would likely be judged under the rule of reason standard.<sup>140</sup> This consensus has been reached in view of the Supreme Court’s 1984 opinion in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* (“NCAA”).<sup>141</sup> In *NCAA*, the Court considered an antitrust challenge brought by Oklahoma and the University of Georgia, contesting an NCAA regulation limiting any single university to four nationally televised football games—and six television appearances in total—during a two-year period.<sup>142</sup> The regulations also established “recommended fees” for the television networks to pay to participating universities for national and regional broadcasts.<sup>143</sup> The Supreme Court categorized these restrictions as a horizontal limitation on output and horizontal price fixing, respectively; restraints typically considered *per se* illegal.<sup>144</sup> Nevertheless, the Court elected not to apply the *per se* rule, concluding that a rule of reason analysis was necessary in light of college football being “an industry in which horizontal restraints on competition are essential if the product is to be available at all.”<sup>145</sup> Therefore, although a prospective plaintiff could attempt to distinguish the BCS from the rule established in *NCAA* in order to receive *per se* treatment, a court hearing a Section One challenge to the BCS would likely decide the case under the rule of reason.<sup>146</sup>

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<sup>139</sup> See Feldman, *supra* note 114, at 583 (noting that the standard and burden of proof for the less restrictive means factor varies from circuit to circuit).

<sup>140</sup> See, e.g., Carroll, *supra* note 27, at 1270; Darling, *supra* note 27, at 459; Kober, *supra* note 27, at 66–67; McClelland, *supra* note, 12 at 206; Moreland, *supra* note 11, at 728–29; Wallace, *supra* note 27, at 75; Warmbrod, *supra* note 27, at 370.

<sup>141</sup> 468 U.S. 85 (1984). The *NCAA* case is discussed in greater detail below. See *infra* notes 263–267 and accompanying text.

<sup>142</sup> *NCAA*, 468 U.S. at 94.

<sup>143</sup> *Id.* at 93, 93 n.10.

<sup>144</sup> *Id.* at 99–100.

<sup>145</sup> *Id.* at 101. The Supreme Court recently reaffirmed this rule in *American Needle*, a case involving the antitrust status of professional football. See *Am. Needle*, 130 S. Ct. at 2214 n.6.

<sup>146</sup> For example, one commentator has suggested that *NCAA* may not be applicable to the BCS insofar as the latter organization is a more explicitly commercial enterprise than the not-for-profit *NCAA*. See Rogers, *supra* note 27, at 294. However, given that the Supreme Court reaffirmed the *NCAA* rule in *American Needle*, a case involving the for-profit National Football League, this will be a hard argument for a BCS opponent to win.

In addition to potential liability under Section One, the BCS is vulnerable to attack under Section Two of the Sherman Act as well.<sup>147</sup> Whereas Section One prohibits agreements in restraint of trade between multiple parties, Section Two focuses on monopolization of an industry, typically by a single firm.<sup>148</sup> In order to establish a Section Two monopolization claim, plaintiffs generally must prove two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>149</sup> Thus, a plaintiff challenging the BCS under Section Two would have to establish that either the BCS National Championship Game itself, or all five of the BCS bowl games collectively, constitute a relevant market, and that the BCS has excluded “non-BCS schools from a meaningful opportunity to compete” in that market.<sup>150</sup>

In asserting that the BCS National Championship Game (or other BCS bowl games) constitutes a relevant market, a plaintiff would likely draw upon the Supreme Court’s 1959 decision in *International Boxing v. United States*,<sup>151</sup> in which the Court held that championship boxing matches comprise a separate and distinct relevant market from non-championship fights for antitrust purposes, due to the significant difference in financial payouts given to the boxers.<sup>152</sup> Along these same lines, a plaintiff could not only argue that the BCS National Championship Game comprises a distinct relevant market, but also that the entire BCS itself constitutes a separate relevant market insofar as an appearance in a BCS bowl game results in a significantly higher payment than does an appearance in any of the other, less prestigious bowl games.<sup>153</sup>

Ultimately, however, a precise assessment of whether the BCS constitutes a separate relevant market would likely require significant economic analysis,<sup>154</sup> analysis beyond the scope of this article. Moreover, because Section Two claims are generally more difficult to prove than

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<sup>147</sup> See Zimbalist, *supra* note 27, at 37–38.

<sup>148</sup> Rogers, *supra* note 27, at 292.

<sup>149</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

<sup>150</sup> Rogers, *supra* note 27, at 299.

<sup>151</sup> *Int’l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959).

<sup>152</sup> *Id.* at 250–51.

<sup>153</sup> See Carroll, *supra* note 27, at 1246.

<sup>154</sup> See, e.g., E. THOMAS SULLIVAN AND JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 2.06[A][2] (5th ed. 2009) (discussing the relevant economic equations, including cross-elasticity of demand calculations, necessary to identify a relevant market). See also Darling, *supra* note 27, at 445 (noting that calculating market power “involves an intricate and thorough assessment of what the competitive market encompasses”).

claims under Section One,<sup>155</sup> an antitrust case against the BCS is unlikely to hinge upon a Section Two claim given the various Section One allegations available to a prospective plaintiff.<sup>156</sup> Therefore, the remainder of this article focuses on an assessment of the BCS's potential liability under Section One of the Sherman Act.

#### IV. ASSESSING THE STRENGTH OF THE POTENTIAL ANTITRUST CLAIMS AGAINST THE BCS

Any number of parties could potentially seek to challenge the BCS under federal antitrust law, including the U.S. Department of Justice, a state attorney general, or an affected conference, university or television network. Meanwhile, because the BCS is not itself a legal entity, but instead is simply a scheduling agreement constructed through a series of contracts between various conferences and bowl games,<sup>157</sup> any antitrust challenge to the BCS would likely name some or all of the BCS participating conferences and bowl games as defendants.

As outlined in Part III, a plaintiff challenging the BCS under antitrust law would have three primary antitrust claims available to it under Section One of the Sherman Act: illegal group boycott, price fixing, and tying.<sup>158</sup> Although at least one of these claims has traditionally been held *per se* illegal, following the Supreme Court's decision in *NCAA* it appears that a challenge to the BCS would be decided under the rule of reason standard.<sup>159</sup> Therefore, this section assesses the merits of each of the three most plausible Section One claims against the BCS by reviewing the applicable arguments regarding the system's anti- and procompetitive effects, as well as any potential less restrictive alternatives.

##### *A. The BCS as an Illicit Group Boycott*

The existing literature considering potential antitrust claims against the BCS has predominantly focused on the system's vulnerability to a group boycott claim.<sup>160</sup> The Supreme Court has stated that a group boycott exists

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<sup>155</sup> See, e.g., Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 219–20 (1999).

<sup>156</sup> Darling, *supra* note 27, at 445 (“Section 1 is much broader than section 2 and will generally reach concerted action that may also be monopolization, without the additional difficulty of definitively proving monopoly power as an element.”).

<sup>157</sup> See *supra* note 8 and accompanying text.

<sup>158</sup> See *supra* notes 119–133 and accompanying text.

<sup>159</sup> See *supra* notes 140–145 and accompanying text.

<sup>160</sup> See, e.g., Carroll, *supra* note 27, at 1259–60; Corns, *supra* note 27, at 186; Fenasci, *supra* note 27, at 980; Hales, *supra* note 27, at 115; Kober; *supra* note 27, at 68; Wallace,

when competitors have collaborated to cut off a rival's access to a "supply, facility, or market necessary to enable the boycotted firm to compete."<sup>161</sup> Thus, the existing analyses have primarily considered whether the BCS constitutes a group boycott insofar as it limits the so-called non-BCS Conferences' access to the national championship and other top post-season bowl games.<sup>162</sup>

Specifically, under the initial BCS rules, teams from non-BCS Conferences could only guarantee themselves an invitation to a BCS bowl by finishing sixth or better in the BCS Standings,<sup>163</sup> a feat that no non-BCS university was able to accomplish during the system's first six years.<sup>164</sup> Non-BCS teams were also consistently passed over for at-large BCS berths during this time, despite a variety of schools completing extremely strong seasons.<sup>165</sup>

In view of this allegedly discriminatory conduct, a number of the initial commentators argued that the BCS Conferences had effectively blocked the non-BCS teams from a necessary resource—namely the BCS bowl games and their accompanying financial payouts—and thus had constructed an illegal group boycott.<sup>166</sup> These analyses predominately focused on the financial disparities created by the BCS's differential treatment of the non-BCS Conferences.<sup>167</sup> Not only did the BCS's exclusion of the non-BCS teams prevent those universities from receiving the substantial payouts associated with participation in a BCS bowl game, but it also resulted in additional financial disparities as well. Specifically, because teams in the BCS Conferences compete annually for a spot in one of the highest profile post-season bowl games, they tend to receive greater media attention throughout the season, leading to significant revenue advantages in the form of increased regular season ticket sales, television contracts, sponsorship agreements, and alumni and fan donations.<sup>168</sup>

These revenue and exposure advantages in turn have enabled the BCS schools to hire better coaches, build better facilities, and recruit better

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*supra* note 27, at 67–68.

<sup>161</sup> *Nw. Wholesale Stationers*, 472 U.S. at 294.

<sup>162</sup> *See, e.g.*, Carroll, *supra* note 27; Corns, *supra* note 27; Fenasci, *supra* note 27; Hales, *supra* note 27; Kober, *supra* note 27; Wallace, *supra* note 27.

<sup>163</sup> Fenasci, *supra* note 27, at 971.

<sup>164</sup> *See BCS, Alliance & Coalition Games, Year-by-Year*, *supra* note 100, at 4–7.

<sup>165</sup> *See supra* notes 84–87 and accompanying text.

<sup>166</sup> *See, e.g.*, Corns, *supra* note 27; Hales, *supra* note 27; McClelland, *supra* note 12; Wallace, *supra* note 27.

<sup>167</sup> *See* Corns, *supra* note 27, at 188; Hales, *supra* note 27, at 120–22; McClelland, *supra* note 12, at 206–09; Wallace, *supra* note 27, at 77–79.

<sup>168</sup> McClelland, *supra* note 12, at 207.



student-athletes,<sup>169</sup> generally allowing the BCS Conferences to maintain their competitive advantage over the non-BCS schools on the playing field.<sup>170</sup> Indeed, commentators have noted that the BCS has effectively created—or, at least, reinforced—a bifurcated structure in major college football, fortifying the competitive disparity between the BCS and non-BCS Conferences.<sup>171</sup> As a result, many of the initial commentators concluded that the original BCS system effectively constituted an illicit group boycott by limiting the non-BCS schools’ access to the BCS bowl games and their accompanying guaranteed payments.<sup>172</sup>

However, as discussed above, the BCS ultimately revised its selection procedures in 2004 following a series of Congressional hearings,<sup>173</sup> modifications that increased the non-BCS Conferences’ access to BCS bowls.<sup>174</sup> In particular, the BCS now guarantees a spot to the highest ranked champion of a non-BCS Conference so long as it either ranks (i) in the top twelve of the final BCS Standings, or (ii) in the top sixteen of the final standings and ahead of at least one champion from a BCS Conference.<sup>175</sup> As a result, the number of non-BCS teams participating in BCS bowl games has increased dramatically in recent years.<sup>176</sup> Accordingly, most recent analyses have concluded that the current BCS system no longer runs afoul of antitrust law, insofar as it does not provide an insurmountable barrier preventing non-BCS teams from reaching BCS bowl games.<sup>177</sup>

Despite the increased representation of non-BCS schools in BCS bowl games since 2004, some contend that the BCS continues to perpetuate a group boycott against non-BCS teams by unreasonably preventing non-BCS

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<sup>169</sup> See *id.* See also Hales, *supra* note 27, at 119.

<sup>170</sup> See Hales, *supra* note 27, at 119 (“The disparity in the revenues received by the BCS and non-BCS conferences creates an insurmountable obstacle to overcome.”). See also Craig A. Depken II & Dennis P. Wilson, *Institutional Change in the NCAA and Competitive Balance in Intercollegiate Football*, in *ECONOMICS OF COLLEGE SPORTS* 197, 205 (John Fizel and Rodney Fort eds., 2004) (noting the possibility that “the BCS might perpetuate the dominance of a small number of teams, thereby reducing competitive balance”).

<sup>171</sup> Rogers, *supra* note 27, at 287–88; Wallace, *supra* note 27, at 76–77.

<sup>172</sup> See, e.g., Corns, *supra* note 27; Hales, *supra* note 27; McClelland, *supra* note 12; Wallace, *supra* note 27.

<sup>173</sup> See *supra* notes 89–90 and accompanying text.

<sup>174</sup> See *supra* notes 91–99 and accompanying text.

<sup>175</sup> *BCS Chronology*, *supra* note 31.

<sup>176</sup> See *supra* notes 100–102 and accompanying text.

<sup>177</sup> See, e.g., Nixon, *supra* note 27; Pruitt, *supra* note 27; Rogers, *supra* note 27. *But see* Schmit, *supra* note 27 (arguing that the modified BCS continues to violate antitrust law).

teams from competing in the BCS National Championship Game.<sup>178</sup> Specifically, although several non-BCS teams have recently finished undefeated regular seasons, none were selected to play for the national championship. For example, Utah was passed over for a berth in the BCS National Championship Game despite being the only university to finish the 2008–09 regular season undefeated.<sup>179</sup> Likewise, Boise State and TCU were left out of the 2009–10 championship game despite both finishing the regular season undefeated.<sup>180</sup>

Defenders of the BCS typically brush off such arguments, noting that both BCS and non-BCS Conference schools are equally eligible to participate in the BCS National Championship Game, so long as they finish either first or second in the final BCS Standings.<sup>181</sup> In particular, BCS supporters note that these standings include a computer ranking component, which ostensibly offers an unbiased assessment of each team's competitive strength unaffected by conference affiliation.<sup>182</sup> Therefore, defenders of the BCS assert that all schools, BCS and non-BCS alike, have an equal shot at playing for the championship game.

There are two primary problems with this defense. First, because each of the computer rankings used by the BCS incorporates a strength of

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<sup>178</sup> Matt Canham, *Utah A.G. Presses BCS Probe With Feds*, SALT LAKE TRIB., Nov. 4, 2010, available at <http://www.sltrib.com/sltrib/sports/50601620-77/bcs-shurtleff-utah-championship.html.csp> (last accessed Nov. 8, 2010) (noting that Utah Attorney General Mark “Shurtleff is convinced the BCS is violating anti-trust laws by making it ‘impossible’ for teams from conferences such as the Mountain West Conference and Western Athletic Conference to play for the national title”).

<sup>179</sup> See 2008 College Football Standings, *supra* note 103.

<sup>180</sup> *BCS, Alliance & Coalition Games, Year-by-Year*, *supra* note 100. At the time of publication of this Article, controversy was yet again brewing with respect to TCU's and Boise State's chances to participate in the 2011 BCS National Championship Game. As of November 19, 2010, both schools were once again undefeated, but both trailed the top-ranked University of Oregon (“Oregon”) and second-ranked Auburn in the BCS Standings. See *NCAA College Football BCS Standings Week 12*, ESPN.COM, Nov. 14, 2010, [http://espn.go.com/college-football/bcs/\\_/week/12](http://espn.go.com/college-football/bcs/_/week/12) (last accessed Nov. 21, 2010). Therefore, barring a late season loss by Oregon or Auburn, it currently appears that the two undefeated non-BCS Conference teams will once again be left out of the championship game in favor of teams from BCS Conferences, despite the fact that TCU and Boise State both began the season ranked higher than either of the BCS Conference teams. See *2010 NCAA Football Rankings – Preseason*, ESPN.COM, [http://espn.go.com/college-football/rankings/\\_/week/1](http://espn.go.com/college-football/rankings/_/week/1) (last accessed Nov. 21, 2010).

<sup>181</sup> See, e.g., Carroll, *supra* note 27 at 1276 (“Indeed, if a non-BCS team finishes the season ranked among the top two in the BCS standings, it will necessarily compete for the national championship.”). See also *BCS, Alliance & Coalition Games, Year-by-Year*, *supra* note 100 (discussing the current components of the BCS Standings).

<sup>182</sup> See Morehead, *supra* note 11 at 740 (“the computer component is an objective calculation used to help determine the BCS poll and should pass a court's scrutiny”).

schedule component,<sup>183</sup> teams from non-BCS Conferences—which typically face weaker competition in the majority of their in-conference games—face an uphill battle in securing a top spot in the computer rankings. More significantly, however, this argument overlooks the fact that the BCS’s component computer rankings are themselves deeply flawed. As a number of statisticians have noted, the computer rankings used in the BCS Standings are highly unreliable because they do not account for a team’s margin of victory, a significant factor when attempting to accurately rank teams that have not met head-to-head and have only played twelve or thirteen regular season games.<sup>184</sup> The failure to consider margin of victory disproportionately impacts schools from the non-BCS Conferences because they play the majority of their games against weaker in-conference opponents, and thus must rely on beating lesser competition by significant margins as evidence of their competitive strength.<sup>185</sup> Consequently, despite its use of purportedly unbiased computer rankings, a case can still be made that the BCS unfairly discriminates against non-BCS Conference teams with respect to their potential participation in the national championship game by using flawed computer ranking systems that fail to account for margin of victory.

Ultimately, however, such a group boycott claim is admittedly not as strong as the one that could have generally been asserted prior to the 2004 modifications to the BCS selection procedures. This is because the BCS does not directly discriminate against non-BCS teams when selecting the participants in the BCS National Championship Game, and greater participation by non-BCS Conference teams in BCS bowl games under the current BCS selection procedures suggest that these teams now have a much greater chance to reach the title game. In any event, another, perhaps stronger, basis for a group boycott claim against the BCS remains—one that has been entirely overlooked by the existing scholarly analyses.

Specifically, even if the BCS selection procedures no longer constitute an illicit group boycott following the 2004 modifications, a plausible group boycott claim can be asserted insofar as the BCS unevenly distributes revenue to the detriment of the non-BCS Conferences. In other words, even when a non-BCS university is selected to participate in a BCS bowl game, its conference does not receive a financial payout equal to those received by the BCS Conferences. As noted above, following the 2009–10 season, each

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<sup>183</sup> BCS Selection Procedures, *supra* note 9 (“Each computer ranking provider accounts for schedule strength within its formula.”).

<sup>184</sup> Jeff Passan & Dan Wetzel, *Numbers Are a Weak Spot in the B.C.S. Standings*, N.Y. TIMES, Oct. 17, 2010, at SP-13.

<sup>185</sup> See Ralph D. Russo, *Throw Out the Scores? The BCS Does*, YAHOO.COM, Nov. 4, 2010, <http://rivals.yahoo.com/ncaa/football/news?slug=ap-marginofvictory> (noting same).

BCS Conference received a payout of at least \$19.7 million, with the Big Ten and SEC receiving \$24.2 million each due to the fact they both had two teams selected to participate in BCS bowls.<sup>186</sup> In contrast, the five non-BCS Conferences shared a total of \$24 million, despite both TCU and Boise State having been selected to play in a BCS bowl game.<sup>187</sup> While the Mountain West and WAC (TCU's and Boise State's respective conferences) divided the lion's share of that revenue, they nevertheless received only \$9.8 and \$7.8 million, respectively, for their appearances—totals less than half of those received by the BCS Conferences.<sup>188</sup> Therefore, despite increased access to BCS games for the non-BCS schools, the non-BCS Conferences still face differential treatment with respect to the financial payouts accompanying their appearance in a BCS bowl game.

Thus, while the non-BCS Conferences may have had a more traditional group boycott case to assert against the BCS prior to the 2004 modifications to the BCS selection procedures, critics can still argue that the system unfairly disadvantages the non-BCS Conferences by providing them with a disproportionately smaller share of revenues for their BCS bowl appearances. Indeed, the fact that the BCS has not completely blocked the non-BCS Conferences' access to BCS bowl games is not enough to defeat a group boycott claim. As discussed above, the Supreme Court in *Klor's* found that a plausible group boycott claim had been asserted when the defendants were accused of colluding to prevent the plaintiff from doing business at the same price and under the same conditions as its rivals, even when the collusion did not necessarily result in a literal refusal to deal.<sup>189</sup> Similarly, critics can allege that the BCS has conspired to prevent the non-BCS Conferences from doing business under the same prices and conditions offered to the BCS Conferences. Even in those cases where a team from a non-BCS Conference is able to overcome the odds and earn an invitation to a BCS bowl game, its conference will nevertheless receive little more than half as much money as the BCS Conferences for its participation.<sup>190</sup> As a result, the non-BCS Conferences will never be able to match the revenues generated by teams in the BCS Conferences, thus helping to enable the BCS Conferences to maintain a perpetual competitive advantage.<sup>191</sup>

Should such a group boycott claim be asserted against the BCS, the

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<sup>186</sup> See *supra* notes 107–108 and accompanying text.

<sup>187</sup> *Id.*

<sup>188</sup> *Bowl Championship Series Five Year Summary of Revenue Distribution 2005-06 through 2009-10*, *supra* note 10.

<sup>189</sup> See *supra* notes 122–125 and accompanying text.

<sup>190</sup> See *supra* notes 186–188 and accompanying text.

<sup>191</sup> See *supra* notes 169–171 and accompanying text.

court would presumably apply the rule of reason, as discussed above.<sup>192</sup> In light of the anticompetitive effects that BCS opponents can assert,<sup>193</sup> and the fact that the BCS likely constitutes a relevant market,<sup>194</sup> the court would presumably shift the burden to the BCS to justify itself through a showing of procompetitive benefits. Commentators defending the BCS from antitrust attack have traditionally identified several procompetitive benefits generated by the system. First and foremost, BCS proponents point to the creation of a national championship game as being a significant procompetitive benefit.<sup>195</sup> These commentators note that prior to the creation of the BCS, only rarely did a college football season culminate with the two top ranked teams in the country facing each other in a post-season bowl game.<sup>196</sup> By guaranteeing a national championship game every season, BCS supporters argue that the system has created a substantial benefit for college football fans.<sup>197</sup> However, the significance of this benefit is mitigated by the regular controversy surrounding the selection of teams to play in the BCS National Championship Game, as recounted above.<sup>198</sup>

In addition to the creation of a national championship game, BCS proponents also point to other procompetitive benefits. First, by dispensing with pre-existing contractual agreements between particular conferences and bowl games, BCS supporters argue that the BCS has created better, more compelling post-season bowl match-ups.<sup>199</sup> For this same reason, BCS proponents have also asserted that the BCS has actually increased access to marquee bowl games for non-BCS Conference teams,<sup>200</sup> as prior to the BCS the various contractual agreements made it nearly impossible for a team from a non-BCS Conference to be selected to play in the Fiesta, Orange, Rose, or Sugar Bowls.<sup>201</sup> Therefore, these commentators argue that even under its initial, more restrictive selection procedures, the BCS

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<sup>192</sup> See *supra* notes 140–145 and accompanying text.

<sup>193</sup> See *supra* notes 168–172 and 186–188 and accompanying text.

<sup>194</sup> See *supra* notes 151–154 and accompanying text.

<sup>195</sup> See, e.g. Carroll, *supra* note 27, at 1273–74; Fenasci, *supra* note 27, at 985–86; Kober, *supra* note 27, at 73–74.

<sup>196</sup> See *supra* notes 51–53 and accompanying text.

<sup>197</sup> See, e.g. Carroll, *supra* note 27, at 1273–75; Fenasci, *supra* note 27, at 985–86; Kober, *supra* note 27, at 73–74.

<sup>198</sup> See *supra* notes 77–83 and accompanying text.

<sup>199</sup> See Kober, *supra* note 27, at 75 (“The BCS format has also been successful in creating competitive contests at the end of the season.”).

<sup>200</sup> Carroll, *supra* note 27, at 1275–78; Fenasci, *supra* note 27, at 987–88.

<sup>201</sup> Only once was a non-BCS team invited to play in one of these four bowls during the twenty years preceding the formation of the BCS. Carroll, *supra* note 27, at 1276; Moreland, *supra* note 11, at 741.

actually benefited the non-BCS Conferences by making it possible, even if highly unlikely, that a non-BCS team would be invited to one of the most prestigious bowl games. However, on this point other commentators have argued that the prior system of contractual arrangements was itself “a web of illegal exclusive dealing arrangements,” and thus at best the BCS simply replaced one anticompetitive system with a slightly less anticompetitive, but still illegal system.<sup>202</sup>

Should a judge or jury find that the BCS’s asserted procompetitive benefits outweigh the anticompetitive harms it inflicts on the non-BCS Conferences, the BCS would nevertheless face an additional hurdle under the rule of reason, namely the less restrictive alternatives inquiry. In this third phase of the rule of reason, courts consider whether the asserted procompetitive benefits could be obtained in another manner without the accompanying anticompetitive side effects.<sup>203</sup> The BCS is particularly susceptible to the less restrictive alternatives inquiry, as the procompetitive benefits identified by its supporters could easily be obtained via less burdensome means.<sup>204</sup> Indeed, while the much clamored for post-season playoff tournament would in all likelihood be too radical a deviation from the current system to constitute a less restrictive alternative for antitrust purposes,<sup>205</sup> a number of other, more modest alternatives exist.

Specifically, the primary asserted benefit of the BCS—the creation of a national championship game<sup>206</sup>—can easily be accomplished without the anticompetitive effect of the BCS’s unequal revenue distribution. The existence of a championship game does not depend in any way on disparities in revenue distribution, but rather simply requires that the nation’s top two teams be matched in a single post-season game. Nor for that matter is it necessary that the national championship game be paired with the BCS and its uneven revenue distribution scheme at all, as the game

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<sup>202</sup> McClelland, *supra* note 12, at 212 (quoting Gary R. Roberts, *BCS Backers Forward Flawed Defense*, THE NCAA NEWS (Sept. 29, 2003), [http://web1.ncaa.org/web\\_files/NCAANewsArchive/2003/Editorial/bcs%2Bbackers%2Bforward%2Bflawed%2Bdefense%2B-%2B9-29-03.html](http://web1.ncaa.org/web_files/NCAANewsArchive/2003/Editorial/bcs%2Bbackers%2Bforward%2Bflawed%2Bdefense%2B-%2B9-29-03.html)).

<sup>203</sup> See *supra* note 139 and accompanying text.

<sup>204</sup> See Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary, 105th Cong. 92, 97 (1997) (statement of Gary R. Roberts, then-Professor of Law and Sports Law Program Director, Tulane Law School) [hereinafter Roberts Congressional Statement] (arguing with respect to the BCS’s predecessor the Bowl Alliance, “[i]f the less restrictive alternative doctrine means anything, this must be a classic example of where it should be applied”); Pruitt, *supra* note 27, at 145 (“The greatest threat to the BCS in a rule of reason analysis would most likely be the ‘less restrictive alternative’ test.”).

<sup>205</sup> See, e.g., Fenasci, *supra* note 27, at 994–95.

<sup>206</sup> *Id.* at 985–86; Kober, *supra* note 27, at 73–74.

could easily be held as a stand-alone event without any ties to the other existing BCS bowl games.<sup>207</sup> Thus, because a national championship game could be held absent any of the BCS's financial disparities, this particular procompetitive benefit of the BCS could easily be realized through less restrictive alternative means—either as a stand-alone game separate from the rest of the BCS, or as part of a BCS system that more equitably distributes its revenue to all participants.

Similarly, other benefits of the BCS regularly cited by its supporters—namely, the creation of more compelling post-season bowl games and increased access for the non-BCS Conferences<sup>208</sup>—also do not rely upon the BCS's uneven revenue distribution scheme. Indeed, both of these benefits could also be obtained through a system in which revenue was distributed more equitably amongst all participating universities and conferences. Thus, these benefits are also obtainable through less restrictive means, and cannot save the BCS under a rule of reason analysis.

In lieu of any sufficiently compelling procompetitive arguments, the BCS may turn to other potential defenses. First, the BCS could argue that the current distribution scheme is not anticompetitive, but instead simply reflects the fact that television networks value the broadcast rights for games featuring BCS Conference schools more than those for games involving non-BCS teams.<sup>209</sup> In other words, BCS supporters might argue that because the inclusion of the BCS Conferences generates a significant portion of the revenues realized by the BCS, those conferences rightfully deserve to split the lion's share of BCS revenues amongst themselves.

However, this argument is belied by the television ratings for BCS bowl games involving non-BCS teams. Indeed, of the five BCS bowl games to date featuring non-BCS universities, three have received higher television ratings than other BCS bowl games the same season featuring only BCS Conference teams.<sup>210</sup> Most significantly, the 2010 Fiesta Bowl, which featured two non-BCS schools playing one another—Boise State and TCU—outdrew the Orange Bowl, which featured two teams from BCS Conferences, by a significant margin.<sup>211</sup> Accordingly, the argument that the BCS's unequal revenue distribution is justified by the reduced appeal of

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<sup>207</sup> See, e.g., Corns, *supra* note 27, at 198; Darling, *supra* note 27, at 465–66; Schmit, *supra* note 27, at 251.

<sup>208</sup> See *supra* notes 199–201 and accompanying text.

<sup>209</sup> Michael Smith, *The BCS' Big Split*, SPORTS BUS. J., Jan. 25, 2010, <http://www.sportsbusinessjournal.com/article/64647> (reporting such an argument made by Nebraska chancellor Harvey Perlman).

<sup>210</sup> TV Ratings, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4819384> (last accessed Oct. 8, 2010).

<sup>211</sup> *Id.*

games involving non-BCS universities is contradicted by the actual television ratings for these games.

Alternatively, even if one accepts the proposition that all of the BCS Conferences are categorically more desirable to television networks than are any of the non-BCS Conferences, this defense by the BCS would still succumb to the least restrictive alternative inquiry. Specifically, a wide variance exists in the attractiveness of each of the six BCS Conferences to television networks. Currently the BCS Conferences have individual television contracts worth anywhere from \$242 million (Big Ten) to \$33 million (Big East) per year.<sup>212</sup> Therefore, rather than simply distributing an equal amount of revenue to each BCS Conference, with any participating non-BCS Conferences receiving a predetermined, lesser amount, a less restrictive alternative would be for the BCS to distribute its revenue such that each conference is rewarded for the value it contributes individually to the BCS. Such a system would dispense with the categorical discrimination against the non-BCS Conferences, and instead distribute revenue on a more meritorious basis across the entire BCS.

Another potential defense available to the BCS is that even if it has effectively constructed a group boycott of the non-BCS Conferences, its boycott does not harm consumer welfare and thus is not a cognizable injury under federal antitrust law.<sup>213</sup> Put differently, the BCS can argue that consumers of college football—i.e., college football fans—are not harmed by any disparities in revenue paid to the non-BCS Conferences, and therefore at most the alleged boycott injures rivals to the BCS Conferences, but not the competitive process itself.<sup>214</sup>

The strength of this potential defense is unclear. As an initial matter, the applicability of the consumer welfare requirement in group boycott cases is uncertain, as the Supreme Court has not yet reevaluated its prior boycott precedents following the increased focus on consumer welfare in antitrust law.<sup>215</sup> Indeed, at its root a classic group boycott claim could be

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<sup>212</sup> Matt Peloquin, *2009 College Sports TV Revenue by Conference*, COLLEGESPORTSINFO.COM, Dec. 25, 2009, <http://news.collegesportsinfo.com/2009/12/2009-college-sports-tv-revenue-by.html>.

<sup>213</sup> See, e.g., *The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?*, Senate Judiciary Comm., Subcommittee on Antitrust, Competition Policy and Consumer Rights, 111th Cong. (2009) (statement of William Monts, outside counsel for the BCS) [hereinafter Monts Congressional Statement] (arguing that consumer welfare is not harmed by the BCS's uneven system of revenue distribution). For more on the consumer welfare requirement in antitrust generally, see *supra* note 116 and accompanying text.

<sup>214</sup> See Rogers, *supra* note 27, at 297 (“Consumer harm . . . would be . . . difficult for non-BCS schools to establish.”).

<sup>215</sup> See generally Rogers, *supra* note 116 (noting that applicability of consumer welfare requirement is uncertain in group boycott cases).



said to ultimately protect competitors themselves, rather than competition generally, rendering consumer welfare of potentially questionable significance in group boycott cases.<sup>216</sup>

However, should a court determine that harm to consumer welfare must be established, such a requirement would not necessarily doom a group boycott claim against the BCS. As an initial matter, a plaintiff challenging the BCS could point to the 2004 decision in *Metropolitan Intercollegiate Basketball Ass'n v. National Collegiate Athletic Ass'n*, in which the U.S. District Court for the Southern District of New York considered whether consumer welfare was harmed by a rule preventing universities selected for the NCAA's college basketball national championship tournament from participating in the competing post-season National Invitational Tournament ("NIT").<sup>217</sup> The NCAA—like the defenders of the BCS—argued that its regulation did not harm consumers, but instead only harmed a competitor to the NCAA, and thus did not present a cognizable antitrust claim.<sup>218</sup> The court rejected the NCAA's consumer welfare argument, finding that it could not distinguish harm to the competing NIT from harm to competition itself. Specifically, the court held that because the NCAA's rule ultimately prevented the competing NIT from offering consumers the most competitive basketball possible, consumer welfare was sufficiently implicated to allow the NIT to proceed with its antitrust case.<sup>219</sup>

Opponents of the BCS can similarly argue that the BCS's disproportionate revenue distribution system harms consumer welfare by decreasing the competitiveness of college football games played by non-BCS Conference teams. As discussed above, BCS Conference schools use the disproportionately higher revenue they receive from the BCS to hire better coaches, recruit better athletes, and build better facilities than non-BCS Conference teams.<sup>220</sup> As a result, the BCS helps perpetuate significant competitive discrepancies between BCS and non-BCS Conference teams on the field, discrepancies that ultimately reduce the competitiveness of games played by non-BCS Conference teams.<sup>221</sup> Fans therefore lose the opportunity to enjoy the most competitive football games possible, the same

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<sup>216</sup> See *id.* at 667 ("All of the decisions involving exclusion of competitors have, without exception, focused on the exclusionary effect on the target rather than the impact of the collective action on the market.").

<sup>217</sup> *Metropolitan Intercollegiate Basketball Ass'n v. National Collegiate Athletic Ass'n*, 339 F.Supp.2d 545 (S.D.N.Y. 2004).

<sup>218</sup> *Id.* at 551.

<sup>219</sup> *Id.*

<sup>220</sup> See *supra* notes 169–170 and accompanying text.

<sup>221</sup> Rogers, *supra* note 27, at 287–88; Wallace, *supra* note 27, at 76–77.

harm to consumer welfare that was identified by the court in *Metropolitan Intercollegiate Basketball Ass'n*.<sup>222</sup> Moreover, because many BCS Conference schools use their significant football revenues to support a variety of other non-revenue generating sports teams, the financial disparities wrought by the BCS can ultimately dampen competition throughout collegiate athletics, allowing the BCS schools to field much stronger teams than non-BCS Conference schools across a number of different sports.<sup>223</sup>

The effect of the BCS's disproportionate revenue distribution on the competitiveness of the non-BCS Conference schools is especially relevant in a consumer welfare context because, as Professor Gary Roberts has persuasively argued, "[c]onsumers of college athletics are to a great extent motivated by emotional loyalty to a particular school," with many fans expressing interest in a particular game "primarily because they are personally affiliated with one of the schools or because a team is affiliated with a local or regional college."<sup>224</sup> For example, Professor Roberts noted that "many fans of the University of Cincinnati football team are not interested in Florida State's team even if it is the best team in the country."<sup>225</sup> Along these same lines, it is hard to imagine that fans in, say, Boise, Idaho would be persuaded that they are not harmed at all by a BCS system that gives their local team (Boise State) a disproportionate share of revenue for its participation in a BCS bowl game—a discrepancy which in turn directly affects the school's athletics budget, and thus ultimately the quality of the various sports teams that it fields.

Moreover, a plaintiff challenging the BCS can also generally allege consumer harm by pointing to recent surveys showing that upwards of 90 percent of college football fans disapprove of the BCS.<sup>226</sup> While much of this unpopularity does not directly result from the BCS's revenue distribution discrepancies (but rather reflects the prevailing desire for a playoff in FBS college football), it nevertheless is indicative of the fact that the BCS generally inflicts harm upon the consumers of college football. Therefore, given the general unpopularity of the BCS among college

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<sup>222</sup> *Metropolitan Intercollegiate Basketball Ass'n*, 339 F.Supp.2d at 551.

<sup>223</sup> See Sally Jenkins, *It's Time For Congress To Sack the BCS*, Wash. Post, Nov. 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/10/AR2010111006922.html> (last accessed Nov. 11, 2010) (noting same).

<sup>224</sup> Roberts Congressional Statement, *supra* note 204. See also Hales, *supra* note 27, at 122 (arguing same).

<sup>225</sup> Roberts Congressional Statement, *supra* note 204.

<sup>226</sup> See Dan Wetzel, *Obama Could Bust the BCS With Broncos*, YAHOO.COM, Jan. 5, 2010, <http://rivals.yahoo.com/ncaa/football/news?slug=dw-obamaplayoff010510> (last accessed Nov. 8, 2010) (noting a recent "a Sports Illustrated poll found 90 percent of college fans have a negative opinion of" the BCS).

football fans, as well as the favorable decision in *Metropolitan Intercollegiate Basketball Ass'n*, opponents of the BCS can credibly allege that the BCS's uneven revenue distribution policies harm consumer welfare. Ultimately though, the persuasiveness of this argument will likely vary from court to court.

Finally, although perhaps not offering an absolute defense to a group boycott claim, the BCS would also likely defend itself from such a charge by emphasizing that the non-BCS Conferences have themselves been a party to the BCS agreements ever since modifications were made to the BCS in 2004.<sup>227</sup> Thus, the BCS can argue that the non-BCS Conferences have had an opportunity to participate in any decisions regarding the BCS's selection procedures and its methods of distributing revenue. However, the significance of this argument is minimal given that the non-BCS Conferences' have only been granted one collective vote out of the eight total on the BCS Presidential Oversight Committee.<sup>228</sup> Accordingly, the non-BCS Conferences lack any meaningful ability to modify the BCS's revenue distribution policies. Indeed, this defense would not even defeat a lawsuit filed by a disadvantaged non-BCS Conference or university, as courts have regularly entertained antitrust suits in the professional sports context by teams challenging league-wide rules that they themselves had previously agreed to, either implicitly or explicitly.<sup>229</sup>

Therefore, although the outcome of a rule of reason trial is generally difficult to predict,<sup>230</sup> opponents of the BCS have a reasonably strong case if they allege that the system's unequal revenue distribution constitutes an illegal group boycott. While the BCS will be able to cite several procompetitive benefits of varying strength, ultimately those same benefits could be achieved through less restrictive alternative means. The BCS's strongest defense appears to be that its alleged restraint does not harm consumer welfare, although its chances of succeeding on that argument are far from certain. Accordingly, the BCS remains quite susceptible to attack as a group boycott under a rule of reason analysis, despite its 2004 modifications to increase access for the non-BCS Conferences.

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<sup>227</sup> See *supra* notes 92–99 and accompanying text.

<sup>228</sup> Bleymaier *Congressional Statement*, *supra* note 94.

<sup>229</sup> See, e.g., *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (considering case filed by a National Basketball Association team against league television policies); *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994) (deciding lawsuit filed by NFL owner challenging NFL rule prohibiting public ownership of teams); *Los Angeles Memorial Coliseum Commission v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (considering antitrust challenge to an NFL rule limiting the movement of league franchises).

<sup>230</sup> Stucke, *supra* note 33, at 1422–29.

*B. The BCS and Price Fixing*

Although a potential group boycott claim against the BCS has received the vast majority of the attention in the academic literature, a price fixing claim against the BCS also provides a strong basis for attacking the BCS under federal antitrust law. Specifically, a prospective plaintiff can assert that the BCS constitutes an illegal price fixing scheme by both enabling formerly independent, competing conferences and bowl games to collectively establish a common pay scale for participation in all BCS bowls, as well as by allowing several of the BCS bowl games to eliminate pricing competition by collectively selling their broadcast rights to television networks.

First, the BCS fixes the payments made to participating conferences. Historically, each bowl game determined for itself how much of a financial payment to offer universities, a practice that continues today for bowl games outside of the BCS.<sup>231</sup> However, upon the formation of the Bowl Alliance, one of the BCS's predecessor entities,<sup>232</sup> the Alliance bowls and participating conferences agreed to a uniform scale under which all bowl payouts were determined.<sup>233</sup> The results of this price fixing scheme were immediately apparent, with the payouts for the three Alliance bowls—the Fiesta, Orange, and Sugar Bowls—more than doubling between the 1994 and 1996 seasons.<sup>234</sup> These increased costs were ultimately passed on to college football fans, through higher ticket prices and television fees, thus harming consumer welfare.<sup>235</sup>

As noted above, the practice of collectively determining the payouts for participating bowl games has continued under the BCS.<sup>236</sup> For example, following the 2009–10 season, the BCS determined that each of the six BCS Conferences would receive a minimum of \$19.7 million for their participation in the system, with both the Big 10 and SEC getting an additional \$4.5 million for each having had a second team selected to participate in a BCS game.<sup>237</sup> Meanwhile, the BCS collectively determined that the five remaining non-BCS Conferences would receive a total of only

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<sup>231</sup> See Thomas O'Toole, *\$17M BCS Payouts Sound Great, But ...: League, Bowl Rules Skew Schools' Cuts*, USA TODAY, Dec. 6, 2006, at 1C (noting that non-BCS bowls negotiate directly with conferences, sometimes resulting in different payouts being offered to the two teams competing against one another in a single bowl game).

<sup>232</sup> See *supra* notes 58–63 and accompanying text.

<sup>233</sup> Roberts Congressional Statement, *supra* note 204.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See *supra* notes 107–108 and accompanying text.

<sup>237</sup> *Bowl Championship Series Five Year Summary of Revenue Distribution 2005–06 through 2009–10*, *supra* note 10.

\$24 million, despite two universities from non-BCS Conferences having been selected for BCS bowl games that season.<sup>238</sup>

Payouts under the BCS are thus established without regard to the competitive strength or marketability of any individual participating university. In other words, two BCS Conferences each placing one team in a BCS bowl game will earn exactly the same, regardless of whether their champion is the top ranked team in the country and selected to play in the BCS National Championship Game, or the lowest ranked team participating in a lower profile BCS game. This was illustrated in the 2005–06 season, when Pac-10 champion and defending national champion USC was ranked first in the nation and selected to play for the national championship, while ACC champion Florida State received an automatic bid to play in the Orange Bowl despite only being ranked 22nd in the nation.<sup>239</sup> Notwithstanding this significant disparity in ranking and marketability,<sup>240</sup> both the Pac-10 and ACC received identical payments of around \$16.6 million from the BCS.<sup>241</sup> In a competitive marketplace, the Pac-10 would surely have received a much greater payment than the ACC by virtue of being the host conference of the nation's number one team.

Second, a price fixing claim can also be alleged against the BCS due to the fact that various BCS bowls collectively sell their broadcast rights to television networks. Historically, each bowl individually negotiated the sale of its rights to television networks, with the price paid for the broadcast rights to a particular game thus determined in a competitive marketplace. However, following the formation of the BCS in 1998, three of the BCS bowls—the Fiesta, Orange, and Sugar Bowls—have sold their broadcast rights collectively, eliminating any pricing competition between these bowl games.<sup>242</sup>

As a result, the BCS bowls have been able to charge television networks significantly higher prices for their broadcast rights. For example, when the BCS was formed in 1998, ABC Sports agreed to pay an estimated \$730 million over eight years for the initial rights to broadcast the four BCS

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

<sup>239</sup> All-time Results, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4809856> (last accessed Oct. 8, 2010).

<sup>240</sup> See Zimbalist, *supra* note 27, at 38 (noting that “the national championship game regularly has the strongest [television] ratings [of all BCS bowl games] by a healthy margin”).

<sup>241</sup> *Bowl Championship Series, Five Year Summary of Revenue Distribution, 2003-2007*, NCAA.ORG, available at <http://www.ncaa.org/wps/wcm/connect/f54bee004e0b9a869ce0fc1ad6fc8b25/BCS++Revenue+Distribution+by+Conference+2007-08.pdf?MOD=AJPERES&CACHEID=f54bee004e0b9a869ce0fc1ad6fc8b25> (last accessed Oct. 8, 2010).

<sup>242</sup> McClelland, *supra* note 12, at 179.

bowl games,<sup>243</sup> approximately two and a half times the previous annual rate paid for the broadcast rights to the same four games.<sup>244</sup> Following the completion of that initial agreement with ABC, the broadcast rights to the Fiesta, Orange, and Sugar Bowls, along with the rights to the newly created BCS National Championship Game for the years in which it was hosted by one of those three games, were collectively sold to Fox for an estimated \$320 million over four years.<sup>245</sup> Most recently, ESPN paid \$125 million per year to land a four-year contract for the broadcast rights to the same games.<sup>246</sup> Therefore, by working together to jointly sell the broadcast rights to their games, the Fiesta, Orange, and Sugar Bowls have been able to extract significantly higher sums of money from television networks than they were ever able to individually charge in a competitively priced market.

Given that the BCS openly allows formerly competing conferences and bowl games to both collectively agree upon the amount to be paid for participation in BCS bowl games, as well as eliminate pricing competition when selling their television broadcast rights, a *prima facie* case of price fixing can be asserted against the BCS. The BCS would likely defend itself against such a claim by arguing that the BCS member conferences and bowl games have effectively formed a joint venture, and therefore their joint decisions regarding the amounts paid to participating conferences or charged to television networks do not violate antitrust law.<sup>247</sup> However, the mere fact that competitors have formed a joint venture alone does not shield their collective activities from scrutiny under the Sherman Act.<sup>248</sup> Rather, courts consider whether the challenged conduct is central to the core operations of the joint venture, or instead ancillary to the venture's

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<sup>243</sup> Schmit, *supra* note 27, at 231.

<sup>244</sup> Zimbalist, *supra* note 27, at 7.

<sup>245</sup> Michael Hiestand, *Fox to Announce Deal to Air Fiesta, Orange, Sugar bowls in '06*, USATODAY.COM, Nov. 21, 2004, [http://www.usatoday.com/sports/columnist/hiestand-tv/2004-11-21-hiestand\\_x.htm](http://www.usatoday.com/sports/columnist/hiestand-tv/2004-11-21-hiestand_x.htm) (last accessed Oct. 17, 2010).

<sup>246</sup> Tom Weir & Michael Hiestand, *BCS Officially Headed to ESPN Starting in 2011*, USATODAY.COM, Nov. 19, 2008, [http://www.usatoday.com/sports/college/football/2008-11-17-bcs-fox-espn\\_N.htm](http://www.usatoday.com/sports/college/football/2008-11-17-bcs-fox-espn_N.htm) (last accessed Oct. 17, 2010).

<sup>247</sup> See *Monts Congressional Statement*, *supra* note 213 (arguing that the BCS should be analyzed as a "joint venture among the various conferences and institutions").

<sup>248</sup> See *Am. Needle*, 130 S. Ct. at 2215 ("If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from §1, then any cartel 'could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products.'") (quoting *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring)). See also Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WISC. L. REV. 835, 865–66 ("A determination that cooperation is necessary for the formation of a venture does not immunize all of the operations of that venture.").

fundamental purpose.<sup>249</sup> The legality of these latter, “ancillary restraints”—i.e., those which reasonably and necessarily affect operations outside the natural scope of the joint venture—is judged under the rule of reason by balancing “the injury to competition [from the ancillary restraint] against [its] purported benefits.”<sup>250</sup>

It will be difficult for the BCS to argue that its price fixing activities are central, and not ancillary, to the underlying purpose of the BCS. Indeed, the BCS’s own website states that the system is “designed to ensure that the two top ranked teams in the country meet in the national championship game, and to create exciting and competitive matchups among eight other highly regarded teams in four other bowl games.”<sup>251</sup> In other words, the basic purpose of the BCS is simply to coordinate compelling college football bowl game pairings, and not to distribute revenue or negotiate television contracts. Indeed, with the exception of the BCS National Championship Game that was created in 2006, the BCS has not itself created or produced any football games; instead, it has simply facilitated the scheduling of better matchups in the preexisting BCS bowl games. Therefore, any agreement as to the payouts given to participants in the BCS bowls, or the prices charged for the broadcast rights to these games, are not central to the primary purpose of the BCS joint venture. Instead, these price fixing restraints would at best be considered ancillary restraints supporting—but not directly essential to—the BCS’s primary objective.

However, an argument can be made that the BCS’s price fixing restraints are not even properly characterized as ancillary. Although the BCS will assert that the various participating conferences would have been unwilling to enter the original BCS agreement without being guaranteed uniform bowl payouts for their participation, one could certainly argue that this agreement was not reasonably necessary to form the joint venture. Indeed, the allure of playing in a national championship game, along with the already substantial payouts previously offered independently by the various BCS bowls, may very well have been sufficient to persuade all of the BCS Conferences to participate. Similarly, the BCS will have an even more difficult time arguing that the collective sale of television broadcast rights is necessary to promote the venture’s fundamental objective of scheduling exciting bowl matchups. The BCS framework in no way requires that the Orange, Fiesta, and Sugar Bowls are all broadcast on the same television network, let alone that the three bowls collectively negotiate

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<sup>249</sup> Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court’s Dagher Decision*, 57 EMORY L.J. 735, 744 (2008).

<sup>250</sup> *Sullivan*, 34 F.3d at 1102; see also Feldman, *supra* note 248 at 865 n.203 (citing additional cases).

<sup>251</sup> *The BCS Is ...*, *supra* note 22.

the sale of their broadcast rights, as evidenced by the fact that the BCS has survived even though the Rose Bowl has continued to negotiate its own television agreement.<sup>252</sup>

In any event, regardless of whether these price fixing schemes are classified as ancillary, such a claim against the BCS would likely be judged under the rule of reason. Indeed, although horizontal price fixing has traditionally been held to be *per se* illegal under Section One of the Sherman Act,<sup>253</sup> following the Supreme Court's decision in *NCAA*<sup>254</sup> any price fixing claim against the BCS will presumably be decided under the rule of reason, for the reasons discussed in Part III above.<sup>255</sup> Moreover, the BCS could also argue that *per se* illegality for its bowl appearance payment scheme is inappropriate because the arrangement contains both horizontal and vertical price fixing agreements,<sup>256</sup> the latter of which are to be judged under the rule of reason following the Supreme Court's 2007 opinion in *Leegin Creative Leather Products v. PSKS, Inc.*<sup>257</sup> Therefore, the legality of the BCS's price fixing schemes would likely be judged by weighing their anticompetitive effects against any procompetitive benefits.

A court considering the BCS's price fixing schemes should find their anticompetitive effects to be readily apparent, given that both restraints are at best ancillary to the BCS's fundamental objective, and considering that the Supreme Court has declared that "no elaborate industry analysis is required to demonstrate the anticompetitive character of [a price fixing] agreement."<sup>258</sup> Indeed, the BCS has eliminated any pricing competition between the formerly independent bowl games and conferences. Thus, the BCS would bear the burden of proving that its price fixing schemes yield sufficient procompetitive benefits to outweigh their clear anticompetitive effects.

As with the group boycott claim discussed above,<sup>259</sup> the creation of a national championship game provides little procompetitive justification with respect to a potential price fixing claim against the BCS. Neither a

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<sup>252</sup> *ESPN, BCS Agree to Four-year Deal for Television, Radio, Digital Rights*, *supra* note 130 (noting that unlike the other BCS games, which will be broadcast on ESPN, "[t]he Rose Bowl will continue to be televised on ABC through 2014 under a separate, previous contract").

<sup>253</sup> *See, e.g.,* Feldman, *supra* note 114, at 577–78.

<sup>254</sup> *See NCAA*, 468 U.S. at 103.

<sup>255</sup> *See supra* notes 140–145 and accompanying text.

<sup>256</sup> *See Carroll, supra* note 27, at 1264–65 (noting that the BCS includes both horizontal and vertical restraints).

<sup>257</sup> 551 U.S. 877 (2007).

<sup>258</sup> *See NCAA*, 468 U.S. at 109 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

<sup>259</sup> *See supra* note 207 and accompanying text.



common pay scale across the BCS bowl games, nor the collective sale of broadcast rights are in any way necessary to stage a national championship game. Thus, a championship game could easily be established via less restrictive means. For the same reason, the BCS's other procompetitive arguments considered with respect to a group boycott claim would similarly fall short when applied to a price fixing claim.<sup>260</sup>

Instead, the more plausible—and perhaps only—procompetitive argument available to the BCS is that the establishment of a common pay scale for all BCS bowl games helps to maintain competitive balance in college football. Specifically, the BCS may elect to argue that its uniform bowl payouts are necessary to prevent any single university or conference from developing a significant financial advantage over its competition. As discussed above, universities can use such revenue disparities to build better facilities and retain better coaches than their rivals operating on smaller budgets.<sup>261</sup> Therefore, the BCS could assert that its common pay scale helps maintain competitive balance by ensuring that each of the top conferences earn the same amount for their participation in the marquee bowl games.

The BCS will face two significant hurdles in order to convince a court that this competitive balance concern justifies its price fixing scheme. First, the BCS would be forced to confront the argument that its preferential treatment of the six BCS Conferences actually *decreases* competitive balance across college football. As discussed above, many commentators have argued that the BCS in fact perpetuates competitive imbalance, insofar as it gives the BCS Conferences a consistent revenue advantage over the non-BCS Conferences, a disparity that enables the six favored conferences to maintain their historical competitive dominance over the traditionally weaker non-BCS Conferences.<sup>262</sup>

Second, even if the BCS convinces a judge or jury that the system does not in fact decrease overall competitive balance in college football, its competitive balance argument would nevertheless face another hurdle: the fact that the Supreme Court previously considered and rejected a similar defense in the *NCAA* case. There, the NCAA attempted to justify its regulation fixing the price that universities charged television networks to broadcast football games on the grounds that the restriction helped to maintain competitive balance among NCAA member institutions.<sup>263</sup> Although the Supreme Court accepted that maintenance of competitive balance was generally a legitimate interest for the NCAA to pursue, it

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<sup>260</sup> See *supra* note 208 and accompanying text.

<sup>261</sup> See *supra* notes 169–172 and accompanying text.

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

<sup>263</sup> See *NCAA*, 468 U.S. at 91–94, 117.

nevertheless rejected the proposition that competitive balance concerns justified the particular price fixing scheme at issue.<sup>264</sup> Specifically, the Court held that the NCAA's plan was poorly suited to achieve competitive balance insofar as it failed to either regulate the overall amount of money that a university could spend on its football program, or the ways in which colleges could spend football-related revenues.<sup>265</sup> The Court noted that the NCAA instead simply imposed "a restriction on one source of revenue that is more important to some colleges than to others."<sup>266</sup> The Court further found that the NCAA presented "no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or other revenue-producing activity."<sup>267</sup> Accordingly, the Court held that the NCAA's price fixing scheme was poorly suited to achieve its interest in maintaining competitive balance, and thus did not outweigh the anticompetitive effects of the challenged restraint.

Given the Supreme Court's decision in *NCAA*, the BCS will have a difficult time arguing that its common pay scale price fixing scheme sufficiently enhances competitive balance to outweigh the agreement's clear anticompetitive harms. As in *NCAA*, the BCS only regulates one source of football-related revenue earned by the conferences and universities, and does not affect other substantial sources of revenue such as alumni donations, regular season ticket sales, television contracts, and sponsorship agreements.<sup>268</sup> Moreover, like the regulation struck down by the Supreme Court in *NCAA*, the BCS places no limitations on the manner in which football-related revenues may be used. Therefore, it is difficult to imagine that a court would accept the BCS's competitive balance argument in light of the *NCAA* precedent.

However, even if a court were willing to accept the BCS's competitive balance argument as a justification for its fixing of the prices paid to conferences participating in BCS bowl games, that argument would not provide a justification for the elimination of competition between the Fiesta, Orange, and Sugar Bowls when selling their broadcast rights to television networks. Indeed, while the collective marketing of the television rights to

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<sup>264</sup> *Id.* at 117.

<sup>265</sup> *Id.* at 119.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See, e.g., McCormick & McCormick, *supra* note 40, at 522 (noting that many universities generate significant football revenues through both ticket sales and related donations); Jack Carey & Andy Gardiner, *Commercialized College: Corporate Sponsors in Spring*, USA TODAY, [http://www.usatoday.com/sports/college/football/2009-04-16-spring-game-sponsorship\\_N.htm](http://www.usatoday.com/sports/college/football/2009-04-16-spring-game-sponsorship_N.htm) (last accessed Oct. 8, 2010) (noting increase in football-related corporate sponsorships).

these bowls certainly helps generate some of the significant revenues distributed by the BCS, ultimately it is not necessary to maintain competitive balance because the BCS could instead simply evenly distribute any revenues earned individually by competing bowl games. Therefore, it is difficult to imagine a sufficiently compelling pro-competitive argument that would justify the collective sale of television broadcast rights under the Sherman Act.

Lastly, for a prospective plaintiff an added benefit of a price fixing claim under either theory is that it bypasses the BCS's strongest defense to a group boycott claim, namely a lack of the requisite harm to consumer welfare necessary to state a valid antitrust claim.<sup>269</sup> While the strength of the consumer welfare argument is questionable in the group boycott context,<sup>270</sup> there should be little doubt that consumer welfare is harmed by both of the BCS's price fixing restraints. As noted above, the BCS's price fixing agreements ultimately result in higher costs being passed on to consumers in the form of increased ticket prices and television fees.<sup>271</sup> Indeed, the initial BCS television contract resulted in an increase of approximately two and a half times the previous annual rate paid for the broadcast rights to the same four bowl games.<sup>272</sup> While some of this escalation can undoubtedly be attributed to increased desirability resulting from the fact that each of the BCS games was slated to host a national championship matchup, at least some of it was also almost certainly due to the elimination of competition between the Fiesta, Orange, and Sugar Bowls. Because these increased fees are ultimately passed on to the consumer, a consumer welfare defense by the BCS would thus be without merit in response to a price fixing claim.

Accordingly, should a prospective plaintiff challenging the BCS assert a price fixing claim against the system—whether premised on the uniform bowl payouts or the collective sale of broadcast rights—such a claim would seem to have a strong possibility of success.

### *C. The BCS as an Illegal Tying Arrangement*

Finally, given the collective sale of the broadcast rights for the Fiesta, Orange, and Sugar Bowls, a prospective plaintiff challenging the BCS may seek to assert that the system constitutes an illegal tying agreement. As noted above, a tying agreement violates Section One of the Sherman Act when four elements are present: (i) two or more separate products are

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<sup>269</sup> See *supra* notes 213–214 and accompanying text.

<sup>270</sup> See *supra* notes 215–226 and accompanying text.

<sup>271</sup> See Roberts Congressional Statement, *supra* note 204 (noting same).

<sup>272</sup> Zimbalist, *supra* note 27, at 7.

grouped together, (ii) the seller conditions the sale of one product on the sale of the other product, (iii) the seller has sufficient economic power to force purchasers to buy the tied products, and (iv) the seller actually coerces the buyer to purchase all of the tied products.<sup>273</sup>

A tying claim against the BCS would most likely be asserted by a television network that attempted to purchase the broadcasting rights for one of the BCS bowl games. Such a plaintiff should easily be able to establish the first element—the grouping of multiple separate products—given the collective sale of the broadcast rights for the Fiesta, Sugar, and Orange Bowls, along with the rights to the BCS National Championship Game for the years in which it is hosted by one of the three aforementioned bowls.<sup>274</sup> Arguing that these games do not constitute separate products will be extremely difficult for the BCS, as prior to the formation of the BCS these bowls independently marketed their own broadcasting rights to networks.

A plaintiff should also be able to establish the second element of a tying claim, as the purchase of the broadcasting rights for any of the Fiesta, Orange, and Sugar Bowls, along with the BCS National Championship Game, appears to be contingent on purchasing the rights for the other games as well.<sup>275</sup> The BCS could argue that the sale of broadcast rights for any one game does not hinge on purchasing the other games, perhaps pointing to the example of the Rose Bowl, which individually markets its broadcasting rights to ABC.<sup>276</sup> However, because the broadcasting rights for the standalone BCS National Championship Game are packaged along with the rights to broadcast the corresponding BCS bowl game held in the same city in a particular year,<sup>277</sup> at a minimum a plaintiff would likely be able to establish that the purchase of broadcasting rights for the championship game are conditioned on acquiring the rights to a second BCS game.

Similarly, a court would likely find the third element of a tying claim to be satisfied as well, as the BCS's control over the national championship game and other marquee bowl match-ups gives it significant economic power in the market for the broadcast rights for the most desirable post-

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<sup>273</sup> See Leslie, *supra* note 113, at 1850–51. See also Feldman, *supra* note 114, at 577–78 (discussing tying agreements generally).

<sup>274</sup> See ESPN, *BCS Agree to Four-year Deal for Television, Radio, Digital Rights*, *supra* note 130 (noting that although ESPN purchased the rights to broadcast the Fiesta, Orange, and Sugar Bowls from 2011–2014, it only acquired the rights to the BCS National Championship Game from 2011–2013, the years in which one of the aforementioned bowls will host the title game).

<sup>275</sup> See *id.*

<sup>276</sup> See *id.*

<sup>277</sup> See *id.*

season college football games. Indeed, the economic power wielded by the BCS became apparent soon after its formation, when the BCS successfully increased television revenues by sixty percent in the first year of its initial television contract with ABC.<sup>278</sup>

Although a prospective plaintiff should thus be able to establish the first three elements of a tying claim against the BCS, satisfying the fourth factor would likely prove more difficult. Specifically, in establishing actual coercion, courts typically require that a plaintiff prove it was an “unwilling purchaser” of one of the tied products.<sup>279</sup> In other words, a prospective plaintiff would need to prove that it was forced to buy the broadcast rights to at least one BCS game it did not wish to purchase in order to obtain the rights for the game(s) it wanted to broadcast. While it is possible that a television network would only be interested in acquiring the broadcast rights to a certain BCS game, in most cases a network interested in purchasing the rights to one BCS game would usually want the rights to the other games as well. Indeed, given that BCS bowl games consistently draw strong television ratings,<sup>280</sup> every BCS game would seem to have at least some appeal to most networks.

Therefore, it will be difficult for a television network to prove that it was actually an “unwilling purchaser” of any BCS game. Instead, a court would likely find that the network was simply more interested in purchasing the rights to some games than others, an insufficient level of coercion under the existing case law.<sup>281</sup> Accordingly, the chances of success for a tying claim against the BCS do not appear to be as strong as for a group boycott or price fixing claim.

## V. CONCLUSION

This Article has considered the continued viability of an antitrust action against the Bowl Championship Series, the system through which participation in college football’s national championship game and other most prestigious post-season bowl games is determined. Although an overwhelming majority of academic commentators have concluded that the BCS alleviated most antitrust concerns through its 2004 revised selection procedures, this Article has instead argued that the BCS remains susceptible to antitrust attack on several grounds. First, opponents of the BCS can

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<sup>278</sup> McClelland, *supra* note 12, at 179.

<sup>279</sup> See, e.g., *Trans Sport*, 964 F.2d at 192.

<sup>280</sup> *T.V. Ratings*, *supra* note 210.

<sup>281</sup> See, e.g., *Six W. Retail Acquisition*, 2004 U.S. Dist. Lexis 5411, at \*22 (holding that having to buy a product that one “does not ‘want as much’” as the tied product is not enough).

argue that the system continues to maintain a group boycott insofar as it inequitably distributes revenue, preventing the non-BCS Conferences from realizing the full benefits of BCS participation. Second, the BCS can also be attacked as an illegal price fixing scheme due to the fact that it enables formerly independent, competing conferences and bowl games to establish a common pay scale for participation in all BCS bowl games, and eliminates any pricing competition between certain BCS bowl games for the sale of their broadcast rights. Finally, however, a tying claim based on the collective marketing of BCS television broadcast rights appears less promising.

Although the outcome of any case under Section One of the Sherman Act is difficult to predict, this Article contends that the BCS would struggle to defend itself against a group boycott or price fixing claim under the rule of reason, because its alleged procompetitive benefits could similarly be obtained via less restrictive alternatives. Accordingly, this Article concludes that the BCS remains quite vulnerable to an antitrust challenge, should the political process fail to address the inequalities of the BCS.