Bowl Championship Series: A legal Analysis of BCS Violation of or Compliance with Sherman Antitrust Laws

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BOWL CHAMPIONSHIP SERIES: A LEGAL ANALYSIS OF 
BCS VIOLATION OF OR COMPLIANCE WITH SHERMAN 
ANTITRUST LAWS

by Jordan Bledsoe*

I, INTRODUCTION

Since its inception in 1998, the NCAA Bowl Championship Series (BCS) has been plagued with controversy. The BCS was adopted in order to establish a system of equality in college football. However, many feel that the BCS creates a hierarchical system that gives an unfair advantage to schools with BCS tie-ins.¹ While inequality is somewhat inherent in competitive sports, the effects of the BCS span far beyond the field of play. BCS inequalities create financial winners and financial losers. The sixty-four universities² with BCS tie-ins have accrued a total of $492 million in the last four years, while the remaining fifty-four universities without

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¹ BCS tie-in is a term describing conferences that automatically qualify for one of the five BCS bowl games each year, and are known as automatic-qualifying conferences or AQ conferences. Conferences that do not have tie-ins with the BCS bowls are known as non-automatic qualifying conferences or non-AQ conferences.

BCS tie-ins have earned a total of only $62 million.\textsuperscript{3} When the figures are further compared, teams from BCS affiliated conferences have earned an average of $7.7 million per year while teams from non-BCS affiliated conferences have earned an average of $1.1 million per year.

The issues surrounding the lucrative BCS have been addressed in senate hearings, law reviews, and sports news broadcasts across the United States. Proponents of the BCS argue it does not violate antitrust laws, stating that it is not a monopoly and does not participate in anticompetitive behavior. Opponents of the BCS argue that the BCS does indeed violate the antitrust laws for legal reasons such as per se and rule of reason violations,\textsuperscript{4} which are aspects of anticompetitive behavior.\textsuperscript{5} An analysis of the terms of the Sherman Antitrust Act reveals that both sides in the debate have legal standing in their positions. With very persuasive and sound arguments from both sides, the future of the BCS remains at an impasse.

\section*{II. Background of the BCS}

\textit{What is the Bowl Championship Series?}

The BCS is the Football Bowl Subdivision’s (FBS) post-season system used to rank and match the highest rated teams against each other to play in bowl games. It is made up of five bowl games, one of which is the national championship game. The BCS bowl games are the Tostitos Fiesta Bowl, FedEx Orange Bowl, Rose Bowl, Allstate

\textsuperscript{3} The Bowl Championship Series: Is It Fair And In Compliance With Antitrust Law?: Hearing before Subcomm. on Antitrust, Competition and Consumer Rights, of the Comm. on the Judiciary, 7 (2009).

\textsuperscript{4} Letter from Orrin G. Hatch, U.S. Senator, to Barrack Obama, U.S. President (Oct. 21, 2009) (on file with author), available at http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.View&PressRelease_id=7822712-1b78-be3e-e0e8-4e50a83a3e2e. A per se violation occurs when “conduct in question is so anticompetitive as to be conclusively unreasonable.” A rule of reason violation occurs when contracts and combinations unreasonably restrain trade.

\textsuperscript{5} See id.
Sugar Bowl and the BCS National Championship Game. The BCS is affiliated with eleven Division I-A conferences and is managed by the Presidential Oversight Committee, which includes a university president or chancellor from each of these conferences as well as from the University of Notre Dame.

Teams are invited to play in BCS bowl games based on a complex ranking system. The BCS ranking system is computed using three equally-weighted components: USA Today Coaches Poll, Harris Interactive College Football Poll, and the average of six computer-generated rankings. Each of the three components ac-

6 Thomas O’Toole, $17M BCS Payouts Sound Great, but... USA Today (Dec. 6, 2006) (on file with author), available at http://www.usatoday.com/sports/college/football/2006-12-06-bowl-payouts_x.htm. The payouts for each of these bowl games is estimated at $17 million.

7 Bowl Championship Series, http://www.bcsfootball.org/news/story/?id=4809793 (last visited Jan. 18, 2010). The 11 Division I-A conferences are as follows: Atlantic Coast, Big East, Big Ten, Big 12, Conference USA, Mid-American, Mountain West, Sun Belt, Pacific 10, Southeastern and Western Atlantic.

8 Id. The Presidential Oversight Committee manages the BCS by focusing on policy, format, revenue distribution, and contractual obligations.

9 Notre Dame is not part of a conference, so it is considered an independent.


11 See id. Voters of this poll include “former coaches, student-athletes, administrators and media representatives with a goal of 114 participants.” These participants are nominated by Division I-A conferences; each conference nominates ten panelists. Harris Interactive ultimately selects the actual voting panel randomly from those nominated.

12 See id. Computer rankings are calculated by six different computer methods; Peter Wolfe, Wes Colley, Sagarin, Seattle Times, Richard Billingsley, and Kenneth Massey. Each of these methods attempts to rank a team’s performance by evaluating factors such as a team’s winning percentage, strength of schedule, and the venue (home or away).
counts for one-third of a team’s total ranking. This total ranking determines which teams will play for the national championship and other bowl championship games. This system was created to match the best two football teams in the country against one another in order to determine a national champion.

Regardless of rankings, certain rules dictate which teams play in BCS bowls. Six of the eleven Division I-A conferences receive automatic invitations to send its conference champion to participate in a BCS bowl game each year. These six conferences that receive these automatic invitations are known as automatic qualifying (AQ) conferences.\(^\text{14}\) The conference champions from the six AQ conferences fill six of the ten spots available in the five BCS games regardless of their record, BCS standings, or losses to non-conference teams. Other teams are selected to fill the four remaining slots in the BCS bowls.\(^\text{15}\) In order for a non-AQ conference team to receive an invitation to play in a BCS bowl—known as an at-large berth—they must be ranked in the top twelve of the final BCS standings; if they are not ranked in the top twelve they must be ranked in the top sixteen and ranked higher than at least one AQ conference team to qualify.\(^\text{16}\) Only one team from each of the AQ conferences will receive

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13 See id.

14 See id. These conferences include the ACC, Big 12, Big East, Big Ten, Pac-10, and SEC. “Each conference will be evaluated over a four year period based on the three elements: the average rank of the highest ranked team, the average rank of all conference teams, and the number of teams in the top twenty-five. Bowls’ contractual agreements with host conferences will remain in place. The ACC, Big East, Big 12, Big Ten, Pac-10 and SEC met the criteria to earn annual automatic qualifications through the 2011 regular season.”

15 See id. The Bowl Championship Series selection committee chooses teams based upon their record, ranking, strength of schedule, and other relevant factors.

16 These conferences include the Mountain West, Sun Belt, Conference USA, Mid-American, Western Atlantic.

an automatic bid each year, the only exception being Notre Dame. No conference may have more than two teams that receive automatic BCS bids, unless “two non-champions from a BCS conference finish as the top two teams in the final BCS standings in which case they will meet in the National Title Game while its conference will play in its conference’s BCS bowl game.”

**BCS Controversy**

Since its beginning in 1998, there have been controversies over the payout inequalities created by the BCS. In 1998, Tulane University went undefeated (11-0), winning the Conference USA championship. Although undefeated, Tulane was denied a BCS bowl. The justification for Tulane’s exclusion from a BCS bowl was it lacked strength of schedule, and it was not a member of an AQ conference. Rather than playing in a BCS game, Tulane played in the Liberty Bowl, defeating Brigham Young University 41-27. Instead of Tulane receiving $11.5 million for its team and conference, the amount they would have received from playing in a BCS bowl game, it earned $1 million.

Trouble struck the BCS again in 2004. No. 21 ranked Pittsburgh, with three losses, received $14 million despite losing the Fiesta

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18 See id. Notre Dame receives an automatic bid if it finishes in the top eight. Notre Dame is an exception because it is not a member of a Division I-A conference.

19 See id. “The third-ranked team will receive an automatic berth if it has not already received one, and if it is a member of a BCS Conference (and provided that its conference has not already earned two automatic berths), if there is room. If the third-ranked team did not require a berth using the previous provision, then the fourth-ranked team will receive an automatic berth if it has not already received one, and if it is a member of a BCS Conference (and provided that its conference has not already earned two automatic berths if there’s room.)”

20 See id.

21 See id.

Bowl, while No. 10 ranked Boise State University, who was undefeated, played No. 7 ranked University of Louisville in the non-BCS Liberty Bowl.²³ Boise State and Louisville, both higher ranked than Pittsburgh, received $1.35 million each for playing in the Liberty Bowl, $12.65 million less than the amount Pittsburgh received from the Fiesta Bowl.²⁴

The BCS rankings went without major disutations for one more season before problems arose once again—this time recurring for three consecutive years. In 2006, 12-0 Boise State ended the season as the only undefeated college team. Boise State was refused a shot at the national championship title and had to settle for the Fiesta Bowl, where it defeated Oklahoma. The following year, 2007, the University of Kansas and the University of Illinois were both defeated by the University of Missouri; Missouri was ranked higher than both of these teams in the BCS poll before bowl selection; however, the University of Missouri was denied a BCS bowl, earning $3 million from playing in the AT&T Cotton Bowl. Meanwhile, the defeated University of Kansas and the University of Illinois both received bids to play in a BCS game, each earning $17 million each for their teams and conferences.²⁵ In 2008, Utah, Boise State, and TCU—all non-BCS teams—were in the top eleven of the final BCS standings. All three of these teams were ranked above the Big East champion Cincinnati (ranked No. 12) and ACC champion Virginia Tech (ranked No. 19);²⁶ but only one of these three teams, Utah, received a BCS bid. Boise State was denied a BCS bid because two-loss Ohio State was the Big Ten conference co-champion; Boise State was ranked above Ohio State in both human polls and every computer model. Boise State and TCU played each other in the Poinsettia Bowl, earn-

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²⁵ Bowl Championship, *supra* note 7.

²⁶ See id.
ing just $750,000 each. Utah went on to beat Alabama in the 2009 Sugar Bowl, ending the season as the only undefeated team in the country, yet was denied a chance to play for the national championship. Opponents of the BCS argue that non-AQ teams such as Utah and Boise State are denied access to the BCS championship game and other BCS bowl games simply because they do not belong to AQ conferences.

*What are the problems with the BCS?*

Unequal access to BCS bowl games, for non-AQ conference teams, is a fundamental problem with the BCS system. All Division I schools have met the same requirements set by the NCAA to qualify as FBS schools and conferences. Schools from both AQ and non-AQ conferences meet these same requirements. As these schools meet the requirements set forth by the NCAA to participate in the FBS, one could argue that they should be awarded equal opportunity to compete in all bowl games, including the national championship. In a recent release, the BCS argued that it does allow equal access for all conferences:

> Each conference had an opportunity to earn annual automatic qualification through a four-year evaluation covering the regular seasons of 2004, 2005, 2006, and 2007. The Atlantic Coast, Big East, Big Ten, Big 12, Pac-10 and Southeastern Conferences met the threshold and earned automatic qualification through the 2013-2014 season. A seventh conference could qualify for the 2012-13 and 2014 [sic] bowl

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28 See Sloppy Joe, Could Conference Expansion Bump any FCS Schools to FBS? College Football Cafeteria (June 1, 2010), http://www.collegefootballcafeteria.com/analysis/could-conference-expansion-bump-any-fcs-schools-to-fbs (describes the requirements set forth by the NCAA for a team to qualify to participate in the FBS).

29 See id.
season based on an evaluation of the 2008, 2009, 2010 and 2011 regular season.\textsuperscript{30}

The opportunity for non-AQ conferences to receive automatic qualification status came six years after the creation of the BCS. By this time, the AQ conferences were able to establish themselves as football powerhouses, giving AQ conferences advantages over non-AQ conferences in a number of ways. First, the money AQ conferences earn each year through automatic invitations to play in BCS bowls allows these conferences to have superior facilities, equipment, and coaching salaries, which leads to superior recruiting. Second, AQ conferences naturally attract the nation’s best athletes, not only because of superior funds, but also because these conferences provide athletes opportunities to play in prestigious and highly visible BCS bowl games, including the national championship. Last, non-AQ conferences may have outstanding teams that occasionally play in BCS bowl games (e.g., Boise State, Utah, Texas Christian), but because of the financial advantages possessed by AQ conferences, non-AQ conferences will have weaker teams that hold back the entire conference from qualifying for AQ status. Thus, the BCS is far from granting equal access for teams to play in BCS bowls and the national championship.

The BCS creates financial inequality among teams and conferences. This inequality results from the millions of dollars more received every year from BCS payouts by AQ conference teams. AQ conferences have received almost 90\% of the total BCS revenues since the beginning of the BCS.\textsuperscript{31} One team from all six of the AQ conferences receives an automatic bid to a BCS bowl game every year, thus currently guaranteeing that these conferences will receive at least $108 million per year from bowl games. Simply being in an AQ conference guarantees that each individual school and conference receives up to ten times more money than a school from a non-automatic qualifying conference, no matter what its record may be.\textsuperscript{32}

\textsuperscript{30} Bowl Championship, \textit{supra} note 7.

\textsuperscript{31} See \textit{Hearings}, \textit{supra} note 3, at 3.

\textsuperscript{32} See \textit{id. at} 4.
Because of exclusive agreements with BCS bowls, the champion of a BCS conference is guaranteed a bowl game, regardless of its record. The payout for each of the BCS bowl games is approximately $17 million; if two teams from the same conference play in a BCS bowl the cap for the conference is approximately $25 million. This creates huge inequality gaps among teams and conferences. Opponents of the BCS believe that non-AQ conference teams cannot keep up with AQ conference teams that automatically receive prodigious amounts of money each year. This is demonstrated by the fact that none of these non-AQ conference teams have played in the national championship since the formation of the BCS, or the fact that they have appeared in only seven BCS bowl games compared to the eighty-seven appearances by AQ Conference teams.

As a result of the apparent inequalities and damaging effects of the BCS on college football, opponents of the BCS are calling for a legal investigation to determine whether or not the BCS is in accordance with law. Business enterprises are required to be in compliance with the nation’s pro- and anticompetitive behavior standards. The standards of pro- and anticompetitive behavior are outlined in the nation’s antitrust laws. If the BCS is found to violate antitrust laws, then legal action can be taken, possibly leading to the dissolution of the BCS. However, if it is found not to violate antitrust laws, the inequalities and damaging effects of college football’s postseason are likely to continue.

33 Conferences receive the money if one of their teams plays in the Fed Ex National Championship Game or the All State Sugar Bowl (Each conference regulates how the money is divided). Individual teams receive the money if they play in the Rose Bowl, Fed Ex Orange Bowl, or the Tostitos Fiesta Bowl.


35 See Hearings, supra note 3, at 2.

36 See id.
III. Sherman Antitrust Act

The Sherman Antitrust Act is the elementary source of antitrust law in the United States. It was created to protect competition within the free market, to maintain opportunities for market access, and to promote market rivalry. Sections 1 and 2 of the Act are relevant to the BCS argument. Section 1 disallows acts committed by two or more people that "restrain trade in interstate commerce." Section 2 prohibits "monopolistic activities," which, in the case of the BCS, includes restricting entry into an agreement.

Section 1 of the Sherman Act

Section 1 defines and restricts specific anticompetitive behavior. Anticompetitive behavior is defined as "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . declared to be illegal." Anticompetitive behavior occurs in two ways: per se violations, which includes the group boycott violation, and rule of reason violations. Either the per se or rule of reason may be used to prove violation of antitrust law.

Per se violation

A per se violation occurs when the conduct of entities is said to be unreasonably anticompetitive. Unreasonable anticompeti-

39 Hatch, supra note 4, at 6.
40 Hales, supra note 38, at 6.
41 See id.
tive behavior occurs when the actions of entities restrict output and competition, regardless of the market context in which it is found.\textsuperscript{44} Also, conduct that is anticompetitive tends to decrease output (and thereby drive up price) or decrease product quality, whereas pro-competitive behavior increases output and quality.\textsuperscript{45} As long as the BCS can show that it provides at least the same standard of quality bowl games as those that existed before the founding of the BCS at the same price or provides higher quality bowl games at a higher price, it is not in violation of the per se rule. In order to determine if the BCS does indeed participate in anticompetitive behavior that constitutes a per se violation, an adequate method of measuring output must be established.

The national championship game might serve as an adequate method of measuring output. Proponents of the BCS might argue that one must take into account the history of national championship games before the formation of the BCS. In the fifty-six years preceding the creation of the BCS,\textsuperscript{46} the top two highest ranked football teams were matched up in bowl games only eight times.\textsuperscript{47} However, in the twelve years that the BCS has existed, the top two AP Poll-ranked\textsuperscript{48} teams have been matched up nine times.\textsuperscript{49} These statistics show that the BCS has had a 75% success rate at matching the two highest ranked teams, whereas the pre-BCS system was able to do so only fourteen percent of the time. Proponents of the BCS would argue that this objective measuring method demonstrates the effectiveness of the BCS and its ability to provide a quality match-up between the top two football teams in the country. This method of

\textsuperscript{44} See id.
\textsuperscript{45} Fenasci, supra note 37, at 50.
\textsuperscript{46} BCS Releases, supra note 10. Before the creation of the BCS, the Bowl Coalition and Bowl Alliance existed as the post-season system. The Bowl Alliance and Coalition “were contractually obligated to certain games and there was no flexibility to match the top teams.”
\textsuperscript{47} Bowl Championship, supra note 7.
\textsuperscript{48} The AP Top 25 poll for College football is made of up votes from 65 sportswriters and broadcasters from across the country.
\textsuperscript{49} Bowl Championship, supra note 7.
measurement also illustrates that the BCS has had a positive effect on bowl games and has increased the quality of output when compared to the previous system.

Nevertheless, opponents to the BCS would argue that although the BCS system is more effective than previous systems at matching the two top-ranked teams in the country, it does not address the unequal access AQ conferences receive that puts them at a significant advantage to participate in BCS games. Also, opponents argue that regular access to these BCS bowl games puts the teams from AQ conferences at an advantage to gain easier access to the national championship game.50

Another way in which output can be measured is the number of bowl and championship games played. Proponents of the BCS argue:

The BCS arrangement fails to limit output because it does not restrict the number of bowl games played in the postseason. In fact, the number of bowl games has increased, rather than decreased, since the advent of the BCS. Thus, it appears that economic competition has actually been enhanced, not diminished, by the BCS.51

The BCS does not stop other bowl games from being played, nor does it have exclusive rights to naming a national champion. Opponents of the BCS, however, argue that the discrepancy in payout money between a BCS and non-BCS bowl game is enormous and

50 The BCS ranking system is partly comprised of human voting polls. Opponents to the BCS argue that there is bias in the human polls against teams from non-AQ conferences. This bias is partly originates from the argument that non-AQ teams cannot compete against teams from AQ conferences that have rich football histories and compete regularly in the high profile BCS bowl games. Opponents of the BCS argue that this regular access of teams from AQ conferences to BCS games creates this bias that significantly influences the voters in the human polls, thus impacting non-AQ teams’ BCS rankings, preventing them from reaching the number one and two spot, not enabling them to compete in the national title game.

thus creates an increasing financial gap between teams from AQ and non-AQ conferences. This discrepancy in funding is a result of associations with the BCS and the tie-ins that AQ conferences have with the BCS. This had led many opponents to argue that the BCS also stands in violation of group boycott laws as defined in the Sherman Antitrust Act.

Group Boycott

A group boycott is defined as a concerted refusal to deal or a refusal to do business with a member of a group until that member stops doing business with a competitor.52 Because of the anticompetitive nature of group boycotts, courts have typically ruled that group boycotts are per se violations of the Sherman Antitrust Act.53 A group boycott is harder to identify than price fixing or output limitation. A precedent has been established for applying the group boycott test to cases that involve sports teams and associations. In Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association as well as in University of Georgia Athletic Association v. National Collegiate Athletic Association, the courts ruled the controls that the NCAA was using to limit member teams from pursuing other television contracts was a group boycott and in violation of the Sherman Act.54

To prove the BCS is participating in an unlawful boycott the BCS must meet the historical definition of a boycott. The simple definition means that some competitors band together to gain a competitive advantage over others.55 Section I of the Sherman Act prohibits competitors from cooperating, agreeing, or conspiring in any manner that unreasonably restrains trade.56 Section I also prohibits

52 Rogers, supra note 24, at 18.
53 See id.
55 Rogers, supra note 24, at 29.
price fixing, bid rigging, and division of markets. In addition to the Sherman Act, Section IV of the Clayton Act allows for private parties injured by a violation of antitrust laws to bring a private enforcement lawsuit. This law allows for private parties to seek damages caused by the unlawful conduct. If a college team can prove it was wrongly excluded from playing in a BCS bowl, it will be eligible to receive recoverable damages that would include the BCS bowl payout minus whatever the team received from participating in a non-BCS bowl. That total would then be tripled.

Opponents of the BCS argue that the BCS violates several of the stipulations set forth in Section I of the Sherman Act. In the college football market, each team and each conference competes with other teams and conferences for the revenue generated from football programs winning as well as the revenue generated from fan support and television contracts. Few fans are actually alumni of particular universities, but they attend and view games because they have an affinity toward that team, much like fans have an affinity toward teams in the professional arena. If BCS opponents can establish that universities and conferences are competitors, then it can also be argued that AQ conferences violate Section I of the Sherman Act by cooperating, agreeing, and conspiring amongst themselves to restrict trade amongst other conferences, leaving out non-AQ conferences. Because of agreements made amongst AQ conferences and the BCS bowls, the champions of AQ conferences are guaranteed to play in a BCS bowl. Champions of non-AQ conferences have no such guarantee. This behavior could be seen as AQ conferences conspiring for

57 See id. § 1-26(b).
58 See id. § 4.
59 See id. § 4; see also Cargill, Inc. v. Montana of Col., Inc., 479 U.S. 104 (1986).
60 If a certain team was found to be wrongfully excluded from a BCS bowl game, Section IV of the Clayton Act would provide for the team and/or conference to receive recoverable damages. If the payout for a BCS bowl game was $17 million, and the team received $1 million for participating in a non-BCS bowl, that team would be eligible to receive $48 million in recoverable damages ($17 million minus $1 million, multiplying the difference by three).
a mutual advantage over non-AQ conferences; they do this so their
conferences are guaranteed the payout that BCS bowls provide each
year, further increasing their advantage over non-AQ conferences.

Although the group boycott argument is one of the strongest
arguments against the BCS, the burden remains with opponents of
the BCS to prove consumer harm rather than simply proving harm
to a competitor. Proponents of the BCS would readily argue that if
the consumer is defined as the general public, then the consumer
benefits from marquee games that often match highly ranked teams
against each other. However, BCS opponents would disagree with
this claim by pointing out that the obvious flaws in the current BCS
system result from conference tie-ins to BCS games. For example, in
the 2011 Fiesta Bowl, No. 7 ranked University of Oklahoma played
unranked University of Connecticut, which received a BCS berth be-
cause of the Big East Conference’s automatic tie-in with the BCS.61
This game resulted in a lopsided University of Oklahoma victory
over the University of Connecticut. Opponents of the BCS argue
that these types of matchups result in consumer harm by providing
the consumer with a lesser product than a system without automatic
bids would produce. This would give other highly ranked teams the
chance to participate in a BCS bowl rather than an unranked team
that happens to be the champion of an AQ conference. Furthermore,
if the definition of “consumer” was expanded to include universities
as a consumer, then a strong argument could be made on behalf of
all non-AQ conferences and universities that do not regularly benefit
from the extraordinary payouts that result from playing in BCS bowl
games and championship games.

Rule of Reason violation

As the antitrust issues involve determining if the BCS restrains
trade, it is likely that an antitrust suit brought against the BCS would

61 TOSTITOS FIESTA BOWL, http://www.fiestabowl.org/index.php/tostitos/ (last
involve a rule of reason analysis. The rule of reason determines whether contracts and combinations unreasonably restrain trade by taking into account all circumstances surrounding the case to determine whether the restrictive practice in question imposes an unreasonable restraint on competition. The rule of reason test requires the plaintiff to plainly show that the practice in question has anticompetitive restrictions that outweigh the pro-competitive effects shown by the defendant. Also, the plaintiff must show that a less-restrictive alternative is available. In this case, opponents of the BCS would have to justify their claim of anticompetitive behavior on the part of the BCS as well as provide an alternative plan to provide quality matchups during the college football season. “Then the burden shifts to the defendant to show the trade restraint’s pro-competitive effects significantly outweigh its anticompetitive effects.”

As shown in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, the rule of reason test can be applied to college athletics. BCS opponents will likely have more success in their case using a rule of reason analysis. However, if BCS opponents decide to use the rule of reason analysis, the BCS would be allowed to argue that it has a justifiable business purpose. The case of the BCS would be strengthened by arguing that it is providing a product to the public that cannot be provided in any other

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64 Hatch, *supra* note 4, at 5.

65 See id.


way, this product being competitively matched bowl games that determine an undisputed national champion. As demonstrated already, the BCS is much more successful than previous systems at matching the two top-ranked teams to play in the national championship game.69

BCS opponents would have to prove BCS bowl games are not what consumers want. They would also have to determine whether consumers have demanded these bowl games or whether they want a system that more closely resembles the old bowl system, where each bowl struck its own deal with a conference or school. There are several ramifications of the actions of the BCS that opponents might use in the case of a rule of reason analysis to demonstrate that the BCS does indeed take part in anticompetitive behavior. These might include “unfair revenue distribution, unfair rules regarding participation in exclusive BCS bowl games, inability to recruit athletes or coaches, and disadvantages in facilities among other inequalities,” with the biggest being financial and recruiting disadvantages.70 Here, opponents argue that the BCS fosters and rewards AQ conference schools that receive large payouts from bowl games while non-AQ schools left out of BCS bowl games are forced deeper into a perpetual cycle that hinders performance and funding. Teams from non-AQ conferences, without the payouts that teams from AQ conferences regularly receive, are at a significant disadvantage and typically do not have the same quality facilities or coaching. Consequently, recruiting the top athletes in the nation is difficult. Meanwhile, AQ conference schools are consistently fed by generous bowl game payouts that allow them to increase in stature, easily catching the attention of top athletes. “BCS members receive an advantage simply through membership and annually reap the rewards of the huge profits from the BCS bowl games.”71

While opponents can make a strong case that the activities of the BCS are anticompetitive and therefore illegal, proponents can defend the actions of the BCS just as well using the rule of reason

69 Bowl Championship, supra note 7.
70 McClelland, supra note 66, at 206.
71 See id. at 207.
test. In order to do so, BCS proponents must prove that the restraints placed on trade do not outweigh the pro-competitive effects of such actions.\textsuperscript{72} For instance, proponents argue that the BCS does what previous bowl systems could not reliably do—provide a national champion for college football.\textsuperscript{73} If the BCS can show that a well-matched national championship game is something that consumers demand, it may be able to build the case that the existence of the BCS is justified. Conversely, opponents of the BCS might argue there are many high-quality teams that play in non-AQ conferences and with the current BCS system those teams remain at a disadvantage in not receiving a chance to play in the national championship game.\textsuperscript{74}

BCS proponents also argue that the BCS system promotes healthy competition in collegiate football. These proponents argue that of the four BCS bowl games, two spots are available to non-AQ teams.\textsuperscript{75} The prospect of playing in a BCS game not only gives non-AQ teams a reasonable chance at a higher payout, it motivates non-AQ teams and thereby creates a more competitive and meaningful regular season. However, having two of eight teams participating in BCS bowl games might easily be considered unfair and biased. Harvey Perlman, Chancellor of the University of Nebraska-Lincoln, draws an interesting analogy that demonstrates how accusations of unfair distribution of bowl game payouts do not carry as much weight as opponents claim.\textsuperscript{76} Perlman argues it would be wrong to force top-ranked universities like Harvard:

[T]o relinquish [their] stranglehold on America’s brightest students...Harvard’s ability to attract the brightest students

\textsuperscript{72} See id.


\textsuperscript{74} These undefeated teams include Tulane, 1998; Marshall, 1999; Utah, 2004; Boise State, 2006; TCU, 2010.

\textsuperscript{75} Kober, supra note 73, at 74-75.

\textsuperscript{76} See id. at 76.
is a result of its success in competing with other universities. If a third party forced the university to bequeath its profit, the incentive to compete would vanish. Doing so would diminish competition and detract from the fact that America’s institutions of higher education benefit from their ability to offer students a variety of opportunities.  

Under the rule of reason analysis, proponents of the BCS can argue the BCS is performing its intended cooperative function amongst member universities to provide quality bowl and championship games, implying that the BCS’ purposes are not to exclude non-AQ schools from BCS bowl games. “The Sherman Act does not prevent a party from unilaterally determining the parties with whom it will deal and the terms under which the party will transact business. Thus, the antitrust laws will not force the BCS to allow the non-BCS universities complete access to the BCS arrangement.”

Section 2 of the Sherman Act

Section 2 of the Sherman Antitrust Act is violated when a business monopolizes, attempts to monopolize, or combines and conspires with others to monopolize trade or commerce. This monopolization occurs in two ways: possession of monopoly power in the relevant market and 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. This means there is a violation of the Act when “one is in possession of monopoly power and uses that power in a way not associated with growth or development as a consequence of having a superior product or business acumen.”

There are two relevant markets to consider if the BCS is said to violate the Sherman Act according to Section 2: the national cham-

77 Id.
78 Warmbrod, supra note 51, at 8.
81 Hearings, supra note 3, at 4.
pionship game and the BCS bowls. The Supreme Court considers the national championship a relevant market because "championship events exist in separate markets from other sporting events." The BCS bowls are considered a relevant market because when compared to all other bowl games, their revenues and prominence constitute a relevant market.

The BCS is in violation of the Act only if it possesses monopoly power in the relevant product market and has the intent to monopolize. A business possesses monopoly power when it is able to control prices or exclude competition, intent to monopolize is measured through an entity's conduct. Opponents of the BCS claim that the BCS excludes competition because AQ conferences do not dominate the market through greater performance, but rather because of the limitations created by the BCS on non-AQ conferences. Also, those who manage the BCS majorly favor AQ conferences, making changes beneficial to non-AQ conferences difficult. Similarly, the intent to monopolize is proved if the national championship game and BCS bowls are shown to be relevant markets, and that the conduct of the BCS excludes non-AQ schools from a meaningful opportunity to compete for that game. Non-AQ conferences claim that in doing this, the BCS makes it considerably more difficult for non-AQ teams to compete in BCS bowl games and the national championship than it is for AQ conferences.

Proponents of the BCS argue that the BCS does not violate Section 2 because it is not lawful to force a business entity to do business with other organizations; it is also not lawful to restrict a business entity in its competitive output, unless its unwillingness to cooperate is unfairly hampering the output of other entities or the business organization in question is enjoying monopoly power, con-

82 See id. at 6.
83 Id.
84 See id.
85 See id.
86 351 U.S. 377 (1956); see also Hatch, supra note 4, at 5.
87 See Hatch, supra note 4, at 5.
sequently raising prices while lowering quality. The BCS is doing neither; non-AQ conferences can produce and host their own bowl games. The BCS does not stop other bowl games from being played (even though the discrepancy in payout money between a BCS and non-BCS bowl game is enormous), nor does it have exclusive rights to naming a national champion.\footnote{Warmbrod, supra note 51, at 12.} Thus, the BCS will likely claim it does not possess monopoly power. Top-ranked teams are playing each other every year, and the price of a bowl game has not gone up for consumers (football fans), even though the payouts to participating teams have increased substantially.

\section*{IV. Conclusion}

Since the creation of the BCS, sports fans, newspaper columnists, political officials, and organizations have scrutinized the ethical and financial inequalities created by the BCS.\footnote{Katie Thomas, Political Heavy Hitters Take on College Bowls, N.Y. Times, Jan. 9, 2011, http://www.nytimes.com/2011/01/10/sports/football/10playoff.html?_r=1&partner=rss&eme=rss.} The concerns about the BCS have led to actions determining whether the current bowl system is legal or not. In 2003, Utah’s Senator Orrin G. Hatch (R) organized a hearing before the committee on the Judiciary U.S. Senate, 108th Congress, to investigate the competitive and economic effects of the BCS.\footnote{Hearings, supra note 3, at 5.} Although no direct results came from the hearing, it proved to be a catalyst for further hearings and investigations. In 2009, a hearing before the Subcommittee on Antitrust, Competition Policy, and Consumer rights of the Committee on the Judiciary, U.S. Senate, took place to determine whether or not the BCS was in violation of antitrust laws. This hearing led to Utah State Attorney General Mark Shurtleff’s current antitrust investigation of the BCS.\footnote{Ben Winslow, Shurtleff Moves Ahead With BCS Probe, Des. News, March 4, 2009, http://www.sportsbusinessdaily.com/article/128222.} The success of this investigation depends on whether the BCS does in fact violate antitrust laws.
Excellent arguments regarding the legality of the BCS exist on both sides of the debate. Proponents argue the BCS does not violate antitrust laws as it is not a monopoly and does not restrict trade. Opponents argue that the BCS does violate the Sherman Antitrust Act because of the per se and rule of reason tests. An analysis of the terms of the Sherman Antitrust Act reveals that both sides in the debate have legal standing in their positions, along with very persuasive and sound arguments, resulting in a probable stalemate.

If the BCS were found to violate antitrust laws, it would likely lead to the dissolution of the BCS and the creation of a new system for determining a college football champion. However, if the BCS is done away with, it is required, as stated in the rule of reason, that the plaintiff must show a less-restrictive option is available. A less-restrictive option would undoubtedly occur through the implementation of a playoff system, which opponents of the BCS, including President Barack Obama,92 are vying for. The proposed playoff system93 would not only create equality and fairness by allowing equal access for teams and conferences, but it would eliminate the legal problems that the BCS currently faces. Equal access to all teams and conferences would be granted through a sixteen-team playoff that provides automatic bids for all eleven conference champions, and invitations, based on rankings, for the five other teams.94 The financial inequalities produced by the BCS would also be resolved. The proposed playoff system is estimated to create $750 million a year from the post-season alone, compared to the current $220 million currently created by the BCS.95 The revenue from the playoff system would no longer go only to the power conferences, but would be nearly equally distributed across all 11 Division I-A Conferences.


93 DAN WETZEL ET AL., DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES 14 (Gotham) (2010). “Former Pac-10 commissioner Tom Hansen, among the most hardcore BCS backers past and present, has said the model we use is the only acceptable option.”

94 Id. at 12

95 Id. at 15.
The implementation of a playoff would solve the problems of inequality in revenue distribution and access to championship games; these changes would lead to increased quality and an equal playing field in college football.