

ANTITRUST & THE BOWL CHAMPIONSHIP SERIES

by

*Nathaniel Grow**

It has been declared “flawed”¹ and “unfair,”² a “joke,”³ a “fraud,”⁴ and an “abomination.”⁵ Senator Orrin Hatch has called it “un-American,”⁶ while Representative Joe Barton of Texas has likened it to “communism.”⁷ It is the Bowl Championship Series, or “BCS,” the system by which college football’s annual national champion is crowned. Created through an elaborate series of agreements between various conferences and post-season bowl games,⁸ the BCS uses a system of human polls and computer rankings to select not only the two teams to compete at season’s end in the national championship game, but also the teams that will play in four of the other most prestigious bowl games.⁹ Thus, the BCS not only controls access to the most desirable post-season games, but in the process it also decides which conferences and universities will receive the significant guaranteed financial payouts accompanying an invitation to a BCS bowl game, payments currently approaching \$18 million for a single bowl appearance.¹⁰

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 frequently criticized since its inception in 1998.¹¹ This criticism predominantly alleges that major college football’s system for determining a champion lacks the fairness of other collegiate and professional team sports, which crown their champions via multi-team, post-season playoff tournaments.¹² Such critics include President Obama, who vowed shortly after his election to “throw [his] weight around” to convince college football to adopt a playoff system.¹³

While the lack of a playoff system is the most frequent criticism directed at 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, during recent Senate Judiciary Committee hearings, Senator Orrin Hatch directly accused the BCS of violating the Sherman Antitrust Act.¹⁴ Meanwhile, Utah Attorney General Mark Shurtleff has recently threatened to initiate legal proceedings against the BCS under antitrust law,¹⁵ while the United States Department of Justice has also acknowledged that it is exploring the possibility of launching its own antitrust investigation of the system.¹⁶

Critics typically accuse the BCS of violating antitrust law through its favoritism of the universities belonging to six of the traditionally most powerful, so-called “BCS Conferences,”¹⁷ at the expense of universities competing in the historically less successful, so-called “non-BCS Conferences.”¹⁸ 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 twelve of the BCS Standings in order to be eligible for an automatic bid.¹⁹ Even then, only the highest ranking non-BCS Conference champion is guaranteed an invitation to a BCS bowl, with other highly ranked champions left to hope they are selected for one of the four at-large invitations given to teams not qualifying for an automatic BCS bid.²⁰

In addition to this competitive disparity, the non-BCS Conferences are also disadvantaged financially, as the BCS pays each BCS Conference a guaranteed payment of approximately \$18 million per season for its participation in a BCS bowl game. In comparison, a total of only \$24 million was split between the five non-BCS Conferences following the 2009-10 season, despite two teams from non-BCS Conferences having been selected to participate in BCS bowl games.²¹ 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.²²

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.²³ However, considering that the BCS has been estimated to have an economic impact of over \$1.2 billion per year,²⁴ 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,”²⁵ the legality of the BCS is a significant issue, and one that increasingly appears headed for judicial 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.²⁶ These analyses have predominantly focused on whether the BCS’s discrimination against the non-BCS Conferences constitutes an unlawful group boycott, with the commentators largely split regarding whether the system contravened antitrust law.²⁷ Those articles concluding that the BCS did not violate antitrust law generally argued that the pro-competitive benefits of the BCS—specifically its creation of a national championship game—outweighed the harm inflicted on the non-BCS Conferences under a rule of reason analysis.²⁸ Meanwhile, those arguing against the BCS disagreed with that balancing, asserting that the creation of a championship game did not warrant the discriminatory treatment of the non-BCS Conferences.²⁹ However, following modifications to the BCS selection procedures in 2004, which granted the non-BCS Conferences greater access to BCS bowl games,³⁰ subsequent academic analyses have overwhelmingly concluded that the current modified system does not violate antitrust law.³¹

This Article diverges from the existing literature in two ways. First, 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 procedure, because the BCS withholds the full financial benefits of participation in a BCS bowl game from non-BCS Conference teams, a factor overlooked by the existing analyses. More significantly, however, this Article further 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 any antitrust trial is notoriously difficult to predict,³² this Article concludes that opponents of the BCS have a strong chance of prevailing should they elect to attack the BCS through antitrust litigation. Specifically, Part I begins by providing the necessary factual context for an antitrust challenge to the BCS, namely a review of the history of post-season college football bowl games and the evolution of the BCS. Part II then presents a brief summary of the relevant provisions of federal antitrust law, while Part III applies these various antitrust theories to the BCS, concluding that the system remains vulnerable to an antitrust challenge on several grounds.

I. 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.³³ The NCAA divides its member institutions into several divisions, with those universities participating at the highest levels of athletic competition designated as Division I.³⁴ In the case of college football, Division I has been 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).³⁵ FBS is widely considered the highest ranked of the two Division I football subdivisions.³⁶

In addition to belonging to the NCAA, most universities also belong to a conference of eight to thirteen other colleges.³⁷ These conferences coordinate a number of athletic competitions between their members,³⁸ culminating with the crowning of an annual conference champion in each of the sports sponsored by the conference, and distribute revenues earned from various television agreements and bowl games.³⁹

Of all the sports officially sanctioned by the NCAA—including football at the FCS, Division II, and Division III levels—FBS football is the only one that does not culminate its season with a championship playoff tournament.⁴⁰ Instead, FBS has traditionally delegated the duty of selecting its national champion to various human polls, in which groups of journalists or football coaches rank the top 25 teams in the nation, with the top ranked team at season’s end proclaimed the national champion.⁴¹ FBS has maintained this unique system in deference to its long-standing tradition of postseason bowl games.⁴² The college football bowl game tradition dates back to 1894, when the University of Chicago hosted the University of Notre Dame in a postseason exhibition game.⁴³ Since then a number of bowl games have come and gone,⁴⁴ with a total of 35 games featuring 70 different teams scheduled to be played between mid-December 2010 and early-January 2011.⁴⁵ Each of these bowl games is a privately owned entity, typically formed to increase tourism to the host city.⁴⁶ Every bowl game is certified by—but ultimately independent from—the NCAA,⁴⁷ and seeks to draw the best available teams, primarily by offering to pay schools anywhere from \$750,000 to nearly \$18 million to play in their game.⁴⁸ Not only do universities thus benefit from the bowl system through these guaranteed participation payments, but they also receive significant national exposure insofar as every bowl game is televised nationally.⁴⁹

Despite these benefits, the traditional bowl system was not without its historical limitations. Most notably, prior to the formation of the BCS, the bowl system was rarely able to orchestrate a postseason 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 number one and two ranked teams meeting in a postseason bowl game.⁵⁰ This unsatisfying outcome was the result a series of contractual relationships formed between individual bowl games and particular conferences.⁵¹ These contractual agreements allowed bowl games to guarantee themselves a quality opponent from a particular conference, while the conferences favored entering long-term agreements with various bowls to ensure a quality allotment 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, from 1954 through 1997 nearly one-quarter of seasons ended with a “split” national championship, in which the competing polls ranked different universities number one in the country.⁵²

In order to address this shortcoming of the traditional bowl system, the College Bowl Coalition (“Bowl Coalition”) was formed in 1992.⁵³ 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 University of Notre Dame (“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 postseason bowl game every year.⁵⁴ 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.⁵⁵ 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 highest ranked teams.⁵⁶

In light of the limitations of the Bowl Coalition, the system was modified in 1994 and renamed the Bowl Alliance.⁵⁷ Under the Bowl Alliance, the champions of the member conferences were no longer obligated to play in a specific bowl game. Instead, the champion 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,⁵⁸ with the two remaining slots available to any team in the country that had won at least eight games.⁵⁹ As a result, the Bowl Alliance was able to arrange a championship game in any season the top two ranked teams were members of its participating conferences.

However, because the champions of both the Big Ten and Pac-10 remained committed to play in the Rose Bowl,⁶⁰ the Bowl Alliance was also unable to guarantee a national championship game whenever the champion of one of those conferences 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.⁶¹ After both Michigan and Nebraska won their bowl games, the coaches' poll ranked Nebraska number one, while the Associated Press' ("AP") poll placed Michigan first, resulting in yet another split national championship.⁶²

B. The Formation and Development of the Bowl Championship Series

The failure of both the Bowl Coalition and Bowl Alliance to reliably create season ending, number one versus number two championship bowl games motivated the formation of the BCS beginning in 1998.⁶³ 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 Alliance's member conferences and bowl games.⁶⁴ Like the Bowl Alliance, rather than tying particular conferences and bowls, the BCS 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.⁶⁵

Specifically, the initial BCS selection procedures were based on 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' opponents.⁶⁶ 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.⁶⁷ 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,⁶⁸ while Notre Dame would qualify if it either won at least nine games or finished at least tenth in the final BCS Standings.⁶⁹ Should any of the eight potential BCS bowl spots remain 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.⁷⁰ However, no more than two schools from a single conference were eligible to appear in BCS games in a single season.⁷¹

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,⁷² approximately two and a half times the previous annual rate paid for the broadcast rights to the same four games.⁷³ The proceeds of this broadcast agreement were overwhelmingly 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.⁷⁴ 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.⁷⁵

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 BCS Standings, causing many fans to believe that Miami should have been selected for the title game over Florida State.⁷⁶ 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.⁷⁷ In 2003-04, the University of Southern California ("USC") was ranked first in both the AP and coaches' polls, but yet finished third in the final BCS Standings.⁷⁸ As a result, USC did not play in the BCS national championship game, and ultimately split the

national championship with BCS championship game winner Louisiana State University—the exact outcome the BCS was created to avoid.⁷⁹ The controversy continued the next year when Auburn University failed to be selected for the 2004-05 championship game, despite finishing the season undefeated.⁸⁰ Most recently, the BCS was forced to make a controversial selection of teams to play for the national title after five different schools finished the 2009 regular season undefeated,⁸¹ with the University of Alabama (“Alabama”) and the University of Texas ultimately selected to play for the national championship.⁸²

While the selection of teams for the BCS national championship game has generally drawn the most criticism, the selections for the other 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.⁸³ 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.⁸⁴ 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.⁸⁵ 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.⁸⁶

Following this series of snubs, the non-BCS Conferences decided to work together to obtain greater access to the BCS. 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.⁸⁷ 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.⁸⁸ Although both Committees generally appeared to side with the non-BCS Conferences, both hearings concluded with it apparent that Congress would only step in if other avenues for reform failed.⁸⁹

Despite the lack of Congressional action, the BCS nevertheless succumbed to the Presidential Coalition’s political pressure,⁹⁰ implementing a series of reforms to the BCS structure in 2004 that became effective for the 2006 season.⁹¹ Perhaps most significantly, the BCS Conferences formally included the non-BCS Conferences as parties to the various BCS agreements,⁹² granting the non-BCS Conferences a single voting position on the eight member BCS Presidential Oversight Committee.⁹³ 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 operating procedures. First, the BCS created a new, fifth BCS bowl game serving as the BCS national championship game.⁹⁴ This doubled the number of at-large slots from two to four, thus increasing 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. Rather than require that non-BCS teams finish ranked in the top six of the final BCS Standings to guarantee a spot, as had previously been the case, 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.⁹⁵ Third, the BCS agreed to reevaluate which conferences would be allotted guaranteed, automatic bids to a BCS bowl, implementing new standards to evaluate all 11 FBS conferences based on their on-field performance every four years.⁹⁶ Under the new procedure, a minimum of five and maximum of seven conferences are granted automatic BCS invitations.⁹⁷ Finally, the existing BCS members agreed to share a greater percentage of BCS revenues with the non-BCS Conferences.⁹⁸

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 2006-07.⁹⁹ In 2007-08 the University of Hawaii from the WAC was picked to play in the Sugar Bowl, as was Utah in 2008-09.¹⁰⁰ Most recently, Boise State and TCU faced each other in the Fiesta Bowl during the 2009-10 season.¹⁰¹

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,¹⁰² the University of Florida and Oklahoma were instead selected to play for the national championship.¹⁰³ Utah had to settle for handily defeating Alabama—a team that had been ranked first for much of the season—in the Sugar Bowl.¹⁰⁴ 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.¹⁰⁵

Second, 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. Following the 2009-10 season, each BCS Conference received a payout of at least \$17.7 million, with the Big Ten and SEC each receiving \$22.2 million by virtue of having two teams selected to participate in BCS bowls.¹⁰⁶ 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.”¹⁰⁷

As a result of these criticisms, the BCS continues to be the subject of significant scrutiny. As noted above, in just the past year alone the Senate Judiciary Committee has held hearings regarding the BCS,¹⁰⁸ 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 investigations against the BCS.¹⁰⁹ Therefore, the legality of the BCS under antitrust law remains a hotly contested issue, one that appears headed towards a judicial resolution.

II. A BRIEF OVERVIEW OF THE RELEVANT ANTITRUST LAW PROVISIONS

Federal antitrust regulation began with the enactment of the Sherman Antitrust Act of 1890,¹¹⁰ the statute providing the most likely basis for a cause of action against the BCS. The Sherman Act contains two provisions attacking 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.”¹¹¹ Because a single party cannot contract, combine, or conspire with itself, this prohibition has been interpreted to require an agreement between multiple entities.¹¹²

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.¹¹³ Specifically, courts have held that in order for a plaintiff to assert a viable claim under Section One of the Sherman Act, three elements must be established: (i) that an agreement was entered, (ii) that the agreement unreasonably restrained trade, and (iii) that the agreement affected interstate commerce.¹¹⁴ In addition to these three requisite elements, courts increasingly also expect a plaintiff to demonstrate how the challenged restraint harms consumer welfare.¹¹⁵

In the case of a Section One claim asserted against the BCS, neither the first nor third elements are likely to be contested, as the BCS readily admits it was formed through a series of contractual agreements,¹¹⁶ agreements which are clearly interstate in nature.¹¹⁷ With respect to the second element, courts have identified various categories of agreements that may unreasonably restrain trade. Of these, the existing scholarship to date considering the BCS has predominantly focused on one form of restraint in particular—the group boycott—based on the BCS's perceived favoritism of the BCS Conferences at the expense of the non-BCS Conferences.¹¹⁸

As the United States 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.”¹¹⁹ 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.”¹²⁰

Although group boycotts most typically arise when multiple entities collectively refuse to deal at all with the aggrieved party, a literal boycott is not required to state a valid claim. For example, in the 1959 case of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,¹²¹ the Supreme Court considered a group boycott claim brought by a San Francisco department 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.¹²² 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.¹²³ 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, can be enough to assert a group boycott claim.¹²⁴

While a potential group boycott claim has received the most attention in antitrust analyses of the BCS to date, the BCS is also susceptible to different classifications 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,¹²⁵ the BCS is arguably guilty of illegal price fixing by collectively establishing uniform amounts to be paid to conferences with member-universities participating in BCS bowl games.¹²⁶ Generally speaking, “antitrust law condemns [agreements] in which competitors set prices collectively rather than letting competition determine price and output.”¹²⁷ 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.¹²⁸

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 game, as a single package to television networks.¹²⁹ Tying agreements violate Section One of the Sherman Act 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.¹³⁰ With respect to the final element—actual coercion—courts typically require proof that the buyer was an “unwilling purchaser of the allegedly tied product[.]”¹³¹ 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 not enough.¹³²

Courts will typically consider the characterization of the allegedly anticompetitive conduct at issue when deciding which standard of review under Section One to apply. For instance, some categories of restraints—including horizontal price fixing¹³³—have been found to “always or almost always ... restrict competition and decrease output” and thus are usually considered *per se* illegal.¹³⁴ Meanwhile, because courts have determined that other categories of restraints—including some

tying agreements¹³⁵—may at times promote competition, the legality of these activities is judged under the more flexible rule of reason.

The rule of reason was first endorsed by the Supreme Court in Justice Brandeis' landmark 1918 decision in *Chicago Board of Trade*,¹³⁶ and 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.¹³⁷ Should the plaintiff succeed, then the burden shifts to the defendant to demonstrate any of the restraint's procompetitive benefits.¹³⁸ Finally, if the defendant successfully establishes that the restraint has some redeeming competitive qualities, then courts consider whether the asserted procompetitive benefits could be achieved through less restrictive means.¹³⁹

Although the BCS is susceptible to attack as a horizontal price fixing scheme—a category of restraint traditionally considered *per se* illegal—most commentators have concluded that the BCS would nevertheless likely be judged under the rule of reason standard.¹⁴⁰ 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*.¹⁴¹ In *NCAA*, the Court considered an antitrust challenge brought by the Universities of Oklahoma and 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.¹⁴² The regulations also established “recommended fees” for the television networks to pay to participating universities for national and regional broadcasts.¹⁴³ The Supreme Court categorized these restrictions as a horizontal limitation on output and horizontal price fixing, respectively, restraints typically considered *per se* illegal.¹⁴⁴ 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.”¹⁴⁵ Therefore, although a prospective plaintiff could attempt to distinguish the BCS from *NCAA* in order to receive *per se* treatment,¹⁴⁶ following the Court's decision it appears likely that any Section One challenge to the BCS would be decided under the rule of reason.

In addition to potential liability under Section One of the Sherman Act, the BCS is also vulnerable to attack under Section Two of the Act as well.¹⁴⁷ Whereas Section One of the Sherman Act prohibits agreements in restraint of trade between multiple parties, Section Two focuses monopolization of an industry, typically by a single firm.¹⁴⁸ 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.”¹⁴⁹ Thus, a plaintiff challenging the BCS under Section Two must first establish that either the BCS national championship game itself, or all five of the BCS bowl games collectively, constitute a relevant market, and second that the BCS has excluded “non-BCS schools from a meaningful opportunity to compete” in that market.¹⁵⁰

In asserting that the BCS championship (or other bowl games) constitutes a relevant market, a plaintiff would likely draw upon the Supreme Court's 1959 decision in *International Boxing v. United States*,¹⁵¹ in which the Court held that championship boxing matches comprise a separate and distinct relevant market from non-championship fights, due to the significant difference in financial payouts given to the boxers.¹⁵² Along these same lines, a plaintiff could argue that the BCS should itself be considered a stand-alone relevant market, due to the significantly higher payouts accompanying a BCS bowl appearances compared to the less prestigious bowl games.¹⁵³

Ultimately, however, an assessment of whether the BCS constitutes a relevant market would likely require significant economic analysis,¹⁵⁴ analysis beyond the scope of this article. Moreover, because Section Two claims are generally more difficult to prove than claims under Section One,¹⁵⁵ and given the clear horizontal nature of the BCS and the various Section One allegations available to a plaintiff, it seems unlikely that an antitrust case against the BCS would hinge upon a Section Two claim.¹⁵⁶ Therefore, the remainder of this article focuses on an assessment of the BCS's potential liability under Section One of the Sherman Act.

III. ASSESSING THE STRENGTH OF THE POTENTIAL ANTITRUST CLAIMS AGAINST THE BCS

As noted above, three primary claims are available to a potential plaintiff challenging the BCS under Section One of the Sherman Act: illegal group boycott, price fixing, and tying.¹⁵⁷ 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.¹⁵⁸ 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 a 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.¹⁵⁹ The Supreme Court has stated that a group boycott exists 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.”¹⁶⁰ 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.¹⁶¹

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,¹⁶² a feat that no non-BCS university was able to accomplish during the system's first six years.¹⁶³ 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.¹⁶⁴

In view of this allegedly discriminatory conduct, a number of 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.¹⁶⁵ These analyses predominately focused on the financial disparities created by the BCS's differential treatment of the non-BCS Conferences.¹⁶⁶ Not only did the BCS's exclusion of the non-BCS teams prevent those universities from realizing 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, sponsorship agreements, and alumni and fan donations.¹⁶⁷

These revenue and exposure advantages in turn enable the BCS schools to hire better coaches, build better facilities, and recruit better student-athletes,¹⁶⁸ ultimately resulting in the BCS Conferences maintaining their competitive advantage over the non-BCS schools on the playing field.¹⁶⁹ Indeed, commentators have noted that the BCS has effectively created—or, at least, reinforced—a bifurcated structure in major college football, wherein the BCS perpetuates a competitive disparity between the BCS and non-BCS Conferences.¹⁷⁰ As a result, many commentators concluded that the initial BCS system effectively cut off the non-BCS schools from a necessary resource—the BCS bowl games—and thus constituted an illicit group boycott.¹⁷¹

However, as discussed above, the BCS ultimately revised its selection procedures in 2004 following a series of Congressional hearings,¹⁷² modifications that increased the non-BCS Conferences' access to BCS bowls.¹⁷³ 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.¹⁷⁴ As a result, the number of non-BCS teams participating in BCS bowl games has increased dramatically in recent years.¹⁷⁵ Accordingly, most recent analyses have concluded that the current, modified 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.¹⁷⁶

Although the consensus among scholarly commentators in the aftermath of the BCS modifications has been that the system no longer violates antitrust law, these analyses have overlooked the fact that the non-BCS Conferences continue to experience significant differential treatment. Specifically, even in those instances when a non-BCS university beats the odds and 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. For example, following the 2009-10 season, each BCS Conference received a payout of at least \$17.7 million, with the Big Ten and SEC receiving \$22.2 million each due to the fact they both had two teams selected to participate in BCS bowls.¹⁷⁷ In contrast, the five non-BCS Conferences received a total of \$24 million to share, despite both TCU and Boise State having been selected to play in a BCS bowl.¹⁷⁸ While the Mountain West and WAC (TCU and Boise State's respective conferences) divided the loin share of that revenue, they nevertheless each received only \$9.8 and \$7.8 million, respectively, for the appearances, totals far below those received by the BCS Conferences.¹⁷⁹ 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 an appearance in a BCS bowl game.

Thus, although the non-BCS Conferences may have had a more traditional group boycott case 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 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 plaintiff from doing business at the same price and under the same conditions as its rivals, even when the collusion did not always result in a literal refusal to deal.¹⁸⁰ 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 when a team from a non-BCS Conference is able to overcome the odds and earn an invitation to a BCS bowl game, it will nevertheless receive little more than half as much money for its participation as will the BCS Conferences.¹⁸¹ As a result, the non-BCS Conferences will never be able to match the revenues generated by teams in the BCS Conferences, giving the BCS Conferences a perpetual competitive advantages.¹⁸²

Should such a group boycott claim be asserted against the BCS, the court would likely apply the rule of reason for the reasons discussed above.¹⁸³ In light of the anticompetitive effects that BCS opponents can assert,¹⁸⁴ the court would likely shift the burden to the BCS to justify itself through 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.¹⁸⁵ 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.¹⁸⁶ By guaranteeing a national championship game every season, BCS supporters argue that the system has created a substantial benefit for college football fans.¹⁸⁷ 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.¹⁸⁸

In addition to the creation of a national championship game, BCS proponents also point to other procompetitive benefits resulting from the system. 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.¹⁸⁹ 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,¹⁹⁰ 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.¹⁹¹ Therefore, these commentators argue that even under its initial, more restrictive selection procedures, the BCS actually benefited the non-BCS Conferences by making it possible, albeit perhaps 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.¹⁹²

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 nevertheless faces 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.¹⁹³ The BCS is particularly susceptible to the less restrictive alternatives inquiry,¹⁹⁴ as the procompetitive benefits identified by its supporters could easily be obtained via less burdensome means.

Specifically, the primary benefit of the BCS asserted by its proponents—the creation of a national championship game¹⁹⁵—can easily be accomplished without the anticompetitive effect of the BCS’s unequal distribution of revenues to the non-BCS Conferences. The existence of a championship game does not depend in any way upon disparities in revenue distribution, but rather simply requires that the nation’s top two teams be matched in a single post-season game. Nor is there a need for the national championship game to be paired with the BCS and its uneven revenue distribution scheme at all, as the game could easily be held as a stand-alone event without any ties to the other existing BCS bowl games.¹⁹⁶ Thus, because a national championship game could be held absent any 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 equally distributes its revenue to all participants.

Similarly, the other primary benefits regularly cited by BCS supporters—the creation of more compelling post-season bowl games and increased access for the non-BCS Conferences¹⁹⁷—also do not rely upon the BCS’s uneven revenue distribution scheme. Indeed, both could also be obtained through a system in which revenue was distributed equally amongst all participating universities and conferences. Thus, these benefits could also be obtained through less restrictive means, and cannot save the BCS under a rule of reason analysis.

In lieu of any compelling procompetitive justifications, proponents of the BCS may turn instead to several other defenses for the system’s uneven revenue distribution. For instance, the primary defense offered by BCS advocates is that the current distribution scheme simply reflects the fact that television networks value the broadcast rights to games featuring BCS Conference schools more than those for games involving non-BCS teams.¹⁹⁸ In other words, BCS supporters argue that because the inclusion of the BCS Conferences generates the significant 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 that same season featuring only BCS Conference teams.¹⁹⁹ 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.²⁰⁰ Accordingly, the argument that the BCS’s unequal revenue distribution is justified by the reduced appeal of games involving non-BCS universities is contradicted by the actual television ratings for these games.

Another potential defense available to the BCS is to argue 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.²⁰¹ Put differently, the BCS can argue that consumers of college football (i.e., the 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.²⁰² However, as Professor Gary Roberts has persuasively argued, “consumers 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.”²⁰³ 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.”²⁰⁴ Critics of the BCS can draw upon this line of reasoning, and argue that the BCS’s revenue disparities do hurt consumer welfare, insofar as the financial disparities perpetuate competitive discrepancies between the BCS and non-BCS Conferences on the football field, depriving non-BCS fans of the opportunity to watch their favorite teams play the most competitive football possible.²⁰⁵

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 2004.²⁰⁶ 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 or revenue distribution. However, critics can respond to this line of argument by noting that the non-BCS Conferences' role in the management of the BCS is marginal at best, given that they have collectively been given only one vote out of eight on the BCS Presidential Oversight Committee.²⁰⁷ Accordingly, the non-BCS Conferences still lack any meaningful ability to alter the operations of the BCS.

Therefore, although the outcome of a rule of reason trial is notoriously difficult to predict,²⁰⁸ opponents of the BCS have a reasonably strong case should they assert that the system 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. Similarly, critics can also overcome the BCS's other defenses, namely that any boycott does not harm consumer welfare and thus is not a cognizable antitrust injury, and that the non-BCS Conferences have had an adequate opportunity to shape the direction of the BCS. 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.

B. *The BCS and Price Fixing*

Although a potential price fixing claim against the BCS has received relatively little attention in the literature, it may represent the strongest attack on the BCS under federal antitrust law. Specifically, a prospective plaintiff can assert that the BCS constitutes an illegal price fixing scheme by allowing formerly independent, competing conferences and bowl games to collectively establish uniform payouts for participation in all BCS bowl games.

Historically, each bowl game determined for itself how much of a financial payout to offer participating universities, a practice that continues today for bowl games outside of the BCS.²⁰⁹ However, upon the formation of the Bowl Alliance, one of the BCS's predecessor entities,²¹⁰ the Alliance bowls and participating conferences agreed to a uniform scale under which all bowl payouts were determined.²¹¹ 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.²¹² These increased costs are ultimately passed on to college football fans, through higher ticket prices and television fees, thus harming consumer welfare.²¹³

As noted above, this practice of collectively determining the payouts for all participating bowl games has continued under the BCS.²¹⁴ For example, following the 2009-10 season, the BCS determined that each of the six BCS Conferences would receive a minimum of \$17.7 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.²¹⁵ Meanwhile, the BCS collectively determined that the five remaining non-BCS Conferences would receive a total of only \$24 million, despite two universities from non-BCS Conferences having been selected for BCS bowl games that season.²¹⁶

These payouts are established without regard to the competitive strength or marketability of any individual participating university. In other words, the top ranked team in the country selected to play in the BCS National Championship Game will earn just as much as the lowest ranked team participating in a lower profile BCS game. For example, in the 2005-06 season, 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.²¹⁷ Notwithstanding this significant disparity in ranking and marketability,²¹⁸ both the Pac-10 and ACC received identical payments of around \$16.6 million from the BCS.²¹⁹

Given that the BCS admittedly collectively establishes the prices to be paid for participation in BCS bowl games, establishing a *prima facie* case of price fixing should not be difficult. Although horizontal price fixing has traditionally been held to be *per se* illegal under Section One of the Sherman Act,²²⁰ following the Supreme Court's decision in *NCAA*²²¹ any price fixing claim against the BCS will likely be decided under the rule of reason, for the reasons discussed above.²²² Moreover, the BCS could also argue that *per se* illegality is inappropriate following the Supreme Court's 2007 opinion in *Leegin Creative Leather Products v. PSKS, Inc.*,²²³ since the BCS features both horizontal and vertical price fixing agreements,²²⁴ the latter of which the Court ruled should be judged under the rule of reason. Therefore, the legality of the BCS's price fixing scheme would be judged by weighing its anticompetitive effects against any procompetitive benefits.

A court considering the BCS's price fixing scheme should find its anticompetitive effects to be readily apparent, given that the Supreme Court has declared that "no elaborate industry analysis is required to demonstrate the anticompetitive character of [a price fixing] agreement."²²⁵ 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 scheme yields sufficient procompetitive benefits to outweigh this clear anticompetitive effect.

Similar to the group boycott claim discussed above,²²⁶ the creation of a national championship game provides little procompetitive justification with respect to a potential price fixing claim against the BCS. A uniform pay scale across the five different bowl games is in no way necessary to stage a national championship game, and thus the championship game could easily be established by less restrictive means.

Instead, the more plausible—and perhaps only—argument available to the BCS regarding the procompetitive benefits of its

price fixing scheme is that establishing uniform payouts for all BCS bowl games helps to maintain competitive balance in college football. Specifically, in response to a price fixing claim, the BCS may elect to argue that its uniform bowl payouts are necessary to maintain competitive balance in college football, preventing any single university or conference from developing a significant financial advantage over its competition. As discussed above, universities can use revenue disparities to build better facilities and retain better coaches than their rivals operating on smaller budgets.²²⁷ Therefore, the BCS may argue that its uniform payout scheme 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 successfully convince a court that this competitive balance concern justifies its price fixing scheme. As an initial matter, 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 schools.²²⁸

However, even if the BCS succeeds in convincing a judge or jury that it does not in fact decrease overall competitive balance in college football, its competitive balance argument would nevertheless face an even greater hurdle, namely the fact that the Supreme Court previously considered and rejected a similar contention in the *NCAA* case. There, the NCAA attempted to justify its regulation fixing the price universities charged television networks to broadcast football games on the grounds that the restriction helped to maintain competitive balance among NCAA member institutions.²²⁹ Although the Supreme Court accepted that maintenance of competitive balance was generally a legitimate interest for the NCAA to pursue, it nevertheless rejected the proposition that competitive balance concerns justified the particular price fixing scheme at issue.²³⁰ 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.²³¹ Rather, the Court noted that the NCAA simply imposed "a restriction on one source of revenue that is more important to some colleges than to others."²³² 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."²³³ 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 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 conferences and universities, and thus does not affect other substantial sources of revenue such as alumni donations, ticket sales, or sponsorship agreements.²³⁴ 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. Accordingly, although the ultimate outcome of a price fixing claim against the BCS remains uncertain, such a challenge would seem to have a relatively strong possibility of success.

C. *The BCS as an Illegal Tying Arrangement*

Finally, 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 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.²³⁵

A tying claim against the BCS would most likely be asserted by a television network that attempted to purchase the broadcasting rights for the BCS bowl games. Such a plaintiff should easily be able to establish the first element, as the BCS collectively markets 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.²³⁶ Arguing that these bowls do not constitute separate products will be extremely difficult for the BCS, as prior to the formation of the Bowl Coalition—the first predecessor to 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.²³⁷ 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.²³⁸ However, because the broadcasting rights for the standalone BCS National Championship Game are packaged along with the rights to broadcast the BCS bowl game held in the city hosting the national championship in a particular year,²³⁹ 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-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.²⁴⁰

Although a prospective plaintiff would thus likely 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 a plaintiff prove that it was an “unwilling purchaser” of one of the tied products.²⁴¹ 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 if a network is interested in purchasing the rights to one BCS game it would also likely be interested in acquiring the rights to other BCS games. Indeed, given that the BCS games consistently draw strong television ratings,²⁴² every BCS game would 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 at best more interested in purchasing the rights to some games than others, an insufficient level of coercion under the existing case law.²⁴³ 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.

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 argue that the system continues to constitute a group boycott insofar as its unequal revenue distribution system prevents 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 uniform payments made for participation in all BCS bowl games. 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 argues that the BCS could 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 legislative process fail to address the inequalities of the BCS.

Footnotes

* Assistant Professor of Legal Studies, Terry College of Business, University of Georgia.

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

² Lee Davidson, *Hatch Calls BCS “Un-American”*, DESERET MORNING NEWS, Jan. 31, 2009.

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

⁴ *Id.*

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

⁶ Davidson, *supra* note 2.

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

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

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

¹⁰ The BCS Is ..., BCSFOOTBALL.ORG, available at <http://www.bcsfootball.org/news/story?id=4809716> (last accessed March 9, 2010).

¹¹ See David Scott Moreland, *Note & 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).

¹² 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).

¹³ See, e.g., 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).

¹⁴ *Hatch Calls for BCS Investigation*, ESPN.COM, July 8, 2009, <http://sports.espn.go.com/ncf/news/story?id=4311694> (last accessed March 9, 2010).

¹⁵ Chris Rizo, *Bowl Championship Series Could Face Multistate Action*, LEGAL NEWS LINE, Jan. 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.'").

¹⁶ Frederic J. Frommer, *Federal Gov't Weighing Action on BCS*, ASSOC. PRESS, Jan. 30, 2010.

¹⁷ The Atlantic Coast ("ACC"), Big East, Big Ten, Big 12, 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).

¹⁸ The non-BCS Conferences include Conference USA ("C-USA"), as well as the Mid-American, Mountain West, Sun Belt, and Western Athletic ("WAC") Conferences. See *Is there a true No. 1*, WASH. POST, Aug. 30, 2006, at H08 (noting same).

¹⁹ BCS Selection Procedures, *supra* note 9.

²⁰ *Id.*

²¹ The BCS Is ..., *supra* note 10.

²² See *infra* notes 168-170 and accompanying text.

²³ See Response to Letter to Senator Hatch, 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).

²⁴ The BCS Is ..., *supra* note 10. Overall, college football has become 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 (last accessed March 4, 2010).

²⁵ McClelland, *supra* note 12 at 205 (quoting Gary R. Roberts, then-Director of the Sports Law Program at Tulane Law School).

²⁶ 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 Championship Series*, 15 SETON HALL J. OF 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*, available at <http://www.smith.edu/econ/workingpaper/pdfs/Zimbalist1.pdf> (last accessed March 9, 2010) (discussing the BCS from an economist's perspective).

²⁷ Among the articles determining that the BCS violated antitrust law were Corns, *supra* note 26; Hales, *supra* note 26; McClelland, *supra* note 12; Wallace, *supra* note 26. 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 26; Fenasci, *supra* note 26; Kober, *supra* note 26; Warmbrod, *supra* note 26.

²⁸ See generally Carroll, *supra* note 26; Fenasci, *supra* note 26; Kober, *supra* note 26; Warmbrod, *supra* note 26.

²⁹ See generally Corns, *supra* note 26; Hales, *supra* note 26; McClelland, *supra* note 12; Wallace, *supra* note 26.

³⁰ See generally BCS Chronology, BCSFOOTBALL.ORG, available at <http://www.bcsfootball.org/news/story?id=4819366> (last accessed March 9, 2010).

³¹ See, e.g., Nixon, *supra* note 26; Pruitt, *supra* note 26; Rogers, *supra* note 26. But see Schmit, *supra* note 26 (arguing that the modified BCS continues to violate antitrust law).

³² 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).

³³ 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).

³⁴ 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 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).

³⁵ 2009 NCAA Division 1 Manual, § 20.1.1.2, available at http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf (last visited Jan. 14, 2010).

Prior to 2006, FBS teams were referred to as Division I-A, while FCS teams were labeled I-AA. See Rogers, *supra* note 26 at 286 n.5 (2008) (citing David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM, Dec. 15, 2006, <http://sports.espn.go.com/ncf/columns/story?id=2697774>).

³⁶ Josh Martin, *The Fairness Doctrine: The BCS of American Politics*, 60 MERCER L. REV. 1393, 1393 n.4 (2009).

³⁷ 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 visited 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).

³⁸ 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").

Since 2006, the NCAA has permitted FBS teams to play up to 12 regular season contests. 2009 NCAA Division 1 Manual, § 17.9.5.1, available at http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf (last visited Jan. 14, 2010). FBS universities located in Alaska or Hawaii are authorized to play 13 regular season games per year. *Id.* at § 17.28.2. See also Liz Clarke, *College Football Gets 12th Game*, WASH. POST, April 29, 2005, at D01 (reporting that the NCAA approved an expansion from an 11 game schedule to a 12 game schedule to begin with the 2006 season).

³⁹ 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).

⁴⁰ See McClelland, *supra* note 12 at 175 (noting that the NCAA offers 87 championship playoffs in 22 sports, but not in FBS football).

⁴¹ Carroll, *supra* note 26 at 1244.

⁴² *Id.* at 1245.

⁴³ Warmbrod, *supra* note 26 at 336.

⁴⁴ Hales, *supra* note 26 at 101.

⁴⁵ See Richard Sandomir, *It's New York. It's the Stadium. It's the Pinstripe Bowl.*, N.Y. TIMES, March 9, 2010, at B15.

⁴⁶ Hales, *supra* note 26 at 101 n.23.

⁴⁷ Corns, *supra* note 26 at 178; Wallace, *supra* note 26 at 64.

⁴⁸ Carroll, *supra* note 26 at 1246.

⁴⁹ 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).

⁵⁰ *Id.* at 1251.

⁵¹ See, e.g., Kober, *supra* note at 60.

⁵² Carroll, *supra* note 26 at 1249.

⁵³ McClelland, *supra* note 12 at 177-78.

⁵⁴ Darling, *supra* note 26 at 437.

⁵⁵ *Id.* at 438.

⁵⁶ Schmit, *supra* note 26 at 228.

⁵⁷ *Id.* at 229.

⁵⁸ Wallace, *supra* note 26 at 62.

⁵⁹ Darling, *supra* note 26 at 439.

⁶⁰ Warmbrod, *supra* note 26 at 346.

⁶¹ Corns, *supra* note 26 at 173.

⁶² *Id.* at 173-74.

⁶³ Moreland, *supra* note 11 at 724.

⁶⁴ Fenasci, *supra* note 26 at 970.

⁶⁵ Schmit, *supra* note 26 at 230-31.

⁶⁶ BCS Chronology, *supra* note 30. The formula for the BCS Standings has subsequently been frequently modified, and presently includes only a mix of human and computer rankings. See BCS Selection Procedures, *supra* note 9.

⁶⁷ Fenasci, *supra* note 26 at 970-71.

⁶⁸ *Id.* at 971.

⁶⁹ Pruitt, *supra* note 26 at 141.

⁷⁰ Fenasci, *supra* note 26 at 971.

⁷¹ 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.”).

⁷² Schmit, *supra* note 26 at 231.

⁷³ Zimbalist, *supra* note 26 at 17.

⁷⁴ Corns, *supra* note 26 at 176.

⁷⁵ *Id.* at 177.

⁷⁶ Hales, *supra* note 26 at 123.

⁷⁷ *Id.* at 124.

⁷⁸ Liz Clarke, *Football Title Game Omits No. 1; Computer Formula Disagrees with Both Major College Polls*, WASH. POST, Dec. 8, 2003, at A1

⁷⁹ McClelland, *supra* note 12 at 203-04.

⁸⁰ Rogers, *supra* note 26 at 291.

⁸¹ See Fred Bowen, *With Perfect Records, Which Team is Best?*, WASH. POST, Dec. 3, 2009, at C09 (discussing controversy).

⁸² Steve Yanda, *BCS Title Game No. 1 Alabama vs. No. 2 Texas*, WASH. POST, Jan. 7, 2010, at D03.

⁸³ Rogers, *supra* note 26 at 290-91.

⁸⁴ Corns, *supra* note 26 at 188.

⁸⁵ Schmit, *supra* note 26 at 233.

⁸⁶ *Id.* at 234.

⁸⁷ *Id.*

⁸⁸ Carroll, *supra* note 26 at 1239.

⁸⁹ *Id.* at 1239-40.

⁹⁰ Schmit, *supra* note 26 at 234.

⁹¹ BCS Chronology, *supra* note 30.

⁹² See *id.* (noting the “landmark” agreement including “the chief executive officers representing all 11 Division I-A conferences and Notre Dame”).

⁹³ 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. __ (2009) (statement of Gene Bleymaier, Director of Athletics, Boise State University) (hereinafter Bleymaier Congressional Statement) (explaining the current voting system).

⁹⁴ Pruitt, *supra* note 26 at 141.

⁹⁵ BCS Chronology, *supra* note 30.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ BCS, Alliance & Coalition Games, Year-by-Year, BCSFOOTBALL.ORG, available at <http://www.bcsfootball.org/news/story?id=4809942> (last accessed March 11, 2010).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See 2008 College Football Standings, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2008_archive_standings.html (last accessed March 11, 2010).

¹⁰³ BCS, Alliance & Coalition Games, Year-by-Year, *supra* note 99.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Frederic J. Frommer, *Record Money for 5 College Football Conferences*, BusinessWeek.com, Jan. 25, 2010, <http://www.businessweek.com/ap/financialnews/D9DF0UV01.htm> (last accessed Jan. 26, 2010).

¹⁰⁷ *Id.*

¹⁰⁸ *Hatch Calls for BCS Investigation*, *supra* note 14.

¹⁰⁹ Rizo, *supra* note 15; Frommer, *supra* note 16.

¹¹⁰ 15 U.S.C. §§1-7 (2010). *See also* Rogers, *supra* note 26 at 292 (noting that federal antitrust law was “first enacted in 1890”).

¹¹¹ Sherman Antitrust Act, 15 U.S.C. § 1 (2010).

¹¹² *See, e.g.*, Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1776 (1999).

¹¹³ Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U.L. REV. 561, 570 (2009).

¹¹⁴ *See, e.g.*, Carroll, *supra* note 26 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).

¹¹⁵ *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, *supra* note 26 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 SMU L. REV. 665 (2009) (discussing the uneven way in which the consumer welfare requirement is applied in group boycott cases).

¹¹⁶ 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 26 at 1264-65. *But see* Pruitt, *supra* note 26 (arguing that the BCS constitutes a single entity under antitrust law, and is thus immune from a Section One claim). The claim in this article that the BCS constitutes a single entity was based largely on the Seventh Circuit’s opinion in *American Needle v. NFL*, 538 F.3d 736 (7th Cir. 2008), a decision recently unanimously overruled by the United States Supreme Court. *Am. Needle, Inc. v. NFL*, 129 S. Ct. 1400 (2009). Following the Supreme Court’s rejection of the single entity argument by the NFL, it is hard to imagine a court granting the BCS single entity status.

¹¹⁷ *See id.* at 1258 (noting that the affect on interstate commerce factor is not at issue in an antitrust analysis of the BCS).

¹¹⁸ *See, e.g.*, Rogers, *supra* note 26 at 294 (“The most likely substantive § 1 violation applicable to the BCS is an unlawful boycott or concerted refusal to deal.”).

¹¹⁹ *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 294 (1985).

¹²⁰ *Id.*

¹²¹ 359 U.S. 207 (1959).

¹²² *Id.* at 209.

¹²³ *Id.* at 212-13.

¹²⁴ *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, *Evolving Antitrust Treatment of Dominant Firms: 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).

¹²⁵ *See* Part III.B *infra*.

¹²⁶ *See* Zimbalist, *supra* note 26 at 38.

¹²⁷ Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1226 (2008).

¹²⁸ *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984).

¹²⁹ 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, Nov. 19, 2008, <http://sports.espn.go.com/ncf/news/story?id=3710477> (last accessed May 12, 2010). Meanwhile, the Rose Bowl maintains its own broadcasting agreement with ABC. *Id.*

¹³⁰ Leslie, *supra* note 112 at 1850-51. *See also* Feldman, *supra* note 113 at 577-78 (discussing tying agreements generally).

¹³¹ Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 192 (2d Cir. 1992).

¹³² Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., Case No. 97-Civ-5499, 2004 U.S. Dist. Lexis 5411 at *22 (S.D.N.Y. March 30, 2004).

¹³³ Feldman, *supra* note 113 at 577-78.

¹³⁴ Broadcast Music, Inc., v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979).

¹³⁵ *See* Feldman, *supra* note 113 at 578 (noting same).

¹³⁶ Bd. of Trade of City of Chi. v. United States, 246 U.S. 231 (1918).

¹³⁷ *See, e.g.,* Carroll, *supra* note 26 at 1260-61 (noting three steps of rule of reason analysis).

¹³⁸ *Id.*

¹³⁹ *See* Feldman, *supra* note 113 at 583 (noting that the standard and burden of proof for the less restrictive means factor varies from circuit to circuit).

¹⁴⁰ *See, e.g.,* Carroll, *supra* note 26 at 1270; Darling, *supra* note 26 at 459; Kober; *supra* note 26 at 66-69; McClelland, *supra* note 12 at 206; Moreland, *supra* note 11 at 728; Wallace, *supra* note 26 at 75; Warmbrod, *supra* note 26 at 370.

¹⁴¹ 468 U.S. 85 (1984). The NCAA case is discussed in greater detail below. *See infra* notes 229-233 and accompanying text.

¹⁴² NCAA, 468 U.S. at 94.

¹⁴³ *Id.* at 93 and 93 n.10.

¹⁴⁴ *Id.* at 99-100.

¹⁴⁵ *Id.* at 101.

¹⁴⁶ For example, one commentator has suggested that NCAA may not be applicable to the BCS insofar as the latter organization is simply a commercial enterprise, whereas the NCAA is a non-profit organization. *See* Rogers, *supra* note 26 at 294.

¹⁴⁷ *See* Zimbalist, *supra* note 26 at 37-38 (suggesting same).

¹⁴⁸ Rogers, *supra* note 26 at 292.

¹⁴⁹ United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

¹⁵⁰ Rogers, *supra* note 26 at 299.

¹⁵¹ Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242 (1959).

¹⁵² *Id.* at 250-51.

¹⁵³ *See* Carroll, *supra* note 26 at 1246.

¹⁵⁴ *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 26 at 445 (noting that calculating market power “involves an intricate and thorough assessment of what the competitive market encompasses.”).

¹⁵⁵ *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).

¹⁵⁶ Darling, *supra* note 26 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.”).

¹⁵⁷ *See supra* notes 118-132 and accompanying text.

¹⁵⁸ *See supra* notes 140-145 and accompanying text.

¹⁵⁹ *See, e.g.,* Carroll, *supra* note 26; Corns, *supra* note 26; Fenasci, *supra* note 26; Hales, *supra* note 26; Kober; *supra* note 26; McClelland, *supra* note 12; Wallace, *supra* note 26.

¹⁶⁰ Nw. Wholesale Stationers v. Pac. Stationary & Printing Co., 472 U.S. 284, 294 (1985).

¹⁶¹ *See, e.g.,* Carroll, *supra* note 26; Corns, *supra* note 26; Fenasci, *supra* note 26; Hales, *supra* note 26; Kober; *supra* note 26; McClelland, *supra* note 12; Wallace, *supra* note 26.

¹⁶² Fenasci, *supra* note 26 at 971.

¹⁶³ *See* BCS, Alliance & Coalition Games, Year-by-Year, *supra* note 99.

¹⁶⁴ *See supra* notes 83-86 and accompanying text.

¹⁶⁵ *See, e.g.,* Corns, *supra* note 26; Hales, *supra* note 26; McClelland, *supra* note 12; Wallace, *supra* note 26.

¹⁶⁶ *See* Corns, *supra* note 26 at 188; Hales, *supra* note 26 at 120-22; McClelland, *supra* note 12 at 206-09; Wallace, *supra* note 26 at 77-79.

¹⁶⁷ McClelland, *supra* note 12 at 207.

¹⁶⁸ *See id.* *See also* Hales, *supra* note 26 at 119.

¹⁶⁹ *See* Hales, *supra* note 26 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 and 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”).

¹⁷⁰ Rogers, *supra* note 26 at 287-88; Wallace, *supra* note 26 at 76-77.

¹⁷¹ See, e.g., Corns, *supra* note 26; Hales, *supra* note 26; McClelland, *supra* note 12; Wallace, *supra* note 26.

¹⁷² See *supra* notes 88-89 and accompanying text.

¹⁷³ See *supra* notes 90-98 and accompanying text.

¹⁷⁴ BCS Chronology, *supra* note 30.

¹⁷⁵ See *supra* notes 99-101 and accompanying text.

¹⁷⁶ See, e.g., Nixon, *supra* note 26; Pruitt, *supra* note 26; Rogers, *supra* note 26. *But see* Schmit, *supra* note 26 (arguing that the modified BCS continues to violate antitrust law).

¹⁷⁷ Frommer, *supra* note 106.

¹⁷⁸ *Id.*

¹⁷⁹ *Non-BCS Conferences get record payout*, ESPN.COM, <http://sports.espn.go.com/dallas/ncf/news/story?id=4856300> (last accessed April 22, 2010).

¹⁸⁰ See *supra* notes 121-124 and accompanying text.

¹⁸¹ See *supra* notes 177-179 and accompanying text.

¹⁸² See *supra* notes 168-170 and accompanying text.

¹⁸³ See *supra* notes 140-145 and accompanying text.

¹⁸⁴ See *supra* notes 167-171 and 177-179 and accompanying text.

¹⁸⁵ See, e.g. Carroll, *supra* note 26 at 1273-75; Fenasci, *supra* note 26 at 985-86; Kober, *supra* note 26 at 73-74.

¹⁸⁶ See *supra* notes 50-52 and accompanying text.

¹⁸⁷ See, e.g. Carroll, *supra* note 26 at 1273-75; Fenasci, *supra* note 26 at 985-86; Kober, *supra* note 26 at 73-74.

¹⁸⁸ See *supra* notes 76-82 and accompanying text.

¹⁸⁹ See Kober, *supra* note 26 at 75 (“The BCS format has also been successful in creating competitive contests at the end of the season.”).

¹⁹⁰ Carroll, *supra* note 26 at 1275-78; Fenasci, *supra* note 26 at 987-88.

¹⁹¹ Only once was a non-BCS team invited to play in one of the Fiesta, Orange, Rose, or Sugar Bowls during the twenty years preceding the formation of the BCS. Carroll, *supra* note 26 at 1276; Moreland, *supra* note 11 at 741.

¹⁹² McClelland, *supra* note 12 at 212 (quoting Gary R. Roberts, *BCS Backers Forward Flawed Defense*, THE NCAA NEWS, Sept. 29, 2003, <http://www.ncaa.org/news/2003/20030929/editorial/4020n26.html>).

¹⁹³ See *supra* note 139 and accompanying text.

¹⁹⁴ 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 (1997) (statement of Gary R. Roberts, Professor of Law and Sports Law Program Director, Tulane Law School) (hereinafter Roberts Congressional Statement) (arguing with respect to BCS predecessor the Bowl Alliance that “[i]f the less restrictive alternative doctrine means anything, this must be a classic example of where it should be applied”); Pruitt, *supra* note 26 at 145 (“The greatest threat to the BCS in a rule of reason analysis would most likely be the ‘less restrictive alternative’ test.”).

¹⁹⁵ See, e.g., Fenasci, *supra* note 26 at 985-86; Kober, *supra* note 26 at 73-74.

¹⁹⁶ See, e.g., Corns, *supra* note 26 at 198; Darling, *supra* note 26 at 465-66; Schmit, *supra* note 26 at 251.

¹⁹⁷ See *supra* notes 189-191 and accompanying text.

¹⁹⁸ Michael Smith, *The BCS’ Big Split*, SPORTS BUS. J., Jan. 25, 2010, <http://www.sportsbusinessjournal.com/article/64647> (last accessed June 1, 2010) (quoting Nebraska chancellor Harvey Perlman).

¹⁹⁹ TV Ratings, BCSFOOTBALL.ORG, <http://www.bcsfootball.org/news/story?id=4819384> (last accessed June 1, 2010).

²⁰⁰ *Id.*

²⁰¹ See generally *supra* note 115 and accompanying text (discussing the consumer welfare requirement). *But see* Rogers, *supra* note 115 (noting that applicability of consumer welfare requirement is uncertain in group boycott cases).

²⁰² See Rogers, *supra* note 26 at 297 (“Consumer harm . . . would be difficult for non-BCS schools to establish.”).

²⁰³ Roberts Congressional Statement, *supra* note 194. See also Hales, *supra* note 26 at 122 (arguing same).

²⁰⁴ *Id.*

²⁰⁵ See *supra* notes 168-169 and accompanying text.

²⁰⁶ See *supra* notes 91-98 and accompanying text.

²⁰⁷ Bleymaier Congressional Statement, *supra* note 93.

²⁰⁸ Stucke, *supra* note 32 at 1422-29.

²⁰⁹ 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).

²¹⁰ See *supra* notes 57-62 and accompanying text.

²¹¹ Roberts Congressional Statement, *supra* note 194.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See supra* notes 106-107 and accompanying text.

²¹⁵ Frommer, *supra* note 106.

²¹⁶ *Id.*

²¹⁷ All-time Results, BCSFOOTBALL.ORG, available at <http://www.bcsfootball.org/news/story?id=4809856> (last accessed April 8, 2010).

²¹⁸ *See* Zimbalist, *supra* note 26 at 38 (noting that “the national championship game regularly has the strongest [television] ratings [of all BCS bowl games] by a healthy margin”).

²¹⁹ *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 April 8, 2010).

²²⁰ *See, e.g.*, Feldman, *supra* note 113 at 577-78.

²²¹ 468 U.S. 85 (1984).

²²² *See supra* notes 140-145 and accompanying text.

²²³ 551 U.S. 877 (2007).

²²⁴ *See* Carroll, *supra* note 26 at 1264-65 (noting that the BCS includes both horizontal and vertical restraints).

²²⁵ *See* NCAA, 468 U.S. at 109 (quoting *Nat’l Society of Prof’l Eng’rs v. U.S.*, 435 U.S. 679, 692 (1978)).

²²⁶ *See supra* note 196 and accompanying text.

²²⁷ *See supra* notes 168-171 and accompanying text.

²²⁸ *See supra* notes 168-171 and accompanying text.

²²⁹ NCAA v. Bd. Of Regents, 468 U.S. 85, 117 (1984).

²³⁰ *Id.*

²³¹ *Id.* at 119.

²³² *Id.*

²³³ *Id.*

²³⁴ *See, e.g.*, McCormick & McCormick, *supra* note 39 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, April 20, 2009, available at http://www.usatoday.com/sports/college/football/2009-04-16-spring-game-sponsorship_N.htm (last visited Feb. 5, 2010) (noting increase in football-related corporate sponsorships).

²³⁵ Leslie, *supra* note 112 at 1850-51. *See also* Feldman, *supra* note 113 at 577-78 (discussing tying agreements generally).

²³⁶ *See* ESPN, *BCS Agree to Four-year Deal for Television, Radio, Digital Rights*, *supra* note 129 (noting that although ESPN purchased the rights to broadcast the Fiesta, Orange, and Sugar Bowls from 2011-2014, it did not acquire the rights to televise the BCS National Championship Game in 2014, as those rights were retained by the host Rose Bowl).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.* (noting that although ESPN purchased the rights to broadcast the Fiesta, Orange, and Sugar Bowls from 2011-2014, it did not acquire the rights to televise the BCS National Championship Game in 2014, as those rights were retained by the Rose Bowl as host to the separate BCS championship game).

²⁴⁰ McClelland, *supra* note 12 at 179.

²⁴¹ *See* Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 192 (2d Cir. 1992).

²⁴² TV Ratings, *supra* note 199.

²⁴³ *See, e.g.*, Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., Case No. 97-Civ-5499, 2004 U.S. Dist. Lexis 5411 at *22 (S.D.N.Y. March 30, 2004) (holding that having to buy a product that one “does not ‘want as much’” as the tied product is not enough).