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The BCS: Antitrust Goes Bowling?

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I. INTRODUCTION

The Bowl Championship Series ("BCS") has received a great amount of attention over the past few years, as many fans have expressed displeasure with its mechanism for selecting a (mythical) "national champion" in the National Collegiate Athletic Association ("NCAA") Division I Football Bowl Subdivision ("FBS").[2] While football bowl games have been played since the turn of the century, the BCS has existed in its current form only since 1998. Public debate over the BCS drew renewed attention last November when newly elected President Obama, in an interview on the popular television show *60 Minutes*, voiced his preference for a playoff system leading to a national championship and indicated that he might use his influence to change the current system.[3]

The BCS has also drawn the attention of legislators. There are currently three Bills pending regarding the BCS and the method by which a champion in NCAA Division I FBS college football is determined. The three Bills are H. Res. 68, H. Res. 390, and H. Res. 599.[4] H. Res. 68 would: 1) reject the BCS system as an illegal restraint of trade that violates the Sherman Antitrust Act; 2) require the Department of Justice to investigate whether the BCS system is illegal; and 3) support the establishment of a play-off system "in the interest of fairness and to bring parity to all NCAA teams."[5] H. Res. 390, also known as the College Football Playoff Act of 2009, would "prohibit, as an unfair and deceptive act or practice, the promotion, marketing, and advertising of any post-season NCAA Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system."[6] The enforcement

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[2] The NCAA's Division I is composed of two subdivisions: the Football Bowl Subdivision ("FBS") and the Football Championship Subdivision ("FCS"). The FBS was formerly known as Division I-A, while the FCS was formerly known as Division I-AA.

[3] Tim Lemke, *Obama's BCS Options*, THE WASHINGTON TIMES, November 18, 2008, available at http://www.washingtontimes.com/news/2008/nov/18/obamas-options-on-bcs-limited/, last visited May 18, 2009.

[4] Library of Congress, Legislation in Current Congress, available at http://www.thomas.gov/, last visited May 18, 2009.

[5] *See* Full Text of H. Res. 68, available at http://www.thomas.gov/, last visited May 18, 2009. This Bill was referred to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness on March 6, 2009.

[6] *See* Full Text of H. Res. 390, available at http://www.thomas.gov/, last visited May 18, 2009. The Act would be applicable to any game occurring after January 31, 2011. Section 3 of this Bill also declares illegal the sale of any

of the Act would be under the purview of the Federal Trade Commission ("FTC") as an unfair or deceptive practice under the FTC Act. Finally, H. Res. 599, also known as the Championship Fairness Act of 2009, would "prohibit the receipt of Federal funds by any institution of higher education with a football team that participates in the NCAA Division I Football Bowl Subdivision, unless the national championship game of such subdivision is the culmination of a playoff system."[7]

This pending legislation and the public debate about the BCS have focused on its alleged "anticompetitive" character. Critics largely argue that the BCS is a means by which the elite football institutions restrain the opportunity for non-BCS schools to participate in the most elite Bowls, and the ultimate championship, which results in lower economic gains for the non-BCS schools. But, is the BCS an antitrust violation? Or, alternatively, does the BCS result in anticompetitive harm that requires legislation to remedy?

II. WHAT IS THE BCS?

In order to understand the current structure of the BCS, it is important to have some historical perspective on football bowl games. College football teams have been playing bowl games since at least January 1, 1916, when Washington State beat Brown 14-0 in the first Rose Bowl.[8] The popularity of, and demand for, bowl games has risen more or less steadily ever since, as has the number of bowl games. Since there is no NCAA-operated playoff system in the NCAA Division I FBS, bowl games make up the entirety of the postseason for FBS teams.

As the number of bowl games rose, the various bowl organizers and athletic conferences (college football teams are organized in conferences which are often geographically oriented) entered into contractual relationships which usually bound the champion of the conference to play in a particular bowl game. Therefore, the match-ups in bowl games were not governed solely by the regular season performance of the team (relative to other teams participating in bowl games); the historical association of a bowl game with a particular conference could also play an important role.

In 1992, Notre Dame, along with the Big East, Atlantic Coast, Big Eight, Southeastern, and Southwestern conferences formed the Bowl Coalition with the Cotton, Fiesta, Orange and Sugar Bowls. This arrangement was designed to approximate a national championship, and the participants agreed upon selection and ranking guidelines.[9] The Bowl Coalition faced two large hurdles. First, the Big Eight,

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merchandise associated with a prohibited game. This Bill was referred to the House Committee on Energy and Commerce on January 9, 2009.

[7] *See* Full Text of H. Res. 599, available at http://www.thomas.gov/, last visited May 18, 2009. This Bill was referred to the House Committee on Education and Labor on January 16, 2009.

[8] ROBERT M. OURS, BOWL GAMES: COLLEGE FOOTBALL'S GREATEST TRADITION (2004) at 5.

[9] Brett P. Fenasci, *An Antitrust Analysis of College Football's Bowl Championship Series*, 50 LOY. L. REV. 967, 973-974 (2004).

Southeastern, and Southwestern conferences declined to sever their historical contractual relationships with the Orange, Sugar, and Cotton Bowls, respectively, which complicated efforts to stage a "championship" game between teams from those conferences.[10] Second, the Big 10 and Pac-10 conferences chose to continue their historical relationship with the Rose Bowl, the "Granddaddy of them all," rather than participate in the Coalition. The Bowl Coalition was succeeded by the Bowl Alliance as conferences and Bowls became more receptive to giving up their historical contractual tie-ins. The Bowl Alliance was eventually replaced by the BCS in 1998.[11]

Today, the BCS is comprised of the Big East, Big Ten, Big Twelve, Pac-10, Atlantic Coast, and Southeastern conferences. They play in five bowl games: the Orange, Rose, Fiesta, and Sugar Bowls, as well as the BCS National Championship Game, which rotates among the BCS bowl sites. The champions of the six BCS conferences are each guaranteed a spot in a BCS bowl, with the teams that finish the regular season ranked first and second in the BCS standings guaranteed a spot in the BCS Championship. The remaining "at large" spots are filled by a complicated system. Notre Dame is guaranteed a spot if it is ranked number 8 or better in the BCS standings. Similarly, the champion of one of the Conference USA, Mountain West, Western Athletic, Sun Belt, and Mid American conferences may receive a BCS bid if it ranks high enough in the BCS standings. The BCS standings themselves are derived from a complicated formula of various polls and computer rankings, which has been revised on occasion. Critics argue that this system unfairly excludes non-BCS conferences, which leads to disproportionate economic gains for BCS conferences and schools. Critics further claim that this system ultimately increases disparity among the BCS and non-BCS schools.

III. BCS AND ANTITRUST

Arguments regarding the BCS' anticompetitive status usually focus on the agreement among the BCS schools regarding the rules governing eligibility to play in the BCS bowl games and the national championship. Some critics argue that this "agreement" among the BCS schools should be investigated as a conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, which prohibits all agreements that unreasonably restrain interstate trade or commerce and cause harm to consumers in the form of higher prices, lowered output, or degraded quality of goods.[12]

A plaintiff bringing this sort of claim would face many challenges. First, since the Sherman Act applies only to restraints of trade—and not to non-commercial activity—the plaintiff would face the threshold hurdle of convincing a court that an agreement about eligibility rules is somehow "commercial" such that it should be subject to the Sherman Act. Moreover, even if a plaintiff were to succeed in convincing a court to

[10] *Id*. at 974.
[11] *Id*. at 975.
[12] Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238 (1918).

analyze the BCS eligibility rules as commercial, the rules would be analyzed under the rule of reason, as assured by the seminal opinion involving college football in *NCAA v. Bd. of Regents of Oklahoma*.[13] The focus of the rule of reason is the analysis of competitive effects in the relevant market. Any antitrust plaintiff challenging the BCS under current antitrust jurisprudence will be unlikely to be able to show significant anticompetitive effects in a properly defined relevant market.

A. Non-commercial Activity

The Sherman Act only applies to commercial restraints. It does not apply to non-commercial activity, even if that non-commercial activity has an incidental effect on commerce.[14] "The dispositive inquiry in this regard is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial."[15] Therefore, an antitrust plaintiff would have to demonstrate that the BCS' setting of rules regarding eligibility to play in the BCS bowls, and to play in the BCS Championship, constitute commercial activity. It seems unlikely that a plaintiff could establish that rules regarding eligibility to play in a football game constitute commercial activity; such rules regulate "athletic competition, which is not protected by the antitrust laws."[16] Several Courts have recognized that rules of the game that govern athletic competition but do not govern any commercial competition are the type of non-commercial activity that is not subject to antitrust scrutiny under the Sherman Act.[17] Similarly, the BCS rules and guidelines arguably do not regulate the commercial activity of these schools; rather they are merely rules of the game that must be agreed upon for the product to exist.[18] Therefore, a challenge to the BCS rules would be likely fail before any analysis of its competitive effects an in any relevant market is even necessary.[19]

B. Relevant Market

The definition of the relevant market is hotly contested in most antitrust cases because its determination can often influence the outcome of the litigation. While the concept of the relevant market is relatively simple, its implementation is often subject to

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[13] 468 U.S. 85 (1984).

[14] Dedication and Everlasting Love to Animals v. The Humane Society of the United States, Inc., 50 F.3d 710, 714 (9th Cir. 1995); Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. and Secondary Sch., Inc., 432 F.2d 650, 654 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

[15] Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004).

[16] Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 720 (6th Cir. 2003).

[17] Aculeus 5, LLC v. NFL Properties, LLC, CV 04-4252 (GAF) (C.D. Cal. 2005); Brookins v. International Motor Contest Ass'n, 219 F.3d 849 (8th Cir. 2000); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F. Supp 1103 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981); Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504 (9th Cir. 1989); *M&H* Tire Company, Inc. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984); Weight-Rite Golf Corp. v. United States Golf Ass'n, 766 F. Supp. 1104 (M.D. Fla. 1991), *aff'd*, 953 F.2d 651 (11th Cir. 1992).

[18] *See* NCAA v. Board of Regents, 468 U.S. at 101-02.

[19] Other cases regarding eligibility to play in athletic contests include: Smith v. NCAA, 139 F.3d 180, 185-86 (3d Cir. 1998) (vacated on other grounds, 525 U.S. 459 (1999)); Gaines v. NCAA, 746 F.Supp. 738, 744 (M.D. Tenn. 1990); Bowers v. NCAA, 9 F. Supp. 2d 460, 497 (D. N. J. 1998); National Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 473 (6th Cir. 2005); Toscano v. PGA Tour, Inc., 201 F.Supp.2d 1106, 1120 (E.D. Cal. 2002).

opposing opinions by expert economists. A properly defined relevant market will take into account all the substitutes available to consumers for the product at issue.[20] The problem with defining a relevant market for college football is that college football itself is not a tangible commercial product at all; it is a sport. There are, of course, commercial products associated with that sport, such as tickets for live attendance at the games, TV broadcast rights, sponsorships, and advertisements. These products have prices that can be studied. And, any properly defined relevant product will take into account all the substitutes available to consumers of these commercial products. The market analysis should ask whether consumers who buy tickets for live attendance at the BCS Bowl Games would consider other options for live entertainment events? Whether sponsors of the BCS will consider other options for reaching the same target demographic? Whether advertisers seeking to attract the same demographic will consider other TV programming? Whether the major television networks consider major sports and entertainment programming as substitutes?

Therefore, a proper analysis of the competitive effects will require that relevant markets be defined separately for each of the commercial products associated with the BCS and college football. In each of these markets plaintiff will have to show substantial anticompetitive effects that could be avoided by a less restrictive alternative. In the simplest of antitrust cases where the market for widgets is to be studied, plaintiffs usually face a tall hurdle in proving the parameters of the relevant market. In a complex case such as this, the hurdle for plaintiffs is even higher. And, given the variety of commercial products associated with college football and the relevant markets that need to be studied, it is likely that the analysis will show that consumers with a limited disposable income for entertainment will consider many options to be substitutes to BCS bowl games. Similarly, advertisers and sponsors will consider all options that allow them to reach their target demographic as substitutes. And, major television networks obviously compete for various programming that gets high ratings and schedule the events so as to avoid competition for these ratings.

C. Single Entity

As the Supreme Court has recently noted in *Dagher*, a fully integrated joint venture acts as a single entity and is not suspect for engaging in conduct that is at the very core of the joint venture's business.[21] The BCS conferences, schools, and bowl games may have a powerful argument that they have formed an integrated joint venture for the purpose of producing the BCS bowl games and the BCS National Championship. An essential component of this joint venture is the participants' agreement on the rules that will govern the selection of the teams that will compete in the BCS Bowls, ultimately

[20] *See* Product Market Definition under the DOJ and FTC's Joint Horizontal Merger Guidelines, available at http://www.ftc.gov/bc/docs/horizmer.htm, last visited May 20, 2009.

[21] Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

leading to the national championship game. While critics may not like the rules that the BCS has agreed upon, that is akin to criticizing the inner workings of a joint venture; however, bad business judgment is not the same as an antitrust violation.

In fact, if a joint venture is fully integrated and it is imperative for the participants in the joint venture to come together to make the product available, then even a so-called agreement on price terms will survive antitrust scrutiny. In *American Needle*, for example, the Seventh Circuit noted that "nothing in §1 [of the Sherman Act] prohibits [a league's] teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages competition inside a business organization—such as, in this case, a professional sports league—to foster competition between that organization and its competitors."[22]

The Seventh Circuit affirmed the district court's holding that for purposes of licensing the teams' intellectual property, the NFL acted as a single entity. Licensing of intellectual property as in *American Needle* or the setting of prices of the joint venture's product as in *Dagher*, should not be subject to antitrust scrutiny where the joint venture is fully integrated and the joint venture's product can be produced only through cooperation among the joint venture participants. The BCS conferences and Bowls have a strong argument that for the purpose of producing the BCS they act as a fully integrated joint venture and their decisions for that purpose are more analogous to a single entity rather than an "agreement" among commercial competitors, which would remove their rules from antitrust scrutiny.

If a plaintiff tries to counter this argument by alleging that even though the BCS acts as a single entity, it is acting in violation of section 2 of the Sherman Act by engaging in attempted monopolization, the analysis will revert to requiring the plaintiff to make a detailed showing of the BCS' market share in the appropriate markets, which likely will have to extend beyond the boundaries of postseason college football, because a market cannot generally be artificially defined to be limited to a single participant.[23]

D. Pro-competitive Justifications

Even if a plaintiff survives all the above challenges to sustaining an antitrust claim against the BCS, there is a credible argument to be made by the BCS that the rules regarding the current method by which a national champion is chosen are pro-competitive. It is undisputable that without these rules, and before the BCS was formed, it was very difficult to determine a national champion in the Football Bowl Subdivision. The consumers voiced a need for a determination of a national champion and the BCS arrived at one method of producing such a champion. While some football fans are obviously displeased with BCS' method for crowning its champion, that argument fails

[22] American Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008) (petition for cert. pending).
[23] Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998)

in antitrust analysis because, by providing a national champion, the BCS increased consumer welfare as compared to the world before the BCS championship. It is not illegal under antitrust law to produce a product that does not satisfy every consumer. Nor does antitrust law prevent the BCS conferences from continuing to work together to try to produce a better product.

IV. CONCLUSION

While the BCS continues to supply sports fans—including the President—with a reason for heated discussion and debate, that debate does not translate into an antitrust violation. Indeed, it might even be pro-competitive. An analysis of the legal elements required to prove an antitrust violation under the Sherman Act shows that a plaintiff will face a tall hurdle in bringing a successful antitrust challenge to the BCS. Therefore, it is not extraordinary that despite some of the nation's penchant for a playoff system, no antitrust action has, in fact, been commenced against the BCS.