"PLAYOFFS?! ARE YOU KIDDING ME, PLAYOFFS?": AN ANTITRUST ANALYSIS OF COLLEGE FOOTBALL'S NEW PLAYOFF FORMAT♦

INTRODUCTION

In its final years criticism of the Bowl Championship Series (the "BCS") was widespread. Academics, the media, members of Congress, and college football fans alike tended to assert the same grievance,[1] that the BCS systematically favored traditional powerhouses at the expense of college football's less prominent institutions. Many who sought to do away with the BCS assumed the implementation of a playoff would remedy the problems historically associated with the BCS. Even the Department of Justice took the time to send the National Collegiate Athletic Association ("NCAA") president a letter.[2] Upon the announcement of the new playoff system prior to the 2012-2013 season,[3] most fans presumably reacted with joy.

However, those who thought eliminating the BCS in favor of a four-team playoff would cause a brief moratorium on the criticism were proven wrong in the playoff's inaugural season. The College Football Playoff ("CFP") already faced some of the same complaints previously lodged against the BCS. Less than three months into the 2014-2015 season, one author had this to say about the new arrangement: "[a]ll the progress made under the BCS during its 16 year life was lost in a single offseason."[4] The author was frustrated with the release of the CFP's week thirteen rankings, which had failed to include the 10-0 Marshall Thundering Herd.[5] That statement may seem like an overreaction, but it was qualified with a fact that is hard to ignore. During the BCS era a non-BCS Conference team went 10-0 eighteen times, with all eighteen of those teams being ranked in the BCS polls.

In the CFP's first year, Marshall became the first non-BCS conference team in seventeen years to win its first 10 games yet fail to

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[1] *See, e.g.*, Stephen W. Dittmore & Craig M. Crow, *The Influence of the Bowl Championship Series on Competitive Balance in College Football*, 2 JOURNAL OF SPORT ADMINISTRATION & SUPERVISION 7, 7–19, (2010); Nick Canepa, *Congress Takes Shot at Righting BCS Wrong*, SAN DIEGO UNION-TRIBUNE (May 7, 2009), http://www.utsandiego.com/news/2009/May/07/1s7canepa223453-congress-takes-shot-righting-bcs-w/; William C. Rhoden, *The B.C.S. is a Travesty, a Sham, and a Mockery, and That's No Joke,* N.Y. TIMES (Jan. 5, 2005), http://www.nytimes.com/2005/01/05/sports/ncaafootball/05rhoden.html?ref=bowlchampionships eries.

[2] Letter from Christine A. Varney, Asst. Atty. Gen.,U.S. Dep't of Justice, Antitrust Div. to Mark A. Emmert, Ph.D., Pres, NCAA, (May 3, 2011), *available at* http://www.scribd.com/doc/54632540/ Letter-From- Dept-of-Justice-to-NCAA-on-BCS (last visited Jan. 20, 2015). The letter asked the NCAA to provide its reasoning behind why a playoff was not utilized and whether any initial steps had been taken toward creating one

[3] *See* Adam Himmelsbach, *College Football Playoff Approved for 2014 Season*, N.Y. TIMES, (June 26, 2012), http://www.nytimes.com/2012/06/27/sports/ncaafootball/four-team-college-football-playoff-approved.html.

[4] Mike Davis, *The Marshall Dilemma: The New Playoff System Has Already Failed College Football*, SPORTS POLITICO (Nov. 19, 2014), http://sportspolitico.com/2014/11/21/the-marshall-dilemma-the-new-playoff-system-has-already-failed-college-football/.

[5] *Id.* The lowest ranking of those teams was 18th, "with all but three of [those teams] ranked inside, or near the top ten."

be ranked.[6] Adding insult to injury, the average college football fan may not even have been aware of Marshall's plight, as the national media largely did not report their story. The national media's failure to address the Marshall story could be rationalized as looking at the shiny new CFP through rose-colored lenses. Nonetheless, Marshall's potential claim on a spot in the CFP rankings became a moot point after loosing their final game of the regular season.

Despite Marshall's inability to finish the season undefeated, it appears that it's only a matter of time until a controversy on the national level stirs the masses once again. In anticipation of the debate discussing whether the CFP continues to disadvantage college football's less prominent institutions, it is necessary to look back on the avenue of recourse suggested as a way to break up the BCS. An antitrust lawsuit was widely considered the best tool to dismantle the BCS,[7] yet some journalists seemed to believe the playoff ended that threat.[8] This note will consider how switching to a playoff format might affect a potential antitrust challenge to college football's postseason and the remedy available should the plaintiff prevail.

Part I begins with a brief exploration of college football's inception. It will examine the circumstances surrounding the founding of the NCAA, why the BCS was initially conceived, and how the BCS functioned in the past. Part II lays out the framework of the four-team CFP that will be used to crown a national champion going forward. The discussion will focus on whether the recently created playoff committee will end the constant aggravation that had become synonymous with selecting the national championship game participants under the old BCS structure. Part III considers the development of the rule of reason under the Sherman Antitrust Act before focusing on how the rule of reason has been applied to antitrust litigation involving sports. Part IV will use the modern rule of reason's burden-shifting framework to evaluate arguments asserting the BCS was, and that the CFP is, an unlawful restraint on trade. Finally, the conclusion will contemplate the remedies available to a plaintiff able to prevail in a hypothetical antitrust lawsuit and whether that potential relief would remedy the perceived transgressions of the BCS.

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[6] *Week 13 Rankings,* COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/view-rankings#week-13 (last visited Jan. 20, 2015). A description of the Non-BCS Conferences is located *infra* note 42.

[7] *E.g.*, Nathaniel Grow, *Antitrust & the Bowl Championship Series*, 2 HARV. J. OF SPORTS & ENT. 53, 53–95 (2011).

[8] *See* Ivan Maisel, *The Playoff Is Not All About Progress*, ESPN (May 23, 2014), http://espn.go.com/college-football/story/_/id/10973311/the-college-football-playoff-bring-new-set-problems. *See also* Jason M. Breslow, *College Football's "Final Four" Could Quell Antitrust Fight*, PBS (June 27, 2012), http://www.pbs.org/wgbh/pages/frontline/sports/money-and-march-madness/college-footballs-final-four-could-quell-antitrust-fight/.

I. THE ORIGINS OF COLLEGE FOOTBALL

A. *The NCAA*

The NCAA's stated mission "is to be an integral part of higher education and to focus on the development of our student-athletes."[9] While pursuing its mission, the NCAA also manages to generate a significant amount of money. The NCAA's audited revenue for its 2013 fiscal year was approximately $913 million.[10] Football Bowl Subdivision ("FBS") and Division I men's basketball programs create the vast majority of revenue utilized by the NCAA.[11] Without the success of football programs in particular, the NCAA could not support the other sports that would otherwise lose money operating on their own.[12]

College football not only sustains the functional operations of the modern day NCAA, but it was also the galvanizing force leading to the creation of the NCAA (albeit under a different name at the time) in 1906.[13] On November 6, 1869, the Rutgers Scarlet Knights defeated the Princeton Tigers in the first intercollegiate football game by a score of six goals to four.[14] There were no touchdowns or field goals scored that day, as the early iterations of football resembled something closer to rugby or soccer than the game of football played today.

Instead, nineteenth century football featured the mass play, which caused enough severe injuries to lead to calls for the abolishment of the game.[15] Despite rule changes designed to increase player safety, there were still "18 fatalities and 149 serious injuries" during the 1905 college football season.[16] Thankfully for modern football fans, President

[9] *Office of the President: On the Mark, The NCAA Mission*, NCAA, http://www.ncaa.org/about/who-we-are/office-president/office-president-mark (last visited Jan. 20, 2015).

[10] Steve Berkowitz, *NCAA Has Net Assets of $627 Million,* USA TODAY (Mar. 20, 2014), http://www.usatoday.com/story/sports/college/2014/03/20/ncaa-expenses-revenue-money-mark-emmert/6651133/.

[11] *Office of the President: On the Mark, On the Value That Football and Basketball Add to the Enterprise*, NCAA, http://www.ncaa.org/about/who-we-are/office-president/office-president-mark (last visited Jan. 20, 2015). The NCAA president, Mark Emmert, suggests the most important responsibility of fans of other NCAA sports (meaning not football or basketball) is to buy football tickets because the NCAA could not "do any of those other sports if we weren't successful in football [and basketball]."

[12] *Id.*

[13] Joseph N. Crowley, *In the Arena: The NCAA's First Century*, NCAA, 10 (2006), http://www.ncaapublications.com/p-4039-in-the-arena-the-ncaas-first-century.aspx (last visited Jan. 20, 2015). The Intercollegiate Athletic Association later changed its name to the National Collegiate Athletic Association. *See infra* note 18 and accompanying text.

[14] *Rutgers-The Birthplace of Intercollegiate Football*, SCARLETKINGHTS.COM, http://www.scarletknights.com/ sports /m-footbl/ archive/first-game.html (last visited Jan. 20, 2015).

[15] *Id.* The mass play consisted of the offensive team lining up in a flying wedge formation and running straight at the defense. The defensive players would catapult themselves into the offense's flying wedge in an attempt to break the wedge apart. *See also* Crowley, *supra* note 13, at 9.

[16] Crowley, *supra* note 13, at 9.

Theodore Roosevelt recognized the hostility developing towards the sport and invited representatives from college institutions to the White House to discuss the game's future. President Roosevelt was instrumental in uniting factions of universities and colleges who had their own divergent views on how to overhaul the rules. He used the influence of his office to establish a joint committee, which drafted a constitution and by-laws to govern the new organization.[17] The organization, originally known as the Intercollegiate Athletic Association of the United States, held its first convention in December of 1906 (the organization was re-named the National Collegiate Athletic Association four years later).[18]

B. *The BCS*

Although the NCAA was formed for the purpose of "protect[ing] young people from the dangerous and exploitive athletic practices of the time,"[19] it is also tasked with the responsibility of organizing the athletic championships in all but one sport. The FBS is the only sport where the NCAA is not the organization responsible for determining its champion. Starting on October 19, 1936, the Associated Press managed that responsibility through its own college football poll.[20] The post-season format of college football, which had consisted of bowl games operating completely independent of one another, made crowning a true national champion quite difficult. Between 1936 and 1992, the number one and number two ranked teams in the Associated Press Poll met in a post-season bowl game on only eight occasions.[21] Critics even mockingly referred to the national title as "mythical," due to the championship rarely being settled on the field, which meant the champion was constantly determined by popular vote.[22]

In response to the perceived deficiencies of the previous system,

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[17] *Id.* at 9–10.

[18] *Id.* at 10.

[19] Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Oct. 6, 2013, 5:12 AM), http://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html. "The 'NCAA was founded in 1906 to protect young people from the dangerous and exploitive athletics practices of the time,' so states the [NCAA] on its official website." As of January 20, 2015 the link to the NCAA's website was dead; which may be related to a wrongful death lawsuit filed against the NCAA shortly after the Huffington Post article was published. *See* Nathan Fenno, *In Court Filling, NCAA Denies Legal Duty to Protect Athletes*, THE WASHINGTON TIMES (Dec. 18, 2013), http://www.washingtontimes.com/news/2013/dec/18/court-filing-ncaa-denies-legal-duty-protect-athlet/.

[20] *History of the AP Top 25 College Football Poll*, ASSOCIATED PRESS (Aug. 22, 2012), http://collegefootball.ap.org/content/history-ap-top-25-college-football-poll. The Associated Press poll is voted on by writers and broadcasters with college football backgrounds and experience.

[21] *BCS Chronology*, BCSFOOTBALL.ORG (Oct. 8, 2013, 3:39 PM), http://www.bcsfootball.org/news/story?id=4819366.

[22] Trevor Jack, *Blue Field of Dreams: A BCS Antitrust Analysis*, 39 J.C. & U.L. 165, 174 (2013). The term "mythical" national champion was used in a derogatory manner when referencing the method of determining a champion.

conference commissioners, representatives of the University of Notre Dame, and four bowl committees came together to create the Bowl Coalition in 1992.[23] Notwithstanding the Bowl Coalition's intentions of creating an on-field matchup between the top two teams in the country, it had its critics and limitations.[24] In response to increasing disapproval of the Bowl Coalition system, the major conference commissioners began to devise a new plan offering more flexibility so the championship game could feature the two best teams by eliminating automatic bowl tie-ins for league champions.[25]

In 1995, those conference commissioners unveiled the Bowl Alliance. Under the new agreement, the champions of the Atlantic Coast, Big East, Big Eight, Southeastern, and Southwest conferences along with one at-large team would play in three alliance bowls.[26] The revolutionary feature of the new Bowl Alliance was the elimination of contractual obligations forcing certain conference champions to play in specific bowls.[27] By eliminating those automatic matchups, the Alliance had a greater chance of producing the long sought after mythical National Championship game between the best two teams in the country.[28] Alas, satisfaction with the Bowl Alliance was short-lived, due in part to its inability to match up undefeated Michigan with Nebraska after the 1997 regular season;[29] the commissioners of the major

[23] *BCS Chronology*, *supra* note 21. The Bowl Coalition was effective for the 1992–94 regular seasons. Under the Bowl Coalition system, the "champions of the Big East Conference and Atlantic Coast Conference and Notre Dame" would "meet either the champion of the Big Eight (in the Orange Bowl), Southeastern (Sugar Bowl) or Southwest (Cotton Bowl) conferences." Additionally, "if the champions of the Big East or ACC or Notre Dame had been ranked [number one or number two] at the end of the regular season, they would have met in the Fiesta Bowl for the national championship." *Id.*

[24] *Id.* (discussing how the Coalition "could not, for example, pair the champions of the Big Eight and SEC in any bowl game"; nor could it pair the Big Ten or Pacific-10 champions with an opponent from another conference since neither conference participated in the agreement). *See also* Gene Wojciechowski, *Coalition Looks Out for No.1 in Matchups*, L.A. TIMES (Dec. 6, 1993), http://articles.latimes.com/1993-12-06/sports/sp-64601_1_bowl-coalition ("Still, despite the controversies, the questions, the delightful mess that is the bowl coalition and its assorted rankings, none of the coaches were in a hurry to scuttle the much-maligned system.").

[25] Ed Sherman, *Revised Bowl Coalition Afoot*, CHICAGO TRIBUNE (May 27, 1994), http://articles.chicagotribune.com/1994-05-27/sports/9405270214_1_bowl-coalition-playoff-format-rose-bowl.

[26] BCSFOOTBALL.ORG, *supra* note 21 (discussing how the three alliance bowls were the Fiesta, Sugar, and Orange bowls).

[27] *Id.* The Bowl Alliance "eliminated conference-champion tie-ins in the three bowls (Fiesta, Sugar and Orange bowls)."

[28] *Id.* (discussing how the 1995 Bowl Alliance allowed the "bowls to match conference champions in games that would have not been played under the previous conference-bowl affiliation arrangements. For example, after the 1995 regular season the Alliance arrangement crated a National Championship game between the only two unbeaten teams in the nation, Nebraska and Florida.").

[29] Michigan was the champion of the Big Ten, which was not part of the Bowl Alliance. Michigan was instead forced to play the Pacific 10 champion, Washington State Cougars. *See* Robyn Norwood, *Rose Bowl: Victory Means National Title for Michigan, Fame for Washington*

conferences then agreed to install the first version of the modern BCS (which was known initially as the "Super Alliance" for a short period of time).[30]

The 1998 regular season marked the first year a bowl system could guarantee a game between the top two ranked teams that would determine the national champion. It also provided the first opportunity (of many) for writers to point out the BCS's inability to identify the best two teams for the championship game.[31] The main change from the Bowl Alliance was to incorporate the Big Ten champion, Pac-10 champion, and the Rose Bowl into a newly formed "Super Alliance."[32] Under the new system, if the champions of either the Big Ten or the Pac-10 were ranked in the top two at the end of the regular season, they would no longer be required to play their traditional Rose Bowl matchup.[33] Thus, the Super Alliance was an improvement over the previous Bowl Alliance because it guaranteed a matchup of the number one and two ranked teams, regardless of the conference the top two ranked teams belonged to.

The changes to the procedure for selecting the National Championship game were not the only modifications to the Bowl Alliance. Under the new system, the champions of the "six founding conferences" (the "BCS Conferences") gained an automatic bid to play in one of the four major bowl games (or "BCS Bowls").[34] The four BCS Bowls would now rotate hosting the national championship game each year.[35] Any Division I-A independent team, meaning a team with no conference affiliation, e.g., Notre Dame, or the champion of any other Division I-A conference gained an automatic bid to play in one of the BCS Bowls, provided the team ranked sixth or higher in the standings at the end of the regular season.[36] The champions from the BCS

State, L. A. TIMES (Jan. 1 1998), http://articles.latimes.com/1998/jan/01/sports/sp-4115.

30 Mark Shapiro, *New Formula to Determine National Champion*, CHICAGO TRIBUNE (June 10, 1998), http://articles.chicagotribune.com/1998-06-10/sports/9806100085_1_espn-coaches-poll-records-bowl-championship-series.

31 Charlie Vincent, *Get Serious About a Series*, DETROIT FREE PRESS (Dec. 31, 1998), http://articles.chicagotribune.com/1998-12-31/sports/9812310035_1_fiesta-bowl-ohio-state-bowl-championship-series (discussing how the Super Alliance provided a guaranteed mechanism to match up number one and number two, but whether or not those two teams were actually the best two teams in the country is an entirely different debate).

32 BCSFOOTBALL.ORG, *supra* note 21.

33 *Id.*

34 *See id.* (discussing how the "BCS Conferences" consist of the Atlantic Coast Conference (ACC), Big East (no longer in existence), Big Ten, Big 12, Pac-10, and Southeastern Athletic Conference (SEC) and that the four "major" or BCS Bowls are the Fiesta, Sugar, Orange and Rose Bowl).

35 *See id.* (discussing how the Fiesta Bowl would host the first championship game, followed by Sugar, Orange, Rose, and then the cycle would repeat with the Fiesta Bowl hosting the game again in its 5th year).

36 *Id.* (discussing how Notre Dame, an independent team, received an automatic bid if it ranked tenth or higher at the end of the year).

Conferences were each assigned to a specific bowl. These champions were contractually required to play in their pre-designated bowl game as long as they were not ranked number one or two in the country.[37] After the teams who had automatic bids to the BCS were selected, the BCS Bowl committees chose the remaining "participants from a pool of eligible at-large teams."[38] Finally, the end of the year rankings would be established by a mathematical formula, dubbed the BCS standings.[39]

The aforementioned method for determining who would play in the National Championship and what teams would play in the remaining BCS Bowls has only been materially altered on one occasion since that first 1998 regular season. Over the years there have been some minor changes to the at-large eligibility requirements,[40] and changes in the mathematical formula used to create the BCS standings.[41] In 2004, potentially in an effort to reduce the possibility of antitrust liability, the BCS agreed to the following changes (which became effective starting with the 2006 regular season): the addition of one more BCS Bowl, an adjusted revenue distribution formula recognizing institutions that were not founders of the BCS, and an automatic qualifying provision for "Non-BCS Conferences" to participate in BCS Bowl Games.[42] The 2004 amendments to the BCS play a vital role in analyzing the potential antitrust liability facing the CFP.[43]

II. A FOUR-TEAM PLAYOFF: THE "NEW" BOWL CHAMPIONSHIP SERIES

A. *How Will the Playoff Work?*

On June 26th 2012, the NCAA Presidents announced their decision to approve a four-team playoff beginning with the 2014–2015 season.[44] The new system will be known simply as, "The College

[37] *Id.* (discussing how the assignments were Big Ten-Rose, Pac-10-Rose, Big 12-Fiesta, SEC-Sugar, ACC or Big East-Orange).

[38] *Id.* (discussing how the at-large teams consisted of all teams who won at least eight games and were ranked among the top twelve teams).

[39] Shapiro, *supra* note 30.

[40] *E.g.*, BCSFOOTBALL.ORG, *supra* note 21 (discussing how in 1999 the automatic qualifier increased from eight victories to nine).

[41] *E.g.*, Chris Dufresne, *BCS Formula Faces Changes*, L.A. TIMES (Apr. 25, 2005) http://articles.latimes.com/2005/apr/25/sports/sp-bcs25 (noting "the controversial BCS formula . . . has been tweaked almost every year since its inception in 1998.").

[42] The additional bowl established a separate National Championship, which also created two additional at-large bowl bids. The term "Non-BCS Conferences" includes Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference. Any Non-BCS Conference team that is either: "(a) ranked in the top 12 of the BCS standings or (b) ranked in the top 16 of the BCS standings and [whose] ranking was higher than that of a champion of one of the [BCS Conferences]" received an automatic bid to the BCS. BCSFOOTBALL.ORG, *supra* note 21.

[43] *See infra* notes 134–136 and accompanying text.

[44] Andy Staples, *Playoff Approval a Historic, Joyous Overdue Day for College Football*, SPORTS ILLUSTRATED (June 27, 2012), http://www.si.com/more-sports/2012/06/26/presidents-approve-

Football Playoff."[45] The announcement, which was accompanied with a twelve-year deal for the playoff and a "Super Bowl"-like bidding process for cities wishing to host the new National Championship game, [46] is what many college football fans have been waiting years for. A thirteen-member Selection committee (the "Selection Committee") will be tasked with selecting the four teams given the opportunity to compete for the coveted National Championship.[47] The Selection Committee is made up of Athletic Directors, former coaches, a college football reporter, and Condoleezza Rice, among others.[48] Theoretically, the four-team playoff should silence the critics who felt the BCS was unfair, but only time will tell if the Selection Committee will remain in the good graces of college football's media and fans.

The CFP will have six individual bowl games plus a separate national championship game.[49] The exact breakdown of the process for slotting the participating teams is somewhat complicated and outside the scope of this note; a high-level view of its structure will suffice.[50] The term "New Year's Six Bowls" has been coined to describe the six bowls affiliated with the CFP to be played approximately one week before the national championship game.[51] Four of the New Year's Six Bowls have no effect on the national championship (the "Non-Playoff New Year's Six Bowls"), while two of the New Year's Six Bowls will function as the semi-finals of the playoff (the "College Football Playoff Semi-Finals").[52] Finally, the "College Football Playoff National Championship" is to be played a week after the New Years Six Bowls at a location that will rotate each year.[53]

A brief summary of the inaugural CFP matchups will help

four-team-playoff.

[45] Brett McMurphy, *Arlington to Host Title Game*, ESPN (Oct. 4, 2013, 4:38 pm), http://espn.go.com/college-football/story/_/id/9204021/arlington-texas-host-first-college-football-playoff-championship ("College Football Playoff will be the name of the four-team playoff, which begins after the 2014 regular season.").

[46] *Id.*

[47] Zac Ellis, *College Football Playoff Officially Unveils 13-Member Selection Committee*, SPORTS ILLUSTRATED (Oct. 16, 2013), http://college-football.si.com/2013/10/16/college-football-playoff-committee/.

[48] *Id.* This author has no concerns about the suitability of most of the panel members, but the inclusion of former Secretary of State Condoleezza Rice is surprising at the very least.

[49] Chris Dufresne, *So What is Next After the BCS?*, L.A. TIMES (Jan. 7, 2014), http://articles.latimes.com/2014/jan/07/sports/la-sp-0107-college-football-playoff-20140107.

[50] *See* Tony Barnhart, *Before BCS Ends, the Whens, Wheres, Whys of College Football Playoff*, CBSSPORTS.COM (Jan. 6, 2014, 10:01 AM), http://www.cbssports.com/collegefootball/writer/tony-barnhart/24400200/before-bcs-ends-the-whens-wheres-and-whys-of-college-football-playoff (breaking down the logistics of the College Football Playoff in detail, and discussing how the different bowls will rotate hosting the games in different calendar years).

[51] The Sugar, Rose, Orange, Cotton, Peach and Fiesta Bowls are collectively known as the "New Year's Six Bowls." *See infra* note 54.

[52] Each year, two of the New Year's Six Bowls will host College Football Playoff Semi-Final Games.

[53] The national championship game is not played at any of the sites of the New Year's Six Bowls.

illustrate how the CFP functions and how the terms defined in the previous paragraph will be used in this Note.[54] The 2015 Non-Playoff New Years Six Bowls were the Orange, Cotton, Peach, and Fiesta Bowls. The 2015 College Football Playoff Semi-Finals were played in the Sugar and Rose Bowls, while the 2015 College Football Playoff National Championship was played at AT&T Stadium in Arlington, Texas.[55]

The Selection Committee ranks the top twenty-five teams in the country during the final seven weeks of the season. The top four ranked teams in the Selection Committee's final rankings are assigned to the College Football Playoff Semifinals. The Big Ten, Pac-12, SEC, Big 12, and ACC (the "Contract Conferences") all have contractual agreements guaranteeing their champions the right to play in one of the New Year's Six Bowls.[56] The highest ranked champion from any one of the following conferences, American, Mountain West, Mid-American, Sun Belt, and Conference USA (the "Group of Five Conferences"), is also guaranteed a place in one of the New Year's Six Bowls.[57] Once the Contract Conference champions and highest ranked Group of Five champion have been assigned to their respective bowls, the Selection Committee has virtually unrestricted discretion over the remaining at-large slots.

The highest ranked teams in the final poll that have not already been assigned to a bowl will fill any openings in the remaining New Year's Six Bowls. The Selection Committee can select the remaining at-large teams without restriction, with the bid going to the highest ranked team in the final Selection Committee rankings.[58] Of particular importance is the absence of a restriction on the number of teams any individual conference can have in the CFP.[59] This should be of extreme

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[54] Heather Dinich, *New Year's Six Bowl Pairings Set,* ESPN (Dec. 8, 2014, 7:05 AM), http://espn.go.com/college-football/story/_/id/11993817/college-football-playoff-new-year-six-bowl-pairings-set.

[55] *See College Football Playoff Schedule*, COLLEGE FOOTBALL PLAYOFF, http://cfp-cms-s3-prod.slcfp.com/wp-content/uploads/2014/11/CFP-Info-Sheet.pdf (last visited Jan. 20, 2015) (referencing the table at the bottom of the PDF for a graphical representation of the College Football Playoff Schedule for the 2015 through 2017 seasons).

[56] For a detailed analysis of those variables, *see* Barnhart, *supra* note 50; *see also* College Football Playoff Information Sheet, *supra* note 55 (determining which New Years Six Bowl each Contract Conference champion depends upon multiple variables).

[57] *See* Barnhart, *supra* note 50 (discussing how the Group of Five's "guaranteed" slot in a New Year's Six Bowl is a misnomer because being ranked in the top twenty-five of the final Selection Committee rankings is a condition precedent to that guarantee). As Marshall found out this year, an undefeated Group of Five team is by no means guaranteed a top twenty-five ranking. *See supra* notes 4–6.

[58] *See Participants in the New Years Bowls*, COLLEGE FOOTBALL PLAYOFF, http://cfp-cms-s3-prod.slcfp.com/wp-content/uploads/2014/11/CFP-Info-Sheet.pdf (last visited Jan. 20, 2015).

[59] *See* Tony Barnhart, *Before BCS Ends, the Whens, Wheres, Whys of College Football Playoff*, CBSSPORTS.COM (Jan. 6, 2014, 10:01 AM), http://www.cbssports.com/collegefootball/writer/tony-barnhart/24400200/before-bcs-ends-the-whens-wheres-and-whys-of-college-football-

concern to the teams from the Group of Five conferences because of the revenue a conference earns for each of its school's appearances in a New Year's Six Bowl.

Conferences will receive $4 million for each school that appears in a Non-Playoff New Year's Six Bowl and $6 million for each team that plays in a College Football Playoff Semifinal.[60] These awards are added to the guaranteed revenue pools distributed to each conference. Each Group of Five Conference is allocated approximately $15 million while Contract Conference members will split approximately $50 million[61]

B. *Will the Playoff Actually Change Anything?*

The most discernible obstacle, with regards to distancing itself from the BCS, for the new CFP will be determining how the Selection Committee will rank the playoff teams. With the dismissal of the dubious BCS formula, surely the committee will want to make its selection process as transparent as possible. Even though the committee has existed for a single year, its selection process has already created doubts about whether it will be any more transparent than its predecessor.[62]

The four principle criteria that the Selection Committee must consider are: conference championships, strength of schedule, head-to-head competition, and comparative outcomes of common opponents.[63] The committee is also permitted to consider "[o]ther relevant factors such as key injuries that may have affected a team's performance during the season or likely will affect its postseason performance."[64] The four principle criteria have been a part of the formula used to calculate the computerized BCS rankings for years;[65] that is not to say the proposed

playoff ("[I]s there any limit to how many teams a conference can put in the four-team playoffs or the CFP bowls? NO.").

[60] *Revenue Distribution*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/revenue-distribution (last visited Jan. 20, 2015).

[61] *Id.*

[62] *See supra* notes 4–6.

[63] *Selection Committee Protocol*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/selection-committee-protocol (last visited Jan. 20, 2015).

[64] *Id.*

[65] *See e.g.*, *The Jeff Anderson & Chris Hester College Football Computer Rankings*, ANDERSON SPORTS, http://www.andersonsports.com/football/ACF_frnk.html (last visited Jan. 20, 2015) (showing an example of a former BCS computer poll that boasted "the most accurate strength of schedule ratings."); Samuel Chi, *An Interview with Richard Billingsley*, PLAYOFF GURU (Oct. 15, 2009), http://bcsguru.blogspot.com/2009/10/interview-with-richard-billingsley.html (quoting Mr. Billingsley, who mentioned that head-to-head results are one of his poll's chief concerns); *see also* Craig Bennett, *Sagarin Speaks: How BCS AQ Teams Help Non-AQ Teams*, USATODAY.COM (Oct. 30, 2013), http://www.usatoday.com/story/sports/ncaaf/2013/10/30/sagarin-speaks-fresno-state-northern-illinois-bcs/3305363/ (interviewing Jeff Sagarin, whose computerized BCS rankings "have been part of the formula that determines the BCS standings" since its inception in 1988; the author stated how "common opponents fare, in the world of computer ratings, also reflect on the teams they have played.").

selection criteria is faulty, but there is no justification for believing that a new committee using the same criteria will produce a different outcome.

Whether selecting two or four teams, there will always be more qualified candidates than available spots to compete in the CFP. Using subjective criteria to pick among similarly situated participants inherently tends to produce multiple opinions and induce controversy. In the inaugural season of the CFP, the Selection Committee was forced to make a close call between three deserving teams: Ohio State, Baylor, and TCU.[66] This sparked controversy in media outlets across the country that wondered whether Ohio State deserved the opportunity and whether Baylor or TCU were snubbed.[67]

Although the Group of Five Conference champions are contractually entitled to an appearance in a New Year's Six Bowl *if that conference champion is ranked*, the Group of Five is still at risk of being disproportionately underrepresented.[68] This note relies upon the inference that the Contract Conferences will continue to asymmetrically and perhaps unfairly, over represent the majority of teams that appear in the New Year's Six Bowls going forward.[69] First, the Selection Committee uses nearly identical criteria to those used by the BCS. The Group of Five Conferences are at the mercy of the Selection Committee for bids to appear in a New Year's Six Bowl, and the new structure potentially creates a contractual right for only one Group of Five Conferences team. Finally, the Selection Committee retains unfettered discretion in choosing the remaining at-large bids for the New Year's Six Bowls. There does not appear to be any evidence to suggest that switching to the CFP will remedy the concerns of the past.[70]

The more probable outcome would be an improved process for crowning a national champion without rectifying the disparity in

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[66] The committee selected Ohio State as the fourth best team, over Baylor and TCU. *E.g.*, Chuck Culpepper, *College Football Playoff Field Set but Controversy Lingers with Ohio State in, TCU Snubbed*, WASHINGTON POST (Dec. 7, 2014), http://www.washingtonpost.com/news/sports/wp/2014/12/07/college-football-playoff-field-set-ohio-state-in-tcu-snubbed/ (last visited Jan. 20, 2015)

[67] *See, e.g.*, Nancy Armour, *College Football Playoff: You Wanted It; Deal With It*, USATODAY (Dec. 7, 2014), http://www.usatoday.com/story/sports/ncaaf/2014/12/07/armour-college-football-playoff-baylor-tcu-ohio-state/20052227/; Laken Litman, *The Big 12 Can Only Blame Itself for the College Football Playoff Snub*, USA TODAY (Dec. 7, 2014) http://ftw.usatoday.com/2014/12/big-12-blame-itself-college-football-playoff-snub (last visited Feb. 25, 2015); Teddy Mitrosilis, *CFB AM: Art Briles Blasts Playoff System After Baylor Gets Snubbed*, FOX SPORTS (Dec. 8, 2014, 9:40 AM), http://www.foxsports.com/college-football/story/baylor-bears-ohio-state-buckeyes-bowl-games-playoff-art-briles-cfb-am-120814 (last visited Feb. 25, 2015).

[68] *See infra* notes 185, 231, and accompanying text for an example of a Group of Five Conference team being treated unfairly.

[69] In the inaugural year, this prediction was true as all participants in the New Year's Six were from Contract Conferences. *See supra* note 54 and accompanying text.

[70] *See supra* notes 4–6 and accompanying text.

treatment between the Contract and Group of Five Conferences. The Selection Committee's ability to select at-large qualifying teams for the remaining CFP Bowl games may actually result in increased revenue discrepancy between the two groups of conferences.[71] The creation of the CFP did, however, put off the potential of antitrust litigation for at least a couple years until its impact can reliably be observed. As time passes, the unfavorable terms the Group of Five Conferences were essentially forced to accept will become more apparent,[72] and proponents of the Group of Five conferences may again look to the judicial system for relief. Before examining the modern antitrust jurisprudence in the arena of sports, the next section will first undertake a brief inquiry into an early 20th century antitrust Supreme Court case.

III. THE SHERMAN ANTITRUST ACT

A. *The Early Interpretation*

The enactment of the Sherman Antitrust Act of 1890 ("Sherman Act") resulted from Congressional recognition of the American public's dissatisfaction with the growing dominance of monopolies in the American economy.[73] The four major political parties involved in the 1888 presidential election all observed the public's discontent and declared their opposition to trusts, combinations, and monopolies of free trade.[74] The 51st Congress of the United States passed the Sherman Act on July 2, 1890. The Sherman Act consists of two main sections:

> § 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished . . . [75]

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[71] See Chris Dufresne, *Power Conferences in College Football Gain Even More Strength,* L.A. TIMES (Apr. 25, 2013), http://articles.latimes.com/2013/apr/25/sports/la-sp-0426-dufresne-bcs-20130426 for a viewpoint that the College Football Playoff increases the disparity ("Somehow, the power brokers got everything they wanted and made it seem as if they were handing out blankets to the homeless.").

[72] *Id.* ("The financial gap between the Power Five and the remaining 'Group of 5' is enough to stave off any serious competitive threats . . . Of the wounds suffered, a non-power commissioner said he was basically told to 'rub dirt on it.'").

[73] HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY – ORIGINATION OF AN AMERICAN TRADITION, 138–41 (1955) (suggesting that "[n]ewspapers perhaps more faithfully than any other media reflect the interest of the public," before setting forth a variety of news publications from multiple geographic areas that confirm public disapproval of monopolistic behavior).

[74] *Id.* at 151 (noting that the Republican, Democratic, Union Labor, and Prohibition Platform's all condemned trusts and combinations used to control capital or deprive the public from the benefits of natural competition).

[75] The Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

> § 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not . . . [76]

The wording in Section 1 designates *every* contract, combination, or conspiracy that restrains trade or commerce as illegal. If that language were interpreted literally, then a vast portion of valuable and legitimate business arrangements would be prohibited. Non-compete clauses, sales agreements binding parties for lengthy periods of time, and provisions protecting trade secrets could all be considered restraints on trade. The implausibility of such an interpretation might seem straightforward today, but the early interpretations of the Act read the statute quite literally.[77] The rule of reason developed out of necessity, in response to the impractical view that all agreements in restraint of trade violated the Sherman Act.

Chief Justice Edward White developed one of the earliest forms of the rule of reason in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).[78] The court ruled in favor of the government, finding that Standard Oil had entered into an illegal combination or contract whose practical effect was to restrain trade by way of "rebates, preferences . . . restraint and monopolization by control of pipe lines . . . [and other] unfair methods of competitions."[79] The opinion affirmed the lower court's order dissolving Standard Oil into thirty-four separate entities.[80] In coming to that conclusion, Chief Justice White pronounced, "that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason . . . must be applied."[81] Dissolving the Standard Oil Trust was no small matter at the time, but the enduring significance of the decision lies in Chief Justice White's interpretation of the Sherman Act and application of the rule of reason.[82]

The analysis began with a lengthy review of English common

[76] The Sherman Antitrust Act, 15 U.S.C. § 2 (2012).

[77] *See e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897) ("[T]he conclusion which we have drawn . . . [is] that [the Sherman Act] renders illegal all agreements which are in restraint of trade or commerce.").

[78] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[79] *Id.* at 42–43.

[80] *Id.* at 79.

[81] *Id.* at 66.

[82] Andrew I Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 741 (2012) ("Chief Justice White's reinterpretation of the Sherman Act to incorporate a reasonableness qualification has never been seriously questioned.").

law,[83] which can be summarized briefly as permitting contractual restraints as long as they did not "unreasonably restrain [the] right to carry on . . . trade or business" or "impl[y] a wrongful purpose."[84] The court determined that United States common law prior to the enactment of the Sherman Act was predominantly in accordance with its English counterpart.[85] Chief Justice White's interpretation is based upon the inference that Congress had the current state of common law in mind when it drafted the first two sections of the Sherman Act.[86]

Congress' decision to deem *every* contract or combination that restricted trade illegal was in response to the multitude of new forms of contracts and combinations that had been designed to circumvent the common law conception of restraints on trade.[87] Thus, the court rationalized that Congress intended for the Sherman Act to protect commerce from all anticompetitive methods, old or new.[88] Yet, because the statute did not explicitly prescribe which acts were to be prohibited, Justice White reasoned that Congress must have intended for some standard to be applied by the courts. The Supreme Court concluded that the criteria "for the purpose of ascertaining whether violations of the [Sherman Act] have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act."[89]

There is another antitrust doctrine that should at least be mentioned, but has generally fallen out of favor in the modern era of antitrust law. That doctrine is the per se rule of illegality, which recognizes "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without inquiry."[90] The Supreme Court has stated the rule of reason presumptively applies unless the challenged economic activity is plainly

[83] *Id.* at 51–56; *see id.* at 59 (establishing the judicial principle of statutory construction: "where words are employed in a statute which had at the time a well-known meaning at common law," the court will afford the statute the common law meaning "unless the context compels to the contrary.").

[84] *Id.* at 56.

[85] *Id.* at 56–59.

[86] *Id.* at 59 (emphasizing that the court's interpretation of the Sherman Act is directed by the common law at the time Congress enacted the Sherman Act). "Let us consider the language . . . guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law . . . they are presumed to have been used in that sense unless the context compels to the contrary." *Id.*

[87] *Id.* at 59–60; *See also* Alan J. Meese, *Standard Oil As Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783, 788 (2012) (both English and American common law viewed a restraint as unreasonable if it "produced monopoly or the consequences of monopoly.").

[88] *Id.* at 60.

[89] *Id.* at 62; *see id.* at 67–68 (limiting and qualifying the holding of *Freight Association* such that "any language referred to [which] conflicts with the construction we give the statute, [is] necessarily limited and qualified.").

[90] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

anticompetitive or the economic impact of the practice is obvious.[91] The next section will demonstrate that a court would never apply the per se rule of illegality to an antitrust lawsuit against the CFP. [92]

B. *Modern Antitrust Law & Sports*

The Supreme Court, while reviewing an antitrust challenge to a college football rule, previously stated that it college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[93] To illustrate this point, imagine a world in which courts applied the per se rule of illegality to college sports and consider an NCAA imposed maximum on the number of regular season games. The rule clearly restrains commerce and competition because without it each team would be able to increase output by playing additional games. In this hypothetical, the limitation on games played would be an unlawful naked horizontal restraint on competition. If rules like the former were subject to the per se rule of illegality, collegiate sports would not be able to exist at all. It follows that antitrust cases involving sports generally always apply the rule of reason, yet they do not always apply the same form of the rule.

The courts have developed two distinct tests for applying the rule of reason formulated in *Standard Oil*.[94] A more contemporary interpretation of the test requires the finder of fact to weigh "whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[95] A second, recently developed test has become known as the "quick-look" test. Unlike the traditional rule of reason, the quick-look test foregoes the fact intensive market analysis before deciding whether a restraint has anticompetitive effects.[96]

The Supreme Court's decision in *California Dental Association v.*

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91 *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

92 *See, e.g.*, U. S. Trotting Ass'n v. Chicago Downs Ass'n Inc., 665 F.2d 781, 790 (1981) (citing multiple antitrust challenges to "provide support for the proposition that, in the context of organized sports . . . courts should be hesitant to fasten upon tags such as . . . 'per se,'" and affirming the use of the rule of reason "because sporting activities and organizations are entitled to a fuller form of antitrust analysis in recognition of their need for self-regulation.").

93 Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (recognizing that horizontal price fixing and output limitation would customarily be subject to the per se rule of illegality).

94 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

95 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citation omitted) (citing Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1958)). *Chicago Board of Trade* is recognized as one of the first Supreme Court cases directing finders of fact to consider the factual circumstances of each restraint and market when applying the rule of reason. Board of Trade of Chicago v. United States, 246 U.S. 231 (1958).

96 California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 771 (1999).

Federal Trade Commission attributed the creation of the quick-look test to three cases.[97] Those three Supreme Court decisions established the guidelines for determining when to apply the quick-look analysis: which is when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[98] The justification for the quick-look test is there are some situations where a court can confidently conclude that a restraint has anticompetitive effects without a fact-driven market intensive inquiry, and thus where a quicker look is preferred over "a more sedulous one."[99] The next portion of this analysis reviews antitrust cases specifically related to the sports industry, some of which used the rule of reason and others that instead elected to use the quick-look analysis. The distinction between the two lines of cases will help illuminate why a court is likely to apply the traditional rule of reason to an antitrust challenge against the College Football Playoff.

Worldwide Basketball and Sport Tours Inc. v. NCAA was a challenge to an NCAA Division One men's basketball rule known as the "Two in Four Rule."[100] The rule allowed each team to participate in not more than one certified basketball tournament per year while also restricting teams to a maximum of two certified tournaments in any four-year period.[101] The plaintiffs, tournament promoters whose events were not classified as certified tournaments, alleged that the rule limiting teams to two certified events per four years "was adopted purely to deny outside promoters the opportunity to make money from the certified events."[102] In overturning the district court's decision to apply the quick look rule, the appellate court stated that analysis of industries where horizontal restraints are essential for the product's commercial viability generally require application of the rule of reason.[103] The decision whether to use the traditional rule of reason or the quick-look test depends upon the transparency of the restraints

[97] *Id.* The first case involved an "absolute ban on competitive bidding," (citing Nat'l Society of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)); the second dealt with a rule that withheld the right of consumers to access a particular service (citing Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986)); and the third concerned a television plan that placed a limitation on output while simultaneously establishing a minimum price (citing Nat'l Collegiate Ass'n. v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 99–100 (1984)).

[98] *Id.*

[99] *Id.* at 781.

[100] Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 957 (6th Cir. 2004). Men's Division One basketball has tournaments, which can either be certified or not. The certified tournament is counted as one game towards the NCAA maximum of twenty-eight in a season; while each individual game in the un-certified tournaments would count toward the maximum.

[101] *Id.*

[102] *Id.* at 958.

[103] *Id.* at 959.

effect on both customers and markets.[104]

The Sixth Circuit determined the district court attempted to apply the traditional rule of reason, but had actually used a formulation of the quick-look rule. The district court did not apply the traditional rule of reason when it said that a formal market analysis was not necessary if the plaintiff established "the restraint had actually produced significant anticompetitive effects.[105] Under the traditional rule of reason, the plaintiff's inability to identify a relevant market should have been fatal to its cause of action.[106] In its decision, the appellate court held the traditional rule of reason should have been applied and found the plaintiff's failure to identify the relevant market sufficient justification to reverse the judgment of the district court.[107]

The Sixth Circuit rejected the contention that a loss of Division I mens games taken as a whole "necessarily constitutes a loss to consumers because college basketball events are not fungible," holding that the appropriate test was cross-elasticity of demand rather than fungibility.[108] Accordingly, since the district court's decision cannot be based on the entire college basketball market as a whole, the opinion then looked to the effect on the relevant submarket of school-scheduled games, where the Sixth Circuit again determined the district court record had erred by concluding the submarket was undisputed.[109] Although the district court record sufficiently establishes that the number of certified events and the number of school-scheduled games have decreased as a result of the rule,[110] the failure to identify the relevant market meant the district court record was insufficient to properly assess the rule's effect on customers rather than competitors.[111]

In juxtaposition to the application of the traditional rule of reason in *Worldwide Basketball and Sport Tours Inc.* is the Supreme Court's decision in *NCAA v. Board of Regents* that elected to apply the quick-

104 *Id.* at 961.

105 *Id.* at 960 (finding the district court's statement that "if a Plaintiff can show the restraint has actually produced significant anti-competitive effects, such as reduction in output, a formal market analysis is unnecessary" an interpretation of the quick-look rule that was wrongly applied to the facts of this case).

106 *See id.* at 961 ("Under the "quick-look" approach, extensive market and cross-elasticity analysis is not necessarily required, but where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice.").

107 *Id*. at 961, 963.

108 *Id*. at 962.

109 *Id. at* 963 ("[S]chool-scheduled games are defined as games that a team is not required to play but rather are selected by a school's scheduling coach.").

110 Worldwide Basketball and Sports Tours, Inc. v. NCAA, 273 F. Supp. 2d 933, 952 (2003).

111 Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 961 (6th Cir. 2004). While the reduction in certified events and school-scheduled games certainly injures the promoters of those certified events, it's not clear how that reduction impacts the consumers where market alternatives exist.

look test.[112] At issue in *Board of Regents* was the NCAA's television plan in effect from the 1982 through 1984 college football seasons. The plan gave an NCAA television committee the authority to award both the rights to negotiate and contract for the broadcasting of NCAA college football games.[113]

The television committee entered into separate agreements with two networks, the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS). Under the terms of the agreement, individual NCAA school members were allowed to negotiate directly with either network to determine the fees for the rights to their respective games.[114] Additionally, the carrying networks agreed to "appearance requirements," which obligated the networks to broadcast a minimum of eighty-two different NCAA member schools during any two-year period.[115] While the networks also agreed to abide by appearance limitations, setting the maximum number of appearances for any individual institution to six.[116] Both the University of Oklahoma and the University of Georgia brought lawsuits against the NCAA alleging the plan was a "horizontal agreement [that] places an artificial limit on the quantity of televised football that is available to broadcasters and consumers."[117]

After first rejecting the per se approach,[118] the Supreme Court addressed the NCAA's counter-argument, which contended that the NCAA television plan had no market power and thus no material anticompetitive effect.[119] The opinion indicated two reasons for rejecting the defendant's argument, one based in law and the other in fact. From a legal viewpoint, a plaintiff's failure to demonstrate market power is not an adequate justification for a naked restraint on price or output.[120] "An agreement not to compete in terms of price or output,"[121]

112 Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984).
113 *Id.* at 91–92.
114 *Id.* at 92–93. Both ABC and CBS agreed to pay a "minimum aggregate compensation" totaling in excess of $131,750,000 during the four-year deal. *Id.* "The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years . . . involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts." *Id.*
115 *Id.* at 94.
116 *Id.* Only four out of those six appearances could be nationally televised games, "with the appearances to be divided equally between the two carrying networks."
117 *Id.* at 99.
118 *Id.* at 99–102. In the general context of business agreements, the court said the challenged practices would normally be deemed unreasonable restraints of trade. Yet because NCAA football involves an "industry in which horizontal restraints" were necessary for the product to function, "a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints." *Id.*
119 *Id.* at 109. Without market power, the defendants argued, the television plan could not "alter the interaction of supply and demand." *Id.*
120 *Id.*
121 *Id.*

does not require an elaborate industry analysis "to demonstrate the anticompetitive nature of such an agreement."[122] While the court did not use the term "quick-look,"[123] the Justices were deciding to forego the extensive fact driven investigation required under the traditional rule of reason approach. Because the television plan functioned as a naked restriction on both price and output it "require[d] some competitive justification even in the absence of a detailed market analysis."[124]

The difference between applying the quick-look rather than the traditional rule of reason is the court's belief that "the experience of the market has been so clear, or necessarily will be," such that the principal effect of a restraint can be determined from a quick-look rather than a more detailed view of the market.[125] Although the holding in *Board of Regents* was not limited to price-fixing restraints, a restraint that reduces output and fixes price is precisely the type of restraint where the principal effect could be determined without a detailed market analysis. "An observer with even a rudimentary understanding of economics could" see the anticompetitive effect on a consumer or market that is restricted to six televised games rather than twelve.[126]

While the agreement in *Worldwide Basketball* merely restricted the number of "certified" pre-season tournaments a team could play.[127] It is unclear how the market for a certified pre-season tournament game differs from a regular season game. For that reason, the Sixth Circuit held the district court had erred by applying the quick-look rule where the relevant market was not adequately defined.[128] Any plaintiff that wishes to bring its case under the more forgiving quick-look analysis must be able to identify obvious anticompetitive effects which would allow a court to determine that a thorough market analysis is unnecessary.

The CFP does not give rise to the sort of obvious anticompetitive effects that generally justify application of the quick-look rule. It consists of an LLC made up of the ten subdivision conferences and the University of Notre Dame.[129] The Contract Conferences have their own individual agreements with the Orange, Rose, and Sugar Bowls outside the CFP.[130] The broadcast rights to the CFP were negotiated without

[122] Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[123] In reality, this is because the doctrine of quick-look analysis was at its infant stages of development. *See* Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999) (citing *Bd. Of Regents* as one of the cases that formed the basis for quick-look rule of reason analysis).

[124] *Bd. of Regents*, 468 U.S., at 110.

[125] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 781 (1999).

[126] *Id. at* 770.

[127] Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 965 (6th Cir. 2004)

[128] *Id. at* 957.

[129] *See infra* note 152 and accompanying text.

[130] *Overview,* COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/overview

restraint, in contrast to the situation in *Board of Regents*, where the rights were limited to either ABC or CBS.[131] A plaintiff's characterization of the unlawful restraint could not be premised on any particularized naked restraint on price or output. Thus, measuring unintentional impacts of the CFP would require some sort of detailed market analysis. Part IV will examine a hypothetical antitrust lawsuit against the CFP under the full rule of reason framework.

IV. FRAMING A POTENTIAL ANTITRUST SUIT AGAINST THE CFP

A. *The Unreasonable Restraint on Trade*

The existing commentary has generally framed the BCS' alleged unlawful activity as an illegal group boycott.[132] The gravamen of the group boycott argument is that the BCS puts Non-BCS Conferences at an "insurmountable competitive disadvantage" by systematically excluding them from BCS Bowl Games and the resulting BCS revenue.[133] As Professor Nathaniel Grow noted in his article, *Antitrust and the Bowl Championship Series*, the argument that BCS Conferences acted in concert to refuse non-BCS Conference schools access to BCS Bowl Games was severely weakened by amendments to the selection procedure in 2004.[134] The amendments, effective beginning with the 2006 regular season, created two additional at-large spots in BCS Bowl Games and provided non-BCS Conference champions an automatic qualifying bid into a BCS Bowl Game if the champion was either: "(a) ranked in the top 12 of the BCS standings or (b) ranked in the top 16 of the BCS standings and [ranked above another BCS Conference champion]."[135] A challenge to the BCS purporting to set forth an illicit group boycott would fail after the 2004 amendments because the Non-BCS Conference champions had been included as automatic qualifiers to BCS Bowl Games.[136] That conclusion stems from recognizing the

(last visited Jan. 20, 2015).

131 *See ESPN to Televise College Playoff*, ESPN (Nov. 21, 2012, 4:04 PM), http://espn.go.com/college-football/story/_/id/8660304/espn-televise-college-football-playoff-12-year-deal.

132 *E.g.*, Grow, *supra* note 7, at 75–76 ("[A] number of the initial commentators argued that the BCS Conferences had effectively blocked the non-BCS teams from a necessary resource—namely the BCS bowl games and their accompanying financial payouts—and thus had constructed an illegal group boycott.").

133 M. Todd Caroll, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235, 1239 (2004).

134 *See* Grow, *supra* note 7, at 76. ("[U]nder 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.").

135 *See BCS Chronology*, *supra* note 21.

136 Grow, *supra* note 7, at 79. The term "illicit group boycott" was used by Professor Grow to identify a situation where participants (the Non-BCS schools) are completely excluded from involvement the BCS bowl games.

Non-BCS conferences could no longer allege the BCS Conferences were completely refusing to deal.

To sustain a successful antitrust challenge, non-BCS schools would need to characterize the harm under a different theory. Professor Grow's solution was to reframe the group boycott theory in terms of the disproportionate revenue shares allocated to non-BCS Conferences under the BCS system.[137] To support his argument, Grow highlighted a Supreme Court case that he interpreted as precedent for asserting that collusion amongst defendants that only partially excluded a competitor was a legally sufficient restraint on trade under which a plaintiff could bring a group boycott claim.[138] Using that reasoning, the 2004 amendments to the BCS selection procedure would not doom a group boycott claim because Professor Grow's approach framed the group boycott in terms of collusion by the BCS Conferences to restrict the revenue shares allocated to non-BCS Conferences.[139]

Yet the case providing the support for Professor Grow's partial exclusion approach arose in a distinguishable context. *Klor's, Inc. v. Broadway-Hale Stores, Inc.* involved an agreement between ten manufacturers of household appliances and their distributors.[140] Those manufactures and distributors offered favorable pricing terms to a chain of department stores (Broadway-Hale) to the detriment of an independently operated department store (Klor's) located next door to a Broadway-Hale store.[141] The court framed the issue as whether a restraint depriving a single dealer of the means to compete was a violation of the Sherman Act, absent proof of injury to the public.[142]

Broadway-Hale did not dispute the allegation of its refusal to deal but instead rested its defense on demonstrating that the dispute with Klor's was a private quarrel. To establish its defense, Broadway-Hale had submitted affidavits showing hundreds of other appliance stores selling the same appliances.[143] The District Court agreed with Broadway-Hale and the Ninth Circuit affirmed the district court's grant of summary judgment, "conclud[ing] that the controversy was a 'purely private quarrel' between Klor's and Broadway-Hale, which did not amount to a 'public wrong proscribed by the (Sherman) Act.'"[144] The Supreme Court reversed finding the complaint had sufficiently alleged a group boycott because it "interfere[d] with the natural flow of interstate

137 *Id.* at 80.

138 *See* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

139 *See* Grow, *supra* note 7, at 80 ("[T]he 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.").

140 359 U.S. 207.

141 *Id.*

142 *Id.* at 210.

143 *Id.*

144 *Id.*

commerce.[145]

In a more recent Supreme Court opinion that declined to overrule *Klor*, the Court summarized *Klor's* holding as "[forbidding], as a matter of law, a defense based upon a claim that only one small firm, not competition itself, had suffered injury."[146] In this author's opinion, citing *Klor* as support for the proposition that a plaintiff may bring a group boycott claim absent a literal or complete refusal to deal is slightly misleading.[147] Although there was no literal refusal to deal in *Klor,* forcing a dealer to purchase goods at prices higher than those offered to that dealer's competitors is analogous to a literal refusal to deal, particularly where the dealer's competitor operates a store directly next door, as was the case in *Klor*. Stated somewhat differently, even though Klor could still purchase goods it could not expect to sell any of those goods when Broadway-Hale has the same goods on sale at a lower price next door.

Notwithstanding Professor Grow's reliance on *Klor*, his underlying argument focusing on the BCS Conferences' competitive advantage stemming from the disparate revenue shares allocated to Non-BCS Conferences still has merit.[148] Instead of attempting to characterize the BCS or CFP as a group boycott, a potential challenge to the CFP might have more success defining the arrangement as a joint venture among competitors.[149] The term joint venture is used to describe a variety of business arrangements where "two or more firms agree to cooperate in producing some input, [e.g., Bowl Games] that they would otherwise have produced individually."[150]

The BCS, and even more so the CFP, are arrangements most appropriately described as joint ventures due to the collaboration between competitors for the purpose of creating a post-season format that determines the champion of Division I FBS college football. While the BCS was merely a set of contractual agreements, a ten member Limited Liability Company now manages the CFP.[151] The Members of CFP Administration LLC, a Delaware Limited Liability Company, consist of the ten Football Subdivision conferences as well as the University of Notre Dame.[152] One could argue that the CFP

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145 *Id. at 213*.

146 NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 134–35 (1998).

147 *See* Grow, *supra* note 7, at 80.

148 *Id.*

149 *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014) (accepting expert opinions from plaintiff and defendant identifying the NCAA as a joint venture).

150 PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 21.01[A] (4th ed. 2013).

151 *Governance*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/governance (last visited Jan. 20, 2015).

152 *Id.* The Football Subdivision conferences (American Athletic, Atlantic Coast, Big Ten, Big 12, Conference USA, Mid-American, Mountain West, Pac-12, Southeastern, and Sun Belt) plus

Administration LLC is a joint venture among competitors whose horizontal agreements allow it to produce an input: the system creating three CFP Games and three non-CFP Bowl Games. Were a court to determine the CFP Administration LLC ("CFP JV") could not be a group boycott, a court could still be receptive to an argument framing the unlawful restraint on trade as a joint venture employing a horizontal agreement that unreasonably limits "intraventure output."[153]

The horizontal agreements among members of the CFP JV are the disparate revenue sharing provisions, discussed *supra*.[154] Thus, the hypothetical cause of action would hinge on alleging the CFP JV's disproportionate revenue provisions function as a limitation on output for the Group of Five Conferences. To illustrate that argument, it is helpful to re-examine the plaintiff's theory on output restrictions in *Board of Regents*. The universities argued the NCAA's restrictions on each school's broadcast rights limited the amount of games that would ultimately be telecast.[155] The *Board of Regents* decision:

> [E]stablished the basic rule that a joint venture agreement limiting its own members' output within the venture is an unlawful restraint of trade when the venturers have significant power in the market subject to the output limitation, and the challenged agreement is not reasonably essential to the functioning of the venture.[156]

The case against the CFP could be alleged using similar reasoning. The CFP JV allocates $50 million to each Contract Conference but only $15 million to each Group of Five Conference.[157] If the Group of Five Conferences received a more proportionate share of revenue, they could improve the quantity and quality of output into the market of college football.[158] The additional revenue could be used to upgrade the Group of Five Conference schools' facilities, coaching staffs, and recruiting

Notre Dame each have a representative on the Board of Managers and on the Management Committee.

153 *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103, 113–14 (1984); *see also* AREEDA & HOVENKAMP, *supra* note 150, at § 21.03[B] ("[W]hile limitations on intraventure output are not inherently suspect, they can still be unlawful if they are not reasonably necessary to the conduct of the venture.").

154 *See supra* notes 60–62.

155 *Bd. of Regents*, 468 U.S. at 105–06.

156 AREEDA & HOVENKAMP, *supra* note 150, at § 21.03[B]. The Areeda & Hovenkamp treatise is persuasive because it has been cited in the following Supreme Court opinions, all of which involved antitrust challenges to sports entities: *Bd. of Regents*, 468 U.S. 85, O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), and Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

157 *Revenue Distribution*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/revenue-distribution (last visited Jan. 20, 2015).

158 AREEDA & HOVENKAMP, *supra* note 150, at § 19.02[D] ("[O]utput can be measured by a number of means. The most obvious is the number of units sold. Perhaps the second most obvious is the quality of the units.").

budgets, which could in turn improve the on-field product. Improved on-field product could increase consumer demand in terms of ticket revenue, television broadcast revenue, and merchandising revenue.

Since the Supreme Court has already identified college football as its own unique market independent of professional sports,[159] the next step would be to analyze whether the CFP JV has significant power within that market. The court's market inquiry would rely heavily on expert testimony, but a finding of substantial market power is likely given that the CFP JV Members makeup the entire FBS.[160]

Assuming a court found substantial market power, the revenue restrictions would be analyzed to determine if they are reasonably essential to the functioning of the CFP JV. Classification as a joint venture is significant because "[t]he Supreme Court has specifically held that concerted actions undertaken by joint ventures should be analyzed under the rule of reason."[161] Thus, the reasonableness inquiry would begin with a plaintiff "bear[ing] the burden of showing the [revenue restriction] produces significant anticompetitive effects' within [the college football market]."[162]

The next section references arguments constructed in articles alleging anti-competitive effects of the now defunct BCS, observations from the first year of the CFP, and features unique to the CFP that a court may find relevant in its rule of reason analysis. Despite the change in form to the CFP, the impact on competition under either system is essentially the same.

B. *Offense: Anti-Competitive Effects*

1. Recruiting

An anticompetitive effect suggested by many that opposed the BCS was the recruiting advantage BCS Conference schools enjoyed because of their membership in a BCS conference. Numerous articles have alleged that non-BCS Conference schools are disadvantaged on the recruiting trail because their conference champions were not granted an automatic bid to a BCS Bowl.[163] Members of BCS conferences knew

159 *Bd. of Regents*, 468 U.S. at 101–02; *see also* O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) ("The NCAA's own evidence demonstrates that FBS football and Division I basketball command a significantly larger domestic television audience than virtually every other football or basketball league, with the exceptions of the NFL and NBA (neither of which permits an athlete to enter its league directly from high school).").

160 *See, e.g.*, *O'Bannon*, 7 F. Supp. 3d at 963–84.

161 *O'Bannon*, 7 F. Supp. 3d at 985 (citing Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010)).

162 *See id.* at 985; *see also* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998).

163 Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS L.J. 97, 120 (2003); Katherine McClelland, *Should College Football's*

that at least one team in their conference would participate in a prominent bowl game during prime-time in front of one of the largest television audiences of the entire college football season, as did the student-athletes they recruited.[164] For proof of this advantage, one only needs to glance at the team recruiting rankings provided by Rivals.com.[165]

Since 2010, there have only been two non-BCS Conference schools whose recruiting classes were ranked in the top thirty-five in the country.[166] Utah's recruiting class finished the 2010 season ranked at number thirty-two, and TCU landed at number twenty-six in 2011.[167] However, both schools' impressive recruiting classes occurred in the season before they were scheduled to join BCS Conferences, and that's no coincidence.[168] The strong correlation between recruiting success and membership in a BCS Conference is indicative of the recruiting advantages that the BCS bestowed upon BCS Conference schools.

The CFP maintains unequal access to its premium bowl games and continues to provide Contract Conference coaches with the ability to pitch their conference's contractual right to appear in a New Year's Six Bowl to potential recruits.[169] The champions from each of the Contract Conferences are guaranteed to play in one of the New Year's Six bowls,[170] while only one champion from the Group of Five Conferences is potentially guaranteed an appearance in a New Years Six bowl.[171] Moreover, the CFP JV is arguably more discriminatory than the BCS

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, 207 (2004); 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 L.J. 219, 244 (2007) .

164 *See* Hales, *supra* note 163, at 120; *Passion For College Football Remains Robust*, NATIONAL FOOTBALL FOUNDATION (Mar. 19, 2013, 10:30 AM), http://www.footballfoundation.org/tabid/567/Article/53380/Passion-for-College-Football-Remains-Robust.aspx (noting that in 2013, the five BCS Bowl Games accounted for 75.5 million out of the 126 million total viewers for all thirty-five bowl games).

165 *See O'Bannon*, 7 F. Supp. 3d at 966 (noting that the court accepted expert testimony based on data from Rivals.com).

166 *See 2010 Team Rankings*, RIVALS.COM, http://sports.yahoo.com/footballrecruiting/football/recruiting/teamrank/2010/all/all (last visited Feb. 27, 2015); *2011 Team Rankings*, RIVALS.COM, http://sports.yahoo.com/footballrecruiting/football/recruiting/teamrank/2011/all/all (last visited Feb. 27, 2015).

167 *Id.*

168 *See* Chris Foster, *Utah Says It'll Join Pac-10 Conference*, L.A. TIMES (June 17, 2010), http://articles.latimes.com/2010/jun/17/sports/la-sp-pac10-utah-20100618; Erick Smith, *TCU Makes Move to Big 12 Conference Official*, USA TODAY (Oct. 20, 2011), http://content.usatoday.com/communities/campusrivalry/post/2011/10/tcu-annoucement-big-12-invitation-big-east/1.

169 *See supra* note 56 and accompanying text.

170 *Overview*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/overview (last visited Jan. 20, 2015).

171 *See Selection Committee FAQs*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/selection-committee-faqs (last visited Jan. 20, 2015).

because of the Contract Conference champion replacement provision. The replacement provision provides: any champion from a Contract Conference that qualifies for the College Football Playoff Semifinals will automatically be replaced in a New Year's Six Bowl with another team from that same conference.[172] Going forward, the CFP JV will arguably result in more Contract Conference teams playing in New Year's Six Bowls than BCS Conference teams playing in BCS Bowl games under the old system. Thus, coaches from Contract Conferences will still be able to advertise the opportunity to play on the national stage to potential recruits, while Group of Five Conference coaches will remain at an all too familiar disadvantage out on the recruiting trail.

2. Competitive Balance

A school's on-field product, meaning the competitiveness of its team, provides another avenue for a plaintiff to show the anti-competitiveness of the BCS and CFP JV. A school's ability to compete on the field is certainly constrained by the talent level of the players it recruits to form its team. One author claimed the BCS "create[d] a system whereby BCS teams [were] able to stockpile their rosters with top student-athletes and, thus, attain the competitive edge over lesser-talented non-BCS teams."[173] Thus, the exclusion of an automatic contractual bid to the BCS Bowls could have lowered the quality of the on-field product by relegating talented players to the benches of BCS Conference schools instead of playing for non-BCS Conference teams.

The player's talent level, however, is only one factor of many that plays a part in determining a team's ability to compete. The coaching and training staffs' level of expertise also plays a significant role in constructing a team that has a chance to go out on the field and win. Contract Conference schools routinely outspend their Group of Five Conference counterparts in order to hire coaches that will give their schools a competitive advantage.

The market for college football coaches operates like any other; a coveted coach has the ability to demand a higher salary in return for his service. In the 2014 season, only two coaches from Group of Five schools received salaries ranked in the top fifty,[174] while the lowest ranked Contract Conference coach, Kyle Flood of Rutgers, ranked

172 *Overview*, *supra* note 170.

173 Schmit, *supra* note 163, at 244 (arguing that non-BCS schools are also unfairly restrained from competing for top coaching talent because coaches understand the disadvantages that come with recruiting at a non-BCS school . . .).

174 *2014 NCAAF Coaches Salaries*, USA TODAY, http://www.usatoday.com/sports/college/salaries/ (last visited Jan. 20, 2015) (showing that Tommy Tuberville of Cincinnati from the AAC was forty-fourth and June Jones of Southern Methodist from the AAC was forty-eighth).

seventy-third out of one hundred and nineteen.[175] A coach's salary may not correspond perfectly to his ability, but it is a useful indicator of the market's perception of his skill level. Data on the salaries of assistant coaches, strength coaches, and training personnel are not easily identifiable, but their salaries would probably correlate in a similar manner. The Contract Conference schools have exhibited their ability and willingness to use their excess resources to assemble staffs that give their programs the best possible chance to win.

After demonstrating the Contract Conference's advantages in the market for recruits and coaching staff, an analysis of how their teams have fared on the field will substantiate the competitive advantage they have enjoyed. The most obvious way to show the BCS's historical impact on competitiveness and to predict the CFP JV's future potential effects is to examine the final BCS rankings from the last ten years.[176] During the ten seasons from 2003 to 2013, non-BCS Conference schools ranked in the top twenty-five of the final BCS rankings merely sixteen percent of the time.[177] Thus, plaintiffs could allege that the competitive disadvantage non-BCS Conference schools faced in the market for recruits and coaching talent translated directly onto the field under the BCS system. The substantial similarities between the BCS and CFP JV suggest that the CFP JV's disparate revenue allocation will continue to have anti-competitive effects on the competitive balance in NCAA FBS football. Group of Five Conference schools are at a competitive disadvantage because their lack of funds prohibits upgrades in athletic facilities, the ability to recruit top-level staff, and a myriad of other campus amenities that could be used to support their football teams.[178]

3. Unfair and Arbitrary Exclusion from BCS Bowl Games

Notwithstanding the 2004 BCS amendments or the CFP JV's guarantee that one Group of Five Conference champion will be represented in a New Year's Six Bowl,[179] a potential plaintiff could still argue that both systems unfairly restrain their ability to compete in the prestigious bowls. The benefits of appearing in a BCS Bowl Game or in a New Year's Six Bowl are undeniable. An appearance provides the school with increased revenue, the opportunity to advertise the

[175] *Id.* (showing the rankings list of 121 out of the 128 NCAA FBS Conference schools, with seven salaries unreported).

[176] *See 2003-2004 College Football Season Final BCS Rankings*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/2003_archive_bcs.html (last visited Jan. 20,2015).

[177] *Id.* A total of forty-one teams from non-BCS Conferences were ranked out of the possible two hundred and fifty spots.

[178] *See* McClelland, *supra* note 163, at 207.

[179] *See supra* notes 134–135 and accompanying text for the 2004 BCS amendments; *see also supra* note 171 and accompanying text.

university in front of a national audience, recruiting advantages, and the ability to appease its alumni base among other intangible benefits. Although neither non-BCS nor Group of Five Conference schools were completely restricted from appearing in such a bowl, both systems contain agreements that in effect constrain their ability to do so.

To establish that their schools deserve an opportunity to compete, a potential plaintiff could show that non-BCS schools have historically performed admirably when given the opportunity to compete against BCS Conference teams. One professor's study determined that "non-BCS schools, with two or fewer losses, won . . . [seventy-two percent]" of the games played against BCS Conference schools between 1991 and 2010.[180] Yet since the BCS' inception in 1998, only eight non-BCS Conference schools have played in a BCS Bowl Game.[181] Non-BCS Conference schools were victorious in five out of the seven BCS Bowl Games, which supports the argument that they can compete with BCS Conference teams.[182] Despite demonstrating their competency on the field non-BCS Conference teams were systematically excluded from participating in BCS Bowl Games and are now only entitled to one spot in the New Years Six Bowls.

The arbitrary perception of the Group of Five Conference's inequality is implied by the CFP JV's disparate revenue allocation to those conferences. The perception of inequality is exacerbated by the requirement that a Group of Five team rank in the top twenty-five before an automatic bid to a Non-Playoff New Year's Six Bowl actually becomes automatic. No matter how accomplished the other champions from Group of Five Conferences might be, the CFP JV provides only the highest-ranked champion out of the five with a bid. The Selection Committee then has sole discretion to determine if any of the four remaining Group of Five Conference champions will play in a Non-Playoff New Year's Six Bowl.[183] It is possible for a ranked Group of Five Conference champion to be excluded from a Non-Playoff New Year's Six Bowl in the same season that an unranked Contract Conference champion gets to play. As discussed above, the Selection

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180 Chad S. Seifreid, *The Legality of the Bowl Championship Series: Examining Pro-Competitive and Anti-Competitive Outcomes on Consumers and Competitors*, 21 J. LEGAL ASPECTS SPORT 187, 200 (2012).

181 *See Bowl Games History*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/bowl_games_history.html (last visited Jan. 20, 2015) (containing an index of bowl games and their history). The list of Non-BCS Conference schools' appearances in BCS Bowl Games is as follows: TCU won the 2011 Rose Bowl, Hawaii lost the 2008 Sugar Bowl, Utah won the 2009 Sugar Bowl, Northern Illinois lost the 2013 Orange Bowl, Utah won the 2005 Fiesta Bowl, Boise State won the 2007 Fiesta Bowl, and Boise State won the 2010 Fiesta Bowl against fellow Non-BCS Conference member at the time TCU. *Id.*

182 The 2010 Fiesta Bowl featured two Non-BCS Conference members playing each other. *Id.*

183 S*ee Overview*, *supra* note 170 (noting that the selection committee rankings determine which teams fill the remaining berths to the New Year's Six Bowls).

Committee criteria largely imitates the factors used by the old BCS ranking formula.[184] Thus, the BCS's track record of unfairly excluding non-BCS Conference schools is likely to continue with the implementation of the CFP JV. Evidence of continued bias against the Group of Five could already be seen in its first year, where undefeated Marshall made its only appearance in the CFP Rankings in Week 14 at twenty-four.[185] The CFP JV avoided its first potential controversy because Marshall was unable to finish the regular season undefeated.

Whether or not the Selection Committee rankings will be based on arbitrary bias in favor of the Contract Conferences remains to be seen. Yet, the Selection Committee's reluctance to rank Marshall even after it won ten consecutive games suggests the BCS's tendencies are likely to continue. However, opponents of the BCS have routinely contended that the BCS ranking process, specifically its fixation with strength of schedule, unfairly prejudiced non-BCS Conference schools.[186] Strength of schedule was determined via the ranking of opponents that make up a school's regular season schedule. Due to the general assumption that BCS Conferences were filled with better teams, the intra-conference portion of their schedules automatically produced higher strength of schedule rankings. A BCS Conference team's strength of schedule was assisted solely because of its membership in a BCS Conference.[187]

Conversely, non-BCS Conference schools were unfairly penalized in the BCS rankings, since a high BCS ranking depended on a correspondingly high strength of schedule.[188] An at-large selection to a BCS Bowl game depended almost entirely on the school's year-end BCS ranking, which was partially a product of the team's pre-season ranking.[189] Multiple commentators have recognized the influential effect a team's pre-season ranking has had on determining where it ranked at the end of the season.[190] The result was a system that arbitrarily favored automatic qualification for the BCS Conferences to the detriment of non-BCS Conference teams due solely to conference affiliation.[191]

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184 *See supra* note 65 and accompanying text.

185 *See Rankings, Week 14, Nov 25, 2014*, COLLEGE FOOTBALL PLAYOFF, http://www.collegefootballplayoff.com/view-rankings#week-14 (last visited Jan. 20, 2015).

186 *E.g.*, Michael Felder, *Why Strength of Schedule is Really the Determining Factor in BCS Rankings*, BLEACHER REPORT (Oct. 16, 2012), http://bleacherreport.com/articles/1372948-why-strength-of-schedule-is-really-the-determining-factor-in-bcs-rankings.

187 Jack, *supra* note 22, at 180.

188 *See* Felder, *supra* note 186.

189 Jon Solomon, *Why College Football Preseason Polls Don't and Shouldn't Matter,* CBS SPORTS (July 31, 2014, 12:21 PM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24644721/why-college-football-preseason-polls-dont-and-shouldnt-matter ("In the past, preseason polls could directly impact the final BCS standings. The coaches poll rankings fed into the BCS rankings that were released later in the season. So how people viewed a team in the preseason — before a single game had been played — could help or hurt you in December.").

190 Jack, *supra* note 22, at 183; Seifreid, *supra* note 180, at 202.

191 Matthew Castleton, *The BCS: A Biased, Unfair System That Needs To Be Exposed,*

The CFP JV may actually allow for an even more arbitrary process for excluding teams from Group of Five Conferences, since the Selection Committee is no longer subject to a formulaic ranking process.[192] The Selection Committee will continue to utilize a team's strength of schedule as one of the primary criteria for its rankings,[193] which certainly favors the Contract Conferences for the reasons mentioned above.[194] Unlike the BCS system, the CFP no longer contains a restriction on the number of teams individual conferences may send to New Year's Six Bowls.[195] As consideration for a guaranteed appearance in a major bowl, the Group of Five Conference schools have potentially traded away the prospect of having two representatives in the New Year's Six Bowls, regardless of how worthy those teams might be. Since the Group of Five Conference schools must be ranked to qualify for a guaranteed appearance in a New Years Six Bowl, the argument could be made that the CFP JV puts them in a worse position than the BCS.

C. *Defense: "Pro-Competitive Effects"*

If the plaintiffs were able to satisfy their initial burden of proving direct anti-competitive effects, the defendants would then be required to establish pro-competitive effects that justify the alleged restraints on trade.[196] Generally accepted pro-competitive justifications include "increasing output, creating operating efficiencies, making a new product available, enhancing product . . . quality, and widening consumer choice."[197] This discussion will begin with potential pro-competitive effects that validate the BCS as a legal restraint on trade, and highlight additional pro-competitive effects created by the CFP JV.

1. Increased Output

First and foremost, the BCS created a new product that did not exist on a yearly basis prior to its inception, a game that decided the National Championship on the field. Before the BCS and its Bowl Alliance predecessor, college football fans were only given the

BLEACHER REPORT (Oct. 12, 2009), http://bleacherreport.com/articles/270529-the-bcs-a-biased-unfair-system-that-needs-to-be-exposed.

192 *See supra* note 64 and accompanying text.

193 *See Selection Committee Protocol*, *supra* note 63.

194 *See supra* notes 186–188 and accompanying text.

195 Chris Dufresne, *Contracts Between Bowls, College Football Playoff Still Not Signed*, CBSSPORTS.COM (May 27, 2014, 11:04 AM), http://articles.latimes.com/2013/apr/25/sports/la-sp-0426-dufresne-bcs-20130426 ("The power leagues will no longer be restricted to two schools in the major bowls. That means the new four-team playoff, as determined by a yet-to-be-named selection committee, can be all SEC schools.").

196 *See* O'Bannon v. NCAA, 7 F. Supp. 3d 995, 999 (N. D. Cal. 2014); *see also* Law v. NCAA, 134 F.3d, 1010, 1019 (10th Cir. 1998).

197 *Law*, 134 F.3d at 1023.

opportunity to witness a true National Championship game a handful of times.[198] BCS proponents argued creation of a new product also led to increased revenue, which can be considered a way of measuring a boost in output. The revenue streams generated by the BCS have produced unparalleled revenue throughout college football. Thus, the argument that the BCS created a new product that had in turn increased output was a sound one, with little room for counter-argument.

The results of the inaugural year of the CFP offer additional ammunition in support of that argument. The semi-final games featuring Oregon versus Florida State and Alabama versus Ohio State were the two most-watched shows in the history of United States cable television.[199] That record stood for less than a week until it was broken by the championship matchup between Oregon and Ohio State.[200] Consumer behavior reinforces the BCS and CFP JV's strongest pro-competitive effect, that it unequivocally increases output in the college football market. Moreover, the playoff games have already provided an increase in revenue to the CFP JV as a result of the $5.64 billion dollar deal signed by ESPN securing the broadcasting rights for the first twelve years. After completing the deal, ESPN's president John Skipper praised "college football's widespread popularity," an indirect confirmation of the pro-competitive characteristics of the now defunct BCS.[201] A restriction that plays a substantial role in maximizing consumer demand is a legitimate pro-competitive justification for that challenged restriction.[202]

2. Widened Consumer Choice

The BCS could have shown that it substantially widened consumer choice when compared to pre-BCS college football. Since 1996, the number of bowl games has increased nearly eighty-five percent.[203] The

198 *See* Brett P. Fenasci, *An Antitrust Analysis of College Football's Bowl Championship Series,* 50 LOY. L. REV. 967, 985 (2004). The author noted that the contractual arrangements referenced *supra* at note 25 had resulted in only "fourteen percent of football seasons resulted in national title games between the two top ranked teams during the forty five years prior" to the BCS and Bowl Alliance; *see also supra* note 21 and accompanying text.

199 Jessica Golden & Eric Chemi, *NCAA Champ Series: Big Ratings, Cheaper Tickets*, CNBC (Jan. 9, 2015, 1:30 PM), http://www.cnbc.com/id/102324997. Approximately 28.2 million viewers watched Oregon versus Florida State. Ohio State versus Alabama broadcast immediately afterwards to approximately 28.3 million viewers. *Id.*

200 Chuck Schilken, *Playoff Final Sets Ratings Record for ESPN, Cable TV*, L.A. TIMES (Jan. 13, 2015, 1:33 PM), http://www.latimes.com/sports/sportsnow/la-sp-sn-college-football-playoff-ratings-20150113-story.html.

201 Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J., (Nov. 21, 2012), http://online.wsj.com/news/articles/SB10001424127887324851704578133223970790516.

202 O'Bannon v. NCAA, 7 F. Supp. 3d 995, 972 (N. D. Cal. 2014) (recognizing telecasts, re-broadcasts, ticket sales, and merchandise as appropriate measures of output).

203 *Opinion, We Have 34 College Football Bowl Games- IS That Too Many?*, NEWNAN TIMES-HERALD, (Jan. 5, 2010), http://www.times-herald.com/opinion/we-have-34-college-football-bowl-games-938874 (noting that there were 19 bowl games in 1996); Tom Fornelli, *The Top 35: Your*

increase in the number of bowl games during the BCS era represented quantitative evidence of an increase in consumer choice. That argument is intuitive, additional bowl games allow consumers greater discretion to choose among substitutes in the market. On the other hand, a defendant should not feel comfortable relying on that alone because there is a plethora of ways that benefit could be achieved and by less restrictive means, referred to as less restrictive alternatives and discussed in the next section.

A more powerful argument is that a qualitative increase in consumer choice can be traced back to the structure of the BCS or CFP JV. One commentator proposed the BCS enhanced the quality of college football's product by creating a standardized mechanism to determine the national champion, arguing that "[p]urging the biases and inconsistencies that plagued the former polls-only system" in effect has increased the product quality of college football as a whole.[204] By itself, that argument resembles a mere regurgitation of the increase in output argument. However, if the defendant can link the creation of an annual national championship game to an increase in consumer satisfaction distinguishable from the national championship, then it could demonstrate a qualitative benefit on the supply in the college football market. A potential mechanism for demonstrating such an increase would be to measure the correlation between the formation of an annual national championship game and increased consumer satisfaction by regular season games.

Without a doubt, more regular season games had national championship implications under the BCS regime than they did in the polls-only system.[205] The growth in overall fan attendance at college football games also tends to suggest that creation of an annual championship game has correlated with increased consumer satisfaction overall. From 1976 until 1997, the year before the BCS was implemented, total FBS attendance grew approximately fifteen percent.[206] During the BCS era, total FBS fan attendance grew approximately thirty-eight percent from 1998 until 2013.[207] While those

2013-2014 Bowl Rankings, CBSSPORTS.COM (Dec. 9, 2013), http://www.cbssports.com/collegefootball/eye-on-college-football/24370140/the-top-35-your-201314-bowl-rankings (noting that the 2013 regular season culminated with 35 bowl games).

[204] *See* Carroll *supra* note 133, at 1274.

[205] When the polls decided the National Championship, there may have been only a handful of teams in contention for the title during the final stretch of the college football season. Thus, only the handful of games that they played could impact the National Championship. Under the BCS, the importance of strength of schedule and the various computer polls allows a game between teams that aren't in contention of the title to impact the race.

[206] *Attendance Records*, NCAA 1, 2 (2010), http://fs.ncaa.org/Docs/stats/football_records/DI/2010/Attendance.pdf.

[207] *Id.; 2013 National College Football Attendance*, NCAA, 1 (2013), http://fs.ncaa.org/Docs/stats/football_records/Attendance/2013Release.pdf.

statistics assume that consumer satisfaction is positively correlated with overall fan attendance, at the very least they provide a basis for arguing the implementation of the BCS has increased the perceived quality of regular season games. Whether a fact-finder would agree with the defendant's position would ultimately be based on the quality of the expert's testimony. However, the formation of the CFP offers additional means to contend consumer choice has widened.

The CFP JV has in effect created a new product for consumption. This year saw the first two playoff games in the history of FCS football. In the past there may have been "de-facto" playoff games during the regular season where the winner would guarantee itself a birth in the BCS championship game,[208] but the CFP JV created the first playoff games which gave the winners a contractual right to play in the championship. Thus, one path to argue the CFP JV widened consumer choice is because it produced a unique commodity.

The CFP JV may also increase its ability to widen consumer choice because of its versatility. First, the CFP undermines the argument the BCS did not actually crown an undisputed champion.[209] For the first time, four teams will receive the opportunity to earn a national championship on the field by besting the three teams with the most impressive regular season resumes. The increased validity of the National Champion is a novel aspect of the CFP that some consumers may appreciate.

On the other hand, the addition of the CFP did not eliminate the remaining BCS Bowl games that were not affiliated with the BCS National Championship game. The Rose, Sugar, and Orange Bowls still have contracts with their respective BCS conference tie-ins.[210] While the Fiesta Bowl remains a major bowl, it no longer has a contract with any of the former BCS Conferences. It is joined by two newly admitted New Year's Six Bowls, the Chick-fil-A and Cotton Bowls, neither of which have conference champion obligations. The exact mechanism for determining which bowl game will host what conference in a particular year is somewhat complicated; put succinctly, the four bowl games that are not a part of the CFP "will have their matchups determined either by contract or by the selection committee."[211]

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[208] *E.g.* Chris Low, *Atlanta Host's SEC's Play-in Game*, ESPN (Nov. 30, 2012), http://espn.go.com/college-football/story/_/id/8693715/college-football-sec-championship-game-serves-de-facto-play-bcs-national-championship-game ("While we count down the days until college football has a real playoff in 2014, leave it to the SEC to once again stage its own play-in game this season.").

[209] Jack, *supra* note 22, at 195. The author listed undefeated teams who did not receive an opportunity to play in the BCS National Championship game and stated, "it is difficult to see how the present BCS system can be considered a reasonable means of establishing an undisputed national champion." *Id.*

[210] *See supra* note 34 and accompanying text.

[211] Barnhart, *supra* note 50.

The CFP has the added bonus of retaining the bowl tradition that college football purists identify with. Some college football fans might enjoy the pageantry involved in long running bowl games and the traditions that those games represent.[212] A supporter of the BCS could argue the CFP widened consumer choice by retaining the traditional bowl matchups while creating an undisputed National Champion in the process. Under the new system, there will still be an opportunity for the Big 10 champion to play the Pac-12 champion in the Rose Bowl, as has been the tradition for one hundred years.[213] One author posited that "college football finally got together to figure out a mechanism that will rightfully expand the pool of potential champions while preserving—for the most part—the long-standing bowl traditions."[214] The ability of the Selection Committee to handpick matchups that consumers want to see via the New Year's Six Bowls without contractual obligations may also enhance the argument that the CFP broadens consumer choice.

3. Increased Group of Five Conference Revenue

Although the unreasonable restraint on trade in this Note is characterized in terms of the disparate revenues allocated to the Group of Five Conferences, those who advocate on behalf of the CFP can argue that the increase in overall revenue guaranteed to the Group of Five Conferences is a pro-competitive benefit justifying the arrangement. The four non-BCS Conferences split a mere $12.6 million in revenue from the BCS in its final season.[215] The four non-BCS Conferences split less revenue than each Group of Five Conference is to receive in the new CFP format.[216] The plaintiff's only avenue of rebuttal is to argue that the Group of Five Conferences portion of the revenue, which unquestionably represents a substantial increase from the BCS system, is still paltry when compared to the $50 million each Contract Conferences will receive to split among its members. Evidence of an

212 Vincent Bonsignore, *100th Rose Bowl: College Football as We Know it Coming to an End*, L.A. DAILY NEWS, (Dec. 31, 2013), http://www.dailynews.com/sports/20131231/100th-rose-bowl-college-football-as-we-know-it-coming-to-an-end ("The Rose Bowl parade and the Rose Bowl game are really important to us. We're celebrating the 100th anniversary this year, and how many sporting events can say they're approaching that kind of milestone? It's special.").

213 *Id.* "The good news is the new system will not end the Rose Bowl as we know it—at least most of the time."*Id.*

214 *Id.*

215 Document Obtained by CBSSports.com Detailing Revenue Split, CBSSPORTS.COM, http://www.cbssports.com/images/collegefootball/Non-AQ-BCS-Distribution.pdf.

216 Kristi A. Dosh, *College Football Playoff Revenue Makes Every Conference Richer Except One*, FOXSPORTS.COM (May 4, 2015), http://www.foxsports.com/college-football/outkick-the-coverage/college-football-playoff-revenue-makes-every-conference-richer-except-one-050415 ("The Group of Five receive $75 million to divide between the five conferences according to their own formula, which is reportedly $60 million split evenly and the remaining $15 million divided based on how the conferences rank against one another based on team performance.").

attempt to negotiate a bigger share by the Group of Five Conferences, which proved to be futile because of the concentration of power in the Contract Conferences, might be enough to validate the plaintiff's counter-argument. Without more, it is possible that a court would recognize the synergies created by the consummation of the CFP, which have materialized in the form of increased revenue shares for all conferences, as a pro-competitive justification for the restraint.

D. *Who Wins?*

The allegedly unlawful restraint on trade lends itself to arguments both in favor of the CFP JV's pro-competitive benefits and against its anticompetitive effects. Attempting to predict precisely how a court would rule is an uncertain endeavor because the Supreme Court has authorized broad discretion for lower courts to consider all factual circumstances when applying the rule of reason.[217] Litigation that involves a novel antitrust theory demands an opinion that emphasizes the logic behind the fact-finder's conclusion.[218] Justice Souter, in dicta, noted the level of inquiry required could change over time if rule of reason analyses in similar cases continue to reach identical conclusions.[219] Quoting Professor Areeda's treatise on Antitrust Law, Souter recognized the benefit of exposing the finder of facts' reasoning to the critical analysis of others as increasing the possibility of greater understanding in the future.[220]

The lengthy *O'Bannon* opinion is instructive of the detailed analysis of the findings of fact necessary to parse through the expert testimony that Souter and Areeda contemplated. This Note examined arguments on both sides from a high level, but an actual antitrust lawsuit would demand a more concrete analysis of the economics behind the college football market to parse out the restraints effect on competition. If a fact finder determined either side did not meet their burden of proof, the rule of reason analysis would be complete. Given the uncertainty of forecasting the outcome in the absence of detailed economic data, it is worthwhile to take a page out of football's playbook and let a coin toss decide the outcome. For the purposes of the next section, this Note assumes both parties were able to satisfy their respective burdens of proof, which under the rule of reason would put the ball back in the plaintiff's hands.

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[217] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).
[218] *See* California Dental Ass'n v. FTC, 526 U.S. 756, 779–81 (1999).
[219] *Id.*
[220] *Id.* at 780.

E. *Overtime: "Less Restrictive Alternatives"*

The final step in the rule of reason analysis is to examine possible alternatives that show how the pro-competitive effects could be "achieved in a substantially less restrictive manner."[221] A plaintiff need only submit less restrictive alternatives to pro-competitive effects deemed legitimate by the finder of fact.[222] The alternative must be "virtually as effective in serving the legitimate objective," and "either be based on actual experience in analogous situations elsewhere or else be fairly obvious" without significantly increasing cost.[223] Moreover, any substantial modifications to the structure of the CFP must be fairly obvious, as they could not be based on actual experience without mirroring the CFP, BCS, Bowl Alliance, or Bowl Coalition.[224] For all three pro-competitive justifications, the alternative must remedy the disparate revenue provision in a substantially less restrictive manner. The discussion will consider less restrictive alternatives for each of the potential pro-competitive justifications considered above.

1. Increased Output

Recognizing output as a legitimate objective would in effect be acknowledging the impact the BCS and CFP JV have had on maximizing consumer demand.[225] Thus, any less restrictive alternative needs to be virtually as effective in boosting measures of consumer demand such as broadcasts, ticket sales, and merchandise sales. As a preliminary observation, all substantial modifications seeking to be categorized as fairly obvious should be read in context with the legitimate objective they aim to preserve. For example, consider a hypothetical playoff system where the eight highest ranked conference champions, chosen by the same committee created by the CFP, competed in a single elimination tournament to crown a national champion. If it is fairly obvious that the alternative playoff system would still effectively increase measures of consumer demand, then the court should find that alternative sufficient.[226] However, the

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221 *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1004 (N.D. Cal. 2014); *see also* Law v. NCAA, 134 F.3d 1010, 1019 (2013).

222 *O'Bannon,* 7 F. Supp. 3d at 1005 ("A court need not address the availability of less restrictive alternatives for achieving a purported precompetitive goal 'when the defendant fails to meet its own obligation under the rule of reason burden-shifting procedure.'") (citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1913b (2006)).

223 *O'Bannon,* 7 F. Supp. 3d at 1004–05.

224 The only other modification that might be based on actual experience would be a true playoff system mimicking that used in the NFL or FCS. Yet, courts have previously separated those markets from the FBS market. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984).

225 *See supra* note 224 and accompanying text.

226 The reasoning behind the "fairly obvious" limitation is to discourage attorneys from coming up with less restrictive alternatives whose "efficacy is a matter of mere speculation." Skilled

aforementioned hypothetical playoff system should not be found fairly obvious because any effect on consumer demand would be conjectural at best.

On the other hand, minor adjustments to CFP's structure could be considered because they fall within the category of being based on actual experience. An example of a minor modification would be adding a contractual provision providing Group of Five Conference champions an automatic bid to a non-playoff related New Year's Six Bowl. For such a provision to comply with the requirement of being virtually as effective in serving the legitimate objective, a court would still need to find the modification does not affect consumer demand in a material way. Thus, only minor adjustments to the CFP structure are likely to be approved by the court provided the alternative remedies the disparate revenue allocation between the Group of Five and Contract Conferences in a substantial way.

2. Widened Consumer Choice

A less restrictive alternative that is virtually as effective in attaining an increase in consumer choice must preserve the variety of options made available by the CFP—specifically, true playoff games, the traditional bowl games, and an indisputable national champion.[227] Consider again a hypothetical playoff system, but this time where the four highest ranked conference champions, chosen by the same committee created by the CFP, competing in a single elimination tournament to crown a national champion. This hypothetical playoff system should not be deemed a fairly obvious alternative because it arguably fails to preserve a format that crowns an indisputable national champion. That system could not crown an indisputable champion in any season where two of the best three teams played in the same conference.[228]

On the other hand, consider a hypothetical playoff system that increased the number of teams allowed into the CFP from four to six. This alternative would increase the playoff to a three round, single elimination tournament with the top two ranked teams received first round byes. This hypothetical system is virtually as effective as the CFP JV at widening consumer demand because a playoff system with six teams would still offer consumer's true playoff games, the traditional bowl games, and an indisputable national champion just like the current

lawyers could imagine endless amounts of less restrictive alternatives to most arrangements. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1913b (2006).

227 *See supra* notes 203–213 and accompanying text.

228 *See e.g., LSU, Alabama to Play for Title*, ESPN (Dec. 6, 2011), http://espn.go.com/college-football/story/_/id/7316817/lsu-tigers-alabama-crimson-tide-rematch-set-bcs-title-game.

version of the CFP.[229] Since this proposed modification is not based on actual experience, it would still need to be deemed fairly obvious.[230] Presumably, a court would find this fairly obvious because it's merely an extension of the CFP JV in its current form. If a court found widened consumer choice to be a legitimate objective, any less restrictive alternative would need to be a modification to the CFP JV structure that retains all of the options available to consumers for consumption.

3. Increased Group of Five Conference Revenue

If a court determined the overall increase in revenue allocated to the Group of Five Conferences served a legitimate objective then any less restrictive alternative must at minimum maintain the $75 million currently split up amongst the Group of Five Conferences. Any modification to the CFP JV that maintained that distribution to the Group of Five would be, on its face, virtually as effective in serving the legitimate objective and fairly obvious. This legitimate objective offers a potential plaintiff the most discretion to change the CFP JV since the only restrictions on the alternative would be that the ratio of revenue allocated between the Group of Five and Contract Conferences be *substantially* less restrictive.

CONCLUSION: IF NOT THE COURTS, THEN WHO?

The best result for a challenger to the CFP under the less restrictive alternative framework would be if a court determined the defendant's only legitimate pro-competitive effect was increasing the revenue distributed to the Group of Five Conferences. This is because it is the only scenario where the plaintiff could materially alter the structure of the CFP JV. Any alternative that contained a provision guaranteeing the Group of Five Conferences the same amount of revenue would by definition be fairly obvious and also virtually as effective in serving the legitimate objective. As long as the alternative involved a material increase in the proportion of revenue allocated to the Group of Five Conferences, it would be deemed substantially less restrictive. In this situation, the plaintiff receives the most discretion under the three pro-competitive justifications to alter the structure in a way that might actually level the competitive playing field.

If the court found either widening consumer choice or increasing output as legitimate pro-competitive effects, then the plaintiff would likely find those potential remedies unsatisfactory. For both, the substantially less restrictive alternatives likely to be approved by a court

[229] This modification would also fail the fairly obvious test for increased output. While a six-team playoff may have a positive impact on consumer demand, this is the type of speculation the fairly obvious requirement was designed to reject. *See* AREEDA, *supra* note 214.
[230] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014).

would involve minor modifications to the CFP structure. Despite the Group of Five Conferences gaining a more proportionate share of the revenue allocation, they would still be subject to disproportionate access to the New Years Six Bowls.

Unless a court holds that the increase in revenue is the only legitimate pro-competitive effect, even if we assumed the plaintiff succeeds in the lawsuit that plaintiff is not likely to receive increased access to the New Years Six Bowls. Instead, Group of Five Conference teams wishing to compete for a national championship will continue to be required to earn its bid on merit alone as decided by the Selection Committee. In year one the Selection Committee made a pretty strong statement of how it views Group of Five schools, by refusing to include Marshall in the top twenty five of its rankings when they were 10-0, yet continuing to rank Contract Conference teams with three losses in the top twenty five.[231] Mike Hamrick, Marshall's athletic director, was understandably "frustrated by what he views as the increasing divide between the so-called haves and have-nots [sic] in college football rankings."[232] Mr. Hamrick's remark is eerily similar to one made by Senator Orrin Hatch who at a 2009 Congressional subcommittee meeting said:

> [T]he BCS continues to place nearly half of all the schools in college football at a competitive and, perhaps more importantly, a financial disadvantage. These disadvantages are not the result of fair competition, but of the inherent structural inequities of the BCS system.[233]

Senator Hatch's comment was made at a Senate hearing whose official purpose was to determine if the BCS violated antitrust law and discuss the possibility of instituting a playoff while Mr. Hamrick's remark was made during the first year of the CFP. Even though a new system has been created, the underlying problem appears to have remained. That problem is exasperated if the analysis in this Note were to play out in an actual antitrust lawsuit against the CFP. In the scenario most favorable to a victorious plaintiff, the plaintiff is unlikely to be unable to secure itself a more direct line to the CFP. The challenger might be able to secure a bigger piece of the revenue distribution, but

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231 Jon Solomon, *Where's Marshall? Still Winning and Puzzled by Playoff Committee,* CBSSPORTS.COM (Nov. 22, 2014, 5:03 P.M.), http://www.cbssports.com/collegefootball/writer/jon-solomon/24830445/wheres-marshall-still-winning-and-puzzled-by-playoff-committee.

232 *Id.*

233 *The Bowl Championship Series: Is it Fair and In Compliance With Antitrust Law?: Hearing on Antitrust, Competition Policy and Consumer Rights before the S. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of Sen. Orrin Hatch, Member, S.Comm on Judiciary) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55645/pdf/CHRG-111shrg55645.pdf.

the structural inequities between the haves and have-nots would survive. That leaves the question of whether an antitrust challenge to the CFP would even be worthwhile.

It is important to reiterate that this Note is operating under the assumption that the CFP will continue to unreasonably favor the Contract Conferences to the detriment of the Group of Five Conferences. This note predicts that five years from now, the presidents and athletic directors at Group of Five Conference institutions will be making the same grievances as they did leading up to the inception of the CFP. The way the Selection Committee handled Marshall's bid for a New Year's Six Bowl suggests the at-large selections will presumably reflect the maxim: *the best predictor of future behavior is past behavior*.

For critics who are still unsatisfied with the structure of the CFP, the window of opportunity for change through antitrust litigation may have just closed for a few years until the genuine effects of the CFP can be observed.[234] Even after the CFP has been around long enough for a court to hear the case, antitrust law is limited with respect to the remedies it can offer to a plaintiff.[235] The challenged restraints, criticisms, and other inequities in college football "could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation . . . [s]uch reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress."[236] Although *O'Bannon* involves slightly different parties and a challenge to the NCAA's own rules, Judge Wilken suggests the courtroom is not the venue to iron out these differences.

While it may appear far-fetched that Congress would undertake such a task, the fact that Congress has held hearings in the past is evidence that Congressional intervention is plausible.[237] In furtherance of that point, a House subcommittee previously passed an anti-BCS bill, which suggests that congressional interference may not be that unrealistic after all.[238] One author has already made a call for congressional intervention, but insisted on tying the exemption to serving educational needs.[239] Although reforming education is a noble thought, a more pragmatic approach is likely to gain more traction. Multiple members of Congress have threatened the NFL's tax-exempt

[234] *See* Worldwide Basketball and Sport Tours, Inc. v. NCAA, 388 F.3d 955, 958 (6th Cir. 2004) (discussing the District Court opinion denying a preliminary injunction because the "rule had not been in effect long enough to permit its effect to be accurately evaluated.").

[235] *See supra* notes 221–224 and accompanying text.

[236] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).

[237] *See, e.g.*, Carroll *supra* note 133, at 1239; *see also supra* note 233 and accompanying text.

[238] Tom Benning, *U.S. Rep. Joe Barton's anti-BCS Bill Passes House Subcommittee*, DALLAS MORNING NEWS (Dec. 9, 2009), http://www.dallasnews.com/news/community-news/arlington/headlines/20091209-U-S-Rep-Joe-3504.ece.

[239] *See, e.g.*, BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA, 178 (2012) (calling for an antitrust exemption requiring the NCAA to serve educational needs in order to qualify).

status during the past year in response to public policy issues confronting the NFL, including domestic violence, child abuse, blackout rules, and a team named after an offensive racial slur.[240] Congress could use the mere threat of removing certain tax exemptions from schools or bowls to get a dialogue started with the members of the CFP JV. Perhaps Congress, whether through an antitrust exemption, tax incentives, or the use of earmarked funds, may one day be relied upon to initiate the change necessary to even the college football playoff landscape.

*Brandon C. Miller**

[240] Elliot Smilowitz, *Will Congress Sack the NFL?*, WASH. EXAMINER, (Jan. 12, 2015, 5:00 AM), http://www.washingtonexaminer.com/will-congress-sack-the-nfl/article/2558414.

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