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## The BCS (Big Crooked System) And Antitrust Law

Law360, New York (February 19, 2009) -- Newly elected President Barack Obama has declared that he will bring change to Washington, D.C. However, to the interest of many sports fans and some antitrust law scholars, he may also attempt to bring change to college football gridirons.

President Obama has said that he intends to influence the Bowl Championship Series ("BCS") championship debate.

Perhaps President Obama takes his cues from ESPN.com, which, on the day of the president's inauguration, asked sports fans what they would fix first as president — the designated hitter rule in MLB, enforcement of the traveling violation in the NBA, overtime rules in the NFL, or the BCS.

Of 38,776 voters polled in "SportsNation" voting, 79 percent chose fixing the BCS as their top priority. President Obama and the majority of SportsNation voters are not alone, as many legal experts have begun to question whether the BCS violates antitrust laws.

In 2008, the University of Utah finished its NCAA football season undefeated, 13-0, defeating four nationally ranked teams along the way, including fourth-ranked University of Alabama (Utah also finished 12-0 in 2004).

An undefeated season by any major Division I-A college football team is usually rewarded with a berth in the national championship game.

However, because Utah's conference, the Mountain West Conference, is not one of the six founding BCS conferences, as discussed further below, the BCS passed over Utah and instead selected 12-1 University of Florida (Southeastern Conference) and 12-1 University of Oklahoma (Big 12 Conference) to play for the national championship.

The BCS excluded Utah from the national championship game for the second time in five years. According to the BCS, Utah's comparative strength of schedule prohibited it from ascending to one of the top two spots in the rankings, despite the fact that Utah may have had the best college football team in the United States this year.

The BCS' inequitable competition structure not only prohibits certain disfavored conferences and their teams from winning a national championship, but in so doing it also maintains and perpetuates the stranglehold of the major football conferences on extremely lucrative television and marketing revenues.

These revenues are unique to college football. Limited access to these revenues restricts both the athletic and academic progress of the schools with teams that participate in the so-called "weaker" Division I-A conferences, regardless of how well those schools play in any given year.

### **The BCS**

The BCS was formed in 1998 by six NCAA Division I-A conferences: the Atlantic Coast, Big East, Big Ten, Big Twelve, Pac-10 and Southeastern Conferences (the "BCS conferences"). The goal was to create a national championship game within Division I-A college football without the necessity of a traditional multi-game playoff.

The BCS designed a mathematical formula for ranking teams, which initially included four elements: 1) a strength of schedule index; 2) subjective polls of coaches; 3) the average of three different computer rankings; and 4) team records.

Once the formula takes each team's statistics into account, a point value is assigned, and the top teams are ranked according to point value. At the end of the college football regular season, including any conference championship games (which not all conferences play), the top two teams in the BCS rankings play for the BCS National Championship in a lucrative, nationally televised game.

The BCS system selects not only the national championship game, but also the eight teams to be included in the four other non-championship BCS bowl games.

The six BCS conferences receive automatic bids to one of the BCS bowl games for their conference champion.

The remaining "at-large" berths are provided to teams ranked in the top fourteen that have at least nine wins, which are also usually teams from the six BCS conferences due to their exposure, notoriety, and strength of schedule.

Thus, the BCS conferences will always account for at least 8 of the 10 potential bowl game slots (two for the national championship game and at least six of the eight slots available in the four remaining bowl games).

Ultimately, only 66 of the 119 Division I schools compete for an automatic bid to play in one of the five BCS bowl games.

NCAA Division I-A teams that compete in Conference USA, the Mid-American, Mountain West, Sun Belt and Western Athletic Conferences ("non-BCS conferences") are not entitled to automatic BCS bowl game bids.

Non-BCS conference teams may be selected to play in one of the four non-championship BCS bowl games only if ranked among the top 14 teams by the BCS rankings and selected through the subjective, discretionary bowl game selection process.

Non-BCS conference teams are effectively excluded from the possibility of ever playing in the BCS National Championship game because the BCS rankings will likely never rank a non-BCS team in the top two teams; the BCS views a non-BCS conference team, even if undefeated, as having played too weak a schedule to be considered for the national championship game.

The six BCS conferences derive approximately \$18 million each annually solely from their association with the BCS, and each BCS conference that sends more than one team to a BCS bowl game receives an additional \$4.5 million.

In contrast, the non-BCS conferences receive a combined \$9 million (to share among themselves) for their agreement to acquiesce in the BCS structure, and receive some additional revenue sharing (also to share among themselves) only if a non-BCS team earns a BCS bowl game berth, with a majority of the additional revenue going to the conference that actually sends one of its teams to a BCS bowl game.

In other words, the BCS ensures that each BCS conference is guaranteed \$18 million, while each non-BCS conference is guaranteed only \$1.8 million. The strong get stronger by about 1000 percent each year.

### **Antitrust Scrutiny of the BCS**

Utah Attorney General Mark Shurtleff conducted a review of the BCS' compliance with antitrust law and argues that teams not provided with an automatic BCS berth are at a competitive and financial disadvantage, stating that "from the very first day, from the very first kickoff in the college season, more than half of the schools are put on an unlevel playing field. They will never be allowed to play for a national championship."

Shurtleff most likely hopes that the BCS' structure violates either Section 1 or Section 2 of the Sherman Antitrust Act, which outlaw unreasonable, collusive, and monopolistic conduct that unreasonably restrains competition.

Of course, the outcome of an analysis under either Section 1 or Section 2 frequently depends on the application of the strict "per se" analysis or application of the much more lenient "rule of reason" analysis, and, for the Section 2 analysis, a finding of market power in the relevant market (which may be all five BCS bowl games, or just the national championship game).

Two commentators have thoroughly analyzed potential antitrust violations by the BCS each concluding that a court would likely not find the BCS structure to violate the law.

Turning first to the Section 1 analysis, Southern Methodist University Law Professor and former Dean, C. Paul Rogers concluded that the rule of reason analysis would apply, instead of a per se analysis, because the BCS structure produces the pro-competitive effect of a bona fide national championship game even in the absence of a playoff, something that did not exist for consumers prior to the BCS.

C. Paul Rogers, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust and the Winner Take All Syndrome*, 18 Marq. Sports L. Rev. 285 (2008).

Brett Fanasci agrees with Rogers by hypothesizing that the rule of reason analysis must apply to any Section 1 claim because without the BCS, the BCS Conferences would not have broken from their traditional bowl games and no national championship game would even be available to the relevant consumers — college football fans.

See Brett P. Fanasci, *An Antitrust Analysis of College Football's Bowl Championship Series*, 50 Loy. L. Rev. 967 (2004).

Other important pro-competitive effects generated by the BCS, as argued by Fanasci, include: (1) an increase in the total revenues available to all Division I-A college football conferences and schools from pre-BCS formats; (2) enhanced importance of each regular season game; (3) increased fan appeal; and (4) a better opportunity for a non-BCS conference team to play in one of the major bowls.

Both commentators agree that the pro-competitive effects of the BCS outweigh the alleged anticompetitive harm caused by the BCS, such as the continued disparity between revenues available to BCS and non-BCS programs and the restriction on the number of Division I-A teams that may compete for a bowl game berth, or a spot in the national championship game (which limits fan interest as related to the non-BCS schools).

Turning to the Section 2 analysis, Rogers concludes that even if the BCS is shown to have market power in the relevant market (much more likely if the relevant market is the national championship game as opposed to all five BCS bowl games), the BCS lacks the requisite intent to monopolize because the BCS does not absolutely exclude the non-BCS Conference teams from the national championship game — technically, any Division I-A team ranked in the top two will play in the game regardless of conference.

Even though it is nearly impossible for a non-BCS conference team to achieve a top two ranking, the BCS does not completely foreclose the opportunity.

Rogers opines that, even if the BCS has market power, its conduct is not sufficiently anticompetitive so as to violate Section 2, as required by *Copperweld v. Independent Tube Corporation*, 467 U.S. 752 (1984) or *American Tobacco Company v. United States*, 328 U.S. 781 (1946).

Notwithstanding Rogers' well-reasoned Section 2 analysis, Utah fans and Boise State fans (Western Athletic Conference, 13-0 in 2006) can attest to the fact that although they witnessed their teams finish undefeated for a combined three seasons, they've never witnessed their team achieve a top two BCS ranking. Even the BCS cannot deny that an undefeated record may be hard to improve upon.

### **If Antitrust Law Allows It ...**

Many legal scholars, Mr. Shurtleff, and college sports fanatics simply wonder why it appears that the national champion is decided not by pure competition, but instead by complex agreements among select schools and television networks which essentially exclude the

underdog non-BCS conference teams from ever winning a title.

The Fresno States (Western Athletic Conference, 2008 NCAA national baseball champion) and Davidsons (Southern Conference, NCAA Tournament Elite Eight) of the college world exemplify the competitive attitude that America embodies: anything is possible with hard work, dedication, preparation, and perseverance, even for an extreme underdog.

These stories are nearly impossible in college football, thanks to the BCS. Instead, the BCS teaches the larger BCS conference schools not to fear the underdog, but just to conspire against them (and to protect their interest in lucrative television deals). As the musical artist "Spoon" declares in its hit song, "you got no fear of the underdog, that's why you will not survive!"

Just because antitrust law may not invalidate the BCS structure — thanks to pretty demanding pleading requirements for Sherman Act claims — does not mean that the BCS is the best, or most appropriate, way to determine a college football national champion.

President Obama agrees that not all teams have an equal opportunity of reaching the national championship game: "If you've got a bunch of teams who play throughout the season and many of them have one loss or two losses, there's no clear, decisive winner," President Obama declared on 60 Minutes after he won the election. "We should be creating a playoff system."

President Obama apparently recognizes that an organization that succeeds in preventing smaller-market conference schools from competing for a national championship, especially when those schools have better records and more decisive wins than their larger-market counterparts, is inequitable and sends the wrong message to America's college students, fans and society.

With other high-ranking political officials concurring — including seven United States Representatives who have introduced legislation requiring a playoff or threatened hearings on the matter — this debate may soon move further from the academic world and closer to the political battleground.

The University of Florida was this year's BCS National Champion, having defeated the University of Oklahoma in the Fiesta Bowl. If Florida played Utah, the outcome may have been no different, but certainly more legitimate. A prolonged antitrust analysis is unnecessary to arrive at this seemingly obvious conclusion.

--By Ruth T. Dowling and Joseph A. Farside Jr. of Edwards Angell Palmer & Dodge LLP

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