

# YOU CAN'T WIN 'EM ALL: HOW THE NCAA'S DOMINANCE OF THE COLLEGE BASKETBALL POSTSEASON REVEALS THERE WILL NEVER BE AN NCAA FOOTBALL PLAYOFF

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## INTRODUCTION

The debate over how to decide the Division I-A<sup>1</sup> college Football National Championship has long been raging and seems to intensify each year.<sup>2</sup> Division I-A College Football is the only National Collegiate Athletic Association (“NCAA”) sport that does not crown a champion through the use of an NCAA sponsored playoff system.<sup>3</sup> Instead, schools, through their respective conferences, along with bowl game organizers and television networks have formed an agreement known as the Bowl Championship Series (“BCS”) through which a national champion is decided.<sup>4</sup> The agreement involves the use of human polls and a computer generated formula to rank teams and then place the two top-ranked teams in a postseason bowl game to decide the national championship.<sup>5</sup> The system has been hailed in years, such as 2005, when the top two teams are both undefeated and there are no other undefeated teams in the top 25. However in years such as 2004, when there are more than two undefeated teams ranked in the top-five in the country, the BCS has been severely criticized.<sup>6</sup>

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1. Effective December 15, 2006, the NCAA changed the name of Division I-A football to “Football Bowl Subdivision” or “FBS.” David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN.COM, Dec. 15, 2006, <http://sports.espn.go.com/ncf/columns/story?id=2697774>. The name change likely adds confusion to an already complex naming scheme. *Id.* To avoid confusion, “FBS” will continue to be referred to as Division I-A throughout this Note.

2. See, e.g., Chuck Klosterman, *No College Football Playoff, Please*, ESPN.COM, Jan. 2, 2007, <http://sports.espn.go.com/espn/page2/story?page=klosterman/070103>; Associated Press, *Strong Matchups Back Up BCS Process*, ESPN.COM, Dec. 4, 2005, <http://sports.espn.go.com/ncf/news/story?id=2247858&campaign=rss&source=ESPNHeadlines>; Associated Press, *Congress to Look into “Deeply Flawed” BCS System*, ESPN.COM, Dec. 2, 2005, available at <http://sports.espn.go.com/ncf/news/story?id=2245440> [hereinafter *Deeply Flawed*].

3. *Metro. Intercollegiate Basketball Ass’n v. NCAA (MIBA I)*, 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

4. Jodi M. Warmbrod, Comment, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go for an Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333, 347 (2004).

5. Bowl Championship Series, About the BCS, <http://www.bcsfootball.org/bcsfb/about> (last visited Jan. 17, 2007).

6. The conclusion of the 2005 regular season saw Southern California and Texas both

Many critics argue that the current postseason bowl system produces unsatisfactory results and will be flawed until some form of a playoff system is instituted.<sup>7</sup>

The bickering and unsettledness of the National Championship in Division I-A College Football is in stark contrast to that of the Division I Men's College Basketball Championship.<sup>8</sup> Through a playoff system, the NCAA Division I Men's Basketball Championship is decided on the court and there is little left to argue about once the tournament is over. The tournament is a huge commercial success each year and is wildly popular among fans.<sup>9</sup> Over the years, the NCAA tournament has faced competition from the National Invitational Tournament ("NIT"),<sup>10</sup> but has managed to maintain its place as the premier postseason college basketball tournament.<sup>11</sup> However, the NCAA tournament's popularity and the simplicity of having a playoff to determine the national championship were not achieved overnight and not without the NCAA employing some cutthroat tactics.<sup>12</sup>

The latest cutthroat tactic to be employed by the NCAA was known as the "Commitment to Participate Rule." The rule required any NCAA team that was invited to the NCAA tournament to either attend the NCAA tournament or abstain from postseason play all together.<sup>13</sup> The rule was challenged in court by the organizers of the NIT and the case was settled with the NCAA purchasing the NIT.<sup>14</sup> The district court opined that the "Commitment to Participate Rule"

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undefeated and ranked number one and number two. Mike Jensen, *Football Gets a True Title Game*, PHILADELPHIA INQUIRER, Jan. 4, 2006. At the conclusion of the 2004 regular season Auburn, Utah, Oklahoma, and Southern California were all undefeated and ranked in the top-five. Southern California defeated Oklahoma in the national title game, with Auburn and Utah winning their separate postseason games but never having a shot to compete for the National Championship Bowl Championship Series, History of the BCS, <http://www.bcsfootball.org/bcsfb/history> (last visited Jan. 17, 2007) [hereinafter History of the BCS].

7. See Jensen, *supra* note 6; see also *Deeply Flawed*, *supra* note 2 (criticizing the college football postseason).

8. The NCAA Men's Division I College Basketball Tournament has been crowning a National Champion through a playoff system since 1939. *MIBA I*, 337 F. Supp. 2d at 566.

9. See discussion *infra* Part III.

10. The NIT is a postseason basketball tournament held in New York City each year. *MIBA I*, 337 F. Supp. 2d at 566. Historically, forty teams are invited as opposed to the sixty-five that are invited to the NCAA tournament. *Id.*

11. See generally *id.* at 566-68 (explaining the rise of the NCAA tournament and the decline of the NIT).

12. The NCAA Basketball Tournament started in 1939; however, one year prior to that, in 1938, the National Invitational Tournament was founded. *Id.* at 566. The two tournaments have a tumultuous past. See discussion *infra* Part III.

13. *MIBA I*, 337 F. Supp. 2d at 567.

14. Gary T. Brown, *Questions Being Answered After NCAA's NIT Purchase, Meaningful Enactments are on the Way*, THE NCAA NEWS, Sept. 12, 2005. The district court issued two written opinions in response to motions for summary judgment. *MIBA I*, 337 F. Supp. 2d at 563;

might be a violation of the Sherman Anti-Trust Act.<sup>15</sup>

It is this type of rule, and moreover the court's likely treatment of this type of rule, that reveals why the NCAA will not be able to organize a college football playoff. The NCAA currently lacks control of the college football postseason and would likely only be able to gain control through the use of the "Commitment to Participate Rule" or the institution of a similar rule. In all likelihood such a rule would fail under antitrust scrutiny by the courts.

This Note compares the development of postseason play in college football and college basketball and the manner in which courts have applied antitrust law to both. Further this Note sets out to demonstrate that, despite annual calls by fans and journalists for a college football playoff, it would be impossible for the NCAA to organize a Division I-A College Football playoff to determine a national champion. *The NIT Case* provides evidence of what is required for the NCAA to maintain control over a sport's postseason and how those measures are susceptible to antitrust challenges. This Note argues that the NCAA lost control over the college football postseason in the 1984 landmark case of *NCAA v. Board of Regents of the University of Oklahoma*,<sup>16</sup> and that the only way the NCAA could regain control would be to employ methods that *The NIT Case* has shown would likely be deemed anti-competitive by the courts.

Part I briefly explains how the NCAA began, what it does, its structure, and views on its role and purpose. Part II recounts the history and development of the college football postseason and summarizes its current situation. Part III briefly sets out the roots of the NCAA and NIT Basketball Tournaments and highlights the NCAA's use of its power to lessen the importance of the NIT. Part IV examines antitrust laws and their application to college athletics, focusing on the recent culmination of the NCAA/NIT rivalry in *The NIT Case*.<sup>17</sup> Part V then argues that the only way the NCAA would be able to take control over the college football postseason through a playoff would be to use the "Commitment to Participate Rule" or to institute a similar rule. However, *The NIT Case* has shown that this would likely run afoul of the Sherman Anti-Trust Act. Further, the BCS is not likely to succumb to an NCAA buyout like the NIT did. Therefore, an NCAA organized Division I-A college football playoff is not possible. Part VI concludes and offers a few brief suggestions for the future of postseason college football.

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Metro. Intercollegiate Basketball Ass'n v. NCAA (*MIBA II*), 339 F. Supp. 2d 545, 551-52 (S.D.N.Y. 2004). For purposes of this Note the two opinions shall be collectively referred to as *The NIT Case*.

15. *MIBA II*, 339 F. Supp. 2d at 551-52.

16. *NCAA v. Bd. of Regents of the Univ. of Okla. (Bd. of Regents)*, 468 U.S. 85 (1984); see also Steve Wieberg, *The Runaway Train*, USA TODAY, Nov. 4, 2003, at 1C (noting the importance of *Board of Regents* to the landscape of college football) [hereinafter Wieberg, *The Runaway Train*].

17. *MIBA II*, 339 F. Supp. 2d at 545; *MIBA I*, 337 F. Supp. 2d at 563.

## I. THE NCAA

At the turn of the last century, college football was not regulated, and player deaths and serious injuries were not uncommon.<sup>18</sup> This was clearly unpleasant and not the way the game was meant to be played, but if a team reduced the violence and played “fair,” that team would likely lose. On the other hand, if play continued in this fashion then the violence was likely to escalate until the game destroyed itself.<sup>19</sup> College football teams were stuck in a “race to the bottom” or a “prisoner’s dilemma” and collective action through a governing body was needed to save the sport.<sup>20</sup> Thus, in 1906, with a little nudging from President Theodore Roosevelt, the NCAA’s predecessor institution met to establish standardized rules to promote safety in the game of football.<sup>21</sup> The group consisted of representatives of sixty three colleges and universities.<sup>22</sup> The NCAA adopted its current name in 1910 and organized its first national championship in 1921.<sup>23</sup>

Since its humble beginnings as a discussion group and rule-making body, the NCAA has grown to include over 1200 colleges and universities.<sup>24</sup> It regulates twenty-three sports, conducts eighty-nine postseason championships, and promulgates rules and regulations that govern not only how sports are played on the field, but also what schools and athletes can do off the field.<sup>25</sup> The NCAA is structured as a voluntary, non-profit organization and schools within the NCAA are classified as either Division I, II, or III.<sup>26</sup> Division I schools are

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18. John L. Fixel & Randall W. Bennett, *College Sports*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 323, 325 (Walter Adams & James Brock eds., 10th ed. 2001).

19. *Id.*

20. *Id.*

21. National Collegiate Athletic Association, *The History of the NCAA*, <http://www.ncaa.org/about/history.html> (last visited Nov. 20, 2006).

22. *Id.*

23. *Id.* The championship was track and field. *Id.*

24. *MIBA I*, 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

25. *Id.* Each year the NCAA publishes a manual that is adopted by all member institutions as a condition precedent to that school participating in NCAA sanctioned athletic contests. The manual governs scholarships and other assistance that can be given to student-athletes and prohibits student-athletes from competing at a professional level in their respective sports while attending college. See NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, July 2005.

26. National Collegiate Athletic Association, *What’s the Difference Between Divisions I, II and III?*, [http://www.ncaa.org/about/div\\_criteria.html](http://www.ncaa.org/about/div_criteria.html) (last visited Nov. 21, 2006) [hereinafter *What’s the Difference*]. Division I schools must “sponsor at least seven sports for men and seven sports for women,” must compete against mainly Division I opponents, and must provide a minimum amount of financial aid for student-athletes. *Id.* Division II schools must have at least four sports for men and four sports for women and must compete against Division II or I opponents. *Id.* While Division I and II schools can provide athletic scholarships for their students, Division III schools are separated by the fact that they do not grant scholarships based on athletic ability. *Id.* As of December 15, 2006, the NCAA now refers to Division I-A as “Football Bowl

subdivided into I-A, or I-AA for football purposes based on minimum attendance requirements at football games.<sup>27</sup> Within each division, schools have voluntarily organized themselves into conferences.<sup>28</sup> According to the NCAA, its current purpose is to promote “fair, safe, equitable, and sportsman-like” conduct while being committed to the values of balancing “academic, social, and athletic experiences,” “enhancing the sense of community” at member institutions, and providing autonomy for member institutions and member institutions’ presidents.<sup>29</sup>

For policy and rule making purposes, the NCAA was originally a one-school one-vote democracy, but in 1997 its structure at the Division I level was changed to a representative democracy.<sup>30</sup> Today, a board of directors comprised of fifteen members, each from a member school, is elected by a vote of all member schools.<sup>31</sup> It is required that nine of the fifteen directors come from Division I-A schools.<sup>32</sup> This results in schools with large athletic programs, mainly football, influencing much of the decision making process.<sup>33</sup>

While the core values of the NCAA of today sound similar to those of the “discussion-group” and “rule-standardizing” NCAA of its founding days, many argue that the association’s purpose has changed and its focus is no longer on standardizing rules, but rather on “instituting the foundations for cartel control of college sports.”<sup>34</sup> The modern NCAA has been characterized as a cartel that limits both inputs and outputs.<sup>35</sup> The traditional argument is that the NCAA is a group comprised of entities (the member schools) that each produce output of a product in the form of athletic competition.<sup>36</sup> That product, or output, has a value that is measurable in terms of the value of television contracts to broadcast games, ticket sales to view the games, licensing fees for school-related sports apparel, and the overall increase in a school’s notoriety that comes with having successful athletic programs. To produce this output of athletic competition there are many required inputs: athletic talent from the athletes, quality coaching

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Subdivision” and Division I-AA as “Football Championship Subdivision.” Albright, *supra* note 1.

27. What’s the Difference, *supra* note 26. To qualify for Division I-A, a school must have an average attendance of 15,000 people per home game. *Id.* Division I-AAA status is typically reserved for schools that do not have, or place little emphasis on, football. *Id.*

28. *MIBA I*, 337 F. Supp. 2d at 565. Schools of the same conference tend to be similar in size and geographic location. *Id.*

29. National Collegiate Athletic Association, Our Mission, [http://www2.ncaa.org/about\\_ncaa/overview/mission.html](http://www2.ncaa.org/about_ncaa/overview/mission.html) (last visited Nov. 20, 2006).

30. Joel G. Maxcy, *The 1997 Restructuring of the NCAA: A Transactions Cost Explanation*, in *THE ECONOMICS OF COLLEGE SPORTS* 11, 17-18 (John Fizel & Rodney Fort eds., 2004).

31. *Id.*

32. *Id.*

33. *Id.*

34. Fizel & Bennett, *supra* note 18, at 325.

35. Maxcy, *supra* note 30, at 13.

36. Fizel & Bennett, *supra* note 18, at 326.

from the coaches, and the facilities and equipment necessary to conduct athletic events. In a cartel, firms collude to coordinate actions and agree to limit output and control the cost of inputs in order to raise prices and overall revenues.<sup>37</sup> The NCAA reduces the cost of inputs by prohibiting schools from paying their athletes and attempting to limit the number of coaching positions and coach pay,<sup>38</sup> while restricting output through limits on the number of games that can be played in a season and, until recently, limiting the number of times a school could be on television.<sup>39</sup>

Others argue that the NCAA is a political body that both provides public goods and redistributes wealth.<sup>40</sup> This argument traditionally proceeds along the lines that the NCAA schools voluntarily agree to be governed by the NCAA rules and guidelines so that the public good of collegiate athletics can be produced<sup>41</sup> and these rules, while sometimes limiting what individual schools can achieve, ultimately result in a level playing field for all schools to the betterment of college sports.<sup>42</sup>

This all matters because whenever the NCAA acts, for example by instituting the “Commitment to Participate Rule” or organizing a playoff, that action can be viewed as either an attempt to restrict inputs or outputs to increase revenue for the controlling schools, or as the result of a legislative process that creates rules necessary for collegiate athletics to flourish. The actual role and purpose of the NCAA, or one’s perception of the NCAA’s role and purpose, will affect whether one views the NCAA’s actions as for the greater good of college athletics<sup>43</sup> or to increase the revenues of its controlling members.<sup>44</sup> The two views are not always at odds with each other and one view is not necessarily better than the other.

## II. THE COLLEGE FOOTBALL POSTSEASON

Division I-A College Football has never had a postseason tournament or a

37. WILLIAM J. BAUMOL & ALAN S. BLINDER, *MICROECONOMICS: PRINCIPLES AND POLICY* 237-38 (10th ed. 2006).

38. *See generally* Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998) (upholding the permanent injunction against promulgation or reenactment of NCAA rule limiting compensation of certain coaches).

39. *See* Fizel & Bennett, *supra* note 18, at 325-27. Granted athletes are given scholarships that have tremendous *value*, but the marginal *cost* of a scholarship (the cost to have one more student in class and the cost to feed one more student) is virtually zero. *Id.*; *see also* Robert J. Barro, *The Best Little Monopoly in America*, *BUSINESSWEEK*, Dec. 9, 2002, at 22 (noting the NCAA’s ability to reduce the cost of inputs by not paying athletes).

40. Maxcy, *supra* note 30, at 13.

41. Without NCAA guidelines we would be back to the days of violent deaths in college football.

42. The rich schools cannot attract the best athletes by paying higher wages because no schools pay athletes. *See* Fizel & Bennett, *supra* note 18, at 325-26.

43. To standardize football rules to promote safety.

44. To eliminate competition through the “Commitment to Participate Rule.”

playoff system.<sup>45</sup> Instead, historically, conferences have entered into three-way agreements with each other and various organizers of bowl games for teams from the respective conferences to play each other in designated bowl games at neutral sites.<sup>46</sup> The first bowl game was played in 1902,<sup>47</sup> and since then more and more bowl games have formed. As of 2005, there were twenty-eight postseason bowl games.<sup>48</sup> The “tie-in” structure of the college football postseason resulted in great popularity;<sup>49</sup> however, from 1946 to 1991 the top-two ranked teams in the country only played each other on nine occasions.<sup>50</sup>

The infrequency of a true number-one versus number-two game in the

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45. *MIBA I*, 337 F. Supp. 2d 563, 565 (S.D.N.Y. 2004).

46. *Review of Selection Process for College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of William Johnstone, Chairman, Rose Bowl Game Mgmt. Comm.) [hereinafter Johnstone Statement]. For example, historically an agreement existed between the Big Ten Conference (a major football conference made up of large schools from the Mid-West such as the University of Michigan, the University of Iowa, and the University of Wisconsin), the Pacific Ten Conference (another major football conference made up of large schools from the Pacific Coast such as the University of Southern California, the University of Arizona, and Stanford University), and the Pasadena Tournament of Roses Association (a group founded in 1890 by the citizens of Pasadena, California, “for the purpose of presenting a floral pageantry on New Year’s Day” that later added a football game to the pageantry) whereby the champion of each conference would play in the Rose Bowl Game hosted by the Pasadena Tournament of Roses Association on New Year’s Day in Pasadena, California. *Id.*

47. *Id.* The first bowl game was a 49-0 shellacking by the University of Michigan over Stanford University in the Rose Bowl Game. *Id.* The date of the first postseason bowl game is not entirely settled. Some point to an 1894 postseason game between the University of Notre Dame and the University of Chicago as the original bowl game. *College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Bus. Rights and Competition of the S. Comm. on the Judiciary*, 105th Cong. 41 (1997) (statement of Cedric W. Dempsey, Executive Director, NCAA).

48. *Review of Selection Process of College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Derrick S. Fox, President, Football Bowl Ass’n) [hereinafter Fox Statement]. The twenty-eight bowl games are played in twenty-four communities across thirteen states. Virtually all of the bowl games are put on by charitable groups. In 2005, forty-eight percent of Division I-A schools participated in a bowl game, most through “tie-in” arrangements similar to that of the Rose Bowl Game whereby one conference agrees to send a team (its first place finisher, second place finisher, etc.) to play another conference’s team (that conference’s first place finisher, second place finisher, etc.). *Id.* The number continues to grow. In the 2006-07 bowl season twenty-seven cities hosted a total of thirty-two bowl games. Football Bowl Association, Home, <http://www.footballbowlassociation.com/index.html> (last visited Jan. 17, 2007).

49. Fox Statement, *supra* note 48. Bowl games that have been in existence for the past six years have seen attendance increase by 6.5% over that period and have “sold 98.5% of their capacity” for that period. *Id.*

50. History of the BCS, *supra* note 6.

college football postseason provided the force required to reshape the traditional college football postseason. In the early 1990s, conferences, bowl organizers, and television networks began discussing agreements that could produce a true national championship game.<sup>51</sup>

The first such agreement was known as the Bowl Coalition and was formed in 1992. The agreement paired the top two teams in national championship games in two of the three years it was in existence.<sup>52</sup> The agreement included four major bowl games, but did not include the Rose Bowl Game and did not abandon any of the historical “tie-in” arrangements. The result was that two major conferences (the Big Ten and the Pacific Ten) and the largest bowl game (the Rose Bowl Game) did not participate in the national championship, and the agreement broke down in January 1995.<sup>53</sup>

Immediately following the Bowl Coalition’s breakdown, the Bowl Alliance was formed.<sup>54</sup> The Bowl Alliance had an advantage over the Bowl Coalition in that many of the historical “tie-in” arrangements between conferences and bowl games expired in 1995; thus, conference champions that might never have been able to meet could now be paired in a postseason bowl game.<sup>55</sup> However, the historically strong tie between the Big Ten, the Pacific Ten, and the Rose Bowl Game remained intact and none of the three were part of the Bowl Alliance. This made a national championship impossible if only one of the top-two teams was from the Big Ten or the Pacific Ten.<sup>56</sup>

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51. *Id.* Absent from this group is most notably the NCAA who did not attempt to create a playoff, although they did form a committee to look into the possibility. One possible explanation for the NCAA’s inability to set up a playoff is that college football teams and conferences had the right to enter into television contracts on their own, free from NCAA regulation. This was not always the case; prior to 1984, the NCAA collectively bargained for its member schools with television networks. No school could contract with a network on its own, and revenue from NCAA football television contracts was evenly distributed among the schools. In 1977, a group of “high investment” football schools (led by the University of Oklahoma and the University of Georgia) formed the College Football Association and threatened to leave the NCAA if they were not allowed to enter into their own television contracts. The group eventually sued the NCAA and won the right for schools to individually, or through their conferences, enter into contracts for the broadcast of their football games. *See NCAA v. Bd. of Regents of the Univ. of Okla. (Bd. of Regents)*, 468 U.S. 85 (1984). The group was also a force behind the shift from a one-vote one-school democracy in the NCAA to a representative democracy with more weight being given to the larger Division I-A schools. *See Maxcy, supra* note 30, at 17; *see also* Kay Hawes, *Gridiron Gridlock: Landmark Lawsuit Caused Football Television to Change Channels*, THE NCAA NEWS, Dec. 6, 1999. This Note argues that once the individual schools and conferences had the powerful bargaining chip of television rights, the NCAA began to lose its importance in the college football postseason.

52. History of the BCS, *supra* note 6.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*



This ultimately led to the end of the Bowl Alliance and the formation of the BCS in 1998. “The BCS is not an NCAA organization, although each member of the BCS is a member of the NCAA.”<sup>57</sup> The BCS is made up of eleven conferences, plus Notre Dame and 116 other universities who do not belong to a particular conference.<sup>58</sup> Through the use of two human voting polls and six computer polls, the BCS ranks college football teams and then places the number-one and number-two ranked teams in a bowl game to decide the national championship. The agreement also attempts to set up other competitive bowl game match-ups.<sup>59</sup> Four bowl games; the Rose, Nokia Sugar, FedEx Orange, and Tostitos Fiesta Bowls, made up the original BCS bowl game and each year the national championship match-up would rotate from one bowl to the next.<sup>60</sup> The original BCS agreement expired at the end of the 2006 bowl season (2005 regular season) and a new BCS agreement will take effect for the 2007 bowl season and last through the 2010 bowl season.<sup>61</sup>

Under the new BCS agreement the original four bowl games will continue to host their respective games, but once every four years the site of one of the bowl games will host an additional game called “The National Championship Game.”<sup>62</sup> The six conferences whose champions receive automatic bids will continue to award automatic bids to the champions until the conclusion of the 2007 regular season.<sup>63</sup> At the conclusion of the 2007 season, conferences will be evaluated on their previous four seasons and any of the eleven Division I-A conferences will be eligible for an automatic bid for the next two seasons with the caveat that no fewer than five, and no more than seven conferences will

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57. *Review of Selection Process for College Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Robert Khayat, Chancellor, The University of Mississippi).

58. *Id.* Although six conferences (the Atlantic Coast Conference, Big East, Big Twelve, Big Ten, Pacific Ten, and Southeastern Conference) along with Notre Dame reap most of the benefit due to the fact that their conference champion (or Notre Dame, if they meet certain ranking and record requirements) is guaranteed a spot in one of the BCS games, these six conferences plus Notre Dame are known as the BCS “founding conferences.” History of the BCS, *supra* note 6.

59. *Review of Selection Process for College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Kevin Weiberg, Coordinator, Bowl Championship Series) [hereinafter Weiberg Statement]. For example, once the National Championship Game is set, the champions of the participating conferences will be matched up in the remaining bowl games that are not hosting the national championship. Teams that have had success, but did not win their conference, are invited as “at-large” teams to fill out the remaining slots. Bowl Championship Series, Automatic Qualification Standards, <http://www.bcsfootball.org/bcsfb/eligibility> (last visited Jan. 17, 2007).

60. History of the BCS, *supra* note 6.

61. Bowl Championship Series, Future BCS Structure, <http://www.bcsfootball.org/index2.cfm?page=structure> (last visited Mar. 3, 2005) [hereinafter Future BCS Structure].

62. *Id.*

63. *Id.*

receive automatic bids.<sup>64</sup>

The money involved in the BCS is astronomical. The BCS does not pay individual teams, but rather the conference from which a participating team belongs.<sup>65</sup> Conferences then divide payouts among members, typically in equal amounts.<sup>66</sup> Total revenue for the 2006 BCS games is projected to be \$96,160,000.<sup>67</sup> From that amount, \$1.8 million is distributed to Division I-AA conferences to “support the overall health of college football.”<sup>68</sup> Next, a minimum of \$5,160,000 is guaranteed to so-called “mid-major” conferences for their participation in the agreement.<sup>69</sup> The remaining revenue is then divided into six equal shares (between \$14,503,333 and \$15,129,166 in 2006) and paid to the participants of the FedEx Orange, Nokia Sugar, and Tostitos Fiesta Bowls. The Rose Bowl pays its participants separately and in 2005 each Rose Bowl participant was paid \$14.5 million dollars.<sup>70</sup> If a conference places more than one team in a BCS game, then that conference receives an additional \$4.5 million, and any remaining money is divided equally among the six founding conferences.<sup>71</sup> A conference placing two teams in the BCS, such as the Big Ten in 2006, is estimated to receive \$22,822,222.<sup>72</sup>

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64. *Id.*

65. Bowl Championship Series, Revenue Distribution (on file with author) [hereinafter Revenue Distribution].

66. *See* Big Ten Conference, Inc., I.R.S. Form 990 (tax year beginning July 1, 2003 and ending June 30, 2004) (on file with author) (reporting that approximately \$10.6 million was distributed to each member school); *see also* Atlantic Coast Conference I.R.S. Form 990 (tax year beginning July 1, 2003 and ending June 30, 2004) (on file with author) (reporting that approximately \$10 million was distributed to each school); *but see* Southeastern Conference I.R.S. Form 990 (tax year beginning Sept. 1, 2004 and ending Aug. 31, 2005) (on file with author) (showing that some conferences have more variation in their revenue distribution by reporting that amounts between \$6.8 million and \$10 million were distributed to member schools depending on size).

67. Revenue Distribution, *supra* note 65.

68. *Id.* There are 118 Division I-AA schools, and each receives approximately \$15,254. *Id.* This number is small compared to the total BCS revenue, but considering the average Division I-AA athletic program operates at a \$600,000 per year deficit every little bit helps. National Collegiate Athletic Association, Division I-AA Revenue and Expenses, at \*2, [http://www.ncaa.org/about/fact\\_sheet.pdf](http://www.ncaa.org/about/fact_sheet.pdf) (last visited Nov. 20, 2006).

69. Revenue Distribution, *supra* note 65. The “mid-major” conferences are Conference USA, the Mid-American, Mountain West, Sun Belt, and Western Athletic Conferences; there are fifty-one schools and each takes approximately \$101,176. *Id.* The conferences do not have to do anything except agree to be a part of the BCS and that their schools will play in a BCS game if invited (playing in a BCS game means even more money). *Id.* An argument could be made that \$100,000 for doing nothing may or may not enter into a school’s decision to support or not support an NCAA football playoff.

70. Revenue Distribution, *supra* note 65.

71. *Id.*

72. *Id.*

The money involved is projected to keep growing.<sup>73</sup> After the 2006 regular season, a BCS participant can expect to receive \$17 million for placing one team in a BCS bowl; after the 2009 season that figure will jump to \$18.5 million.<sup>74</sup> The BCS and FOX Sports recently signed a new four-year deal that will give FOX Sports the rights to broadcast the BCS games (except for the Rose Bowl Game and the 2010 National Championship Game, which will be held at the Rose Bowl site) through 2009.<sup>75</sup> The deal is worth \$320 million.<sup>76</sup>

College football's postseason has grown from one bowl game in the early 1900s into a system that attracts more than 1.5 million fans each year—more than the Super Bowl, World Series, NBA Finals, and NHL Stanley Cup combined.<sup>77</sup> This growth has occurred without the existence of an NCAA postseason playoff. The basketball postseason is equally as popular, but is a different story.

### III. THE COLLEGE BASKETBALL POSTSEASON

The roots of the college basketball postseason trace back to the year 1938 in New York City when the Metropolitan Intercollegiate Basketball Association ("MIBA"), a group of New York City schools comprised of Fordham University, Manhattan College, New York University, St. John's University, and Wagner College, hosted the first National Invitational Tournament ("NIT").<sup>78</sup> One year later, the NCAA held its first national championship tournament.<sup>79</sup> In the years that followed, the NCAA implemented many changes to the rules governing its member schools and their basketball programs.<sup>80</sup> The effect of these changes was to funnel talented teams away from the NIT and into the NCAA tournament, thus allowing the NCAA tournament to grow in popularity and cementing the NCAA's control over the college basketball postseason.<sup>81</sup>

The first rule change occurred in 1953 with the passage of an NCAA rule prohibiting teams from playing in more than one postseason basketball tournament. Teams were forced to choose the NIT or the NCAA tournament, as they could no longer compete in both.<sup>82</sup> In 1961, the NCAA passed the

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73. Future BCS Structure, *supra* note 61.

74. *Id.*

75. Associated Press, *Fox Will Get Rights for Four Years*, ESPN.COM, Nov. 22, 2004, <http://sports.espn.go.com/ncf/news/story?id=1929158>.

76. *Id.* ABC had paid \$305 million for the last four years. *Id.*

77. Fox Statement, *supra* note 48.

78. *MIBA I*, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004).

79. *Id.*

80. *Id.* NCAA rules are published in the NCAA manual each year and every year all member schools must comply with rule changes or face fines and/or sanctions. *Id.* at 567.

81. *See generally* Maxcy, *supra* note 30, at 33 n.10 (noting the NCAA's expansion of the tournament field as a factor in the NIT's loss of popularity); *see also MIBA I*, 337 F. Supp. 2d at 566-67 (detailing the rise in popularity of the NCAA tournament and the decline in popularity of the NIT).

82. *MIBA I*, 337 F. Supp. 2d at 567.

“Expected Participation” rule which stated that teams invited to the NCAA tournament were expected to participate in the NCAA tournament.<sup>83</sup> The “expected” language in the rule did not prove very effective as one team in 1961, and five teams in 1962, chose to accept invitations to the NIT over invites to the NCAA tournament.<sup>84</sup> Further, in 1970, one of the top-ranked men’s basketball teams in the country, Marquette University, elected to play in the NIT tournament despite a bid from the NCAA tournament.<sup>85</sup>

The NCAA continued to expand the number of teams in its tournament while also making rule changes that allowed multiple teams from a single conference to participate in the NCAA tournament, something that was previously prohibited.<sup>86</sup> The MIBA has argued that minutes from NCAA meetings during the 1940s, 1950s, and 1960s demonstrate that the NCAA’s motive in making these changes was to disadvantage the NIT.<sup>87</sup> The NCAA maintains that the decisions were made strictly for business reasons and that the minutes on which the MIBA relies were taken out of context.<sup>88</sup> Regardless of the motivations, the NCAA tournament expanded considerably from 1950 to 1980, and the NCAA has maintained control over the college basketball postseason.

The most significant NCAA rule change came in 1981 when the “Commitment to Participate Rule” was passed. This rule stated that any team invited to participate in an NCAA postseason tournament was required to participate in the NCAA tournament or forego postseason competition all together.<sup>89</sup> Failure to comply with the Commitment to Participate Rule was considered a “major” NCAA violation.<sup>90</sup> As the court in *MIBA I* stated, “[t]his ended any uncertainty about a team’s obligation to participate in the NCAA [basketball] championship if invited.”<sup>91</sup>

The Commitment to Participate Rule stood unchallenged for nearly twenty years until, in 2001, the MIBA filed suit against the NCAA challenging the rule.<sup>92</sup> No team ever violated, or asked to be exempt from, the Commitment to Participate Rule while the rule was in effect.<sup>93</sup> In 2000, the NCAA Antitrust Subcommittee recommended to the NCAA Division I Management Council that

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83. *Id.*

84. *Id.* The teams were Loyola University (Chicago), Mississippi State, the University of Houston, St. John’s University, and Dayton University (Dayton chose the NIT in 1961 and 1962).  
*Id.*

85. *Id.* at 566-67.

86. In 1951, the tournament was expanded to sixteen teams, then to twenty-two in 1953, then forty in 1979, forty-eight in 1980, fifty-two in 1982, fifty-three in 1984, sixty-four in 1985 and to its current level of sixty-five in 2001. *Id.* at 566-68.

87. *Id.* at 566.

88. *Id.* at 566-67.

89. *Id.* at 567.

90. *Id.*

91. *Id.*

92. *Id.* at 568.

93. *Id.* at 567.

the Commitment to Participate Rule be abandoned.<sup>94</sup> The Council never voted on a rule change, as several conference commissioners were worried that some teams might choose not to play in the NCAA tournament if the rule was changed.<sup>95</sup> The 2001 lawsuit was ultimately settled with the NCAA purchasing the NIT for \$40.5 million along with a payment of \$16 million in damages.<sup>96</sup>

Based on the NCAA's ability to control the men's college basketball postseason, the NCAA tournament has become a commercial success. The contract for television rights to air the tournament, an eleven-year \$6 billion deal with CBS, accounts for virtually all of the NCAA's operating revenue.<sup>97</sup> The money made from the tournament is divided among conferences based on a six-year rolling average of the number of games that each conference has a team playing in during the tournament.<sup>98</sup> For example, if a conference has placed one team in the tournament each of the last six years and that team has played only one game in the tournament then that conference will receive six units of the current year's revenue from the tournament.<sup>99</sup> A basketball unit was worth \$176,864 in 2005-06 and the NCAA paid out approximately \$132.6 million in 2005-06 to conferences.<sup>100</sup> Antitrust law and challenges to NCAA rules help explain why the NCAA was able to maintain control and grow the college basketball postseason, yet was unable to have any meaningful presence in the college football postseason.

#### IV. ANTITRUST LAW AND THE NCAA

To understand why the NCAA would be unable to organize a college football playoff, it is necessary to understand the manner in which courts have applied antitrust laws to the NCAA. The courts' application of antitrust laws also reveal why the NCAA lost control of the college football postseason, yet was able to maintain control of the college basketball postseason.

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94. *Id.* at 567-68.

95. *Id.* at 568.

96. Brown, *supra* note 14.

97. According to the NCAA, the television deal will average about \$545 million a year. Press Release, Wallace I. Renfro, Director of Public Relations, NCAA, NCAA Reaches Agreement with CBS (Nov. 18, 1999) (on file with author) [hereinafter Renfro Press Release]. The NCAA's operating revenue for 2005-06 was \$521,100,000, of which 90% was attributed to television and marketing rights and fees. National Collegiate Athletic Association, NCAA Revised Budget Fiscal Year Ending August 31, 2005, [http://www1.ncaa.org/finance/2005-06\\_budget.pdf](http://www1.ncaa.org/finance/2005-06_budget.pdf).

98. See National Collegiate Athletic Association, Distribution of Basketball-Related Moneys According to Number of Units by Conference, 1999-2004, <http://www.ncaa.org> (follow "About the NCAA" hyperlink; then follow "Budget and Finances" hyperlink; then follow "Revenue Distribution and Forms" hyperlink; then follow "2006 Basketball Revenue Distribution" hyperlink) (last visited Jan. 17, 2007).

99. *Id.*

100. *Id.*

### A. Overview

In the United States the Sherman Act<sup>101</sup> has been the typical vehicle of choice to attack an NCAA rule.<sup>102</sup> Section 1 of the Sherman Act provides “[e]very 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 hereby declared to be illegal.”<sup>103</sup>

In applying the Sherman Act, courts examine agreements between two or more entities<sup>104</sup> to determine if the agreement is an unreasonable restraint of trade.<sup>105</sup> Certain types of restraints have been found by the courts to be “so inherently anticompetitive that they are *per se* invalid” under section 1 of the Sherman Act.<sup>106</sup> Restraints such as price fixing,<sup>107</sup> market divisions,<sup>108</sup> tying arrangements,<sup>109</sup> and group boycotts<sup>110</sup> have all been held invalid as *per se* violations of the Sherman Act.<sup>111</sup> In the case of the NCAA, however, agreements

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101. 15 U.S.C. §§ 1-7 (2000).

102. Violations of the Sherman Act were alleged in *NCAA v. Board of Regents of the University of Oklahoma (Bd. of Regents)*, 468 U.S. 85 (1984), *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004), and several other cases.

103. 15 U.S.C. § 1 (2000).

104. *MIBA I*, 337 F. Supp. 2d at 569-70. “[Section 1 of the Sherman Act] is directed only at joint action and ‘does not prohibit independent business actions and decisions.’” *Id.* at 570 (quoting *Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council*, 857 F.2d 55, 70 (2d Cir. 1988)). This is important because the NCAA has attempted to raise the defense that it is a single actor and therefore not subject to Sherman Act Section 1 scrutiny, this argument was rejected in *MIBA I. Id.*

105. *Id.*

106. *Id.*

107. See generally BAUMOL & BLINDER, *supra* note 37, at 239 (noting that price fixing is defined as collusion among competitors in which they agree on pricing policies).

108. See generally ROBERT W. EMERSON, BUSINESS LAW 488 (4th ed. 2004) (explaining that market divisions or horizontal territorial limitations occur when competitors divide up and keep exclusive geographical areas for the sale of their products).

109. See generally *id.* (noting tying arrangements involve requiring the purchase of a “tied” product in return for a contract involving a more highly desirable “tying” product). For example Microsoft has been accused of “tying” its Internet Explorer web browser with its Windows operating system. See *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1204 (D.C. Cir. 2004).

110. See generally *Clarett v. National Football League*, 306 F. Supp. 2d 379, 390 n.70 (S.D.N.Y. 2004) (explaining that group boycotts “generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms”). In *Clarett*, an accomplished Ohio State University football player challenged an NFL rule restricting NFL draft eligibility to players who were three football playing seasons removed from high-school graduation. *Id.* at 382. At the district court, the player successfully argued the rule was a group boycott and a violation of the Sherman Act. *Id.* However, the court of appeals overruled the district court, holding that the rule fell within an exemption to antitrust review. *Clarett v. National Football League*, 369 F.3d 124, 140 (2d Cir. 2004).

111. *MIBA I*, 337 F. Supp. at 570.

that appear to be per se violations are nonetheless not struck down due to the unique nature of the NCAA.<sup>112</sup> Instead, NCAA rules are typically subjected to the “Rule of Reason” analysis.<sup>113</sup>

The Rule of Reason analysis looks to the actual effects of a rule or restraint on the market and the rule or restraint’s pro-competitive justifications.<sup>114</sup> The Rule of Reason analysis is a three-step burden-shifting analysis.<sup>115</sup> Initially, the plaintiff must show that “the challenged action has had an actual adverse effect on competition as a whole in the relevant market.”<sup>116</sup> If the plaintiff carries that burden, the defendant must then establish the pro-competitive “redeeming virtues” of the action.<sup>117</sup> If the defendant is able to do so, then “the plaintiff must show that the same procompetitive effect could be achieved through a method that is less restrictive on competition.”<sup>118</sup> In the end, the goal is to determine whether the rule or restraint is potentially harmful to consumers.<sup>119</sup>

The plaintiff can be relieved of its initial burden if the anticompetitive effects of the restraint are obvious and “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.”<sup>120</sup> This is known as a “quick look” analysis and has been employed by the courts to examine some NCAA rules.<sup>121</sup> It appears that the benefit to a plaintiff of a “quick look” analysis is that the plaintiff will not have to engage in complex factual proofs of actual adverse effects on competition and defining the relevant market.

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112. *Id.* at 570-71 (citing *NCAA v. Bd. of Regents of the Univ. of Okla. (Bd. of Regents)*, 468 U.S. 85, 102 (1984)) (discussing the fact that sport activities can only be carried on jointly and that certain NCAA restraints are necessary for college sports to exist at all).

113. *Id.* at 571.

114. *Id.* at 572.

115. *Id.* at 571.

116. *Id.* (citing *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995)).

117. *Id.*

118. *Id.*

119. *Id.* (citing *Virgin Atl. Airways Ltd. v. British Airways PLC*, 69 F. Supp. 2d 571, 582 (S.D.N.Y. 1999)).

120. *Id.* at 572 (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999)).

121. *Id.* In *Board of Regents*, the Supreme Court found a restriction on the price and output of televised football games to be suited for a “quick look” analysis. *NCAA v. Bd. of Regents of the Univ. of Okla. (Bd. of Regents)*, 468 U.S. 85, 110 (1984). In *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998), the court applied a “quick look” analysis to an NCAA rule that capped certain coach’s salaries. In other cases the courts have declined to apply a “quick look” analysis. For example, in *Worldwide Basketball and Sport Tours, Inc. v. NCAA (Worldwide Basketball II)*, 388 F.3d 955, 961 (6th Cir. 2004), the court chose not to apply a “quick look” analysis to an NCAA rule that restricted the number of “exempt contests,” games not counting towards a team’s total number of regular season games, that a team could play in during a given time period. Also, in *MIBA I*, 337 F. Supp. 2d at 573, the court refused to apply a “quick look” analysis to the NCAA’s “Commitment to Participate” rule.

The Supreme Court's jurisprudence in Rule of Reason analysis has been shaped by two relevant cases: *Board of Trade v. United States*<sup>122</sup> and *National Society of Professional Engineers v. United States*.<sup>123</sup>

### B. Relevant Cases

1. *Board of Trade v. United States*.—The initial formulation of the Rule of Reason analysis was laid out by the Supreme Court in *Board of Trade*.<sup>124</sup> The case involved members of the grain industry in Chicago who agreed that the price of grain would only be negotiated between the hours of 9:30 a.m. and 1:15 p.m. (or while the exchange was open) and that after the exchange closed the price of grain would remain fixed until the exchange opened the next morning.<sup>125</sup> Even though the rule restrained trade by fixing the price of grain while the exchange was closed, the Court allowed the rule because the defendants could justify it based on the small amount of grain traded while the price was fixed and the fact the rule may also improve market conditions by bringing buyers and sellers together.<sup>126</sup> Justice Brandeis articulated, “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”<sup>127</sup> This was the initial rule of reason test and did not require the defendant to show pro-competitive benefits of the restraint, only to justify it.<sup>128</sup> It has been argued that this early formulation of the rule was much less burdensome on the defendant and that the current test has increased the burden on the defendant.<sup>129</sup>

2. *National Society of Professional Engineers v. United States*.—The “Rule of Reason” analysis evolved further in *Professional Engineers*<sup>130</sup> and now required the defendant to show pro-competitive benefits. This is important because this shows the difficulty an organization could face if they fail to offer pro-competitive benefits when a rule is challenged. *Professional Engineers* involved engineers who agreed, through a code of ethics, not to discuss price with customers when soliciting bids.<sup>131</sup> According to the engineers, discussing price would destroy the industry's traditional method of selecting an engineer

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122. 246 U.S. 231 (1918).

123. 435 U.S. 679 (1978).

124. *Bd. of Trade*, 246 U.S. at 231.

125. *Id.* at 236-37.

126. *Id.* at 239-41.

127. *Id.* at 238.

128. Michael B. LiCalsi, Casenote, “*The Whole Situation Is a Shame, Baby!*” *NCAA Self-Regulations Categorized As Horizontal Combinations Under the Sherman Act's Rule of Reason Standard: Unreasonable Restraints of Trade or an Unfair Judicial Test?*, 12 *GEO. MASON L. REV.* 831, 857-58 (2004).

129. *See id.* at 858-59.

130. 435 U.S. 679 (1978).

131. *Id.* at 682-83.



and possibly endanger the public because competition based on price could lead to a decrease in the quality of engineering.<sup>132</sup> The Court noted that there are:

[T]wo complementary categories of antitrust analysis. . . . agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal *per se*. . . . [and] agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why [the restraint] was imposed.<sup>133</sup>

The Court found that the agreement to not discuss price did not require elaborate industry analysis to demonstrate its anticompetitive character and held the agreement, on its face, to be a violation of the Sherman Act.<sup>134</sup> It has been argued that this version of the analysis places a greater burden on the defendant to not only justify the restraint but to also prove its pro-competitive benefits.<sup>135</sup>

3. *NCAA v. Board of Regents of the University of Oklahoma*.—The case of *NCAA v. Board of Regents of the University of Oklahoma*<sup>136</sup> represents a crucial development in the shift of power from the NCAA to member schools in the realm of college football. It empowered conferences, free from NCAA controls, to negotiate for the sale of television rights and thus in the future enter into agreements to sell television rights to postseason bowl games.<sup>137</sup> The case also shows how a court might apply antitrust laws to the NCAA in the future. In *Board of Regents*, a group of NCAA member schools entered into a contract with NBC to broadcast football games despite an NCAA agreement with ABC and CBS.<sup>138</sup> The NCAA threatened disciplinary action and sanctions against any team that honored the NBC contract.<sup>139</sup> The Supreme Court first noted that the NCAA rule was a horizontal restraint of trade that amounted to price fixing and would ordinarily be struck down as a *per se* violation of the Sherman Act.<sup>140</sup> However, the Court declined to strike the rule down as a *per se* violation because the industry of college sports required horizontal restraints in order to exist.<sup>141</sup> Instead, the Court applied a Rule of Reason analysis in rejecting the NCAA's

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132. *Id.* at 684-85.

133. *Id.* at 692.

134. *Id.* at 692-93.

135. See LiCalsi, *supra* note 128, at 859.

136. 468 U.S. 85 (1984).

137. See Fizel & Bennett, *supra* note 18, at 332.

138. *Id.* at 94-95. The NCAA had a television plan that gave ABC and CBS the right to broadcast college football games and negotiate with schools to air games. *Id.* at 92. However ABC and CBS agreed to schedule appearances for eighty-two schools over a two-year period and no one school could appear nationally more than four times in the same period. *Id.* at 94.

139. *Id.* at 95.

140. *Id.* at 99-100.

141. *Id.* at 100-01.

alleged pro-competitive benefits<sup>142</sup> and found that college football could be marketed just as effectively without the NCAA plan.<sup>143</sup> This decision is important because now college football teams can sell the rights to televise their games and take control of television revenues generated from football.<sup>144</sup> Ultimately, this is what prevents the NCAA from interfering with individual schools entering into postseason agreements to have their bowl games televised. In comparison, the right to televise the NCAA men's college basketball tournament has always been, and remains, with the NCAA.<sup>145</sup>

4. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*.—An NCAA rule relating to basketball was successfully defeated in *Worldwide Basketball & Sport Tours, Inc. v. NCAA*;<sup>146</sup> however, the case was overruled on appeal.<sup>147</sup> The challenged rule was NCAA bylaw 17.5.5.4, or the “Two in Four Rule.”<sup>148</sup> The Two in Four Rule limited the number of “certified events” in which a basketball team could play during a given time period.<sup>149</sup> The rule allowed a team to play in only one certified event a year and no more than two certified events in a four-year time span.<sup>150</sup> It was argued that the rule decreased the output of college basketball games by lowering the number of “certified events” played while the rule was in effect.<sup>151</sup> The district court applied a “quick look” analysis (relieving the plaintiff of its initial burden) and found a violation of the Sherman Act; however, the court of appeals held that a quick look analysis was inappropriate and reversed based on the plaintiff's failure to establish the relevant market.<sup>152</sup> This case shows the courts' reluctance to apply a quick look analysis to NCAA rules.

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142. *Id.* at 113. The NCAA argued that the plan was a sort of joint venture that assisted in the marketing of television rights. *Id.* The Court also noted that there could be no procompetitive efficiencies because the effect of the plan was to raise prices by restricting outputs and competition would have the opposite effect, prices would decrease and output would increase. *Id.* at 114.

143. *Id.*

144. Maxcy, *supra* note 30, at 22.

145. See Renfro Press Release, *supra* note 97. The NCAA chooses to sell this right. *Id.*

146. *Worldwide Basketball & Sport Tours, Inc. v. NCAA (Worldwide Basketball I)*, 273 F. Supp. 2d 933, 954-55 (S.D. Ohio 2003).

147. *Worldwide Basketball II*, 388 F.3d 955, 963-64 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 334 (2005).

148. *Id.* at 957.

149. *Id.* “Certified events” are basketball tournaments in which teams play between one and six games; however, those games count as only one game toward a team's total number of games allowed in a season (twenty-eight at the time of the suit). *Id.* “Certified” or “exempt” events typically take place before the season or during a vacation break. *Id. Worldwide Basketball I*, 273 F. Supp. 2d at 937.

150. *Worldwide Basketball II*, 388 F.3d at 957.

151. *Worldwide Basketball I*, 273 F. Supp. 2d at 938.

152. *Worldwide Basketball II*, 388 F.3d at 961.

5. Metropolitan Intercollegiate Basketball Ass'n v. NCAA ("The NIT Case").—In *The NIT Case*,<sup>153</sup> the organizers of the NIT sued the NCAA in 2001 over several current NCAA rules that they alleged violated the Sherman Antitrust Act.<sup>154</sup> The thrust of the plaintiff's argument was that the Commitment to Participate Rule, along with the other rules, was a violation of the Sherman Act in that the rules operated to prevent the NIT from competing with the NCAA tournament to attract a competitive field of teams.<sup>155</sup> The district court held that the Commitment to Participate Rule was an agreement among NCAA members and therefore subject to Sherman Act scrutiny.<sup>156</sup> Also, a per se analysis was not appropriate under *Board of Regents* and a full burden shifting "Rule of Reason" analysis would be applied, as opposed to the "quick look" analysis.<sup>157</sup>

The court also found that the plaintiff had made a sufficient showing that it could prove at trial that the relevant market was Division I men's college basketball postseason tournaments and that the NCAA earns monopoly profits and has the power to exclude.<sup>158</sup> The court also noted that the Commitment to Participate Rule potentially adversely affected competition by depriving colleges and fans of a potentially attractive postseason tournament choice and the possibility of participation in an additional tournament; however, it was left for trial to determine if the plaintiff could prove anticompetitive effects or if NCAA could prove pro-competitive justifications under the Rule of Reason analysis.<sup>159</sup> During trial the parties settled for \$16 million and the NCAA purchased the NIT for \$40.5 million.<sup>160</sup> Some argue that the purchase will create a monopoly and should not be allowed to stand; however, thus far neither the Federal Trade Commission nor the Department of Justice have taken any action.<sup>161</sup>

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153. *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); *MIBA II*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

154. *MIBA I*, 337 F. Supp. 2d at 568. The challenged rules were the "End of Playing Season" rule which prevented any games from being played after the NCAA tournament's final game; the "One Postseason Tournament Rule" which prohibited a team from playing in both the NIT and the NCAA tournament; the "Commitment to Participate Rule" which required a team invited to the NCAA tournament to participate in the NCAA tournament or no tournament at all; the automatic qualification of conference champions for the NCAA tournament; and the NCAA's expansion of its tournament's playing field. *Id.*

155. *Id.*

156. *Id.* at 570. The NCAA's single actor argument was rejected. *Id.*

157. *Id.* at 573.

158. *MIBA II*, 339 F. Supp. 2d at 550. This was the area where the plaintiffs in *Worldwide Basketball* failed. *Worldwide Basketball II*, 388 F.3d 955, 961 (6th Cir. 2004), *cert. denied*, 126 S. Ct. 334 (2005).

159. *MIBA II*, 339 F. Supp. 2d at 551-52.

160. Brown, *supra* note 14.

161. Letter from Diana Moss, Vice-President and Senior Fellow of the American Antitrust Institute, to Thomas Barnett, Assistant Atty. Gen. for Antitrust, U.S. Dept. of Justice, Deborah Majoras, Chairman, Fed. Trade Comm., & Elliott Spitzer, Atty. Gen. State of N.Y. (Sept. 12, 2005), available at <http://www.antitrustinstitute.org/recent2/445.pdf>.

### C. Antitrust Challenges to the BCS

This Note does not argue whether or not the BCS violates the Sherman Act. There have been no legal challenges to the BCS to date; therefore, it will be presumed that the BCS passes Sherman Antitrust scrutiny under the *Board of Regents* "Rule of Reason" analysis as having pro-competitive benefits.<sup>162</sup>

## V. THE NCAA'S DOMINANCE OF THE COLLEGE BASKETBALL POSTSEASON AND LACK THEREOF IN THE COLLEGE FOOTBALL POSTSEASON

### A. Why Are the Two Postseasons So Different?

To understand why the NCAA will never be able to control the college football postseason in the same way that it currently controls the college basketball postseason it is important to look at how the two postseasons arrived at their current positions. As mentioned above, the NCAA used a series of rule changes to grow their basketball tournament and maintain control over the college basketball postseason. The most recent example of the NCAA exercising power over universities to maintain control over the basketball postseason was highlighted in *The NIT Case*<sup>163</sup> in which the owners of the NIT sued the NCAA over the NCAA Commitment to Participate Rule. The district court in *The NIT Case* opined that the NCAA rule might be a violation of the Sherman Antitrust Act,<sup>164</sup> but the case was settled during trial when the NCAA bought the NIT.<sup>165</sup> This eliminated any competition to the NCAA postseason tournament. In the wake of the NCAA's purchase of the NIT, two very different postseason environments are left in college basketball and in college football. The postseason in college basketball is controlled exclusively by the NCAA in a tournament format, while the postseason in college football is controlled exclusively by the BCS through agreements between conferences, bowl game organizers and television networks, leaving out the NCAA.

College football and college basketball are strikingly similar in structure and

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162. Several law review articles take up this topic. They are essentially split on whether the BCS could survive an antitrust challenge. See Jasen R. Corns, Comment, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167 (2003) (argues that litigation is unlikely but that the BCS violates antitrust law); Katherine McClelland, Comment, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167 (2004) (arguing the BCS violates the Sherman Act); Warmbrod, *supra*, note 4, at 333 (arguing an antitrust challenge to the BCS would be unsuccessful); M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235 (2004) (arguing no antitrust violation).

163. *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); *MIBA II*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

164. *MIBA II*, 339 F. Supp. 2d at 551-52.

165. Brown, *supra* note 14.

nature,<sup>166</sup> but the postseason structures of the two sports are dramatically different. Why is this the case, and how did the two sports arrive at such different outcomes? Football is not inherently incapable of being played in a postseason tournament. The National Football League holds one every year,<sup>167</sup> and college conference structures vary only slightly between football and basketball.<sup>168</sup> One possible answer is in the evolution of the postseason structures and with whom the power to control those structures was originally vested.

When basketball postseason play first started, it was organized by the MIBA in the form of the NIT tournament, not the NCAA.<sup>169</sup> The NCAA acted quickly and organized a tournament.<sup>170</sup> Next, the NCAA enacted rules to promote the success of their own tournament. These rules were rarely challenged, and only recently did the MIBA, the organizers of the NIT, mount a full-scale legal challenge to the NCAA's competition restricting rules.<sup>171</sup> However, this challenge came too late. The NIT tournament was minuscule in comparison to the NCAA tournament,<sup>172</sup> and the NCAA quickly solved its legal troubles by purchasing the NIT.<sup>173</sup>

In contrast, the football postseason was originally organized by bowl promoters through agreements with conferences to send conference champions to particular bowl games.<sup>174</sup> The NCAA did not attempt to interfere with these agreements. Further, when the NCAA attempted to restrict individual schools from entering into television contracts for their football games, the schools challenged the NCAA and won control of the right to enter into broadcast

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166. Both sports are organized into conferences and governed by similar NCAA rules in regards to amateurism, scholarships, and academic requirements. See National Collegiate Athletic Association, NCAA Sport Listing, <http://web1.ncaa.org/ssLists/sportByConf.do> (last visited Mar. 6, 2006). Rules regarding amateurism and academic requirements are the same across all sports and scholarships vary only by number based on the number of athletes required per sport. NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, Articles XII, XIV, and XV, July 2005.

167. National Football League, Playoff History, <http://www.superbowl.com/history> (last visited Nov. 21, 2006).

168. Compare National Collegiate Athletic Association, Sport Listing by Conference (Football), <http://web1.ncaa.org/ssLists/sportByConf.do?sport=MFB&division=1> (last visited Nov. 21, 2006), with National Collegiate Athletic Association, Sport Listing by Conference (Basketball), <http://web1.ncaa.org/ssLists/sportByConf.do?sport=MBB&division=1> (last visited Nov. 21, 2006).

169. *MIBA I*, 337 F. Supp. 2d 563, 566 (S.D.N.Y. 2004).

170. *Id.*

171. See generally *id.* at 563 (discussing the recent legal challenge to NCAA rule changes).

172. *Marketplace: The NCAA and the NIT* (National Public Radio broadcast Aug. 18, 2005) available at <http://marketplace.publicradio.org/shows/2005/08/18/PM200508183.html>. The NIT's net revenue in 2004 was approximately one million dollars while the NCAA tournament's TV rights alone are sold to CBS on an eleven-year \$6.2 billion contract. *Id.*

173. See Brown, *supra* note 14.

174. Johnstone Statement, *supra* note 46.

contracts for football games.<sup>175</sup> These factors allowed the football postseason bowl games to grow without unfair NCAA interference.

Today these agreements between conferences, bowl organizers, and television networks are so strong and lucrative that the NCAA is not in a position to establish a postseason playoff because doing so would require either the use of unfair restrictions to force teams to play in the NCAA tournament (which would likely be illegal based on the reasoning of *The NIT Case*) or buying out the bowl games (which is unlikely because the BCS is in a stronger financial position than the MIBA was).

*B. No Football Team Would Agree to a Playoff; Therefore, an NCAA Rule Would Be Necessary*

Based on the NCAA's treatment of revenue sharing in the postseason basketball tournament, teams participating in a football playoff would likely have to divide any revenue produced by a football playoff among all NCAA schools.<sup>176</sup> This would make schools that excel in college football unlikely to agree to a playoff because they would have to share money that they currently keep under the BCS. Additionally, college football teams of a lower caliber would be unlikely to agree to a playoff because a playoff would decrease the number of postseason play options and thereby reduce the number of postseason payouts.<sup>177</sup> The revenue from a playoff could result in a larger pie, but the pie would have to be split among a larger number of teams, and thus, teams would have to agree to a smaller piece of a larger pie.<sup>178</sup>

*The NIT Case* revealed the NCAA's unwillingness to tolerate any competition in the basketball tournament. The history leading up to the case showed how the NCAA was unwilling to lose control over the basketball postseason.<sup>179</sup> In fact, the NCAA was willing to take steps to eliminate any competition.<sup>180</sup> As the NCAA currently lacks control over the college football postseason, college football programs should look at *The NIT Case* and realize that if they agree to a playoff system, they will cede control to the NCAA that the NCAA will not give back.<sup>181</sup>

Since college football teams are not likely to voluntarily agree to an NCAA

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175. See generally *NCAA v. Bd. of Regents of the Univ. of Okla. (Bd. of Regents)*, 468 U.S. 85 (1984).

176. Maxcy, *supra* note 30, at 13. If there were a sixteen-team playoff, then only thirty-two teams would share in the money versus the current bowl system where there are twenty-eight games resulting in payouts to fifty-six teams.

177. Currently there are thirty-two bowl games involving sixty-four teams. Football Bowl Association, *supra* note 48. A sixteen-game playoff would reduce the number of participating teams to thirty-two.

178. Maxcy, *supra* note 30, at 26.

179. See generally *MIBA I*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004); discussion, *supra* Part III.

180. Maxcy, *supra* note 30, at 33 n.10.

181. *Id.* at 26.

playoff, the only way the NCAA could put together a playoff system would be through use of the Commitment to Participate Rule in a manner similar to its challenged use in *The NIT Case*.<sup>182</sup> Granted *The NIT Case* is not law, but it shows the analysis that a court would go through if the NCAA instituted measures to take control of the college football postseason. An attempt by the NCAA to do so would produce anticompetitive effects that would be much more obvious than the subtle measures used to maintain power over postseason basketball. The NCAA's hold over the college basketball postseason was gradual and played out over time, whereas any attempt by the NCAA to take control of the college football postseason now would have to be drastic given the BCS's stature.

### C. *The Situation Will Not Change*

The bowl system creates a set of postseason play options; college football teams currently have thirty-two choices.<sup>183</sup> However, choices are limited somewhat by the BCS because the BCS is really just the bowls collectively deciding who they want to invite. The BCS acts as a central coordinator in a distributive function and attempts to place highly ranked teams against other highly ranked teams.<sup>184</sup> A team can turn down a BCS bowl bid because acceptance is not mandatory, but no team has ever done so.<sup>185</sup> This choice is influenced by the pay out and reputation of the bowl. If the system works and teams are rational, then each team will go to the bowl game that will maximize exposure and revenue.

“The relationship between the power football conferences and the bowl

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182. *MIBA I*, 337 F. Supp. 2d at 549; *see also* Maxcy, *supra* note 30, at 23, 33 n.10 (noting the tactics used by the NCAA to maintain control over the college basketball postseason and commenting that an independent football playoff would be at a considerable disadvantage in competing with the NCAA because of the NCAA's treatment of the NIT).

183. Football Bowl Association, *supra* note 48.

184. Weiberg Statement, *supra* note 59. “[The BCS] has always had relatively simple objectives . . . to match the number one and number two ranked teams . . . [and provide] a means by which other highly regarded teams can be matched together to create quality bowl match-ups.” *Id.*

185. It would be irrational for a team to turn down a BCS bowl bid given the \$14 to \$15 million payout. Revenue Distribution, *supra* note 65. Other bowls average a significantly lower payout, between \$750,000 and \$5.125 million. Humanitarian Bowl, Inc. I.R.S. Form 990 (tax year beginning Mar. 1, 2003 and ending Feb. 29, 2004) at 11 (on file with author); Florida Citrus Sports Assoc, Inc. I.R.S. Form 990 (tax year beginning Apr. 1, 2003 and ending Mar. 31, 2004) at 17 (on file with author). Teams can also accept a bid to a bowl game early, even if that team's conference has an automatic bid to a different bowl game. For example, during the 2005 season Ohio State finished second in the Big Ten conference, through a “tie-in” arrangement the second place Big Ten team usually attends the Capital One Bowl. However, Ohio State chose to accept an at-large bid from the Fiesta Bowl. History of the BCS, *supra* note 6.

organizers provides the main obstruction to an NCAA playoff.”<sup>186</sup> If an NCAA playoff were instituted it would compete with the bowl games.<sup>187</sup> Teams would not necessarily have a choice as to where they would play in the postseason because the Commitment to Participate rule is still on the NCAA books;<sup>188</sup> this would give the NCAA a considerable advantage.<sup>189</sup> However it is unlikely use of the rule in the football context would survive antitrust challenges based on the analysis of *The NIT Case*.

What would happen if the Rose Bowl (the largest bowl game) did not go along with an NCAA playoff system and instead chose to invite teams and pay them \$13 million to play in the game?<sup>190</sup> It is unlikely that a team would pass up the money of a BCS game to go to an NCAA playoff. This is exactly what stood to happen in college basketball if the MIBA could have maintained their lawsuit. The NIT could possibly have paid more through less restrictive corporate sponsorship rules<sup>191</sup> which would have resulted in more tournament revenues to be paid out to participating teams. The NIT could have potentially lured teams away from the NCAA tournament in the same fashion that the BCS is able to control the postseason in college football. This shows that even if the NCAA instituted a playoff and the Commitment to Participate Rule were unchanged, it is still unlikely that a powerhouse college football program would choose to play in an NCAA tournament over a high-paying BCS bowl game.<sup>192</sup>

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186. Maxcy, *supra* note 30, at 23.

187. *Id.*

188. NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, art. 31.2.1.1, July 2005. At the time of submission of this Note a search of NCAA pending legislation revealed no pending legislation that would alter the “Commitment to Participate Rule.” See <http://www.ncaa.org> (follow “Legislation and Governance” hyperlink; then follow “Rules and Bylaws” hyperlink; then under “Proposed Legislation” follow “Division I” hyperlink).

189. Maxcy, *supra* note 30, at 23.

190. This is what happened with the Bowl Coalition and Bowl Alliance. See discussion, *supra* Part II.

191. Currently the NCAA restricts the nature of advertising at the men’s basketball championship. The championship cannot be sponsored by beer, liquor, wine, or tobacco companies; alcohol sales are not allowed; and beer and wine advertising is restricted to no more than fourteen percent of the advertising space in event programs and no more than sixty seconds in every hour during a television broadcast. NCAA MEMBERSHIP SERVICES STAFF, 2005-06 NCAA DIVISION I MANUAL, art. 31.1.14.1.1-2, 31.1.15, July 2005.

192. The NCAA could sanction any team that chooses to do so. However, that fine would have to be high enough to offset the payout offered by a BCS game (some \$13 million). If the fines, were significant, some schools might seriously consider leaving the NCAA. See Steve Wieberg, *Option for Top Football Schools: Leave NCAA*, USA TODAY, Nov. 4, 2003, at 8C (discussing the option of top football schools leaving the NCAA) [hereinafter Wieberg, *Option for Top Football Schools*].



## VI. POSSIBILITIES FOR THE FUTURE AND CONCLUSION

### A. Possibilities for the Future

One option discussed at a recent congressional hearing was the “plus-one” format.<sup>193</sup> Under this format there would be one additional game, played after all other bowl games have been played, which would feature two teams that “advanced” from the first four bowl games.<sup>194</sup> The BCS could organize this or the NCAA could step up and make this game their national championship game.<sup>195</sup> As it now stands, university presidents are reluctant to add an additional game to the season so the plus-one format will most likely not be appearing anytime soon.<sup>196</sup>

A more drastic solution views the BCS as an alternative to the NCAA and calls for a breakaway from, or the formation of a new division within, the NCAA.<sup>197</sup> The NCAA’s original purpose of standardizing rules seems to be fulfilled and its current usefulness is sometimes called into question.<sup>198</sup> The new division or the BCS could loosen restrictions on things like length of season and academic standards to allow for a greater focus on football.<sup>199</sup> This could allow for the organization of a playoff independent of the bowls, or the bowl games could be incorporated into an extended regular season with the playoff to follow. This would preserve the bowl games, add a playoff, and allow for a consensus national champion.

### B. Conclusion

In the end, NCAA football programs should learn from the evolution of the

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193. Associated Press, *Congress Won't Legislate After BCS Hearings*, ESPN.COM, Dec. 7, 2005, <http://sports.espn.go.com/ncf/news/story?id=2251585>.

194. *Id.*

195. *Id.* The plus-one game is not the same as the fifth BCS game added this year. The current additional BCS game will feature two teams who have not already played in a bowl game that year, whereas the plus-one format game would feature two teams who have already played their respective bowl games. *Id.*

196. *Review of Selection Process for College Football Bowl Games: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) (statement of Jim Delaney, Commissioner, Big Ten Conference).

197. See generally Wieberg, *The Runaway Train*, *supra* note 16 (discussing option of a new NCAA division); Wieberg, *Option for Top Football Schools*, *supra* note 192 (discussing teams leaving the NCAA). The NCAA’s recent name change of Division I-A to “Football Bowl Subdivision” might appear to be a step in this direction; however, the change is merely a matter of semantics and there have been no changes in the rules. See Albright, *supra* note 1.

198. See Wieberg, *The Runaway Train*, *supra* note 16.

199. Granted this is totally converse to the ideal of a student-athlete, but with most football programs failing academically as it is, see Associated Press, *41 Percent of Bowl Teams Miss Academic Standards*, ESPN.COM, Dec. 5, 2005, <http://sports.espn.go.com/ncf/bowls05/news/story?id=2248992>, this ideal of a student-athlete may be fading into the past.

college basketball postseason and resist any attempt by the NCAA to institute a playoff. College football programs are currently maximizing their wealth through the bowl system and the successful schools and conferences are being rewarded for their success. The wealth created by that success is then in turn distributed within conferences, which promotes parity within conferences and motivates all teams to strive for bowl game bids and increase revenues.

Any maneuver by the NCAA to gain power in the college football postseason would likely require the use of the Commitment to Participate Rule or a similar rule. However *The NIT Case* has demonstrated that this type of behavior would likely fail under Sherman Act scrutiny. Unlike the NIT, which was somewhat easily purchased by the NCAA, the NCAA could not easily purchase the BCS to take control of the college football postseason and solve any potential antitrust litigation. Also, the BCS would not likely be willing to sell.

No matter how much fans and journalists cry out for an NCAA playoff, the NCAA is incapable of organizing a playoff given its current situation. Drastic changes in the landscape of college football, such as further NCAA reorganization or a split from the NCAA, are needed before a playoff can become a reality in the postseason of college football.