

Antitrust And The Bowl Championship Series

While the Florida Gators celebrated their second Bowl Championship Series (BCS) title in three years, the Utah Utes and their fans complained bitterly about their exclusion from the title game despite being the only unbeaten

JAMES MORSCH

team in major college football. Utah's Attorney General, a graduate of the University of Utah's School of Law, issued a statement saying he is looking into whether the BCS's bowl selection process violated the antitrust laws. This article discusses why such an investigation is unlikely to lead to a successful antitrust claim and the difficulty of challenging arrangements like the BCS as anticompetitive despite what might initially appear to some observers to be a unfair or improper use of market power.

Background on the BCS

The BCS sponsors five bowl games: the Orange, Sugar, Fiesta, and Rose Bowls as well as the National Championship Game. Six conferences receive automatic bids. The five remaining conferences that participate in the BCS, including the Mountain West Conference where Utah plays, can place teams in the BCS bowls if they are ranked high enough in the BCS poll. At the end of the year, the BCS crowns a collegiate national champion.

The BCS is a joint venture comprised of college football competitors. As a general matter, the antitrust laws permit certain conduct by participants in a joint venture that would not pass muster if the competitors had engaged in the same conduct outside the auspices of a joint venture. This includes joint pricing of their products, in this case the fees paid to televise and attend their bowl games, and joint decisions to limit their output, namely the number of BCS bowl games offered each year. If such joint conduct was ever challenged under the antitrust laws, central to a court's analysis of its legality would be whether (1) the BCS is a legitimate joint venture, (2) the bowl selection process is necessary to

achieve the joint venture's goals and (3) there are other, less exclusionary methods that could be utilized.

The Legality of the BCS' Selection Process

The BCS is a form of joint venture. Established in 1997, the BCS was created to provide a more objective basis for selecting a collegiate football national champion and to create other bowl matchups for highly regarded Division I-A teams. The BCS is managed by the commissioners of the eleven participating conferences, the athletic director of the University of Notre Dame, and representatives of each of the five bowls. Although revenues from the BCS bowl games go to participating colleges and conferences, the BCS is responsible for negotiating exclusive television contracts for the bowls it sponsors and for establishing the criteria used in selecting the teams to play in the National Championship Game. The BCS bowl games generate revenues in excess of \$100 million a year. According to published reports, the vast majority of these revenues go to colleges and universities that participate in the BCS, leaving non-BCS schools with little or no revenue for their Division I-A football and other sports programs.

While it does not appear that the BCS has ever faced antitrust challenge, courts generally have characterized similar sports ventures like the National Collegiate Athletic Association (NCAA) as legitimate joint ventures. As the Supreme Court made clear in *NCAA v. Bd. Of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), however, there are limits to what even a legitimate joint venture can do in the name of promoting college football. In *Bd. of Regents*, the court held that the restraints on competition inherent in membership in the NCAA can be challenged by a participating university under the rule of reason and sided with two universities that sued the NCAA over its policy of limiting the number of televised football games. The court found that, while the NCAA generally is good for competition because it promotes college football as a unique brand and its own relevant market, the association's policy of

restricting the number of televised games that any individual college could contract for did not serve any legitimate pro-competitive purpose.

Applying this same analysis to the BCS, the BCS probably constitutes a legitimate joint venture because it fosters competition in Division I-A college football by creating bowl match-ups that could not have existed prior to 1997 (due to agreements individual bowls had with conferences) and by initiating for the first time a “national championship game.” While many sports fans, journalists and political commentators question whether the winner of the BCS’ National Championship Game truly deserves recognition as the country’s best college football team, it would be very difficult to argue that the BCS’ bowl selection process either serves no pro-competitive purpose whatsoever or somehow represents an abuse of the BCS’s market power. It also would be very challenging to show under the rule of reason that the BCS’s bowl selection process is not necessary to achieve the joint venture’s goals or that there are other, less exclusionary, methods that could be utilized.

First, the BCS selection process is open to any college or university that is willing to participate in it. Although the BCS has elected to award automatic bids to certain conferences and not others, any participating school can qualify for a BCS bowl game by winning enough football games to achieve a high ranking in the polls. Obviously, some sort of selection process is necessary given there are more than 100 Division I-A college football programs, and the BCS brand and participating colleges’ revenues are enhanced by matching the best of the best against each other.

Second, the BCS utilizes objective criteria that limits its ability to unfairly favor one school over another in the bowl selection process. Moreover, that criteria — ranking in polls, win-loss records, strength of schedules — is reasonably related to the BCS’s goal of identifying the best college football teams in the country. Partisans of particular college and university football programs, of course, may disagree over whether the criteria used by BCS results in best team being crowned the BCS national champion, but it would be difficult to point to an alternative (i.e., a playoff) that would do a better job identifying a consensus national champion while preserving college football’s bowl game system and still not result in the exclusion of teams like Utah.

Third, even if the BCS selection process results in a national championship match-up that does not pit “the best” teams against each other, the BCS has a strong argument that the title game nonetheless generates an unprecedented amount of revenue and attention for Division I-A college football and that its other bowls allow universities without a history of success in major bowl games or without a large fan base to gain exposure through a national television audience.

Finally, even though the BCS manages to generate the lion’s share of bowl revenues, it would be difficult for a school that wanted to challenge the system to claim that it was foreclosed from competing against schools selected for BCS bowl appearances. There are, at last count, 26 non-BCS bowl games held each year, including such interestingly named bowls as the Chick-fil-A Bowl, PapaJohns.com Bowl and the Meineke Car Care Bowl. College and university football programs compete for and earn millions of dollars in television, attendance and sponsorship revenue outside of BCS-sponsored bowl games. Thus, while a school might contend that BCS has a virtual monopoly over the most lucrative bowl games, its selection process does not preclude schools from competing for non-BCS bowl revenue or for other revenues associated with college football.

In conclusion, an antitrust challenge to the BCS’ bowl selection process is unlikely be successful. There are legitimate, pro-competitive reasons for the process that is utilized. While the BCS and the polls may have gotten it wrong this year by not matching Florida against Utah in the National Championship Game, Utah and its supporters would be well advised to push for an automatic birth for their conference in BCS bowl games rather than suing to achieve the recognition their football program deserves as one of the best in the country.

James Morsch is a partner with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. He concentrates his practice in complex commercial litigation, including counseling companies and litigating antitrust and other competition law matters. The views expressed are personal to the author.



BUTLER RUBIN
excellence in litigation™