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The Real March Madness

Law360, New York (March 16, 2011) -- Sixty-five (now 69) teams. Automatic berths for all conference champions. Three weeks of play. George Mason, Villanova, N.C. State, and most recently Butler — a new Cinderella story every year. Six wins to a national championship. One undeniable national champion. No one can really dispute the energy, excitement, unlimited possibility and ultimate finality of NCAA basketball come spring.

When it comes to college sports, or any televised sports for that matter, it rarely gets better than this. Which is why every spring, as the NCAA's finest, along with their less heralded peers, battle their way down the road to the Final Four, we are so strikingly reminded of the relative inadequacy of college football's postseason.

Who can argue with Duke's championship run last year? Who can challenge the Blue Devils' right to the NCAA title? Every team that had a chance got their chance. So did dozens of teams that had no realistic chance at all. It was all part of the frenzy. Duke bested them all.

And here we are again, at tournament time, realizing just how good it all could be for football too. Where, instead of griping about poll numbers and bowl matchups, about whether undefeated teams like '10 TCU, '09 Boise State or '08 Utah got their fair shake, we could be celebrating '10 Auburn, '09 Alabama, or '08 Florida as irrefutable national champions.

Where instead of a single-game championship matchup, with a parade of inconsequential side-shows, there could be one grand all-in playoff. This is where the real March madness sets in. It works so well for basketball (and virtually every other NCAA sport). Why can't it work the same for college football?

The answer lies within the much maligned Bowl Championship Series (BCS). This is the system set up by the 11 conferences of the NCAA's Football Bowl Subdivision (FBS), formerly Division 1. It dictates the only path to a national championship and the spoils that go with it. It is a very narrow path. It heavily favors the traditional football powers of the Big Ten, Big East, Pac-10, SEC, ACC and Big 12, as well as Notre Dame.

For everyone else, it provides, at best, a shot (a long shot) at one of the four other BCS bowls. Far more likely, it relegates them to the sea of also-rans playing in one of the countless secondary bowls that continue to sprout up across the country.

Disgruntled schools and football fans have been complaining about this controversial system for years. The battle cry has only gotten louder since President Barack Obama himself weighed in on the need for change. Congressional hearings have been held. Bills have been introduced. Even the U.S. Department of Justice has vowed to take action.

The U.S. antitrust laws are at the center of this revitalized campaign. Surely, the FBS elite cannot continue to entrench and perpetuate their football dominance through such an exclusionary arrangement. At least, that is the reasoning of those arguing for reform. Unfortunately, the antitrust laws do not provide the necessary fix so many are seeking here.

Not without ignoring how the BCS came to be and where college football would be without it.

The BCS and Its Origins

Unlike virtually every other college sport, there has never been a formal playoff system for Division I college football. The postseason has always consisted of a jumble of independent bowl games. Starting with the Rose Bowl in 1902, independent organizations in cities across the country developed strategic relationships with particular conferences to host postseason "championship" games to bring revenue to their communities at a time of year when business would ordinarily be slow.

These predetermined bowl affiliations created storied rivalries and enhanced economic revenue for the cities involved. However, they rarely provided for a championship matchup between the nation's top two teams.

This scattershot system of stand-alone, preordained bowl contests lasted until 1991 when several bowls and conferences got together to form the Bowl Coalition to facilitate the chances of a one-two postseason matchup. The coalition kept the historic bowl affiliations intact in order to ensure participation of the major conferences. But it waited until the end of the season to assign the open bowl slots. While this loose coordination proved moderately successful in securing top matchups, its adherence to preset bowl affiliations still hampered the likelihood of a true national championship.

The coalition was thus replaced in 1995 by the Bowl Alliance which finally did away with the traditional bowl tie-ins. All of the bowl matchups were to be determined at the end of the season. This improved the system even further. But not enough. The Rose Bowl, and its affiliated Big Ten and Pac-10 conferences, refused to participate. Without these power conferences and their celebrated bowl, there was still little chance of obtaining on a consistent basis the long sought after championship contest. Enter the Bowl Championship Series.

The BCS was formed in 1998 and remains the latest link in this evolutionary chain of postseason conference coordination. For this latest incarnation, everyone joined the party — the Big Ten, Big East, Pac-10, SEC, ACC, Big 12, Notre Dame, and their historically affiliated Rose, Orange, Sugar and Fiesta Bowls.

As the BCS works today, the champion of each of these conferences qualifies automatically for one of these top bowls. So does Notre Dame if it is in the top eight of the BCS rankings (a composite of the Harris Interactive College Football Poll, the USA Today Coaches Poll, and several other independent computer rankings). The two top ranked teams play in the BCS National Championship game.

The BCS clearly accomplished what it set out to do. It guarantees a championship matchup between the two top ranked teams. And it ensures that the remaining top teams square off in one of the four premier bowls. College football postseason play has never been more exciting or more exacting in providing for the best possible matchups.

But for many, including the most vocal of sports fans, the BCS does not go far enough; it is patently unfair. That is because for the other, less renowned FBS conferences — Conference USA, Mid-American, Sun Belt, Mountain West and Western Atlantic — the BCS offers only a pyrrhic path to postseason glory and riches.

For these disfavored conferences, only one team can automatically qualify for a BCS bowl, and then only if that team has a top 12 ranking (or a top 16 ranking if it is higher than the ranking of a champion of one of the favored conferences). A second or third team might also qualify by invitation, but this is a rare occurrence. As for the right to the title fight, forget about it. While theoretically possible, it has not happened yet. Based on the skewed BCS

dynamics, it is not likely to happen anytime soon.

The revenue share from the BCS regime is equally misapportioned. The favored conferences get the lion's share of the lucrative BCS television deals. In fact, they got roughly 90 percent of the \$700 million in revenue over the past six years. They are certain to take home a comparably large slice of the \$500 million ESPN agreed to shell out for the rights to air the 2011 to 2014 BCS games. For those FBS middlings, they must settle for the crumbs.

Two Sides of the Storm

No real shot for the title. Only one or two openings for a top bowl. A mere trifle of the postseason payday. Obviously in the BCS, not all conferences are created equal. And to those yearning for change, the current system is destined to keep it that way by engendering a self-perpetuating cycle of presumed mediocrity — limited bowl appearances, trivial revenue share, constrained recruitment, low ranking and so on.

Even an undefeated season against the nation's top BCS powers seemingly cannot overcome this manifest destiny. Just ask the University of Utah, Boise State or TCU — they never made it into the BCS championship game despite their undefeated records in 2008, 2009 and 2010, respectively.

Proponents of the BCS system obviously see it quite differently. It is not about excluding the secondary conferences, or putting up roadblocks to their BCS bowl success. Rather, it is about giving them the opportunity they never had before.

Under the pre-BCS regime, these teams almost never participated in a top bowl because they did not have the necessary tie-in relationships. That is why in the entire 45-year period leading up to the formation of the original Bowl Coalition, these teams made a total of only six appearances in what now comprise the BCS bowls. Under the current system, these teams have had seven appearances in the past seven years alone. Quite an improvement.

What is more, it is the privileged conferences that brought their bowls into the BCS mix in the first place. Clearly, they would not have agreed to offer up their historic bowl affiliations without some guarantee that their bowl prospects would be equally, if not more, promising. The automatic bowl spot for each of these conference champions provides that assurance. The disfavored conferences, on the other hand, need (and arguably deserve) no such assurance. Under the new system, their bowl prospects have gone nowhere but up.

The harsh reality is that these secondary conferences are not even necessary to the success of the BCS venture. They do not have the historic bowl relationships. They generally do not comprise the best teams. And, their teams do not have the same commercial appeal. To the BCS defender, these conferences have nothing to complain about. They should be grateful that they are allowed to participate at all. And (bias in the college football zeitgeist be damned!), if these teams are really as good as they pretend to be, nothing is stopping them from securing a top two ranking and a direct line to the championship game.

So there you have the two sides to the great BCS debate. The problem with this back-and-forth between BCS fans and foes is that it largely has been displaced by a very different dialogue. Not whether the BCS system is inherently fair. But whether a formal March Madness type playoff system would be better. That is the question that has dominated all of the recent chatter in Washington on the pitfalls of the BCS program. It is certainly a valid question. It may even be the right question for getting to the bottom of this dispute. But, from an antitrust perspective, it entirely misses the point.

No Antitrust Fix

In its simplest form, the U.S. antitrust laws are about protecting the competitive process.

This means ensuring that in any given market, the sellers of a particular product or service are subject to real competition, or at least the threat of it. Only then can the ultimate aim of the antitrust laws be secured; namely, maximizing innovation, quality and choice while minimizing the ultimate price to consumers.

So, for example, a monopolist may not engage in wrongful conduct — such as certain types of exclusive deals — that would further increase or entrench its market dominance. Likewise, competitors may not gang up on other competitors or conspire to somehow disadvantage their common customers. In either case, competition is foreclosed and consumers get hurt. They pay more and/or get less.

Critics of the BCS contend that the current championship bowl system fits precisely into this proscribed competitive paradigm. After all, the favored BCS conferences comprise the schools that dominate college football. And, they have gotten together to create a postseason system that clearly favors their own. They get most of the money. They get most of the bowl spots. They get the only real chance for a national title. They get a perpetual leg-up over their less privileged rivals. On its face, this would appear to be just the type of exclusionary arrangement the antitrust laws are supposed to cover. There are two basic reasons why it is not.

First, we are dealing with a sports league where there is an inherent need for coordination and cooperation among competing conferences and teams. Without it, there could be no postseason play of any kind, whether through bowls or playoffs. The antitrust laws are applied much more loosely in these situations. In fact, they are not applied at all where the challenged arrangement is found to be essential to the very existence of the product or service.

Arguably, that is the situation here. The BCS is necessary for facilitating a true national championship. History shows where college football would be without it — at best, a series of disconnected predetermined postseason challenges with only a slight chance for a one-two matchup.

To be sure, a formal playoff system would provide — by many accounts, if not most — a more equitable and competitive course to the national championship. But this kind of predilection has no place in the analysis. The antitrust laws do not measure a particular practice or arrangement by how it stacks up against something else held out to be better, fairer and more complete.

Instead, the antitrust laws look to how the challenged practice itself has changed the competitive landscape. If it has made it better, by, for example, allowing for a higher quality product or service, then the antitrust laws will not kick in. This is true, even if the product or service could be even better through some other design.

By most accounts, the BCS has vastly improved college football's postseason play. It has created a real national championship game, and ensured that it will be played between the two top-ranked teams in the nation. It has enhanced the overall quality of the leading bowl games.

And, it has opened the door for the less brawny conferences and teams to make a run at some measure of postseason prominence. Many contend that even the regular season has benefited from the system by creating a "do or die" scenario where a single loss can take a team out of championship bowl contention. It is by no means a perfect system. But love it or hate it, it is a lot better than it used to be.

The other major reason why the antitrust laws do not apply here is that there is no real consumer harm at stake. Sure, the subsidiary BCS teams and non-BCS teams are the subject of unequal treatment. But that is not the constituency of primary antitrust concern. It is the

ultimate consumer of the product or service. Here, that most obviously would include the college football fan. It might also include the TV networks purchasing the postseason broadcast rights as well as the bowl organizations that host the games. None of these groups have been harmed by the BCS. They all have done much better.

Whether they could do even better under a playoff system does not matter. A court could never impose such a system, even if it found the BCS did violate the antitrust laws. All it could do is disband the current BCS system, bringing us back to the relative dark ages of haphazard bowl matchups. Antitrust intervention or not, it is unrealistic to expect that the entire bowl system, and the hundreds of millions of dollars that it brings to businesses and universities across America, is going to disappear anytime soon.

Conclusion

So let us all be real here. The current BCS system could be better, a lot better in providing a more open, just and compelling postseason contest. A March Madness-type playoff system would certainly do the trick. But the antitrust laws are not going to get us there. They are not even implicated given the vast improvements the BCS has brought over the indiscriminate bowl assemblage that preceded it.

The sooner everyone recognizes this, the better they will fare in reaching some common ground on improving the mighty BCS. And maybe next winter, instead of bemoaning the relative failings of the BCS system, we all will be embracing a new system, one that draws on both the unique history the BCS and the inimitable force and spirit of the March Madness tournament.

--By Gordon Schnell (pictured) and David Scupp, Constantine Cannon LLP

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