

Antitrust Law Blog

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Senate Antitrust Subcommittee Discusses BCS Legality

On November 16, 2008, just after President Barack Obama's election, the president-elect stated in an interview with CBS's 60 Minutes that the Bowl Championship Series' (BCS's) current system should be dismantled and replaced with a playoff system:

I think any sensible person would say that, if you've got a bunch of teams who play throughout the season and many of them have one loss or two losses, there's no clear, decisive winner, that we should be creating a playoff system. Eight teams, that would be three rounds to determine a national champion. It would -- it would add three extra weeks to the season. You could trim back on the regular season. I don't know any serious fan of college football who has disagreed with me on this. So I'm going to throw my weight around a little bit. I think it's the right thing to do.1[1]

In response to President Obama's comments, BCS coordinator John Swofford announced that BCS would "welcome a dialogue on what's best for American football." Id.

Almost nine months later, on July 7, 2009, Senator Orrin Hatch (R-Utah), the ranking member of the Senate Antitrust Subcommittee, initiated a formal dialogue in the U.S. Senate on the legality of the Bowl Championship Series (BCS).2[2]

Senator Hatch noted that in the ten years the BCS has been in existence, numerous congressional committees have held hearings to examine the legal and consumer-protection issues associated with the BCS system. In fact, Senator Hatch himself chaired a hearing in the full Judiciary Committee on this issue in 2003. Id.

In his opening statement to the Subcommittee, Senator Hatch detailed his concerns that the BCS violated both Section 1 and 2 of the Sherman Act: "Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, or conspiracies to limit competition. I've said before that I

don't believe a plainer description of the BCS exists." Id. Senator Hatch characterized the system as an agreement between preferred conferences and the major bowl games as to how they will compete against each other and the non-preferred conferences. Id.

Under the current BCS system, six select conferences are guaranteed to receive a large share of the BCS revenue to distribute among their member schools. Id. The remaining five non-preferred conferences, which include nearly half of all the teams in Division I, all share a much smaller portion of the BCS revenue, even if one of their teams is fortunate enough to play their way into a BCS game. Senator Hatch pointed out that over the lifetime of the BCS, the preferred conferences have received nearly 90 percent of the total revenues. Id.

The subcommittee hearing was called for by Senator Hatch, whose state had an undefeated college football team in 2008 that was not chosen to play in the BCS's national championship game. "It's hard to imagine what more [the University of Utah] could have done." Brush, Law 360, July 7, 2009. Not surprisingly, in presenting his argument that the BCS violates Section 2 as well, Senator Hatch used the recent example of University of Utah:

In 2008, two teams, Utah and Boise State, met the qualifications for an automatic BCS berth, but, under the rules, only one of them, Utah, was invited to play in a BCS game. Furthermore, four teams, Utah, Boise State, Texas Christian, and Brigham Young, finished the season ranked higher in the BCS's own standings than at least one of the teams that received an automatic bid. Clearly, the BCS bowl games exist in a category all their own and the architects of the BCS system appear to have intentionally excluded teams from non-privileged conferences, not on the basis of competition, but due to pre-arranged agreements.^{3[3]}

In response to Senator Hatch's hearing, Utah Attorney General Mark Shurtleff said he was considering an antitrust investigation. Brush, Law 360, July 7, 2009. Since the hearing, little has been done to change to BCS system. However, BCS coordinator John Swofford expressed his lack of concern that much would happen as a result of the hearing: "Much of the time, the criticism of the BCS heats up when there's a particular school that feels it deserves the chance to play in the championship game and does not receive that opportunity." Brush, Law 360, July 7, 2009.

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4[1] See Michael Wilbon, "[When the President-Elect Talks, The BCS Should Listen](#)," *The Washington Post*, November 19, 2009;
See Associated Press, "[Swofford: We 'welcome dialogue on what's best for college football'](#)," *ESPN*, updated Nov. 18, 2008.

5[2] See Orrin G. Hatch, "[In Case You Missed It: Hatch's Opening Statement at BCS Hearing](#)," July 7, 2009

6[3] See Orrin G. Hatch, "[In Case You Missed It: Hatch's Opening Statement at BCS Hearing](#)," July 7, 2009
