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The College Bowl Alliance and the Sherman Act

by
LAFCADIO DARLING*

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Introduction

This note explores the question, recently asked by observers and Congress, of whether the college football Bowl Alliance (hereinafter "the Alliance") constitutes a violation of the Sherman Act. I conclude that, even though a successful antitrust action against the Alliance would be unlikely, the agreements which constitute the Alliance would probably be found unlawful under section 1 of the Act, were such an action brought.

Since the emergence of college football on the national sports scene many decades ago, determining which school should be crowned "national champion" in a given year has been fraught with difficulty, disorganization, and controversy. Fans, coaches, and sports writers have perennially watched powerful teams play successful seasons and, at the end, debated as to which of that year's best would have the advantage in a hypothetical match-up. These disputes were rarely settled on the field since actual games between the year's best teams often did not occur. Top contenders were frequently in different conferences and regions, and were unable to play one another for the title of national champion. Consequently, the arguments were usually not resolved on the field of play, and the arguments went on.

Unlike most college and professional sports, in which such competing claims of superiority are settled by a playoff, the Division I-A college football season has traditionally ended with a series of bowl games. Until recently, the bowls generally consisted of match-ups between inter-conference

1. After this note was written, the Bowl Alliance changed its name, and a similar association of conferences and bowls is now known as the Bowl Championship Series ("BCS"). Although the name has changed, the antitrust concerns remain the same, as the agreements and arrangements which constitute the BCS are virtually the same as I describe in this note.
2. The first bowl game is thought to have occurred in 1894 between the University of Chicago and Notre Dame University. See Antitrust Implications of the Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition, 105th Cong. 9, 43 (1997) [hereinafter Antitrust Hearing]. The next known bowl game was the first Rose Bowl in 1902, and the bowl system does not seem to have become widespread until the 1920's. See id.
rivals or nationally prominent schools, but frequently did not include a game between the nation's strongest teams that season. Thus, the schools and their fans have often been left at the end of the college football season with two or more dominant teams and only the semi-subjective rankings (generated by writers and coaches) to tell them who is "#1" for that year. Although the National Collegiate Athletic Association (NCAA) has set up a playoff system for all other intercollegiate sports, as well as for football in the lower divisions, the bowl system has remained intact for the Division I-A football schools.

Ostensibly in response to growing discontent with the lack of a clear national championship decided on the field of play, the first incarnation of the Bowl Alliance was formed. The stated purpose of the Alliance was to insure that a national champion was determined each year by matching the first and second ranked teams in a post-season bowl. While the prospect of assuring a national championship game was well-received, the limited membership and exclusivity of the Alliance and its member bowls began to raise concerns. Most prominently, the charge was made that the Alliance constituted a violation of the antitrust laws, as embodied in

3. See Antitrust Hearing, supra note 2, at 33-36.

4. The National Collegiate Athletic Association [hereinafter NCAA] awards the national championship to the team which finishes first in the combined AP and ESPN-USA Today coaches polls. See Don Borst, The BCS for Beginners (visited Apr. 10, 1999) <http://web4.sportsline.com/ulpage/covers/football/college/dec98/bcsbegin/2198.htm>. Even if one accepts the wisdom of the voters, problems remain. For example, in the 1997-98 college football season, the University of Michigan and the University of Nebraska were crowned co-champions, since the teams were tied in the final poll. See Richard Rosenblatt, Michigan, Nebraska Split National Title (visited Apr. 10, 1999) <http: //washingtonpost.com/wp-srv/sports/colfoot/longterm/1997/bowls/news/title3.htm>.

5. The NCAA, founded in 1905, is a non-profit organization composed of colleges that engage in sports and is designed to promulgate rules and act as a neutral body to regulate intercollegiate athletics. See Antitrust Hearing, supra note 2, at 44-47.

6. NCAA football is divided into four Divisions (I-A, I-AA, II, and III) with the goal of matching up schools of roughly equivalent size, athletic excellence, and financial strength. See id.
the Sherman Act, since it excluded certain conferences and teams and altered the free market of the bowl system. Although subsequent changes to the Alliance rules have been made in an attempt to address these problems, many antitrust questions continue to surround this amorphous set of agreements known as the Bowl Alliance: What is the relevant market? What role do the Alliance members play? What are the Alliance's purposes and effects? Do these agreements, through their purpose or effects, unreasonably restrain trade? Are there any less restrictive alternatives?

This note will examine the factual features of the Bowl Alliance and analyze the antitrust issues which they raise. It will initially detail the genesis and history of the Alliance so that its creation and operation can be fully understood. Next, it will discuss the sections of the Sherman Act the Alliance has been accused of violating and will assess which of these claims are the strongest. It will then attempt to characterize the markets which are affected by the Alliance to allow a coherent assessment of if and how these competitors are damaged by the operation of the Alliance. After the background is laid, this note will discuss the applicable antitrust standards that courts use, and evaluate which would likely be applied to the Bowl Alliance. Finally, it will apply the legal standard that seems most appropriate to the Bowl Alliance in an effort to decide whether a hypothetical trier of fact would find that the Alliance does indeed cross the antitrust line drawn by the Sherman Act.

I

What is the Bowl Alliance?

The Bowl Alliance does not have a concrete beginning or distinct structure, but rather is a set of vertical and horizontal agreements which has changed shape several times since its inception. In order to understand how the present Bowl Alliance works, it is useful to look at the origins of the present post-season bowl system.

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A. History

Before the Bowl Alliance was introduced into post-season college football, the bowl system worked on a mixed bidding and placement system. Stated simply, a college team would get invited to a bowl for one of two reasons. First, if the team finished the season at a designated place in its conference standings, it would be invited pursuant to an automatic bid. For example, the team which won the Pacific 10 Conference was automatically entitled to play in the Rose Bowl. Second, a team which did not qualify for one of these designated spots could be invited to a bowl, based on that bowl's decision that the school would be a desirable participant in that year's bowl game. This second method was essentially a bidding process, in which certain available teams would receive multiple invitations and have a choice of bowls. Each of the bowls had an independent governing committee which made the selection decisions and followed its own rules. Thus, the pre-Alliance regime consisted of some vertical agreements between conferences and bowls, alongside a free bidding system for the remaining bowl slots. This twofold system had the advantage of being flexible, since it allowed the selection of a good team which was not in a traditionally strong conference, while still giving certain popular conferences some assurance of bowl play. As expressed above, however, the major disadvantage of this system was its frequent failure to produce a national championship game. Indeed, between 1945 and 1991 (the year the Alliance began), the top two ranked teams played on only two occasions.

This loose invitation system underwent a dramatic change with the advent of the Bowl Alliance. The Alliance (originally...
called the "Bowl Coalition") began in 1991 when five major football conferences—the Southeastern Conference, the Southwestern Conference (SWC), the Big Eight, the Atlantic Coast Conference (ACC), and the Big East—and the independent Notre Dame University formed a set of agreements among themselves and with the Committees of four major post-season Bowls— the Federal Express Orange, USF&G Sugar, IBM Fiesta, and Mobil Cotton Bowls—to change the way that bowl teams were selected. Under the original plan, the Orange Bowl, the Sugar Bowl, and the Cotton Bowl would invite the champions of the Big Eight, the Southeastern Conference, and the SWC, respectively, to fill one of their slots while the Fiesta Bowl had two open slots. The Bowls also agreed to fill these open positions with the champions of the ACC, Big East, Notre Dame, and "additional teams that were attractive and had completed their seasons with exceptional records." The stated purpose of this arrangement was to increase the chances of a national championship game by controlling the pairings in these major bowls.

This arrangement proved to have several flaws, both practical and legal. As an initial matter, the main justification offered for the creation of the Alliance—a national championship game—was still elusive. If, for example, the University of Florida was the Southeastern Conference champion and number one in the national rankings, and the University of Nebraska was the Big Eight champion and number two, Florida would still have been obliged to play in

13. In the interest of clarity, I will refer to the Coalition, as well as the earlier and present versions of the Alliance all as the "Bowl Alliance" or "Alliance."
14. The Big Eight Conference merged with part of the now defunct Southwestern Conference to form the Big 12, which is part of the present Alliance. See Letter from Senators Mitch McConnell, Robert F. Bennett, Craig Thomas, and Mike Enzi, United States Senate, to The Honorable Robert Pitofsky, Chairman, Federal Trade Commission 2 (March 14, 1997) [hereinafter McConnell Letter] [on file with Senator McConnell and the Author].
15. With the demise of the Southwestern Conference, the Cotton Bowl dropped out of the Alliance scheme. See id.
16. See Antitrust Hearing, supra note 2, at 34.
17. Id. (testimony of Roy Kramer, Southeastern Conference Commissioner).
18. See id.
the Sugar Bowl while Nebraska would have played in the Orange Bowl. Additionally, the non-participation in the Alliance bowls by other conference champions, who were excluded from the Alliance scheme or who were bound to participate in non-Alliance bowls (such as the Pac 10 and Big Ten champions, who played annually in the Rose Bowl) made it possible, if not likely, that the two top-ranked teams still would not play each other under the Alliance allocation scheme.

This plan also presented some antitrust problems. Viewing the Alliance as a market allocation which "precluded a non-Alliance team from going to the significant and lucrative Alliance bowls— even when the non-Alliance team had a better record and a better ranking than an Alliance team," United States Senator Mitch McConnell formally requested an investigation into the Alliance for a possible antitrust violation. Essentially, his contention was that the Alliance was illegally dividing the market only among competitors that were members of the closed Alliance group. The Department of Justice complied with this request and began to investigate the then-existing Alliance.

In 1994 after the initial three-year term of the original Bowl Alliance agreements expired, the participants, reacting to these problems, decided to change the structure of the Alliance. Under the new plan, the Orange, Sugar, and Fiesta Bowls would remain the Alliance bowls, but the conferences were no longer committed to play in a specific bowl. Instead, the champions of all four conferences would be guaranteed a slot, and the remaining two slots would be "at-large," and "open to any team in the country with a minimum of eight wins or ranked higher than the lowest-ranked conference champion" of the four Alliance conferences. Although this language is permissive, any team that wanted to be considered was also, according to Senator McConnell, required to sign a "special restrictive agreement" which entailed a promise by that school to accept any Alliance invitation over any non-

20. See id.
21. Id. (Emphasis in original).
The new system retained the rotating national championship plan included in the previous agreements, in which the top two ranked teams in the nation, assuming they were both playing in an Alliance bowl, would play one another in one of the three bowls, rotating annually.

The Big Ten and the Pac 10 also participated in the revised Alliance, but did not commit to participate in the Alliance Bowls at that point since they were under contractual agreement to play in the Rose Bowl through the 1997-98 season. This was changed with the creation of the “Super-Alliance” in 1996, in which the Rose Bowl agreed to become an Alliance bowl beginning with the 1998-99 season. The Rose Bowl, however, will continue to field the Pac 10 and Big Ten champions except when (1) it is the Rose Bowl’s turn in the rotation to host the championship game, and (2) when it is not the Rose Bowl’s turn and the Big Ten or Pac 10 champion is ranked first or second, in which case that team will go to the designated national championship bowl.

In addition to these agreements regarding bowl match-ups among Alliance participants, there is also the allegation that the Alliance scheme includes an “anti-overlap” agreement, which prohibits member teams or bowls from playing or scheduling games that would compete with Alliance Bowls. The Alliance, in the person of Southeastern Conference Commissioner Kramer, denied that such an agreement exists, pointing to a clause which leaves member schools free to participate in any non-Alliance bowls if they are not selected to an Alliance Bowl. This clause, however, does not seem to

22. See id.
23. See Antitrust Hearing, supra note 2, at 35-36.
24. See id. at 2.
25. See id. In the 1998-99 bowl season, which was the first year of the Rose Bowl’s participation in the Alliance, the Rose Bowl hosted a game between UCLA and the University of Wisconsin, since the schools were the champions of the Pac-10 and Big 10, respectively, and neither was ranked in the top two. See Rose Bowl Preview (visited Apr. 10, 1999) <http://www.foxsports.com/js_index.frm?content=colfoot/stories/cfl213roseprev.sml>.
27. See Antitrust Hearing, supra note 2, at 138-39.
prove or disprove the existence of a written or unwritten anti-overlap agreement.

Since the creation of the first Bowl Alliance, there has been an increase in national championship games played.\textsuperscript{28} Alongside this, however, has been an increase in concern by observers that the Alliance is a violation of the Sherman Act, since (according to its critics) it excludes certain bowls and conferences from the "top-tier" bowl picture and has led to a sharp increase in prices paid by television networks for the Alliance bowls. Senator McConnell, joined by Senators Bennett, Thomas, and Enzi, has spearheaded an investigation into this issue and has urged Congress and the Federal Trade Commission to do the same.\textsuperscript{29}

One of the main sources of controversy that generated much of this debate arose during the 1996-97 college football season. During that season, Brigham Young University (BYU) and the University of Wyoming, both members of the non-Alliance Western Athletic Conference (WAC), had very successful seasons. BYU finished with the WAC title, a record of 13-1, and the number five ranking in the nation. Wyoming, which lost to BYU in the WAC title game, posted a record of 10-2 and a national ranking of twenty second. Despite these strong seasons, neither team was invited to play in an Alliance bowl that year. BYU went to the non-Alliance Holiday Bowl and Wyoming was not invited to play in any post-season bowl.\textsuperscript{30} Further, Alliance conference teams with lower rankings and worse season records than either BYU or Wyoming were invited to play in the Alliance Bowls.\textsuperscript{31} These events rekindled critics' suspicions, who argued that the "at-large" bids

\textsuperscript{28} See id. at 36. These games were: Miami vs. Alabama after the 1992 season; Florida State vs. Nebraska after the 1993 season; and Florida vs. Nebraska after the 1995 season. See id.

\textsuperscript{29} See McConnell Letter, supra note 14, at 8.

\textsuperscript{30} See id.

\textsuperscript{31} These were the University of Texas (8-5 record, No. 20 ranking); Pennsylvania State University (11-2 record, No.7 ranking); Virginia Tech University (10-2 record, No.13 ranking) and Nebraska (11-2 record, No. 6 ranking). Id. at 4. Additionally, 13 teams that were not ranked in the top 25 at all were chosen over Wyoming for bowl games. See Antitrust Hearing, supra note 2, at 30.
mentioned in the Alliance rules were an illusion that were not truly open to all teams, and that non-Alliance schools and conferences were being wrongfully excluded from full participation in the post-season bowl market, possibly pursuant to secret or implicit agreements among Alliance members to exclude non-members.\(^3\)

On May 22, 1997, the Senate Subcommittee on Antitrust, Business Rights, and Competition\(^3\) held a hearing to address these concerns.\(^3\) Although the hearing generated some useful information and possible background for an investigation or lawsuit, the Subcommittee generally expressed the sentiment that congressional action was not the solution to this controversy.\(^3\)

\section*{B. The Bowl System Today}

The entrance of the Alliance onto the college bowl scene seems to have enhanced the financial benefits for Alliance participants significantly, but these benefits have not necessarily extended to all the Division I-A schools.\(^6\) In the 1996-97 bowl season, the three Alliance bowls and the Rose Bowl paid out a total of $67.9 million dollars to eight teams, while the combined total from all non-Alliance bowl purses was only $34 million.\(^7\) The total payout to Alliance schools for that same season was $95.9 million,\(^8\) while the non-Alliance bowl schools received $5.4 million in payouts.\(^9\) This divergence of competitors' economic success is a source of

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32. See id. 152-54 (responses by Professor Gary Roberts regarding the Alliance's possible antitrust violations).
33. Subcommittee of the Committee on the Judiciary.
34. See Antitrust Hearing, supra note 2.
35. During the hearing, Senator Sessions remarked, "I hope that we don't have the U.S. Government setting bowl picks." Id. at 85.
36. Under the bowl system, most of the revenue from the bowl payouts does not go directly to the schools, but rather to the conference to which the school belongs, which then distributes money to all conference members. See Ray Waddell, Winners & Losers Alike Cash in on Bowl Games, AMUSEMENT BUS., Jan. 8, 1996.
37. See Antitrust Hearing, supra note 2, at 15.
38. This was a marked increase even from the previous year in which the same conferences received $69.4 million in bowl payouts. See id.
39. See id.
concern from an antitrust perspective, since it may indicate the presence of conduct which harms the competitive market, by artifically stifling the ability of lesser market participants to gain ground on the dominators.

II

The Bowl Alliance in an Antitrust Framework

Two key determinations are required before engaging in an effective Sherman Act analysis of the Bowl Alliance. First, one must narrow the legal question by deciding which part of the Act is best suited to scrutinize the activities of the Bowl Alliance. This is done by comparing the general purposes of the two major sections of the statute with the nature of the activities that are alleged to be in violation. Second, the competitors and markets which are said to be adversely affected by the Alliance must be defined. This can be the most difficult part of any antitrust case, but it is vital to a satisfactory determination of whether these competitors and markets are being unreasonably restricted from the free conduct of their activities by the Alliance agreements.

A. What Part of the Sherman Act Applies?

Section 1 of the Sherman Act prohibits "[e]very contract combination... or conspiracy, in restraint of trade or commerce among the several States[.]"40 Although the sweeping language of this provision has been limited to only those contracts, combinations, or conspiracies that "unreasonably" restrain trade,41 the statute's condemnation of all conduct with an anticompetitive purpose or effect remains clear, and has been applied to a wide range of conduct which restrains trade, including direct and indirect price-fixing,42 market allocation,43 group boycotts,44 and even restrictive college athletics regulations.45

42. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
43. See United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified, 175 U.S. 211 (1899).
Critics of the Bowl Alliance have characterized it as a form of market allocation and a group boycott, which has both the purpose and effect of restraining trade and eliminating competition. Since the Alliance involves both horizontal agreements among competitive groups—conferences and bowls—as well as vertical dealing agreements between these entities and television networks and sponsors, an analysis under section 1 would be appropriate.

The applicability of section 2 of the Act, however, is somewhat more questionable. That section forbids monopolization, attempt to monopolize, or conspiracy to monopolize. As the Supreme Court has stated and repeated numerous times, monopolization "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." Some have argued that the Alliance is indeed guilty of monopolization, but an analysis of the Alliance under section 2 is fraught with difficulties.

Professor Roberts, in his statements to the Senate Subcommittee, argues that "the Alliance has complete control over a sports entertainment product that its creators tout as being unique and without substitute in many consumers' minds[,]" and that the Alliance has used this control to

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44. See Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941) [hereinafter FOGA].
46. See McConnell Letter, supra note 14, at 4-6.
47. It is notable that in NCAA v. Ok., the United States Supreme Court emphasized that even a non-profit college sports organization is not immune from Sherman Act scrutiny. See 468 U.S. at 100 n.22 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975)); see also Wendy T. Kirby and T. Clark Weymouth, Antitrust and Amateur Sports: The Role of Non-economic Values, 61 IND. L.J. 31 (1985/1986).
50. See Antitrust Hearing, supra note 2, at 154. It is possible that the Alliance members engaged in attempted monopolization or conspiracy to monopolize, but since a claim under section 2 seems less appropriate under these facts, this note will not explore those possible violations.
51. Id.
charge "monopoly prices." While this may be true, it does not get one past the most difficult aspect of any section 2 analysis: the definition of the market. The threshold requirement of section 2 that a violator has monopoly power involves an intricate and thorough assessment of what the competitive market encompasses. As Professor Roberts acknowledges, using typical market power economic theories in a sports context "is almost impossible because of the unusual nature of the product." He also stated that identifying what market variables to use in this situation is "a mindboggling conceptual task." The ability to show monopoly power by defining a market that the defendant dominates is often the most difficult hurdle for a section 2 plaintiff to clear, and in this case it may not be possible, or even necessary. Section 1 is much broader than section 2 and will generally reach concerted action that may also be monopolization, without the additional difficulty of definitively proving monopoly power as an element. Section 2 is a more effective tool for reaching the conduct of monolithic organizations that are engaging in abuse of their power, while section 1 is generally better designed to cover agreements between separate, non-dominant entities that have anticompetitive purposes or effects.

Given these considerations, it appears that the most useful inquiry into the legality of the Bowl Alliance is a section 1 analysis. However, the problem remains of identifying the relevant markets involved as well as the participants and

52. Id.
53. See Grinnell, 384 U.S. 570; United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).
54. Antitrust Hearing, supra note 2, at 154.
55. Id.
56. See ERNEST GELLHORN and WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS at 22-23 (4th ed. 1994) [hereinafter GELLHORN]. As discussed below, while market power is not an essential element to a finding of section 1 liability, it is often a key part of the evidence of an unreasonable restraint. See NCAA v. OK., 468 U.S. at 111-12 (discussing market power as a pertinent factor in a section 1 analysis).
57. See Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59-60 (1911); see also MILTON HANDLER ET AL., TRADE REGULATION at 156 (4th ed. 1997) [hereinafter, HANDLER].
“victims” in an antitrust framework. This identification will affect both the form and scope of our entire antitrust analysis, since the focus of the Sherman Act is to preserve competition in these markets. Since different types of agreements between competitors, buyers, and sellers require different standards of scrutiny, it is necessary at the outset to decide which Sherman Act lens to look through in our examination of the Bowl Alliance. This is done by characterizing the relevant parties and conduct.

The first challenge is to identify the markets affected by the Bowl Alliance. This is an important step to any later determination of whether the Alliance offends the market-protecting policies of the Sherman Act. Although a definitive market definition would require detailed economic analysis which reaches beyond the scope of this note, it seems, on a basic level, that the Alliance implicates two main markets: the bowl market and the television market. The bowl market is the competitive pool of bowls that have traditionally vied for top college teams to play in their bowls at the end of each season. This competitive market has been significantly affected by the formation of the Alliance since these agreements remove many top bowls and schools from the open bidding process. The television market consists of the TV networks which broadcast or might broadcast post-season college football who compete in a bidding environment for the rights to broadcast bowl games. This market is also potentially affected here because

58. It seems reasonable to restrict the market to only post-season football contracts for economic and legal reasons. First, networks who broadcast bowls purchase rights to bowl games independently of their other college football contracts. See Antitrust Hearing, supra note 2, at 43-45. Additionally, narrower definitions of markets in unique sports contexts are supported by antitrust jurisprudence. The NCAA v. Ok. Court expressly approved of the district court’s use of “live college football” on Saturdays as the relevant market, due to the unique nature of that type of entertainment. See NCAA v. Ok., 468 U.S. at 110-12 (citing International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1959), which held that “championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for non-championship events.”). The NCAA v. Ok. Court also specifically held that “broadcasting rights to college football constitute a unique product for which there is no ready substitute,” which indicates a view that a more general categorization of “sports” or even “football” as the product would be inappropriate. Id. at 115.
the prices that the networks have paid has increased markedly since the advent of the Alliance structure.\(^{59}\)

A related inquiry is the relative strength of the Alliance participants in these markets, which corresponds with the significance of the impact the Alliance agreements can have on the overall markets. The Alliance includes 53% of the Division I-A football schools,\(^{60}\) and Alliance teams collected over 94% of the total bowl payouts in the 1996-97 season.\(^{61}\) This numerical majority and financial hegemony demonstrates the powerful presence of the Alliance members in both of the relevant markets and the degree to which the formation and operation of a set of agreements such as the Alliance can impact these markets.

Therefore, using antitrust terminology, the following model is presented by the Bowl Alliance facts: the Alliance contains both horizontal (among the conferences and among the bowls) and vertical (between the conferences and the bowls) agreements in these two competitive markets. The “producers” in both the bowl and television markets are the bowls themselves, since they are the range of “products” available to the post-season college football consumer. The Alliance conferences and universities are thus the “suppliers” for both markets. Under this framework, the “consumers” are the television networks— and possibly the networks’ bowl game advertisers as well— since they pay the bowls (and indirectly the conferences and schools) for the broadcast of the games.\(^{62}\)

The mere presence of these agreements, and the fact that they may significantly change the complexion of both the bowl and TV markets, however, is not enough to constitute a violation of section 1. Section 1 only prescribes “unreasonable”


\(^{60}\) The Alliance now encompasses 63 of the 113 Division I-A teams. See Antitrust Hearing, supra note 2, at 99.

\(^{61}\) See id. at 15.

\(^{62}\) Of course, this characterization is merely this author’s estimate of what a court would likely do. It is possible that some would analyze this case differently and conclude that different categorizations should apply. Indeed, some critics of the Alliance have characterized these agreements differently than I do here. See McConnell Letter, supra note 14, at 5.
restraints of trade which harm competition. Thus, before the Alliance could be held to be liable for a section 1 violation, a court or jury must find that the relevant markets were sufficiently harmed by the conduct in question. In order to make such a determination, the correct antitrust standard under which the conduct at issue should be examined must be found and applied to the factual situation of the Alliance.

III
The Legal Standard Under Section 1 of the Sherman Act

A. The Purposes of the Sherman Act § 1

Whenever one interprets and applies any statute, the goals and policies underlying its enactment and operation must be considered in the course of that interpretation and application. This maxim is no less true with the Sherman Act. Although the exact motives behind the creation of the Sherman Act is disputed by scholars, it is safe to say that the law sought to give shape and clarity to pre-existing legal rules regarding restraints on competition and monopolization. In a sense, the Sherman Act was a re-affirmance of the long-standing distrust of all forms of cooperation between competitors in market economies, since such behavior imperiled free and vigorous competition.

Accordingly, the basic policy underlying the body of antitrust law generally, and section 1 of the Act specifically, is

63. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
64. See id.
66. Senator Sherman, for whom the statute is named, said that the law "does not announce a new principle of law, but applies old and well recognized principles of the common law." 21 Cong.Rec. 2456 (1890).
67. Expressing this sentiment, Economic Scholar Adam Smith wrote: "people of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." ADAM SMITH, THE WEALTH OF NATIONS 128 (Edwin Cannon, ed., Random House, Inc. 1965) (1789).
that a group, association, cartel, or any other coalition of competitors should not be able to use concerted action to interfere with competition in the market. While this is a simplistic way of expressing the goals of section 1, it is mentioned simply to remind us that the tandem of values embodied in the Act—keep competition free and limit large oppressive market entities—should be kept in mind when considering whether the set of agreements that comprise the Bowl Alliance should be found to be an offending restraint of trade and an unlawful stifling of the freedom of all competitors.

B. In Search of the Correct Level of Review

Section 1 of the Sherman Act states that "[e]very contract . . . in restraint of trade or of commerce . . . is illegal." Although the Supreme Court originally took the position that this broad language covered all restraints of trade, the impracticality and doctrinal awkwardness of such an approach soon became apparent and courts wisely refined the doctrine to "prohibit only those contracts or combinations that are 'unreasonably restrictive of competitive conditions.'" As the Court once noted, "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Therefore, the challenge is to determine which restraints will be invalidated as unreasonable and offensive to the policies of the Sherman Act.

68. See CARL KAYSSEN & DONALD F. TURNER, ANTITRUST POLICY (1959).
70. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
71. See United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) (carving out an exception to the broad holding of Trans-Missouri only one year later, stating that "[a]n agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think covered by the act . . . ." Id. at 567-68).
72. United States v. Brown University, 5 F.3d 658, 668 (3d. Cir. 1993) (quoting Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1911)). The Brown court also noted that "[c]ourts long ago realized that literal application of section one would render virtually every business arrangement unlawful." Id.
73. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
The development of Sherman Act doctrine and application has yielded three basic approaches used by courts to make this determination. These are: the per se rule, "quick look" rule of reason, and the traditional rule of reason. Which of these tests applies is generally a function of the nature of the conduct alleged and sometimes the nature of the market involved.

1. The Three Levels of Review

As federal courts heard and ruled on Sherman Act cases in the first half of this century, judicial experience and stare decisis combined to generate the per se rule in section 1 cases. The per se rule simply creates a conclusive presumption of a Sherman Act violation for certain types of behavior, upon a showing that the defendant's conduct fits into one of the per se categories that have been recognized by courts. The reasoning behind the per se rule is that certain types of combinations or agreements will so often amount to a Sherman Act violation, regardless of the intent of the participants or the justifications offered, that a conclusive rule condemning the conduct is justified. Following this logic, courts have refused to engage in a detailed (and costly) market and effects analysis of conduct that fits into a per se category, since such a close look would almost never save the prohibited conduct from section 1 condemnation. Because courts are slow to create such strong presumptions, there are only a handful of categories that trigger the per se rule. Examples of

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74. See Brown University, 5 F.3d at 668.
75. See id.
78. See Maricopa, 457 U.S. at 344-47.
79. As the Court once expressed it: "Congress has not left us with the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies." Socony-Vacuum, 310 U.S. at 221-22.
80. See id.
conduct that subjects a case to the per se rule are price-fixing,\(^{81}\) resale price maintenance,\(^{82}\) and market allocations.\(^{83}\)

2. *The Per Se Rule Applied*

Although some of the critics argue that the agreements which form the Alliance take the form of a group boycott or market allocation,\(^{84}\) it seems unlikely that a court would use the per se rule in this context. While it is true that the restrictive agreements that constitute the Bowl Alliance resemble refusals to deal, which have traditionally been subject to the per se rule,\(^{85}\) two factors militate for a closer examination of the Alliance than the per se rule allows.\(^{86}\) First, the trend by the Supreme Court and the lower federal courts in recent decades has been to apply the per se rule to group boycotts and refusals to deal selectively and only under certain circumstances.\(^{87}\) Second, and more importantly, courts have recognized the unique characteristics of sports leagues and their markets, which require some degree of interaction between competitors in order to exist at all, and have thus disfavored the inflexible per se rule, which is designed for restraints in traditional commercial contexts.\(^{88}\)

The view that dominated antitrust jurisprudence until recent years was that all conduct that could be technically categorized as a refusal to deal would be viewed under the stringent per se rule and thus struck down.\(^{89}\) However, as the

\(^{81}\) See *Maricopa*, 457 U.S. at 332; *Socony-Vacuum*, 310 U.S. at 150.

\(^{82}\) See *Maricopa*, 457 U.S. at 332.


\(^{84}\) See *McConnell Letter*, supra note 14, at 5-6.


\(^{86}\) It should be noted that other antitrust characterizations of the Bowl Alliance have also been offered. For example, Professor Roberts charges that the "Alliance has created a monopoly" *Antitrust Hearing*, supra note 2, at 155. Aside from my belief that the monopoly standards are less appropriate to an antitrust examination of the Alliance, I have chosen to limit my discussion to only those characterizations that most closely fit the facts of the Alliance, although other theories of liability might well prove fruitful avenues of legal analysis.

\(^{87}\) See *Gellhorn, Antitrust*, supra note 56, at 206-07.

\(^{88}\) See *NCAA v. Ok.*, 468 U.S. at 100-01.

\(^{89}\) The *Klor's* Court stated that "[g]roup boycotts, or concerted refusals to
law on refusals to deal has developed to adapt to a greater variety of fact patterns and situations, courts have shown a greater willingness to use a more relaxed standard in some group boycott cases. This has mainly grown out of a recognition by courts that the per se rule should be applied with care and only to certain specific categories of conduct. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, the Supreme Court enunciated this reluctance to apply the per se rule in the group boycott context: "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that the expulsion is virtually always likely to have anticompetitive effects is not warranted."

These more recent cases seem to support the view that not all refusals to deal will be given equal per se treatment under section 1.

Moreover, courts have long held that "judicial inexperience with a particular arrangement counsels against extending the reach of per se rules." Although antitrust cases involving sports are far from uncommon, the unusual facts and conditions of the post-season bowl markets would present a unique type of sports restraint to a court, counseling

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91. See GELLHORN, supra note 56, at 220-21.
93. Id. at 296.
reluctance to use the per se mechanism. Thus, even though the per se rule seemingly continues to enjoy a vitality for certain types of antitrust conduct, this gradual sophistication and limitation of the rule indicates that an action brought against the Alliance on a refusal to deal theory would likely not be subject to summary disposal under the per se rule.

Also working against the application of the per se condemnation is the reluctance that courts have shown to use the conclusive presumption in the sports context. Due to the inherently interdependent nature of sports leagues and associations, and the need for cooperative action to address problems and allow organized play between competitors, courts have accorded rules or coalitions in sports associations—even those which have the potential to restrain competition—greater deference than typical commercial combinations receive. While this reasoning has generally been expressed in cases involving professional sports, the NCAA Court expressly acknowledged the same cooperative needs in the college athletics context and refused to apply the per se standard.

As the foregoing suggests, it seems that the presence of these two considerations against the use of the per se rule weigh in favor of the conclusion that the Bowl Alliance will not be viewed under the harsh per se lamp. The diminished use of the rule in group boycott and refusal to deal situations, along


98. See id. (refusing to apply the per se rule to an NCAA television restriction); Deesen v. Prof’l Golfers Ass’n of Am., 358 F.2d 156 (9th Cir. 1966) (upholding PGA rules which restricted player entry into tournaments); Molinas v. National Basketball Ass’n, 190 F. Supp. 241 (S.D.N.Y. 1961) (allowing a league rule that suspended players for gambling).

99. See Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (in characterizing the National Football League for antitrust purposes, the Court recognized that “clubs that make up a professional sports league are not completely independent competitors, as they depend upon a degree of cooperation for economic survival.”). Id. at 248.

100. NCAA v. Ok., 486 U.S. at 100-01.
with the unique characteristics of sports markets, combine to
move us into an inquiry of whether the somewhat more
exploratory standard of the quick look rule of reason would be
appropriate against the factual background of the Bowl
Alliance.

3. Quick Look Rule of Reason

As courts fashioned the per se rule to deal with certain
types of commercial behavior under the antitrust laws, a
“sharp dichotomy” developed between its use and that of the
more traditional and elaborate rule of reason standard. This
existence of two distinct brands of standard sometimes left
courts with an inflexible test that presented difficulties in
categorizing new forms of restraints. Conduct might
technically fit the classic definition of a “price-fix” or “market
allocation,” which would require a per se approach, yet the
circumstances of the case presented the possible existence of
procompetitive goals or effects, which seems to call for the rule
of reason. This situation left courts with the dilemma of
either going against the precedential force and traditional
wisdom of the per se rule, or of allowing a procompetitive
activity to be condemned as an anticompetitive antitrust
violation.

Under recent Supreme Court case law, however, this
judicial dilemma seems to have been somewhat ameliorated. In
the late 1970's, certain section 1 decisions came down that
did not use the per se rule for a given restriction, but also did
not enter into a full-scale rule of reason analysis. Rather,

101. See GELLHORN, ANTITRUST LAW, supra note 56, at 177; United States v.
Trenton Potteries Co., 273 U.S. 392 (1927), is thought to be the first major use of
the per se rule for horizontal restraints. See id.
102. Gellhorn and Kovacic mark the emergence of this dichotomy after the
Socony-Vacuum case in 1940. Id. at 179.
103. See id. at 215-17; SULLIVAN, supra note 96, at § 4.08.
104. See GELLHORN, ANTITRUST LAW, supra note 56, at 197.
105. See id. at 210-12.
106. See SULLIVAN, supra note 96, at § 4.08.
107. See id. (citing National Soc'y of Prof'l Eng'rs v. United States, 435 U.S.
679 (1978), as an early example of the Court's "changing analysis of horizontal
restraints.")
the approach seemed to fall in the middle-ground between these poles, by engaging in some analysis of the specific restraint to glean its purpose and effects, but not fully delving into the economic details of the restraint and its market.\textsuperscript{108} This method takes a "quick look" at the restraint to see if it had the actual purpose or effect of hurting competition, or whether it in fact displayed some procompetitive elements or enhanced output.\textsuperscript{109} As the Third Circuit put it, the quick look rule applies "where per se condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate anticompetitive character' of an inherently suspect restraint."\textsuperscript{110} This approach has been lauded by scholars and seems to have given courts greater flexibility by giving them a viable third option when analyzing unique or ambiguous restraints.\textsuperscript{111}

The quick look rule of reason, unlike its older and more complex cousin discussed below, operates in a fairly simple way by giving courts an intermediate step to guide their section 1 analysis to the correct level of scrutiny. In a sense, it is not even an independent test itself, but rather it resembles a railroad switching mechanism, directing certain types of cases onto either the per se or rule of reason "track," depending on the nature of the conduct at issue. The court will start, once a restraint is found, by presuming there is harm to competition.\textsuperscript{112} Therefore, the defendant will be required to "promulgate 'some competitive justification' for the restraint, 'even in the absence of detailed market analysis' indicating actual profit maximization or

\begin{footnotesize}
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\item[\textsuperscript{108}] See id.
\item[\textsuperscript{109}] See Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (refusing to apply the per se rule to a group refusal to cooperate with insurance companies' X-ray requirement, but finding the boycott unlawful due to its restraining character); Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985) (declining to label the expulsion of plaintiff from a cooperative an illegal group boycott, pointing to lack of actual anticompetitive effects).
\item[\textsuperscript{110}] United States v. Brown University, 5 F.3d 658, 669 (3d Cir. 1993) (quoting \textit{NCAA v OK}, 468 U.S. at 109).
\item[\textsuperscript{111}] See, e.g., GELLHORN, supra note 56, at 213; SULLIVAN, supra note 96, at §§ 8.04, 8.13, 8.14.
\item[\textsuperscript{112}] See \textit{Brown University}, 5 F.3d at 669.
\end{itemize}
\end{footnotesize}
increased cost to the consumer resulting from the restraint."\textsuperscript{113} If the defendant is unable to show procompetitive reasons for the restraining conduct, "the presumption of adverse competitive impact prevails and the court condemns the practice without ado."\textsuperscript{114} Thus, without a showing of a redeeming aspect of the restraint which furthers procompetitive goals, the quick look switch directs the case to the per se track, which inexorably leads to the condemnation of the restraint.

On the other hand, if the defendant is able to offer "sound procompetitive justifications..." the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis."\textsuperscript{115} Thus, to continue the analogy, the showing of economic reasons which promote competition\textsuperscript{116} will activate the switch and send the litigants to the rule of reason track, upon which the court will more fully explore the merits and demerits of the restraint and how it affects the given market.

Applied to the Bowl Alliance, the quick look doctrine would appear to switch us to the rule of reason track. While the Alliance is facially a restraint of trade, since it inhibits both non-Alliance conferences from playing in certain high-profile bowls, and non-Alliance bowls from bidding for desirable Alliance teams, the members of the Bowl Alliance are likely to be capable of forwarding procompetitive reasons for these restraints to the satisfaction of a court. Specifically, they could argue (as they have)\textsuperscript{117} that the Alliance enhances the quality of post-season college football by assuring a national

\begin{footnotes}
\textsuperscript{113} Id. (quoting NCAA v. Ok., 468 U.S. at 110).
\textsuperscript{114} Id. (quoting Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992).
\textsuperscript{115} Id.
\textsuperscript{116} Note that only procompetitive justifications will suffice. Courts have long and unambiguously held that goals or effects of efficiency, reduction of "ruinous" competition, increase in individual product quality, or the like will not save a antitrust restraint from the per se rule. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified, 175 U.S. 211 (1899).
\textsuperscript{117} See Antitrust Hearing, supra note 2 at 33-38, 157-62 (statement of Roy Kramer, Southeastern Conference Commissioner).
\end{footnotes}
championship game each year, which in turn benefits all football schools and all of the bowls by increasing the total fan base for college football. While this argument might be disputed by critics, the threshold for showing that the restraint has some procompetitive elements appears to be relatively low. Moreover, even if a court looking at the Alliance believed that the members had other than competitive motives in creating the Alliance agreements, it would still survive the quick look test if it was shown that the effects of the Alliance are procompetitive. Most significantly, the Alliance could point to the fact that the incidence of post-season national championship games has in fact increased markedly since the advent of the Alliance. It also might be able to show that college football as a whole has prospered since the creation of the Alliance, but such a possibility has not been explored, and is somewhat questionable. However it is framed, it appears that, despite the potential threat to competition that the Alliance poses, its members would be able to make a sufficient initial showing of procompetitive elements to survive quick look scrutiny and direct the inquiry to the rule of reason track.

4. Rule of Reason

The oldest and most common judicial method of dealing with conduct alleged to be in restraint of trade is the rule of reason. This basic anticompetitive rule has its roots in 18th Century English Common Law and was quickly adopted by United States courts construing section 1 of the Sherman Act. Of the three main section 1 approaches, the rule of

118. See id.
120. In the first five years of the Alliance, three of them ended with a national championship game. In the previous 45 years, the top two teams had only met twice. Antitrust Hearing, supra note 2, at 36.
121. The rule of reason was born in the English case of Mitchel v. Reynolds. See Handler, supra note 57, at 43-45 (excerpting Mitchel, 1 P.Wms. 181, 24 Eng.Rep. 347 (K.B.1711)).
reason is the most thorough, requiring a careful look at the markets and parties affected.\textsuperscript{123} The focus of the rule of reason inquiry is not so much the legal category in which the conduct falls, but rather on the actual purpose and effects, and how they affect competition.\textsuperscript{124} Therefore, due to its pragmatism, this long-standing\textsuperscript{125} rule entails a detailed case-by-case economic and legal analysis to determine whether the conduct qualifies as an unreasonable restraint under section 1.\textsuperscript{126}

The rule of reason involves a burden-shifting between the parties.\textsuperscript{127} Initially, the plaintiff must show that "the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets."\textsuperscript{128} Such effects include reduction of output, increase in price, or deterioration of quality.\textsuperscript{129} The defendant's market power—meaning actual market share, the ability to raise prices above competitive rates, or the possession of some particular advantage in the market—is also relevant to this showing, particularly if the restraint's effects are difficult to clearly delineate.\textsuperscript{130} If the plaintiff is able make a showing of market power or "actual anticompetitive effects," the burden will then shift to the section 1 defendant, who must show "that the

\textsuperscript{123} See Annotation, Monopolies, Restraints of Trade, and Unfair Trade Practices, 54 AM. JUR. 2D 48 (1996).

\textsuperscript{124} See id.

\textsuperscript{125} The Brown University court observed that "the contours of the traditional rule of reason inquiry have remained largely unchanged since they were first defined in Chicago Board of Trade v. United States." 5 F.3d at 668 n.8 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

\textsuperscript{126} See Annotation, Monopolies, Restraints of Trade, and Unfair Trade Practices, 54 AM. JUR. 2D 48 (1996). The National Legal Research Group gives five factual aspects of the business and the restraint that the trier of fact should consider in making a reasonableness determination: (1) its condition before and after the restraint was imposed; (2) the nature of the restraint and its effect, actual or probable; (3) the history of the restraint and the evil believed to exist; (4) the reason for adopting the particular restraint; and (5) the purpose or end sought to be attained by the restraint." Id. (citing Chicago Bd. of Trade, 246 U.S. 231).

\textsuperscript{127} See Brown University, 5 F.3d at 668.

\textsuperscript{128} Id. (citing Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991) and Cernuto Inc. v. United States Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979)).

\textsuperscript{129} See id.

\textsuperscript{130} See id.
challenged conduct promotes a sufficiently procompetitive objective.”

' Even if the defendant can show procompetitive elements, however, it is not out of the woods yet. The plaintiff may answer the defendant's justifications by arguing that the restraint is not "reasonably necessary to achieve the stated objective." To prove this, the plaintiff may argue that the restraint does not further the stated objective or that there are "less restrictive alternatives" to the conduct in question, thus the antitrust law should strike down that which is unnecessarily anticompetitive.

After these questions are explored at length, taking into account the markets affected, the intention of the parties, the actual operation of the restraint, and the alternatives, the trier of fact will then decide whether the restraint is "unreasonable" under the circumstances.

a. The Bowl Alliance Under the Rule of Reason

Since I have concluded that the per se rule would not be likely to apply to the Bowl Alliance, neither through its categorization in a per se category nor through the quick look mechanism, the rule of reason remains the best analytical approach with which to examine the legality of the Alliance. Indeed, use of the rule of reason in this situation is not a forced choice, but rather it seems the most appropriate of the tests, especially given the uniqueness of the markets involved and the restraint at issue, as well as the Alliance's assertion of having positive effects on these markets.

As has been pointed out above, the rule of reason is a complex, highly fact-specific antitrust inquiry. What would happen in the hypothetical section 1 suit against the Bowl Alliance would largely be a function of the court's categorization of the restraint and the market, and, most importantly, would be subject to a jury's determination of

131. Id. at 669.
134. See Brown University, 5 F.3d at 669.
whether the Alliance is in fact an "unreasonable" restraint on competition. Nonetheless, even without an actual case, one can look at certain aspects of the Alliance agreements to see if they conform with the legal standard, in order to predict what might transpire in an antitrust suit. While analyzing this restraint under the rule of reason, it is useful to remember that although the rule can often be hideously complicated and difficult, its focus is quite simple: does the restraint in question affect competition in the identified markets and, if so, how necessary is this restraint to an actual procompetitive end?

The first question, then, to ask under a rule of reason analysis is whether the restraint has anticompetitive effects or the participants have market power.135 Whether the Alliance in fact has anticompetitive effects is a disputed question, but a persuasive argument could be made that it does. Proponents of the Alliance argue that the only effects of the agreements have been to increase fan interest and revenues.136 Others, however, have argued that the Alliance's exclusion of conferences and bowls has resulted in financial and reputational damage to non-Alliance conferences and schools.137 This, as Professor Roberts phrases it, will lead to the relegation of the 50 non-Alliance schools to "second tier status," which hurts competition and detracts from the quality of the overall product for consumers.138 It is also possible that this economic domination of the post-season college football markets by the Alliance would reduce the number of non-Alliance bowls in the future, thus reducing product quantity as well, which is also a cognizable anticompetitive effect.139 In addition to these charges of reduction in quality and output, critics of the Alliance have also argued that the Alliance has operated to raise prices above the competitive norm, forcing

136. See Antitrust Hearing, supra note 2, at 37.
137. According to an official statement by the non-Alliance Plymouth Holiday Bowl: "Many bowl games already are experiencing alarming declines in attendance, sponsorships, and television rights fees." Id. at 114.
138. Id. at 151-52.
139. See Brown University, 5 F.3d at 668-69.
networks (and ultimately consumers) to pay disproportionately high fees for television rights to Alliance games.\textsuperscript{140}

Moreover, it seems clear that the Alliance easily satisfies the market power requirement. Alliance teams collected approximately 95\% of the total bowl pool in the 1996-97 season and the Alliance contains over half of the total of Division I-A football schools. These facts, along with the less statistically concrete truth that the Alliance conferences and schools are among the most dominant and popular in recent years, point to the conclusion of market power for the Alliance. Considering these arguments, it is unlikely that the Alliance would be able to avoid the shifting of burden to it, which would require that it show the procompetitive goals and effects of the Alliance agreements. It is true that the Alliance has one major effect (its espoused purpose) that certainly has the potential to yield beneficial and procompetitive effects: its creation of a national championship game. It is accepted by all that this is a desirable goal, and the Alliance has argued that the enhancement of the possibility of such a game occurring each year\textsuperscript{141} will benefit college football.\textsuperscript{142} This may be difficult to prove empirically, especially after such a short time, but a court and jury are quite likely to consider this a legitimate procompetitive goal. The Alliance agreements also seem factually linked to that goal, which would create the necessary nexus between the problem and remedy required by the rule of reason.

Yet this beneficial goal alone will not necessarily save the restraint from antitrust violation.\textsuperscript{143} For one thing the trier of fact must also consider the intent of the makers of the restraint in deciding whether the restraint is procompetitive.

\textsuperscript{140} Antitrust Hearing, supra note 2, at 154. At the hearing, Professor Roberts contended that even though the costs of attending a bowl have not significantly risen since the inception of the Alliance, the prices charged by Alliance schools has increased markedly, which is an indicator of "monopoly prices." See id.

\textsuperscript{141} In fact, with the inclusion of the Big 10 and Pac 10 in the 1998-99 season, and the Alliance provision that any team ranked No. 1 or 2 will automatically get an invitation to the championship, a national championship game each year is all but guaranteed.

\textsuperscript{142} See Antitrust Hearing, supra note 2, at 37-38.

\textsuperscript{143} See United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).
and thus reasonable. In the words of Justice Douglas, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Although there is not extant evidence of an actual anticompetitive motive by the Alliance members, the creation of this broad association of teams, conferences, and bowls which excludes based on conference affiliation might reasonably give rise to a suspicion that the intent behind the creation of the Alliance was not mainly procompetitive. Moreover, even if one assumes that the creation of a national championship game was the true goal behind the Alliance, in order for the restraint to survive antitrust scrutiny, it still must be shown to be "reasonably necessary" for the achievement of that goal.

One method of determining whether a restraint was reasonably necessary is to look at alternative methods which could have brought about the same goal and deciding whether those would have been less restrictive to competition. Although the "least restrictive alternative" doctrine as an independent grounds for finding a restraint invalid under the rule of reason has not been clearly defined by the case law, an inspection of what other possible solutions for the problem existed also allows the trier of fact to better understand the reasonableness of the defendants' conduct. In other words, the presence of other, less anticompetitive avenues that the Alliance could have taken to achieve its stated goal is powerful evidence that the restraint was not in fact "reasonably necessary" for the achievement of the legitimate goal. In the case of the Alliance, there is a strong argument that the complex agreements among the member conferences and bowls is excessively restrictive and exclusive to achieve the simple goal of a single national championship game each year.

145. See Brown University, 5 F.3d at 669.
146. See Antitrust Hearing, supra note 2, at 96.
147. See id. (Professor Roberts called it an "often referred to but conceptually elusive" doctrine, but pointed out that "many courts have applied some form of less restrictive alternative notion in rule of reason cases, and virtually none have rejected it outright." Id.).
Many have called for an Division I-A playoff, similar to those conducted by the NCAA in the other college football divisions. This system has both strengths and weaknesses. On the positive side of the ledger is that a playoff would not "automatically" exclude certain teams or conferences from a chance at the national title, as the Alliance allegedly does. It would also, if run like the NCAA Men's Basketball Tournament, allow more teams to benefit from post-season revenue, since the profit-sharing would not be restricted to certain conferences, but rather would be spread among all the Division I-A teams in varying shares. On the negative side, however, there are also powerful considerations. First, one could argue that a playoff would not achieve the goal of matching up the top two teams in the nation each year, since upsets might commonly allow a lower-ranked team to advance over a higher-ranked opponent in the playoff. Therefore, the playoff "alternative" might not be an alternative at all for the purposes of the rule of reason. Additionally, the Alliance has a strong argument that a playoff system, which would likely have a 16-team/15-game format, would decrease output, since the current number of bowls is around twenty. Thus—the argument might go—less games means less football, less television presence, and less all-around revenue. Not only would this harm the television market for bowls, but it would either completely wipe out the bowl market or (if the NCAA were to integrate the playoff system with the bowl games) would at least reduce the total number of bowls. Finally, there may also be some degree of difficulty in picking which teams go to the playoffs, akin to the controversy that

148. See e.g., id. at 9-11 (Statement of Senator Mitch McConnell); id. at 29 (Statement of Pennsylvania State University Quarterback Wally Richardson).
149. See id. at 9-11.
150. One has to only look at 1997’s NCAA Basketball Tournament to see this in action. The University of Arizona, despite being fifth in its conference and a No. 4 seed in its region, won the tournament and with it the national title.
151. See id. at 47.
has surrounded the national rankings in college football to
date. Given these negatives, therefore, it would be difficult to
maintain that the playoff system, although it may have other
non-antitrust merits, would be a viable less restrictive
alternative in a section 1 analysis.

More tenable is the proposition, forwarded by Professor
Roberts and others, of a return to the pre-Alliance
invitation/bidding bowl system, with one national
championship game mandated and administered by the
NCAA. This, argue its proponents, would have the advantage
of keeping the bowl and television markets almost totally
competitive, yet would satisfy the fan demand for a game
between the nation's two best teams. Under this system,
conferences and bowls would be able to bargain freely for bowl
invitations, and television networks would be free to bargain
with bowls, with all parties being subject to the condition that
if a team ended the season ranked first or second, it would be
released from all other obligations to allow it to play in the
championship game that year.

In addition to achieving the stated goal that the Alliance
gives for its existence, the national championship, this single
game system seems to have more equitable results. As
Professor Roberts proposes it, the two participating schools
would receive an individual sum for playing (Roberts puts it at
$1 million per team), with the balance of the substantial
profit generated from television and advertising revenue to be
divided among the 110 Division I-A teams equally, as is done
with the revenue from the Men's NCAA Basketball
Tournament.

While this scheme has much fairness appeal, it is not
generalized fairness that section 1 is concerned with—it is the
protection of competitive markets. Therefore, one should be

153. See Antitrust Hearing, supra note 2, at 96-97.
154. See id.
155. Although this may seem like a significant pay cut from the $8-$10
million payoffs in the top bowls, it should be kept in mind that the participating
school receives only about 10% of that total, while the remainder is shared
among the conference and its member schools.
156. See Antitrust Hearing, supra note 2, at 96-97.
sure to specifically look at the markets involved and predict how they would be affected by this plan. Although such questions are inherently speculative, it appears that both the bowl and television markets\textsuperscript{157} would be able to continue competitively under this system, which is the paramount goal of the antitrust laws.

The bowl market would remain healthy under the championship game system since (1) all bowls would be able to compete for desirable teams other than the top two, regardless of conference affiliation and (2) if the championship game was played in a bowl on a rotating basis, a new and prosperous bidding system would emerge for the bowls to pursue, similar to the Olympic Games host city selection process.

Likewise, the television market would seem to be less encumbered by this plan than it is under the Alliance system. Although the championship game would be the most desirable and garner the largest contracts, the contract would be sanctioned by the NCAA, thus freeing it from the tendencies (or at least appearances of tendencies) towards the overexposure of certain teams and conferences as a result of collateral relationships between members. This would also have the potential of keeping the price more in line with market forces, since the sport's regulatory body would set the price and be accountable to the entire NCAA membership. Moreover, the networks would be free to bid on the remaining post-season bowls, which would still promise large fan support and revenue, especially if they were able to feature popular or powerful teams, or field traditional rivalries.

In the final analysis, however, the actual viability of this precise scheme is not as important as what its discussion illustrates: that the Alliance does not appear to be either the necessary or desirable means to reach the goal of a national championship game. It would be safe to say that the reasonableness restraint, if ever properly brought as a section 1 claim in a court of the United States,\textsuperscript{158} would be a question

\textsuperscript{157} For a discussion of how I chose and defined these markets, see supra Part III.B.

\textsuperscript{158} Professor Roberts expresses doubt that such a suit will ever realistically
left to the trier of fact who would have ample fodder for a finding that the Alliance, whatever its true or stated goals, operates to exclude both bowls and conferences from a prosperous portion of the market and to force prices above the fair market rate. The rule of reason, by definition, creates results that cannot be predetermined since it is so dependent on the trier of fact's view of reasonableness, but in this case there seems to be a significant chance that the Alliance would crumble under the scrutiny of section 1 of the Sherman Act.

IV
Conclusion

The foregoing analysis of the Bowl Alliance and its possible antitrust violations vividly illustrates the tensions constantly at work in the arena of antitrust law. The Alliance, to take an optimistic view, was conceived and designed to address a long-felt need in post-season college football. It is the product of much effort and expenditure by its members to promote it and further its goals. In fact, the Alliance has been shown to be somewhat successful in obtaining its stated objective, an objective that almost any college football fan would endorse. Taken in a positive light, the Alliance was a large and well-meditated effort to organize and unify a somewhat chaotic Division I-A football market.

None of this positive motive, effort, or result however, will immunize such an agreement from antitrust scrutiny. Several times during the Senate Subcommittee Hearing, Commissioner Kramer and others insisted that the Alliance was the imperfect product of a good-faith attempt to correct some of the ills which beset college football. While this may be true, it misunderstands the operation of our antitrust laws. Economic experience and legal wisdom clearly tell us that restraints between competitors must be vigilantly watched and

be brought, given the problem of proving standing, the enormous expense involved, the disincentive for the regulatory agencies to get involved, the possibility of reprisal from the Alliance against any plaintiff conference, bowl, or school, and the inevitable uncertainty of a favorable verdict. See Antitrust Hearing, supra note 2, at 99-100.
immediately sacrificed if, in the pursuit of individual goals, the larger goal of competition was compromised.

The task of defining markets, delineating parties, and discerning the correct level of review is always difficult in section 1 cases, and the case of the Bowl Alliance seems to present a particularly complicated challenge. Nonetheless, a close examination of the markets and the prior case law yields some answers. It seems clear that the background of this case and the uniqueness of the agreements require a meaningful rule of reason analysis, which was attempted in part here, but which cannot be properly done without much more data, many more pages, and an actual case to distill the pertinent issues. While we cannot accurately predict what the results of this complex examination would be, we might be able to set out some conditional theories. If this analysis yields a result that the Alliance does enhance bowls in general, gives all Division I-A schools benefits and a fair chance, and gives television networks value for their contracts, the Alliance should be vigorously upheld as a valid restraint with procompetitive effects. If, on the other hand, the result is the stifling of smaller bowls and less dominant conferences, the centralization of economic and talent wealth in only the Alliance schools, and the charging of unfairly inflated prices, then the Alliance must, under the simple command of the Sherman Act, be struck down, no matter how much positive intention and effort was put into its creation.