Updates
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Pro Golfers Tee Off Antitrust Suit Against PGA Tour

A group of 11 professional golfers launched an antitrust suit in the U.S. District Court for the Northern District of California against the PGA Tour, Inc. (the PGA Tour) on August 3, 2022.

The following week, on August 9, U.S. District Court Judge Beth Labson Freeman denied plaintiffs' request for a temporary restraining order (TRO) that would have enabled three of them to play in the upcoming FedEx Cup Playoffs in Memphis, Tennessee. Judge Freeman reasoned that the plaintiffs failed to establish they would suffer irreparable harm because it appeared, at this preliminary stage, that the golfers would actually earn more money in a rival golf promotion than they would have earned under PGA Tour contracts. Federal courts treat TROs as "extraordinary" remedies, so plaintiffs' failure to prevail at this stage should not be taken as a sign that their case lacks merit. In other words, denial of a TRO is par for the course.

Plaintiffs made a Section 2 claim, under the Sherman Antitrust Act (Sherman Act), on the ground that the PGA Tour is a "monopsonist in the national market for the services of professional golfers for elite golf events" that has squelched competition from nascent rival LIV Golf, Inc. (LIV) by "threatening to expel and impose a lifetime ban on all players who contract with LIV," denying "players the freedom to play in competing tours," threatening to "harm other agencies, businesses or individuals who would otherwise" partner with plaintiffs or LIV, and "suspending and punishing" golfers for "playing in LIV [events] and supporting it."

In addition, the golfers allege a Sherman Act Section 1 violation stemming from an alleged agreement between the PGA Tour and the European Tour to "engage in a group boycott" of LIV, golfers who play in LIV tournaments, and "any other person or entity who seeks to partner with LIV." Finally, plaintiffs allege a violation of California's Cartwright Act and a breach of contract claim. Notably, this lawsuit comes on the heels of reports that the U.S. Department of Justice's (DOJ) Antitrust Division is also investigating the PGA Tour regarding its recent conduct.

The Teeing Ground

Plaintiffs are 11 current and former professional golfers, the most notable being three-time Masters Tournament champion Phil Mickelson. LIV is a professional golf tour financed by a Saudi Arabian sovereign wealth fund. Defendant PGA Tour is a tax-exempt entity formed in the 1960s by elite golfers, including Jack Nicklaus and Arnold Palmer. According to the complaint, plaintiffs were suspended from the PGA Tour for playing in tournaments sponsored by LIV and attempting to recruit players to join the upstart league.

The Fairway

Plaintiffs allege that before the establishment of LIV, professional golfers "had no meaningful option but to play on the [PGA] Tour if they wanted to pursue their profession at the highest levels." This "provided the Tour with enormous power over the players, including the ability to force players into restrictive terms that foreclose them from playing in competing events and the ability to suppress player compensation below competitive levels." Following the launch of LIV, the defendant allegedly responded by attempting to "choke off the supply of elite professional golfers" and "cement its dominance over the sport." Plaintiffs assert that the PGA Tour "threatened lifetime bans on players who play in even a single LIV Golf event" and "threatened sponsors, vendors, and agents to coerce players to abandon opportunities to play." In addition to these "career-threatening bans," plaintiffs also claim that the PGA Tour has made threats to agents, business partners, golf courses, sponsors, and ranking organizations. Plaintiffs cite a tour representative in saying that the PGA Tour "hold[s] all the cards," and reporting "we don't want those guys playing," and "don't care what the courts say."

Plaintiffs take aim at two PGA Tour regulations. The first is the Conflicting Events Regulation, which prohibits members from participating in "any other golf tournament or event" in North America during a week in which a PGA Tour event is scheduled, with such events scheduled "almost every week of the year." The second is the Media Rights Regulation, which bars members from appearing in any golf program, apart from PGA Tour-approved tournaments, shown on any media of any type "anywhere in the world," without the express written approval of the PGA Tour's commissioner.

By enforcing these regulations, agreeing with the European Tour to "punish" members that played in LIV events, and threatening golfers that join LIV with a "lifetime ban," plaintiffs claim that the PGA tour is attempting to cement its monopsony over elite golfer services by foreclosing LIV from access to "inputs necessary to compete," meaning elite golfers. Plaintiffs claim that it is not just these golfers in the suit that will be harmed if the PGA Tour continues its anticompetitive actions, but so will LIV Golf, consumers, and other stakeholders. Plaintiffs drive their core argument right down the fairway: "A nascent golf league without the golfers necessary to put on elite events is no threat at all."

The Bunker

Plaintiffs' suit further alleges that the PGA Tour's monopsony power is protected by high barriers to entry. "To enter this market, a competing elite professional golf promoter needs to raise hundreds of millions of dollars in capital, recruit a sufficient number of elite professional golfers to comprise a credible competing tour, arrange venues and tournaments, arrange for television coverage of tournaments, [and] recruit sponsors and advertisers."

The Green

Plaintiffs' lawsuit against the PGA is far from a singular event. In fact, this litigation reflects several important antitrust trends that are now cresting after several years of buildup.

1. **Professional sports in the antitrust crosshairs.** Plaintiff golfers' lawsuit is just one of several recent antitrust attacks on professional sports leagues and conferences. For example, last year, the U.S. Supreme Court, in *National College Athletic Association v. Alston*, unanimously enjoined National Collegiate Athletic Association (NCAA) rules that limited education-related benefits that schools provide to student-athletes. Major League Baseball (MLB) is also facing antitrust challenges, including a lawsuit filed by former minor-league teams and a Senate Judiciary Committee inquiry into MLB's long-standing antitrust exemption.
2. **Upstream and labor markets now a focus.** Another notable aspect of this litigation is that it alleges a Sherman Act Section 2 violation based on monopsony power, or buyer market power. Historically, nearly all Section 2 cases were based on allegations of monopoly, or seller market power. Here, however, plaintiff's theory is grounded in the PGA Tour's control over the *services* of professional golfers. The ongoing Antitrust Division merger challenge against Penguin Random House and Simon & Schuster also relies on a monopsony power theory of harm by alleging a market for the *acquisition* of U.S. publishing rights to books from authors. This increased scrutiny of "upstream" restraints is further reflected in the Antitrust Division's recent string of cases involving wage-fixing and no-poach agreements. Companies that purchase a large share of a particular good or service should keep abreast of these developments, even if they do not control a large portion of downstream sales.
3. **State antitrust laws are increasingly important.** In addition to Sherman Act Section 1 and Section 2 claims, the golfers alleged a violation of California's Cartwright Act. Although state antitrust laws largely mirror federal laws, there are some instances when state legislation provides additional avenues for relief. For example, California's attorney general continues to maintain that resale price maintenance (known in antitrust law as RPM) remains a *per se* antitrust violation under California law, years after the Supreme Court held the opposite under federal law. Firms that conduct business in several states would be wise to customize their compliance programs to account for key nuances of state antitrust laws.

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