Updates
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Golf Antitrust Suit Revamped With New Theories and New Plaintiff

In a rapid shake-up of the antitrust lawsuit filed against the PGA Tour Inc. (PGA Tour), professional golfers Carlos Ortiz, Abraham Ancer, Pat Perez, and Jason Kokrak have withdrawn from the case. While the exact reasons for their departures are unclear, Perez admitted to *Sports Illustrated* that he "didn't really think it through" before signing on to the *Mickelson et al v. PGA Tour, Inc.* case.

Meanwhile, the remaining golfers filed an amended complaint that included LIV Golf Inc. (LIV) as an additional plaintiff. This Update discusses key changes to the complaint and offers insight into how the recent reshuffle could affect the case going forward.

New Player on the Course

The plaintiffs' amended complaint, filed on August 26, marks professional golf tour LIV's first appearance as a party in this litigation. Though it's widely known that LIV is financed by the sovereign wealth fund of Saudi Arabia, the plaintiffs point out that LIV is also a Delaware corporation with its principal place of business in New York.

LIV sponsors an eight-event series of golf tournaments that takes place around the world, with the next event scheduled for September 16-18 at Rich Harvest Farms in Chicago. LIV is also the sponsor of a "planned season-long golf tour, the League," which the plaintiffs allege was "thwarted" by the PGA Tour's anticompetitive conduct.

Taking a Mulligan

In denying the plaintiffs' motion for a temporary restraining order (TRO) on August 10, U.S. District Court for the Northern District of California Judge Beth Labson Freeman expressed significant skepticism toward the plaintiffs' Sherman Act section 1 claim alleging a per se unlawful group boycott. Specifically, the plaintiffs claimed that the PGA Tour "orchestrated a per se unlawful group boycott with the European Tour to deny LIV Golf access to their members."

Commenting on the merits of the section 1 claim, Judge Freeman highlighted that group boycotts are only per se violations when they involve horizontal competitors. Here, however, the judge noted that the plaintiffs' own expert admitted that the PGA Tour and the Europe Tour were not competitors. Judge Freeman went on to note that "a group boycott may still be considered a violation of the Sherman Act under the rule of reason," but criticized the plaintiffs' analysis under that standard as "limited to a single footnote" in the TRO motion and "not alleged in the Complaint."

The distinction between per se and rule of reason treatment is extremely important: per se violations do not require proof of competitive effects, whereas the rule of reason claims require such proof. The amended complaint shows that the plaintiffs read the judge's decision carefully and responded deftly to her criticisms. With regard to the per se claim, the plaintiffs now allege that the European Tour is a potential competitor to the PGA Tour and that the putative boycott was "expressly aimed at foreclosing the entry of the only viable

alternative to the [PGA] Tour." According to the plaintiffs, this conduct should be treated as a per se offense because an elaborate analysis is not needed to demonstrate its anticompetitive character. However, the potential competition allegation could prove a difficult allegation to establish, particularly in light of the strategic alliance between the PGA and European Tours, which extends through 2035.

In the alternative, the plaintiffs also allege a violation under the rule of reason analytical framework by arguing that the "principal tendency of the agreement is to restrain competition, reinforce the market power of the PGA Tour, defeat the nascent entry of LIV Golf, and eliminate competition in the relevant markets." As a result, competition for golfers' services was eliminated, and LIV's competitive viability was hindered. The plaintiffs argue that the alleged boycott was nothing more than an effort "to lock arms in a joint effort to foreclose competitive entry," which "lacks any legitimate procompetitive justifications."

Time will tell whether these expanded allegations survive scrutiny, but the plaintiffs are clearly prepared to put in the work to address the judge's concerns.

Trying a New Club

In addition to the beefed-up allegations supporting the section 1 claim, the plaintiffs have also included two new causes of action under section 2 of the Sherman Act. First, the plaintiffs allege that the PGA Tour unlawfully monopolized the market for the promotion of elite professional golf events. Previously, the plaintiffs alleged a monopolization violation based on an upstream market for elite professional golf services. By contrast, the new allegation involves the downstream promotion of elite professional golf events. This new cause of action dovetails with LIV's involvement in the case, as the plaintiffs claim that the PGA Tour's actions prevent LIV from "contracting with agencies, vendors, sponsors, advertisers and players," interfere with "negotiations with agencies, sponsors, venues, vendors, broadcasters and partners" and effectively "prevent LIV Golf from launching a competitive elite professional golf tour."

Second, the amended complaint includes a claim for attempted monopolization that sets out a potential path for the plaintiffs to prevail even if "the PGA Tour's position in the relevant markets does not amount to monopoly and/or monopsony power, either by virtue of LIV Golf's nascent entry or otherwise." This claim addresses Judge Freeman's dicta suggesting that "LIV Golf's early success in entering the elite professional golf markets," which has only increased following British Open and Players Championship winner Cam Smith joining LIV in a deal worth more than $100 million, potentially exposes fundamental flaws in the plaintiffs' claims.

In other words, if the PGA Tour is truly preventing LIV from entering the market, then why is it drawing so much interest from players and the press? The attempted monopolization theory addresses this critique by alleging that even if LIV scores some early points off the PGA Tour and chips away at its market power, the challenged conduct presents a "dangerous probability of success in acquiring (or reacquiring)" that power going forward.

While it's too early to tell if this tactic will work, the new allegations demonstrate that the plaintiffs have mined the judge's TRO and are thinking creatively about all contingencies.

Reading the Greens

Deeper Pockets for Plaintiffs

The addition of LIV to this lawsuit will have monumental implications as the case unfolds. For example, the newly alleged downstream theory of harm may feature more prominently in the case going forward. Along these same lines, whether the promotion of elite professional golf events is a cognizable antitrust market will now be an important question. The demographics of professional golf fans, particularly as it relates to targeted advertising, will likely come into play.

One area to keep an eye on is the cost of the lawsuit. With LIV forking over hundreds of millions of dollars to lure players away from the PGA Tour, there's no telling how much it could be willing to invest in this lawsuit. With a plaintiff that has pockets as deep as LIV, any potential monetary settlement may be headed into a sand trap.

Potential Competition Emerges as Key Question

Whether the PGA Tour and European Tour are deemed potential competitors is now an important question. If the two entities are considered potential competitors, this would make the putative group boycott a per se violation and relieve the plaintiffs of their burden to prove anticompetitive effects. This presents a much easier path to victory than the plaintiffs would face under a rule of reason analysis.

Potential competition has been a focus of antitrust enforcement in recent years, as reflected in U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) statements that they intend to scrutinize mergers of even potential competitors.

Another One Bites the Dust

Four golfer plaintiffs have now withdrawn from the lawsuit, raising questions about whether the remaining golfers can stay in the fight, and for how long. This is especially true as they continue to face criticism from peers like Tiger Woods, who recently stated that the LIV players "turned their back on what has allowed them to get to this position."

As players drop out of the lawsuit, the addition of LIV to the lawsuit will become more and more significant for plaintiffs, both strategically and financially.

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