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Fore! Professional Golf Investigation Is Driver of New Antitrust Theories

WRITTEN BY

Michael S. Lowe | Barbara T. Sicalides | Timothy J. "Tim" Bado | Brett E. Broczkowski | Sam Hatcher

As a sport, golf has rarely, if ever, been described as “cutting edge.” But in the courtroom, golf may be at the forefront of the latest antitrust developments. In the coming months, the legal war unfolding in professional golf will become a testing ground for several new antitrust theories.

The U.S. Department of Justice, Antitrust Division, (DOJ) investigation into the PGA TOUR (TOUR) became public in July 2022, and has since raised a number of legal questions. The investigation is just one layer of the highly publicized showdown between the PGA and Saudi-backed upstart, LIV Golf (LIV). LIV sent shockwaves through the world of professional golf when it burst onto the scene, promising players sky-high signing bonuses and dramatic increases in prize money. The TOUR responded by suspending players who participated in LIV events.

At first blush, it is easy to write off the battle between LIV and the TOUR as an oddity — a conflict between participants in a niche market unlikely to have broad implications outside the rarified world of professional golf. But the DOJ investigation and private suits that have followed reflect the current trend of more aggressive antitrust scrutiny under President Biden’s administration. Two of those trends — an increased focus on labor markets or restrictions on the workforce and a shift away from consumer harm as the ultimate litmus test for anticompetitive effects — are squarely at issue in this rapidly progressing legal battle.

Many will watch the unfolding drama, but companies and individuals keen on limiting antitrust risk should follow the legal developments closely.

Antitrust Law and Professional Sports

Professional sports are a unique ecosystem, and even within the realm of professional sports leagues, professional golf stands out. Professional golfers — whether on the TOUR or LIV — are independent contractors. Unlike, for example, MLB players, professional golfers are not employees of the tour(s) they play on. Professional sports also present a unique ecosystem for the application of antitrust laws, as leagues seldom compete against one another. Recognizing this unique structure, Congress and the Supreme Court have exempted various leagues — most notably MLB — from antitrust scrutiny in certain areas.[1]

Overview of Recent Antitrust Trends

Since taking office, President Biden has made increasing antitrust enforcement a hallmark of his administration.

The Biden White House issued a sweeping executive order creating a "whole-of-government" policy to promote competition and step up antitrust enforcement. The executive order, as discussed in our previous advisory, identified key sectors for enforcement, including health care, agriculture, information technology, telecommunications, and the labor market.

Since the issuance of that order, the Federal Trade Commission (FTC) and DOJ have significantly expanded their enforcement activities, not just increasing the number of actions, but by targeting conduct that previously would not have been considered for antitrust enforcement, even conduct that may previously have been considered *pro*competitive. Whereas harm to the consumer was once the *sine qua non* of federal antitrust enforcement, recent enforcement actions suggest that the broader "tends to negatively affect competition conditions" approach will play a substantial role in agency decisions for the foreseeable future.

i. Federal Trade Commission

On July 1, 2021, the FTC withdrew its previous policy statement defining "unfair methods of competition" under Section 5 of the FTC Act. Section 5 permits the FTC to bring civil lawsuits against companies for engaging in "unfair methods of competition" even if such conduct is not in violation of the Sherman Act or the Clayton Act. The previous policy statement — issued in 2015 — stated that the FTC would be guided by "the promotion of consumer welfare" and that the FTC would apply the rule of reason in deciding whether to bring Section 5 claims.

As summarized in our prior advisory, the FTC then issued a new policy statement guiding Section 5 enforcement on November 10, 2022. The new guidance creates significant uncertainty regarding the scope of conduct the agency may deem an "unfair methods of competition," for example, even where there is no "current anticompetitive harm." The new policy statement also abandons its focus on the rule of reason, noting that, even if there are "net efficiencies" to consumers, conduct might still be deemed unfair.

Despite the new policy statement, antitrust lawyers continue to assert that the rule of reason applies when arguing in front of the FTC and in court. The FTC has identified several categories of conduct, which it might investigate under its new interpretation of Section 5, including some — such as "parallel exclusionary conduct that may cause aggregate harm" or conduct "undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market" — that previously the FTC was unlikely to examine.

ii. Department of Justice

The DOJ has similarly expressed a desire to expand its antitrust enforcement scope. One example of this expanded approach includes the recent criminal antitrust case brought by the DOJ for attempted monopolization — a rarely used charge — against the CEO of a paving company. As we reported in our advisory earlier last year, the DOJ also has been more active in targeting "no poach" agreements between companies, where companies agree not to hire each other's employees, as criminal conduct.[2] Assistant Attorney General Kanter stated, "antitrust laws protect competition for the acquisition of goods and services for workers" just as they protect consumers. The DOJ has similarly taken a more active role in filing statements of interest in private antitrust labor market cases.

Legal Challenges to the TOUR and LIV

i. The DOJ Investigation Into the TOUR and Other Golf Entities

The Wall Street Journal announced in July that the DOJ was investigating the TOUR for antitrust violations relating to the TOUR's restrictions on players' participation in non-TOUR events, particularly with regard to LIV. Though the DOJ has so far refused to comment on the inquiry, statements from TOUR personnel to media outlets suggest that the inquiry was triggered by the TOUR's public battle with LIV for the top players in professional golf. In October, *The Wall Street Journal* reported that the DOJ's investigation had expanded to include the U.S. Golf Association (USGA), Augusta National Golf Club, and the PGA of America — the host entities of the three majors held on U.S. soil. The specific parameters of the DOJ's investigation remain unclear, but the addition of the USGA, Augusta National, and the PGA of America suggests that the DOJ may not only be examining the TOUR's bylaws and actions, but also might be examining whether the major hosts have been involved in keeping LIV from successfully participating the professional golf market.

ii. Private Antitrust Litigation by LIV and Its Players

Against the backdrop of the DOJ's investigation, several suspended and former TOUR players brought a private antitrust suit against the TOUR, alleging that the TOUR's suspension of players who committed to participating in LIV events and agreement with the European Tour and possibly others to not compete for players' services, prevented the entry of LIV into the market for the services of professional golfers for elite golf events, and amounted to anticompetitive conduct.

The lawsuit — brought on the eve of the TOUR's annual playoff series — sought a preliminary injunction to allow the suspended players to participate in the upcoming playoffs. The Northern District of California court denied the players' motion for a preliminary injunction, finding that the players had not demonstrated a significant likelihood of irreparable harm or success on the merits.[3] The court noted that based on LIV's own statements about the success of the nascent tour and significant prize money available, the players' claims of harm were less than compelling. LIV was not originally a party to the case but joined the suit on August 26, 2022. Since the denial of the players' preliminary injunction, most of the suspended and former TOUR players, including Phil Mickelson, dropped out of the lawsuit, leaving LIV and former TOUR players Matt Jones, Peter Uihlein, and Bryson DeChambeau, as the remaining plaintiffs.

In September, the TOUR filed a counterclaim against LIV, arguing that LIV's conduct tortiously interfered with players' contracts with the TOUR. The TOUR asserts that several of the former players' contracts with LIV require the players to assist in recruiting current TOUR players to LIV. In an apparent attempt to undermine LIV's theory that the TOUR's similar restrictions amount to anticompetitive conduct, the TOUR's counterclaim additionally asserts that LIV's restrictions on player activities are more onerous than the restrictions that the TOUR's bylaws impose on TOUR players, including requirements that LIV players wear LIV gear at non-LIV events and that players seek LIV's approval for media appearances. LIV also prohibits players from playing in non-LIV events that conflict with LIV events. The court noted this at the preliminary injunction hearing, stating that LIV's contracts "lockup these players in ways that the PGA TOUR never imagined."[4]

The TOUR also attempted to seek discovery from the Public Investment Fund of Saudi Arabia (PIF) and Yasir Al-Rumayyan, the governor of the PIF. Since its inception, LIV has faced criticism for its ties to Saudi Arabia and the PIF, with many commentators suggesting that LIV is an effort by the Saudi government to engage in

"sportswashing" and soften its image worldwide after a series of recent human rights scandals, including the 2018 killing of *Washington Post* Columnist Jamal Khashoggi inside the Saudi Arabian consulate in Istanbul. Several members of Congress, including Representative Chip Roy (R., Texas) have asserted that LIV and its associated personnel should be registered under the Foreign Agents Registration Act as lobbyists for the Saudi Arabian government. The TOUR has asserted Al Rumayyan and the PIF are responsible for LIV's strategic direction and have direct authority over decision-making, including player recruitment, calling the PIF and Al-Rumayyan the "wizards behind the curtain: they call the shots, they approve the expenditures, and they supply the money."[5]

Antitrust Implications and Connections to Broader Trends

At first glance, the recent antitrust activity in the professional golf space may appear unrelated to the broader antitrust trends discussed previously. However, the recent actions by the DOJ and the private litigants reflect many of the broader shifts in the antitrust enforcement landscape under the Biden administration.

i. Emphasis on the Competition for Labor as a "Market" Ripe for Antitrust Enforcement

Public speculation suggests that the DOJ's investigation focuses primarily on restrictions that prevent TOUR players from participating in events or organizations that rival the TOUR. LIV's private suit similarly focuses on contractual restrictions on players.[6] This is consistent with the Antitrust Division's greater emphasis on challenging restrictions in the labor market, including no-poach challenges and the potential reduction in competition for workers in mergers.

The recent victory for the DOJ in blocking the proposed merger between Penguin Random House and Simon and Schuster is likely to further fuel the DOJ's more aggressive enforcement strategy.[7] There, the DOJ sought to block the proposed merger on the theory that the merger would reduce competition between publishers to acquire publishing rights from authors, which would in turn lower the advances paid to authors by publishers and reduce the number of books available in the market. In its decision enjoining the merger, the court focused on the harm to authors and rejected the publishers' arguments that the merger would result in market efficiencies that would lower overall consumer prices for books. Indeed, the court found not only harm to authors but also reduced output (of books) that would occur as a result of lower advances.

This emphasis on labor markets may similarly be reflected in the investigation into the TOUR. Although LIV has argued that the TOUR's bylaws result in a harm to the "consumers" of professional golf — the viewing public or media rights purchasers, the principal focus of their arguments have centered on the alleged restrictions placed on players that limit their ability to sell their "services" to competing organizations — in this case, LIV.

The FTC has also taken steps to curtail perceived abuses in the labor market. On January 5, the FTC announced a proposed rule that would ban noncompete agreements for workers, deeming them "unfair methods of competition." The proposed rule broadly defines "worker" to include "independent contractors, externs, interns, volunteers, apprentices, or sole proprietors who provide a service to a client or customer." If adopted, the proposed rule would have retroactive effect by requiring employers to rescind existing agreements that violate the proposed rule. The proposed rule is not yet effective, and it is likely to face significant legal challenges, but the proposal itself demonstrates the increased focus on antitrust enforcement in labor markets. While the proposed rule is unlikely to impact the outcome of the DOJ's investigation, the proposed rule could impact the contractual

restrictions imposed on players by both the TOUR and LIV.

ii. Will Existing Market Participants Be Impacted by Market Entrants Unmotivated by Traditional Economic Incentives?

The economic theory that has predominated antitrust cases since the rise of the "Chicago School of Economics" is fundamentally premised on the assumption that market participants are rational economical actors motivated to maximize profits. Although they have been applied to nonprofits, it has been through the lens of revenue-generating activities. A nonprofit entity might not be passing profits to shareholders, but it can nonetheless seek to maximize its revenue to use or pass on for the benefit of its constituents. LIV appears to be different. LIV currently does not enjoy a monopoly position in the market for professional golf, and neither the DOJ nor the FTC have announced any investigation into LIV. But LIV's conduct raises corollary questions that existing guidance and policy statements have yet to answer — namely, how should a market participant react to the entry of a competitor that is willing to forgo profits for the sake of growth, or a market participant motivated primarily by noneconomic factors?

The FTC's recent interpretation of Section 5 and other recent antitrust developments make clear that government enforcers will target existing market participants for actions that increase market concentration or undermine existing market structures, even if those actions do not necessarily result in higher prices to consumers.

Conclusion

The Biden administration's focus on more aggressive antitrust enforcement will likely continue to create uncertainty for firms, especially in the sectors identified as a priority for enforcement. The DOJ's willingness to pursue cases that might have been previously overlooked, coupled with the FTC's more seemingly expansive interpretation of "unfair methods of competition," makes it more difficult to predict what types of conduct will attract scrutiny. Private litigants will similarly be emboldened, and private suits are likely to follow closely behind any federal enforcement action. From an antitrust risk perspective, companies are reevaluating conduct against a new and uncertain standard — and they are closely watching enforcement to identify the boundaries of this "new and improved" antitrust.

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[1] *See Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs*, 259 U.S. 200, 209 (1922).

[2] *See also,* Plea Agreement, *United States v. VDA OC, LLC*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Oct. 27, 2022), ECF No. 106, in which the DOJ recently negotiated a plea agreement with a staffing agency for school nurses over a scheme to allocate nurses geographically with other competitors, suppressing wages.

[3] *Mickelson v. PGA TOUR, Inc.*, 2022 WL 3229341 (N.D. Cal. Aug. 10, 2022).

[4] Transcript of Proceedings, *Mickelson v. PGA TOUR, Inc.,* No. 5:22-cv-4486 (N.D. Cal. Aug. 9, 2022), ECF No. 64.

[5] Alex Miceli, "PGA Tour Believes Greg Norman Is Not Running Day-to-Day Operations at LIV Golf, According to a New Court Filing," *Sports Illustrated* (December 3, 2022), available at https://www.si.com/golf/news/pga-tour-

believes-greg-norman-is-not-running-day-to-day-operations-at-liv-golf-according-to-a-new-court-filing

[6] On December 21, 2022, Augusta National Golf Club Chairman Fred Ridley announced that all golfers who qualified under the current invitation criteria will be invited to play at the 2023 Masters Tournament, regardless of whether the golfer previously participated in any LIV golf events. Ridley's statement reinforced, however, that the invitation criteria for the Masters is reviewed on an annual basis, and any changes to the invitation criteria for future Masters events would be announced in April.

[7] *United States v. Bertelsmann SE & CO. KGaA*, 2022 WL 16949715 (D.D.C. Nov. 15, 2022).

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