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Legal and Illegal Monopolies: Why The PGA-LIV Merger Will Not Survive Regulatory Scrutiny

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On June 6, 2023, the three established professional golf entities—PGA Tour (PGA), DP World Tour and the Public Investment Fund (PIF)—announced a "landmark agreement" "to unify the game of golf, on a global basis.

The parties have signed an agreement that combines PIF, PGA Tour and DP World Tour into a new, collectively owned, for-profit entity to ensure that all stakeholders benefit from a model that delivers maximum excitement and competition among the game's best players."

While the announcement was light on detail and the agreement has yet to be finalized, the language suggests a merger among all three golf entities. For the purposes of antitrust analysis, we will assume that a triple merger is intended.

Antitrust Blueprint: LIV's Case Against PGA

When one company sues a rival for antitrust violations, and then agrees to merge with that rival, the two parties may revel in a resolved conflict. But with the erstwhile plaintiff's antitrust allegations further enhanced by the proposed merger, federal authorities are well positioned to prevent that merger from being consummated. So it is with the announced "agreement" among PGA Tour, the long-time dominant player in the world of international golf; LIV, its well-funded state-backed upstart rival; and DP World Tour, the newly renamed European Tour.

In Phil Mickelson et al. v. PGA Tour, (Case No. 5:22-cv-04486-BLF, N.D. Cal.) the plaintiff golfers who had signed contracts with LIV set out a powerful case in a complaint amended on Aug. 26, 2022, detailing monopolistic and monopolist conduct by

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the PGA, including threatening to expel and impose lifetime bans on all players who contract with LIV; imposing unreasonable and anticompetitive restrictions on players' ability to sell their independent contractor services; threatening to deny players the freedom to play in competing tours; threatening to harm other agencies, businesses or individuals who would otherwise work with LIV; and conditioning an alliance with DP World Tour on the latter not partnering with or sponsoring LIV's predecessor, the Premier Golf League (PGL). (The LIV parties include Phil Mickelson, Taylor Gooch, Hudson Swafford, Matt Jones, Bryson Dechambeau, Ian Poulter and Peter Uihlein).

Prior to the announced agreement, the Department of Justice was already investigating the PGA and other golf entities for potential anticompetitive behavior. In August, PGA Tour Commissioner Jay Monahan said the PGA was in communication with the Justice Department with respect to the proposed deal.

The Federal Trade Commission, the Department of Justice's Antitrust Division or both together cannot fail to challenge the proposed LIV/PGA/DP World

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Tour agreement, and they are likely to prevail when the agreement is analyzed under the Merger Guidelines, whether under the 2010 Horizontal Merger Guidelines or the proposed 2023 Draft Merger Guidelines.

Detailed below is the analysis to determine whether the agreement amounts to an illegal monopoly under Sections 1 and 2 of the Sherman Act.

Legal Issues to Consider

Sherman Act, 15 USCA Sections 1 and 2

Monopolies, Section 2

While not all monopolies are illegal, the conduct that contributes to the establishment of a monopoly can be illegal. So held the U.S. Supreme Court in *United States v. Grinnell*, 384 U.S. 563 (1966).

To establish a Sherman Act Section 2 violation, the *Grinnell* court held, the following elements must be proven: (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. *Grinnell* at 570-571.

By applying these elements, courts assess a participant's market power by first determining the extent and degree of the participant's market power to affect prices and/or output in a particular and relevant market. Then, the court determines whether such market power amounts to monopoly power and, if so, whether that monopoly power is maintained through proper and competitive means, or through illegal and anticompetitive means.

Anti-competitive conduct alleged in the LIV complaint against the PGA includes the following:

1. Monopsony Conduct or Buyer's Monopoly

- Threatening to expel and impose lifetime ban on all players who contract with LIV (complaint at paragraphs 89 and 165) (Under pressure from the Department of Justice, the PGA and LIV agreed in July 2023 to drop a provision in their framework agreement in which each party pledged not to recruit the other's players);
- imposing unreasonable and anticompetitive restrictions on player's ability to sell their independent contractor services;
- threatening to deny players the freedom to play in competing tours;
- threatening to harm other agencies, businesses or individuals who would otherwise work with LIV; and
- suspending and punishing players for playing in LIV in order to prevent competition for players' services. Complaint at Paragraph 312.

2. Monopolization

The complaint further alleges:

In furtherance of its monopoly power, the PGA informed players that anyone joining LIV would lose their status as a PGA member and moreover, face a lifetime ban from the PGA. Complaint at Paragraph 124. The prospect of being banned from the PGA for joining an upstart LIV that could not guarantee its long-term existence was obviously very risky. It could amount to a professional foreclosure, particularly for a young player facing 20 years of elite play ending. Complaint at Paragraph 125.

As if its own threats did not suffice, the PGA found allies for its monopolistic conduct from various golfing events—the PGA of America, which sponsors the PGA Championship; Augusta National, which sponsors the Masters; and the R&A, which sponsors the Open—all of which lent their support to the unlawful, monopolistic conduct of the PGA.

3. Attempted Monopolization

This count was pled in the alternative should the count for monopolization fail. In addition to the same elements of a monopolization claim—establishing product and geographic markets, anticompetitive conduct, and intent to acquire monopoly power—proving "attempted" monopolization requires establishing a dangerous probability of success that PGA Tour would destroy the "competitive viability of LIV" and achieve success in acquiring monopoly or monopsony power over the relevant market. Complaint at paragraphs 326-340.

Unlawful Restraint of Trade Practices, Section 1

Horizontal, Group Boycott

By joining with the European Tour/DP in an alliance, the PGA blocked the PGL, the predecessor to LIV, and cut off a potential partner of LIV. Complaint at paragraphs 93-100.

In November 2020, the European Tour announced that it entered into an alliance with the PGA, conditioned on the European Tour not partnering with or sponsoring the PGL. This ended LIV's attempt to provide a competitive alternative to the PGA, and it disbanded. The conditions the PGA imposed on the European Tour would constitute a horizontal group boycott.

The complaint at paragraph 342 sets forth the factual predicate for this group boycott count.

The PGA Tour has unlawfully reached an agreement with the purpose to eliminate competition with the European Tour, a potential horizontal competitor (and possibly other) to not compete for players' services and to prevent the entry and competitive viability of LIV Golf into relevant markets. Specifically, the PGA

Tour and the European Tour have agreed to engage in a group boycott of LIV Golf, other potential competitors, golfers (like Player Plaintiffs) who agree to play in LIV Golf's events, and any other person or entity who seeks to partner with LIV Golf, to harm competition for the services of professional golfers for elite golf events and for the promotion of elite golf events.

Evidentiary Standards of Review: Per Se and Rule of Reason

Whether the group boycott allegation violates the per se rule or rule of reason is a matter of evidence. If the originally proposed merger between the PGA Tour and DP World Tour constituted a group boycott, the merger of all three golf entities including LIV would constitute an overwhelming anticompetitive act for players and any potential entrants competing as a viable alternative to this new golfing (and financial) behemoth.

While LIV asserted all of the anticompetitive actions that the proposed merger would pose, this new "agreement" would terminate the only possible and remaining competition. Without much doubt, it would lack any legitimate procompetitive justifications.

Clayton Act, Section 7, 15 USCA Section 18

The complaint filed in *LIV Golf et al. v. PGA Tour,* recently dismissed with prejudice, sets forth a nearly insurmountable burden for the parties to overcome in order to meet the standards set forth under Section 7 of the Clayton Act.

The two-prong test for which mergers, acquisitions and certain joint ventures are prohibited is where such transactions: (1) substantially lessen competition or (2) tend to create a monopoly.

The anti-competitive conduct that the LIV parties allege in their 118-page complaint against the PGA Tour was damning even when the complaint was filed, while there existed ostensible competition among three parties: PGA Tour, LIV Golf/PGL (LIV) and DP World Tour (formerly European Tour) (DP). With the agreement effected as a full merger, all competition would be eliminated. Is there any doubt that such an agreement would substantially lessen competition or tend to create a monopoly? The agreement would accomplish both prongs of Section 7.

Conclusion

The legal infirmities plaguing this proposed agreement are not subtle. Predictably, it has drawn the attention of the Department of Justice, Antitrust Division. While financial considerations seem to be the driving factor behind the agreement, such reasoning cannot shield it from legal scrutiny where the agreement violates federal antitrust law and would most certainly violate the 30% market share threshold and would likely not pass muster under the current Merger Guidelines. The only hole-in-one that will be achieved with this agreement will be when the government's review results in it being withdrawn. The parties cannot even count on a bogey.