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"The Showdown Between LIV Golf and the PGA Tour: What are the Antitrust Issues Involved and is There a Legal Solution That Can Return the World of Golf to Peace and Unity Once Again?"

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THE SHOWDOWN BETWEEN LIV GOLF AND THE PGA TOUR: WHAT ARE THE ANTITRUST ISSUES INVOLVED AND IS THERE A LEGAL SOLUTION THAT CAN RETURN THE WORLD OF GOLF TO PEACE AND UNITY ONCE AGAIN?

By Joseph Foster

I. INTRODUCTION

A. The Beginnings of LIV

Greg Norman and His Deal with the Saudis

On October 27, 2021, Greg Norman hosted an interview session with golf media outlets, announcing LIV Golf Investments, and that he accepted a position as CEO, with his eyes set on the role of Commissioner as well.[1] LIV Golf Investments, which began as an idea to rival the PGA Tour by developing a global professional tour, has been backed by the Saudi Public Investment Fund ("PIF"), the sovereign wealth fund of Saudi Arabia.[2] This has been a controversial move. Because the financial arm for the Saudis has been accused of human rights violations, they are attempting to clear its reputation by investing in sports, which has been considered a form of propaganda to distract critics from their heinous acts.[3] After being founded in 2021, LIV Golf Investments named Greg Norman as CEO and announced an eight-tournament circuit, with $255 million in prize money for their inaugural season.[4] LIV has branded itself "an opportunity to reinvigorate golf" through large purse amounts, modified schedules, and a new culture for fans, using the slogan "golf but louder" as a key marketing strategy.[5]

PGA Tour Members' Reasons for Jumping Ship to Join the New League

LIV is offering the largest purses in golf with $25 million in prize money, $20 million for the individual event, and $5 million for the team aspect.[6] The individual winner of each event takes home $4 million while last place makes $120,000.[7] All of this tournament prize money is on top of appearance fees and signing bonuses that have been extremely lucrative,

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[1] Sean Zak, *LIV Golf timeline: How we arrived at pro golf's civil war*, GOLF (Sept. 8, 2022), https://golf.com/news/timeline-liv-golf-how-we-arrived-pro-golf-civil-war/ [https://perma.cc/S5T8-5BDV].

[2] Joel Beall, *The LIV Golf series: What we know, what we don't, and the massive ramifications of the Saudi-backed league*, GOLF DIGEST (June. 8, 2022), https://www.golfdigest.com/story/saudi-golf-league-2022-primer#:~:text=On%20Tuesday%2C%20May%2031%2C%20LIV,loyalty%20to%20the%20PGA%20Tour [https://perma.cc/ZL2U-K5FQ].

[3] *See id.*

[4] *See id.*

[5] Tarik Panja & Andrew Das, *What is LIV Golf? It Depends Whom You Ask.*, NY TIMES (Jul. 28, 2022), https://www.nytimes.com/article/liv-golf-saudi-arabia-pga.html [https://perma.cc/YM58-YWGG].

[6] *See id.*

[7] *See id.*

into the nine-figure range, especially for top players such as Dustin Johnson, Phil Mickelson, Bryson Dechambeau, and Brooks Koepka.[8] Each event consists of 54-holes with no cut, ensuring each player will receive a paycheck for the week.[9] In fact, "LIV" are the Roman numerals for 54, indicating the number of holes played in their tournaments.[10] The tournaments begin with "shotgun starts", allowing for shorter rounds, and will establish a team aspect of 12 teams of four players made up from the 48 player field.[11] Well-established veteran players may favor the shorter events and shotgun starts, allowing flexibility in their schedule and, in essence, allowing them to spend less time working.[12] Professional golf newcomers will favor the no-cut format, because it ensures they will be paid. Based on performance, the PGA Tour cuts about half the field halfway through tournaments, based on performance, and does not pay the players who do not complete all four rounds of tournament play.[13]

Perhaps the greatest reason for players making the jump has to do with ensuring sufficient competition in the world of golf.[14] Phil Mickelson used this as a big part of his reasoning for making the jump, explaining that this new competition would require the PGA Tour to rethink its business strategy and perhaps make necessary improvements to keep up with the new LIV Golf Tour.[15] To be competitive, a major consideration for the PGA Tour would be to increase its compensation for their players.[16]

A recent development gaining a lot of traction is the Official World Golf Ranking system ("OWGR") refusing to allow participants in LIV events to garner ranking points.[17] Points are crucial for golfer's compensation and points enable them to play in the biggest events worldwide, including major championships.[18] The PGA Tour and DP World Tour, both entities alleged to be anticompetitive in practices against LIV Golf, make decisions on the OWGR board that determine if LIV events should allow rankings points and put the exiled golfers back on the world map.[19] This newly-developing feud is fueled by control of the game of golf, and may determine whether the PGA Tour prevails or will have to yield to the market entrance of

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[8] *See id.*

[9] *See* Beall, *supra* note 2.

[10] *See* Richard R. Meneghello & Adam F. Sloustcher, *An Employer's FAQ Guide to the Antitrust Battle Between LIV Golfers and the PGA Tour*, FISHER PHILLIPS (Last Updated Sept. 9, 2022), https://www.fisherphillips.com /news-insights/employers-faq-guide-antitrust-battle-between-liv-golfers-pga-tour.html [https://perma.cc/YL3J-5YJS].

[11] *See* Beall, *supra* note 2.

[12] *See id.*

[13] *See id.*

[14] *See* James Dator, *Why professional golfers are choosing LIV Golf and Saudi propaganda, explained*, SB NATION (Jun. 8, 2022, 2:06 PM), https://www.sbnation.com/golf/2022/6/8/23159771/liv-golf-london-saudi-arabia-sportswashing [https://perma.cc/NT7W-CUX4].

[15] *See id.*

[16] *See id.*

[17] *See* Louise Radnofsky, *The Secretive Body at the Center of the Fight for Golf's Future*, WSJ (Oct. 8, 2022, 8:00 AM), https://www.wsj.com/articles/liv-golf-owgr-pga-tour-11665165563 [https://perma.cc/YS9N-DCJY].

[18] *See id.*

[19] *See id.* ("LIV, though, had a clear goal in mind: taking a backdoor approach to getting world ranking points that its players covet, but currently don't receive.").

the Saudi-breakaway tour.[20] The OWGR has made clear that the 54-hole format must meet the rigorous competitive standards set by the rankings committee to earn points.[21] This has become an issue due to LIV's marketing strategy that showcases golfers carefree while competing, playing with music blasting, and even intimate, underwhelming crowds at some events thus far.[22]

B. The Threat of Competition and the Sparks of Legal Consequences

Friendship Between the PGA and European Tours

Within the buzz of new competition rising, in November of 2020 the PGA Tour and European Tour came together and announced a strategic alliance.[23] In perhaps a logical attempt to avoid legal issue, PGA Tour commissioner Jay Monahan was careful not to call this union a modified partnership, instead referring to it as an extension of the steps the two tours have already taken.[24] The two co-mingled tours have different rules and regulations relating to the procedure for disciplinary action, however, both have in some form punished LIV Golf defectors.[25] This has sparked reports that the U.S. Department of Justice has begun an investigation into the PGA Tour to determine if they are engaging in anticompetitive practices against LIV Golf, in violation of antitrust law.[26]

This has raised significant issues and resulted in potential litigation under violations of the Sherman Act.[27] Given the PGA-DP World Tour agreement, group boycott claims will be at the center of attention throughout proceedings in the future of this dispute.[28] Most sports leagues follow a "rule of reason" approach when assessing group boycott violations.[29] However, group boycotts have the potential to be analyzed as per se violations of the Sherman

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[20] *See id.*

[21] *See id.*

[22] *See* Lanie Everett, *The Cheap Seats: Why the Saudi-Arabia-backed LIV golf tour has led to ethical concerns, rivalry with PGA tour*, THE DARTMOUTH (Aug. 5, 2022, 2:00 AM), https://www.thedartmouth.com/article/2022/08/everett-liv-golf-tour [https://perma.cc/Z2ZJ-48N2].

[23] *See* Zak, *supra* note 1 ("The European Tour and PGA Tour announced a strategic alliance intended to synthesize a global golf schedule, increase purses and improve playing opportunities within the existing men's pro-golf ecosystem.").

[24] *See* Matt Bonesteel, *PGA Tour strengthens ties with European golf to blunt LIV threat*, THE WASHINGTON POST (June 28, 2022 4:02 PM), https://www.washingtonpost.com/sports/2022/06/28/pga-tour-dp-liv/ [https://perma.cc/2ZBC-UMJW].

[25] *See id.* ("Last week, both tours announced measures intended to make their tournaments more attractive to players or to punish golfers who played in LIV's first event earlier this month in England.").

[26] Meneghello & Sloustcher, *supra* note 10.

[27] Craig Seebald & Annabelle Castleman, *Legal issues to observe in the PGA Tour-LIV Golf rivalry*, SPORTS BUSINESS JOURNAL (July 11, 2022), https://www.sportsbusinessjournal.com/SB-Blogs/COVID19-OpEds/2022/07/11-Seebald.aspx#:~:text=Unlike%20baseball%2C%20golf%20and%20other,harmful%20things%20to%20thwart%20competition. [https://perma.cc/V22N-CUE9].

[28] John Eichlin et. al., *You're Outta Here! Developing precedent on group boycotts in sports*, LINKLATERS (Nov. 3, 2022), https://www.linklaters.com/en-us/insights/blogs/sportinglinks/2022/november/developing-precedent-on-group-boycotts-in-sports [https://perma.cc/AK3Z-6CCD].

[29] *See id.*

Act if they exhibit a horizontal-competitor aspect, which is much more difficult to show.[30] This high burden for per se showings has resulted in a fading of the per se application, causing a loss of judicial certainty and consistency in decisions.[31]

This note proposes an amendment to the language of the Sherman Act that would thwart the vagueness issues missed by the Supreme Court in its failure to firmly establish any precedent regarding the application of a per se analysis through its past decisions.[32] This proposed amendment would incorporate language into the statutory text regarding "per se" and "rule of reason" standards, eliminating uncertainty left by the judicially-set precedent.[33] Language that eliminates the horizontal requirement for group boycott activity to be considered per se illegal would allow for a lower threshold of activity to be met in situations that clearly demonstrate elements of group boycott restraints.[34]

This note proceeds in four parts. Section II discusses the key actors involved, including Greg Norman, the Saudi Public Investment Fund, Jay Monahan, and of course, the professional athletes in the middle of this divide.[35] This section also discusses the harsh feelings of each side regarding one another, and the swift action taken on part of the PGA Tour to combat its LIV-defectors.[36] Section II goes on to discuss strategies being used by LIV Golf to draw players and fan attention towards their new platform as well as the response of the PGA Tour to remain on its high horse atop the world of golf.[37]

Section III examines the legal issue raised regarding the PGA Tour's alleged anticompetitive behaviors towards LIV Golf, as well as the goals that both the PGA Tour and LIV Golf seek to achieve through future litigation.[38] This section also delves into the history

[30] *See id.* ("The federal judge in that case expressed skepticism that the PGA's actions could be considered a per se violation of the Sherman Act, since group boycott claims are usually only per se violations when they involve horizontal competitors (which the PGA Tour and the European Tour are not, as they likely serve different markets)").

[31] *See* Adam Weg, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L. J. 1535 (2009).

[32] *See* Ann Graf McCormick, *Group Boycotts – Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703 (1976).

[33] *See* Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 710 (2018).

[34] *See* McCormick, *supra* note 32; *see also* Weg, *supra* note 31.

[35] *See* Mark Cannizzaro, *Greg Norman opens up to Post about LIV Golf, 'blood money' controversy, PGA Tour fight*, NEW YORK POST (Jul.28, 2022, 2:53 PM), https://nypost.com/2022/07/28/greg-norman-opens-up-about-liv-golf-blood-money-controversy/ [https://perma.cc/P8MT-7HDE], *see also* Beall, *supra* note 2; Panja & Das, *supra* note 5.

[36] *See* Beall, *supra* note 2, *see also* Cannizzaro, *supra* note 35.

[37] *See* Dominic Chu, *Saudi-backed LIV Golf envisions franchises in its future, executive says*, CNBC (Jul. 29, 2022, 12:42 PM), https://www.cnbc.com/2022/07/29/liv-golf-backed-by-saudis-and-trump-sees-franchises-in-its-future-exec-says.html [https://perma.cc/9LJK-M34M]. *See also* Dylan Dethier, *The PGA Tour just made big-time structural changes. Here are the 10 biggest*, GOLF (Aug. 24, 2022), https://golf.com/news/pga-tour-structure-changes-10/ [https://perma.cc/AD7X-MWGB].

[38] *See* Brian Baxter, *LIV Golf's New Top Lawyer Has Experience Challenging the PGA (1)*, BLOOMBERG LAW (Aug. 10, 2022, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/liv-golfs-new-legal-chief-has-experience-challenging-the-pga [https://perma.cc/6AYH-TRU]; *see also* Zak, *supra* note 1.

of the Sherman Act; how the Act applies to the issue at hand and highlights the standards for violating the Act when there is group boycott activity in question [39]

Section IV discusses the shortcomings of the Sherman Act, especially regarding group boycotts being analyzed as a per se violation, and proposes an amendment to the Act, that will add language to eliminate uncertainty and judicial discretion.[40] This proposed amendment would likely be enough to allow for a more clear-cut application of a per se analysis of group boycott activity in cases such as the one at hand, or encourage Jay Monahan and Greg Norman to sit down with key parties and hash out an agreement before lengthy and costly litigation proceedings ensue.[41]

II. BACKGROUND / HISTORY

Parties to the controversy and their relevant histories within the world of golf, along with the actions taken on behalf of each of them throughout the early stages of the rise of LIV Golf, are key to a firm understanding of the direction of this paper. Part A provides a look into LIV Golf commissioner and CEO Greg Norman's connection with the Saudi PIF, as well as the role of PGA Tour commissioner Jay Monahan and the athletes that have remained loyal to his tour.[42] Part B then discusses the actions taken by each tour in response to one another, in their attempts to keep star-athletes playing for their platform.[43] Part B also delves into major structural changes being implemented by the PGA Tour in response to players defecting towards LIV.[44]

A. Major Players

Norman and Saudi Arabia Partnership

Greg Norman jumped on the opportunity to be a part of the new breakaway tour, as he was previously involved in a start-up tour in 1994-1995 that was swatted aside by the PGA Tour.[45] Norman's harsh feelings towards the PGA Tour stems back to that time period when they emulated exactly the strategy they are carrying forward now to disband the newly proposed

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[39] *The Antitrust Laws*, FEDERAL TRADE COMMISSION, (last accessed Aug. 21, 2022, 4:35 PM), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/49TF-CGJE]; *see also* Jarod Bona, *Antitrust Group Boycotts: My Competitors are Conspiring Against Me*, THE ANTITRUST ATTORNEY (Jan. 20, 2022), https://irglobal.com/article/antitrust-group-boycotts-my-competitors-are-conspiring-against-me-3/ [htpp://perma.cc/46T2-SKK3]; *Nynex Corp. v. Discon*, 525 U.S. 128, 134 (1998); *see also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[40] 15 U.S.C. §§ 1-38; *see also* Bona, *supra* note 39; *see also Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA LAW (last accessed Sept. 18, 2022, 8:01PM), https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests#:~:text=Antitrust%20Standards%20of%20Review%3A%20The,Reason%2C%20and%20Quick%20Look%20Tests&text=Section%201%20of%20the%20Sherman,competition%20in%20a%20relevant%20market. [https://perma.cc/QV3Q-RLFD]; *see also* SHERMAN ANTITRUST ACT, 15 U.S.C. § 1 (1890).

[41] *See* Bona, *supra* note 39; *see also* Cannizzaro, *supra* note 35.

[42] *See* Beall, *supra* note 2.

[43] *See* Chu, *supra* note 37; *see also* Beall, *supra* note 2; Dethier, *supra* note 37.

[44] *See* Dethier, *supra* note 37.

[45] *See* Cannizzaro, *supra* note 35.

breakaway tour.[46] With Norman's experience in attempting to create a breakaway world tour, the Saudi Arabian PIF named him as LIV's first CEO.[47] Norman believes that his legacy on the course during his playing career allowed him to be in a position to not only expand the game of golf on a world stage but also expand his legacy as a major player in LIV.[48] Norman insists that LIV is not politically motivated, and the sole reason for creating the new tour is to expand the good that golf can do around the world; Norman emphasizes that Saudi Arabia should not be excluded from that good.[49]

The Saudi Arabian PIF is the financial leg to the new breakaway tour.[50] Investing in LIV Golf furthers the goal of the Saudi Arabian kingdom to diversify the country's economy and change its public image.[51] This shift would also make Saudi Arabia less dependent on the oil export industry and focus on increasing wealth with entertainment and tourism.[52] This act could be considered by outsiders as "sports washing", as the Saudis hope that in promoting international sporting events with a large interest worldwide, the athletes will extol the virtues for which Saudi Arabia is infamous.[53] The Saudis believe LIV Golf will cover their reputation of decades filled with human rights violations and transform the country into a tourist destination.[54] Mohammed bin Salman, Saudi Arabia's crown prince, is currently attempting to balance the public image of the country while maintaining complete control over Saudi Arabia and its involvements.[55]

Jay Monahan and the PGA Tour Members

Jay Monahan, the commissioner of the PGA Tour has made clear from the beginning, dating back to 2020, if a rival tour arose, players would have to choose to either remain loyal to the PGA Tour or take their talents elsewhere.[56] The European Tour, now named the DP World Tour, has also taken the PGA Tour's stance by disallowing its members to participate in LIV events.[57]

Top players such as Tiger Woods, Rory Mcllroy, Justin Thomas, Jordan Spieth, Jon Rahm, Scottie Scheffler, and Colin Morikawa have passed up on the opportunity to join the

[46] *See id.*

[47] *See* Beall, *supra* note 2.

[48] *See* Cannizzaro, *supra* note 35.

[49] *See id.*

[50] *See* Beall, *supra* note 2.

[51] *See* Dator, *supra* note 14.

[52] *See id.*

[53] *See id.* ("With each name added to LIV Golf's growing roster, more cover is provided to the group of defecting golfers who remain lockstep in their justification: They want more money, and they're going to get it — even if they have to sell their souls.").

[54] *See id.* ("The end goal is to soften the global image of Saudi Arabia, covering its decades of human rights violations, the murder of journalist Jamal Khashoggi, and ongoing atrocities against civilians in Yemen with the veneer of a sparkling utopia that provides opportunities.").

[55] *See id.*

[56] *See* Beall, *supra* note 2.

[57] *See id.*

new tour and have pledged allegiance to the PGA Tour.[58] Rory Mcllroy has stated that for top guys, there is no reason to tarnish the reputation they have built on the PGA Tour for more money.[59] Rory has since gone on to add that the feud between the two tours has already set golf on a path toward irreparable harm to the game.[60] Mcllroy followed up these comments in another interview stating, "I think they [LIV] have been misguided in how to spend the money."[61] Mcllroy has made it clear to the media that he believes the only way peace can be achieved between the new rival tours is if Norman steps down as CEO and Commissioner.[62] It appears the 33-year-old PGA Tour-star has shifted his negative-focus away from the idea of the LIV Tour and towards its CEO, Greg Norman.[63] He believes that Norman remains a negative force in the ongoing war and is using the funds provided by the Saudi PIF to continue his long-standing vendetta against the PGA Tour.[64]

Tiger Woods is perhaps the most important advocate to pledge loyalty to the PGA Tour, citing that all his wins and major championships have built him a legacy that is intertwined with the reputation and competition provided by the PGA Tour.[65] Loyal PGA Tour members have taken this opportunity to work together to better the Tour for its survival and provide a better product for the fans as well as a better work environment for members.[66] Many strategic changes to the institution of the PGA Tour in the future will come from the ideas of top players on how to better the tour in every facet including compensation, scheduling, and enhancing opportunities for sustained careers on the Tour.[67]

B. Strategies and Goals of the Opposing Tours

LIV Looking to Draw Players Away with a Modern Twist to Golf (oh yea, and tons of money)

In addition to large purses, new formatting of tournaments, and a refined schedule, LIV Golf is looking to completely change the landscape of golf from a business perspective.[68] LIV Golf and the Saudi PIF are looking towards a future where the teams will be developed into franchises that can be sold, similar to other major sports.[69] Officials have found that fans

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[58] *See id*.

[59] *See id*.

[60] *See* Jason Burgas, *Rory Mcllroy says PGA Tour vs LIV Golf war is doing 'irreparable' damage to the sport*, SPORTSNAUT (Oct. 26, 2022), https://sportsnaut.com/rory-mcilroy-pga-tour-vs-liv-golf-damaging-sport/ [https://perma.cc/3HZQ-UZWQ].

[61] *See id*.

[62] *See Ian Baker-Finch backs Rory Mcllroy's claim Greg Norman needs to leave LIV Golf for the game to find peace*, ABC (Last Visited Nov. 19, 2022), https://www.abc.net.au/news/2022-11-19/ian-baker-finch-greg-norman-rory-mcilroy-liv-golf-pga-tour/101674956 [https://perma.cc/39LE-2BFS].

[63] Burgas, *supra* note 60.

[64] *See id*.

[65] *See* Beall, *supra* note 2.

[66] *See* Cameron Jourdan, *Report details PGA Tour players' meeting with Tiger Woods; 7 more players defecting to LIV Golf*, USA TODAY (Aug. 20, 2022, 6:20 PM), https://www.usatoday.com/story/sports/golf/2022/08/20/tiger-woods-meeting-pga-tour-players-liv-golf/50621273/ [https://perma.cc/E9LC-UW7F].

[67] *See id*.

[68] *See* Chu, *supra* note 37.

[69] *See id*.

love to see golf as a team event and due to team merchandise selling out on the first day of each event thus far.[70] Saudi Arabia's PIF has invested a massive $2 billion into LIV and has lured players by offering them equity in the league, in addition to the tournament purses, signing bonuses, and appearance fees.[71] While the money is large, leaving more room for trial and error at the beginning stages of the startup, investors will expect to see returns eventually, and believe implementing these strategies for the new tour will provide just that in due time.[72]

The new breakaway tour is looking to stay competitive by achieving eligibility for their athletes to receive world golf rankings points.[73] Although several of the biggest names in the world of golf are competing at LIV events, their world ranking is continuing to slide.[74] For a new tour looking to grow and add more star-power to their roster, this is a major concern.[75] World rankings act as a "players passport", allowing them to be compared to players on opposing tours and enter some of the world's most elite tournaments.[76] Gaining world rankings points would be a huge success in LIV's pursuit to compete with the PGA Tour, as their players would no longer have to rely elsewhere to gain points and stay eligible for the most desired tournaments known in the golf world.[77] This is an urgent matter for LIV and a major goal so that players may repair their currently sliding ranking in time for the 2023 major championship season.[78]

PGA Tour Commissioner Continues to Lay Down a Heavy Hand Towards New Rival

Commissioner Monahan is standing firm on his stance that any PGA Tour members who declare that they will join and play in any LIV events will face suspension and a possible lifetime ban from the PGA Tour.[79] Monahan believes the talks of the Saudi-backed tour have distracted PGA professional golfers and maintains that loyal members are focused on building their legacies on the PGA Tour and not being dragged on the idea of financial leverage.[80] The

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See* Dylan Dethier, *Why can't LIV get points? Inside LIV Golf's controversial World Rankings Quest*, GOLF (Oct. 7, 2022), https://golf.com/news/liv-golf-world-ranking-controversy/ [https://perma.cc/U3X9-FGN7].

[74] *See id.* ("The fact that these pros regularly compete against each other and even the winners are plummeting in the world rankings reveals an obvious blind spot in the system.").

[75] *See id.*

[76] *See id.*

[77] *See id.* ("As a result, the OWGR's ruling — and timing — is a big deal. If LIV is awarded points, its members can more easily leave the PGA Tour in their rearview mirror, knowing they'll still be able to qualify for the majors through strong play on LIV. Until then, they're in limbo. That limbo has already contributed to lawsuits, to resentment, to dramatics. There's likely to be more of all of the above.").

[78] *See id.*

[79] *See* Beall, *supra* note 2; *see also* Eamon Lynch (@eamonlynch), TWITTER (June 9, 2022, 9:39 AM), https://twitter.com/eamonlynch/status/1534892998407950336?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1534892998407950336%7Ctwgr%5E4d6e3bf6fc8f3a0d3092b80858cc12783ba31bc3%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.sbnation.com%2Fgolf%2F2022%2F6%2F8%2F23159771%2Fliv-golf-london-saudi-arabia-sportswashing [https://perma.cc/S2DA-PTWH].

[80] *See* Beall, *supra* note 2.

PGA suspensions are based on the idea that their members are required to receive a release to play in any events that conflict with the PGA Tour schedule, and in the case of LIV tournaments, the players were not granted releases, but played regardless.[81]

The suspensions do not come as a surprise, as the world was made aware of PGA's stance towards LIV in as early as 2020.[82] These suspensions apply to all PGA Tour affiliates, including PGA Tour Champions and the Korn Ferry Tour, as well as removing breakaway players from the FedEx Cup points list and consideration for representing their countries on President's Cup teams in the future.[83] Seth Waugh, the CEO of PGA of America, stands with the Commissioner and has stated that players who leave for LIV will not be welcome at the PGA Championship (one of golf's four majors), nor will they be able to participate in Ryder Cups.[84]

PGA Tour Responding with Major Changes of Their Own

The PGA Tour has amended its Player Impact Program (PIP) to include 20 players that get paid at the end of each season, up from 10 previously, as well as changing the format so players will have to give back by playing in elevated events that will create a better product for the fans.[85] The Tour has also elevated 12 additional tournaments, raising the purse to $20 million in each and ensuring that each top player will participate in all of these events.[86] This adds up to seeing 20 events per year with a star studded field all together, rather than them spacing out their events and rarely all playing together.[87] Each fully-exempt PGA Tour member will now receive a league-minimum salary of $500,000 credited against their on-course earnings, similar to the format of other sports where players are guaranteed a salary.[88] Non-fully exempt members who still have status to play in tournaments will receive a $5,000 travel stipend if they do not make the cut to help with travel and tournament expenses.[89] Tiger Woods and Rory Mcllroy have also launched a Monday-night golf league called the TMRW Golf League (TMRW), which will feature a head-to-head team event to supplement the PGA Tour and boost the profiles and earnings for PGA members.[90]

III. ANTITRUST LAW IN THE WORLD OF GOLF

Section III provides an overview of the current lawsuits between the PGA Tour and LIV Golf, what each side hopes to gain from the litigation, and a detailed analysis into the Sherman Act, specifically group boycott violations and what it takes to be deemed a per se violation. Section A discusses the allegations brought by LIV Golf and its athletes regarding

[81] *See* Panja & Das, *supra* note 5.
[82] *See id.*
[83] *See id.*
[84] *See* Beall, *supra* note 2.
[85] *See* Dethier, *supra* note 37.
[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] *See id.*

the PGA Tour violating antitrust law, as well as the actions that have followed.[91] This section also discusses the goals of the opposing tours.[92] Section B then gets into the history of the Sherman Act and how precedent has set the application of a per se analysis to claims of group boycott activity.[93]

A. Current Lawsuits

Antitrust Suit

On August 3, 2022, LIV Golfers, led by Phil Mickelson and Bryson Dechambeau, filed an antitrust lawsuit against the PGA Tour, challenging their suspensions by accusing the PGA of anti-competitive practices.[94] Norman has stated that LIV would support players who want the freedom to play golf anywhere they want as independent contractors. On August 26, LIV Golf, in an amended complaint, joined some of their players as a party in the suit against the PGA Tour.[95]

On September 27, Mickelson and several others, including Taylor Gooch and Ian Poulter have dropped out of the suit.[96] The reason being, according to Mickelson, is he is "focused on moving forward and extremely happy being a part of LIV, while also grateful for [his] time on the Tour."[97] Mickelson believes that LIV's involvement in the case is sufficient to protect players rights, so much so that it is no longer necessary for him to stay involved as an individual party to the proceedings.[98]

The case alleges monopolistic practices on behalf of the PGA Tour by not granting leave to players to participate in LIV events, instead suspending them indefinitely when they participated.[99] When several of the players sought an injunction to play in the PGA Tour's playoff events, the court found that they did not meet the standard for injunctive relief, having not shown a likelihood to succeed on the merits and that they would not be irreparably harmed absent the injunction.[100] The lawsuit alleges violations by the PGA Tour of § 1 of the Sherman

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[91] *See* Kyle Porter, *LIV Golf joins player-led lawsuit against PGA Tour as two more golfers drop out*, CBS (Aug. 27, 2022, 3:47 PM), https://www.cbssports.com/golf/news/liv-golf-joins-player-led-lawsuit-against-pga-tour-as-two-more-golfers-drop-out/ [https://perma.cc/U4UJ-9TMY].

[92] *See* Baxter, *supra* note 38; *see also* Sean Zak, *PGA Tour Countersues LIV Golf: Here's where the lawsuit stands*, GOLF (Sept. 29, 2022), https://golf.com/news/pga-tour-countersues-liv-golf-where-lawsuit-stands/ [https://perma.cc/BAG4-YSLZ].

[93] *See The Antitrust Laws*, *supra* note 39; *see also* Bona, *supra* note 39.

[94] *See* Brian Baxter, *supra* note 38; *see also* Zak, *supra* note 1.

[95] *See* Porter, *supra* note 91; *see also* Jacob Lev, *LIV Golf joins antitrust lawsuit against PGA Tour*, CNN (Aug. 28, 2022, 6:29 AM, https://www.cnn.com/2022/08/28/sport/liv-golf-antitrust-lawsuit-pga-tour-spt-intl [https://perma.cc/JX3M-ZEKL].

[96] *See* Diane Bartz & Frank Pingue, *Mickelson and three others drop out of LIV Golf lawsuit against PGA Tour*, REUTERS (Sept. 27, 2022, 5:51 PM), https://www.reuters.com/legal/litigation/golfer-phil-mickelson-others-drops-out-lawsuit-against-pga-tour-liv-fight-2022-09-27/ [https://perma.cc/2BXZ-NS4N].

[97] *See id.*

[98] *See* Zak, *supra* note 92.

[99] *See* Porter, *supra* note 91.

[100] *See* FED. R. CIV. P. 65; *see also* Baxter, *supra* note 38.

Antitrust Act for an alleged boycott of LIV and teaming up with the DP World Tour, as well as a § 2 violation of the same act for alleged monopolistic practices by the PGA Tour trying to control where professionals play golf.[101]

The PGA Tour has since countersued, alleging tortious inducement of breaches of contract on the part of LIV Golf.[102] The PGA Tour alleges that there was no injury to the plaintiffs as a result of their suspensions from the Tour, as they lacked financial harm, and some even earned more from LIV than their PGA contract provided for, due to the exorbitant signing bonuses they received from LIV.[103] The PGA Tour argues that the breakaway tour is just a sports washing scheme by the Saudi regime and that they are enticing players to breach their PGA Tour contracts with exuberant amounts of money.[104] The PGA Tour has denied any allegations made regarding them being involved in a group boycott with the DP World Tour and other governing bodies in the world of golf, including the OWGR board of directors.[105]

Goals of the Legal Matter

LIV Golf and their players involved in the antitrust suit against the PGA Tour seek to prove that golfers should be considered independent contractors that should be free to play where they choose.[106] The Commissioner of the PGA Tour may deny any release to play elsewhere if it affects an obligation in contract between the Tour and one of its sponsors, or if it causes unreasonable harm to the PGA Tour or a sponsor involved.[107] Norman, along with others involved with LIV Golf, hope to prove the denial of releases is an example of the PGA Tour exercising a monopolistic practice in violation of the Sherman Act.[108]

The plaintiffs allege a per se violation of § 1 of the Sherman Act due to the PGA Tour entering a group boycott with the DP World Tour (formerly known as the European Tour).[109] As it currently stands, the plaintiffs must show that the PGA Tour and DP World Tours are horizontal competitors to warrant a per se violation.[110] Horizontal agreements take place between two market forces that are at the same level, or are direct competitors.[111] These horizontal agreements occur when two or more forces restrain another entity, either at their market level or a separate level.[112] In contrast, a vertical restraint involves two or more parties at different market levels; examples include restraints between a distributor and a retailer or a

[101] *See* Mickelson v. PGA Tour Inc., No. 22-cv-04486-BLF, 2022 U.S. Dist. LEXIS 142803 (N.D. Cal. Aug. 10, 2022).

[102] *See* Zak, *supra* note 92.

[103] *See id.*

[104] *See id.* ("LIV has executed a campaign to pay the LIV Players astronomical sums of money to induce them to breach their contracts with the TOUR in an effort to use the LIV Players and the game of golf to sportswash the recent history of Saudi atrocities and to further the Saudi Public Investment Fund's Vision 2030 initiatives.").

[105] *See id.*

[106] *See* Baxter, *supra* note 38.

[107] *See* Porter, *supra* note 91.

[108] *See* Baxter, *supra* note 38.

[109] *See* Mickelson, 2022 N.D. Cal. LEXIS 142803 at 3.

[110] *See id.*

[111] *See* Erin Garrity, *A New Chapter in Antitrust Law: The Second Circuit's Decision in United States v. Apple Determines Hub-And-Spoke Conspiracy Per Se Illegal*, 57 B.C. L. REV. E. SUPP. 84 (2016).

[112] *See* Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151 (1996).

retailer and a customer.[113] In some cases, distinguishing between a horizontal and vertical agreement between competitors requires an inquiry into the purpose, effect, and interests of the agreement.[114]

As previously stated, the PGA Tour's goal is not only to answer the numerous anticompetitive allegations, but also to show that LIV Golf is guilty of interfering with the PGA Tour player's contracts.[115] By doing so, the PGA Tour hopes to prove that the PIF has tortiously interfered with contracts between the PGA Tour and the former PGA Tour members, encouraging players to breach their contracts to join LIV Golf.[116] The PGA Tour alleges that LIV has advised tour members that their contracts with the PGA Tour are unenforceable, and thus have offered them enormous sums of money to breach those contracts.[117] The PGA Tour has stated in their countersuit that the LIV contracts "impose contractual restrictions on the LIV Players more onerous in scope and duration than any of the Tour regulations they challenge."[118] This countersuit looks to show that it is LIV, and not the PGA, that is competing unfairly.[119]

B. Applicable Law

The Sherman Act

The goal of antitrust law is the same since the Sherman Act was passed in 1890, to protect consumers by ensuring competition that incentivizes the efficient and productive operation of businesses.[120] The Sherman Act was passed to prevent the restraint of trade and monopolization practices, as well as attempts or conspiracies to monopolize.[121] The Sherman Act can impose a penalty of up to $100 million for violations.[122] The second section of the act makes monopolizing, as well as attempting or conspiring to monopolize a felony.[123] After proving too vague in practice, leaving loopholes that allow for easily defensible positions for corporations, the Sherman Act was supplemented.[124] Congress has supplemented the Sherman

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[113] *See 23.2 Horizontal Restraints of Trade*, SAYLOR ACADEMY (Last Visited Oct. 9, 2022, 12:14 PM), https://saylordotorg.github.io/text_legal-aspects-of-marketing-and-sales/s26-02-horizontal-restraints-of-trade.html [https://perma.cc/U5R4-E6NM].

[114] *See* Ricks and Loftis, *supra* note 112.

[115] *See* Zak, *supra* note 92.

[116] *See id.*

[117] *See* Mark Schlabach, *PGA Tour countersuit claims LIV Golf induced golfers to breach existing contracts by offering 'astronomical sums of money'*, ESPN (Sept. 29, 2022), https://www.espn.com/golf/story/_/id/34689459/pga-tour-countersuit-claims-liv-golf-induced-golfers-breach-existing-contracts-offering-astronomical-sums-money [https://perma.cc/FJX5-62CE].

[118] *See id.*

[119] *See id.*

[120] *See The Antitrust Laws*, *supra* note 39.

[121] *See id.*

[122] *See id.*

[123] *See* Coryanne Hicks, *The Sherman Antitrust Act is the first in a line of federal laws protecting consumers from unfair prices*, BUSINESS INSIDER (last updated Aug 2, 2022, 2:09 PM), https://www.businessinsider.com/personal-finance/sherman-antitrust-act [https://perma.cc/L6WW-HGJJ].

[124] *See id.*

Act with the passing of the Federal Trade Commission ("FTC") Act and Clayton Act, both in 1914.[125] The FTC Act deals with methods of competition that are unfair, while the Clayton Act covers specific practices not addressed by the Sherman Act, such as mergers and acquisitions that would lessen competition.[126]

The Clayton Act strengthened the Sherman Act by clarifying certain points such as mergers between businesses and situations where one person makes decisions for multiple competing corporations, called an interlocking directorate.[127] The Robinson-Patman Act amendment of 1936 again strengthened the initial Sherman Act by covering discriminatory pricing between competitors in their dealings with each other.[128] The Celler-Kefauver Act, passed by congress in 1950, was amended to provide guidance against forms of mergers between corporations that led to a substantial reduction of competition in that market space because of monopolization caused by the merger.[129] An amendment in 1976 called the Hart-Scott-Rodino Antitrust Improvements amendment, required notice to be given to the government when engaging in a large merger or acquisition.[130] These amendments have proven useful as a supplement to the Sherman Antitrust Act, making it easier to disincentivize anticompetitive business practices and to recover damages for violations.[131]

The "per se" rule under the Sherman Act applies to extreme anti-competitive restraints that damage the market so much so that they deserve to be deemed violative of the Sherman Act without further knowledge of the market or possible justifications for competitive behavior.[132] A per se analysis has traditionally been applied only in specific cases where companies teamed up to directly deny, persuade, or coerce their vertical counterparts (suppliers or customers), to impede the relationships necessary in a competitive struggle for market power.[133] In a per se violation, a plaintiff need only show that the anticompetitive behavior took place, not the unreasonableness or negative effects that the conduct has on the relevant markets.[134] Also under the per se rule, defendants are not able to provide justifications for their objective anticompetitive behavior.[135]

Per se illegal practices under antitrust law may include horizontal market allocation agreements, certain horizontal group boycotts by competitors within the market, and more.[136] A major exception to the per se application is when the restraints are necessary to the existence

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[125] *See The Antitrust Laws*, *supra* note 39; *see also* Daniel Baracskay, *Federal Trade Commission*, MTSU (2009), https://www.mtsu.edu/first-amendment/article/812/federal-trade-commission [https://perma.cc/L8RB-EJZC]; *see also* CLAYTON ACT, 15 U.S.C. §§12-27 (1914).

[126] *See The Antitrust Laws*, *supra* note 39.

[127] *See* Hicks, *supra* note 123.

[128] *See id.*

[129] *See* Hicks, *supra* note 12; *see also* Jason Gordon, *Celler-Kefauver Act – Explained*, THE BUSINESS PROFESSOR (last updated Apr. 15, 2022), https://thebusinessprofessor.com/en_US/business-transactions/celler-kefauver-act-defined [https://perma.cc/W9GG-GPHV].

[130] *See* Hicks, *supra* note 123.

[131] *See id.*

[132] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40.

[133] *See* Weg, *supra* note 31; *see also* United States v. Socony Vacuum Oil Co., 310 U.S. 150, 217-224 (1940).

[134] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also United States v. Topco Associates Inc.*, 405 U.S. 596 (1972).

[135] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1940).

[136] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40.

of the venture that places them; when restraints are necessary, a court will move away from per se and apply a lower standard, such as the rule of reason.[137] This would require a full analysis into the; (i) definition of relevant products and geographic markets, (ii) defendant's market power in the market of relevance, and (iii) anticompetitive effects, along with burdening the defendant to justify.[138]

Group boycotts and concerted refusals to deal, which are components of antitrust law and the Sherman Act, cost target companies and consumers money.[139] Companies that are victims of group boycott and refusal to deal cases can recover damages.[140] Courts may issue injunctions against participants in group boycotts to prevent the illegal activity in that market space.[141] Monetary damages are also recoverable by target companies, and can triple damages, along with the payment of reasonable attorneys' fees.[142]

Standards for Violating the Sherman Act

§ 1 of the Sherman Act is violated when a contract is made that restrains trade between the states or foreign nations, therefore making it illegal.[143] Parties engaged in illegal contracts or conspiracies to restrain trade can be guilty of a felony and subject to massive fines.[144] Attempts to monopolize, conspiring to monopolize, and monopolistic practices are guilty of violating § 2 of the Sherman Act.[145] Restraining competition between states and/or foreign nations through monopolistic practices can be punishable, again, as a felony and with massive fines.[146]

A group boycott, § 1, claim arises when two or more entities work together to restrict competition.[147] Businesses are typically permitted to choose their business partners under law, however, companies with sufficient market power have this freedom restricted.[148] For § 1 of the Sherman Act to apply in these cases, there must be an agreement or concerted action by the defendant, shown by the plaintiff.[149] Violators typically use a concentrated harm towards one or few competitors that are trying to establish themselves in the space by disrupting the

[137] *See id.*

[138] *See id.*

[139] *See Group Boycotts and Refusalto Deal*, KOHNSWIFT&GRAF (last visited Oct. 28, 2022, 7:51 PM), https://www.kohnswift.com/practice/antitrust/group-boycotts-and-refusal-to-deal/ [https://perma.cc/7B3Y-P8YH].

[140] *See id.*

[141] *See id.*

[142] *See id.*

[143] *See* SHERMAN ANTITRUST ACT, *supra* note 40.

[144] *See* 15 U.S.C. §§1,2.

[145] *See id.*

[146] *See id*.

[147] *See* Bona, *supra* note 39.

[148] *See* KOHNSWIFT&GRAF *supra* note 139.

[149] *See Does the Group Boycott Violate the Antitrust Laws? Five Questions You Should Ask*, BONA LAW (last accessed Sept. 9, 2022, 8:21 PM), https://www.bonalaw.com/insights/legal-resources/does-the-group-boycott-violate-the-antitrust-laws-five-questions-you-should-ask. [https://perma.cc/2WK4-3JB5].

market.[150] This type of boycott usually occurs when a new competitor enters the market with a new and potentially better way of doing things, followed by fellow established-competitors working together to crush the new entrant.[151]

Some courts require plaintiffs to demonstrate that the alleged company possesses enough market power to eliminate or limit the victim company.[152] Plaintiffs are also required to show control by the defendant over a resource or facility necessary to the target company to survive.[153] Group boycotts have sometimes been analyzed as a per se antitrust claim, which is less burdensome to prove, with the plaintiff not needing to show each element usually required to constitute a violation.[154]

While businesses are usually free to choose business partners, refusing to deal with specific businesses may have anti-competitive effects.[155] When a company that has sufficient market power refuses to deal with another entity within that market space, with the goal in mind of maintaining monopoly power in that market, the refusal could constitute an antitrust violation.[156] Refusals to deal can substantially decrease the market shares and profits of competitors, or more severely, remove them from the market space altogether.[157] Victims of an illegal refusal to deal may bring private actions under federal or state antitrust laws, including the Sherman Act.[158]

With current U.S. Supreme Court precedent, there must be a horizontal boycott for there to be a per se violation of the Sherman Act.[159] This typically means two or more competitors will come together in some sort of agreement to exclude the victim from the market.[160] For example, the Supreme Court in *FTC v. Superior Court Trial Lawyers Ass'n* found a horizontal agreement that undoubtedly restrained price and output, therefore the lower court erred in finding an exemption against a per se violation.[161] The Supreme Court in *Nynex Corp. v. Discon* followed this precedent and confirmed that the per se rule may apply only to horizontal agreements that take place between two or more direct competitors.[162] Here, the per se rule did not apply to a telephone company because their anticompetitive motive was to prevent a supplier from obtaining a potential new customer, constituting a vertical restraint.[163] There must be a direct agreement on price or price levels for the per se rule to apply to vertical restraints.[164] Some lower courts also require there to be an exercise over shared market power

[150] *See* Bona, *supra* note 39.
[151] *See id.*
[152] *See* KOHNSWIFT&GRAF, *supra* note 139.
[153] *See id.*
[154] *See* Bona, *supra* note 39.
[155] *See* KOHNSWIFT&GRAF, *supra* note 139.
[156] *See id.*
[157] *See id.*
[158] *See id.*
[159] *See* Bona, *supra* note 39; *see also* Nynex Corp., 525 U.S. at 135; *see generally* Business Electronics Corp., 485 U.S. at 730.
[160] *See* Bona, *supra* note 39.
[161] *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).
[162] *See Nynex Corp.*, 525 U.S. at 135.
[163] *See id.* at 138.
[164] *See id.* at 136.

or complete control of an essential resource to the market.[165] The conduct of the defendants must be commercially motivated, or it will not receive any consideration for group-boycott liability in antitrust law.[166]

IV. Solution: Amend the Sherman Act

This note proposes an amendment to the Sherman Act, incorporating language that eliminates the horizontal requirement for a group boycott claim to be analyzed under a per se analysis. This proposal is that eliminating the higher burden for being analyzed as a per se violation will create more judicial consistency and avoid costly litigation in situations where it is not necessary.[167] Critics may argue that the language of the Sherman Act is left intentionally vague due to the uncertain dynamics of economics and the marketplace.[168] This note argues that the vagueness created by the language has left a large void, resulting in a high-level of variability in regards to judicial decisions and the question of when the per se analysis applies to claims such as group boycott activity.[169]

Therefore, Part A discusses, in detail, the shortcomings of the Sherman Act, as well as the inconsistencies in group boycott violations within the act.[170] This part also discusses how precedent has slowly moved away from the per se analysis.[171] Part B then highlights the language changes of the proposed amendment to the Sherman Act, along with how the amendment will bring about benefits in the sphere of Antitrust Law, such as more judicial certainty and less financial waste by both the court systems and victims seeking judicial intervention.[172]

A. Does the Sherman Act Remain Good Law?

The Sherman Act has had a complicated history due to its loose wording and poor definition of key terms within the act itself.[173] The act was designed to restore competition to industries that had been monopolized.[174] It was deemed nearly pointless five years after its adoption in *United States v. E.C. Knight Company*,[175] where it was found that the American Sugar Refining Company's ownership of 98% of all sugar refining in the U.S. did not constitute

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[165] *See* Bona, *supra* note 39.

[166] *See id.*

[167] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also* Weg, *supra* note 31.

[168] *See* George E. Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U.L. REV. 389, 417 (1980).

[169] *See* Weg, *supra* note 31.

[170] *See Sherman Anti-Trust Act (1890)*, *supra* note 40. *See also* Bona, *supra* note 39.

[171] *See* Weg, *supra* note 31.

[172] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40. *See also Sherman Anti-Trust Act (1890)*, *supra* note 40; *see also* Weg, *supra* note 31.

[173] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.

[174] *See id.*

[175] *See United States v. E.C. Knight Co.*, 15 S. Ct. 249 (1895).

a restraint of trade.[176] Since then, the act has been used with more success to maintain a free-market, an example being the breakthrough against Microsoft in the 1990s.[177] More recently, in 2013, the Sherman Act was used successfully in *United States v. Apple Inc.*, where it was found that Apple violated § 1 of the act by conspiring with a publisher to eliminate competition and drive up e-book prices.[178] While the Sherman Act remains a useful source of law today, its lack of definitions cannot be ignored, as they lead to inconsistency due to leaving a large amount of discretion in the hands of the judicial system.[179]

Group boycott claims, which fall under Sherman Act § 1, are a particular area of antitrust law that remains flexible and inconsistent.[180] Given that the specific language of group boycott activity is not directly in the Sherman Act itself, a major issue arises when courts decide between using the per se or rule of reason standard.[181] Due to the inconsistencies that have arisen, courts have created a standard in the grey-area of both of these approaches called the quick-look analysis.[182] This analysis has been developed due to the gaps left by ambiguities in the language of the law, and is considered an abbreviated rule of reason approach.[183] This approach is taken when the action does not constitute a per se violation but is so clearly anticompetitive that the court need not go through all the rigorous analysis laid out by the rule of reason approach.[184] This short-cut approach has only been established due to the difficulty in meeting the standard that precedent requires to be analyzed as a per se violation, which would be leaps and bounds easier to prove, especially for violations so clear that they need not go through all the formalities required by an unnecessary, in-depth analysis.[185]

Given the growing complexity of commercial and foreign markets, the per se rule has been slowly disfavored.[186] Courts have moved toward a willingness to analyze procompetitive justifications in horizontal group boycotts closer to a rule of reason approach.[187] The per se analysis for horizontal group boycotts continues to fade as it has been less useful of late, as courts look to other methods of analysis for these violations.[188] Moving away from per se approach has its downfalls, including the provided judicial certainty that stems from this analysis.[189] This will create very flexible standards that the U.S. Supreme Court will need to establish over a long period of time.[190] Although the establishment of the quick-look approach applies a partial remedy to this problem, lower federal courts will struggle to analyze causes of

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[176] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.

[177] *See id.*

[178] *See United States v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (2d Cir. 2013).

[179] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.

[180] *See* Bona, *supra* note 39.

[181] *See id.*

[182] *See id.*

[183] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40.

[184] *See id.*

[185] *See id.*

[186] *See* Weg, *supra* note 31.

[187] *See id.* at 1548 ("the Court is willing to examine the procompetitive justifications for horizontal group boycotts, an analysis that is strikingly similar to a fullblown rule-of-reason analysis. Either way, the traditional per se treatment of horizontal boycotts is no longer necessary or even justifiable under the Court's current trend.").

[188] *See id.* at 1539.

[189] *See id.* at 1555.

[190] *See id.*

action, such as group boycott claims, via the rule of reason approach that were previously analyzed by a per se analysis.[191]

Shifting away from a per se analysis would cause a significant uptick in cost of litigation.[192] The per se analysis as applied to the Sherman Act claims significantly decreases the length of the litigation process because the action allows for the hearing of evidence that only relates to certain agreements before being able to decide a case.[193] In contrast, the rule-of-reason and quick-look approaches both require an in-depth investigation into factors such as market power, market history, and competitive justifications.[194] This in turn leads to a significant uptick in the financial and judicial resources that are expended during a drawn out litigation process.[195]

B. Proposed Legal Solution

Moving back to a per se approach when analyzing antitrust claims such as group boycott activity would engender more judicial consistency and lead to an easier burden for the plaintiff to prove to the court.[196] Although products and the need for cooperation between competitors in the same market space has become more complex, not every situation requires such an in depth and expensive analysis, and there still remain some situations that the courts could consider "tap-ins", golf terminology for a no-doubter.[197]

Although the Supreme Court has made horizontal group boycotts a per se violation of § 1 of the Sherman Act, lower courts continue to find ways to dance around this principle.[198] The ambiguity of the application of per se analysis to group boycott claims is much more obvious when compared with its application to other per se relevant claims, such as price fixing.[199] Simply defining acts as group boycotts and applying the per se rule was seen as an invitation to open the possibility that some reasonable activity will be forbidden without good reason.[200] Keeping the per se rule in practice is key, as it acts as not only a deterrent, but also aids in predicting the types of conduct that will be allowed.[201] These ambiguities regarding the application of per se analysis to certain antitrust violations by the Supreme Court have been due to the Court's failure to properly define the term group boycott and inability to set a fine-line on when to apply per se or move towards a rule of reason approach.[202] With lower courts

[191] *See id.*

[192] *See id.* at 1556 ('Without per se treatment, the courts will only have the rule-of-reason and quick-look analyses to scrutinize agreements, both of which can produce a longer, more arduous litigation process.").

[193] *See id.*

[194] *See id.*

[195] *See id.*

[196] *See id.*

[197] *See id.*

[198] *See* McCormick, *supra* note 32.

[199] *See id.* at 708.

[200] *See id.* at 753.

[201] *See id.* at 765-766 ("The application of such a standard frees the courts of the burden of extensive fact-finding analysis and of the difficult economic examination inherent in the application of the rule of reason.").

[202] *See id.*

hesitant to apply the per se rule, an elimination of the ambiguity can be resolved by a proposed amendment directly to the Sherman Act, since the Supreme Court has failed to adequately fill the gaps through its own precedent.[203]

The language of the Sherman Act allows for a framework to be created judicially, establishing rules on a flexible and discretionary basis, rather than providing notice and consistency within the statutory language itself.[204] Courts now weigh many more economic and market factors than originally deemed necessary, enabling judicial determinations of "reasonableness" on a much more malleable basis.[205] This is a major problem due to the Department of Justice (DOJ) standing firm on their policy that only per se violators can be charged criminally while guilty companies are dealt with civilly.[206] With such a black-and-white approach being taken by the DOJ to differ the punishments according to the level of wrongdoing, the blurring of the line between per se and rule-of-reason violators contradicts the DOJ's purpose to separate more egregious violations from those where there may have been a legitimate business purpose.[207] The more severe penalties are for an offense, the less ambiguity will be accepted as to application.[208]

These concerns are also magnified when the issues overlap with constitutional protections, which the Sherman Act does, making it particularly suspect.[209] Courts have found similar trade regulation statutes unconstitutionally vague, but there is no sign the Sherman Act will be applied in a more definite nature in the future.[210] This gives rise for the need to interpret the criminal provisions of the Sherman Act with extreme caution due to the potentially unconstitutional level of vagueness left by the language of the statute.[211] It is clear that the issues regarding vagueness in the Sherman Act must be faced and dealt with sooner rather than later.[212]

A novel legal solution that would solve the matters between the PGA Tour and LIV Golf would be a new amendment to the Sherman Antitrust Act of 1890.[213] Amending the statute to include more precise definitions of terms such as "group boycott" and eliminating the horizontal requirement for per se group boycott violations would make it more efficient and lead to more probable and consistent outcomes in legal proceedings.[214] Also, finding a way to incorporate "group boycott" language into § 1 of the act will lessen the burden on plaintiffs to

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[203] *See id.*

[204] *See* Sipe, *supra* note 33 at 721.

[205] *See id.* at 728 ("The Sherman Act's judicially-created framework of rules, instead of providing the notice and consistency otherwise lacking in the statutory text itself, has thus single-mindedly elevated discretion and flexibility. One by one, the courts have eliminated the bright and predictable lines of per se analysis, whether explicitly and outright or implicitly through threshold rule-of-reason inquiry. Compliance in the shadow of Sherman Act jurisprudence thereby means weighing the totality of all economic factors and market effects and determining whether the activity in question will be found 'reasonable' down the line by a judge or jury.").

[206] *See id.* at 729.

[207] *See id.*

[208] *See id.*

[209] *See id.*

[210] *See* Garvey, *supra* note 168 at 418.

[211] *See id.* ("Moreover, the Sherman Act does not have the characteristics of a traditional strict liability offense. Finally, the Act is, and will continue to be, vague.").

[212] *See* Sipe, *supra* note 33.

[213] *See* 15 U.S.C §§ 1, 2.

[214] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.

prove per se violations, thus potentially allowing for a more clear and concise application of the act to cases such as the one at hand.[215]

The Supreme Court has not determined that the Sherman Act is unconstitutionally vague, however the act does not describe specific conduct but only the general harm that it seeks to prevent.[216] Including this language in the statute will assure that "conduct that is manifestly and plainly anticompetitive" will receive the per se treatment, regardless of where the flexible Court precedent lies at the time.[217] Given the current inconsistent application, the benefits brought about by the per se approach are easily overstated.[218] The reduced litigation costs and judicial certainty are defeated when additional litigation is needed solely to determine if the conduct fits the mold of a per se violation.[219] Group boycotts are capable of creating per se liability in antitrust law but not in all cases.[220] Victims can feel extremely frustrated when experiencing group boycott acts against them.[221]

Critics will point out that the Sherman Act will perpetually be vague due to inherent aspects of the act.[222] They will address and rely upon the fact that case law is able to follow and adapt to new competing economic theories, given the fluctuating dynamics of economics and the marketplace.[223] The point will be made that unpredictability on a case-by-case basis stems from the tension between antitrust law and changing political and economic climates.[224] This will all be used to show that the vagueness of the Sherman Act was intentional, with the goal of leaving discretion to courts to adapt precedent to a rapidly changing environment surrounding antitrust law.[225] However, this note takes the position that the cons created by the intentional, non-specific nature of the statutory language outweigh the benefits. Creating judicial certainty, while minimizing financial and judicial resource waste resulting from unnecessary litigation will create a more efficient path forward for antitrust law involving group boycott violations.[226]

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[215] *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, *supra* note 40; *see also Sherman Anti-Trust Act (1890)*, *supra* note 40.

[216] *See* Garvey, *supra* note 168 at 390.

[217] *See* Jonathan Baker, *Per Se Rules in the Antitrust Analysis of Horizontal Restraint*, THE ANTITRUST BULLETIN 733, 738 (1991).

[218] *See id.*

[219] *See id.* ("Similarly, the Court has remarked that the distinctions it must make in order to determine whether to use a per se rule are 'reasonably clear [in theory]' but 'often. . . difficult to apply in practice.'").

[220] *See* Bona, *supra* note 39.

[221] *See id.*

[222] *See* Garvey, *supra* note 168 at 417.

[223] *See id.* ("Dean Kadish has stated that the Sherman Act is necessarily vague for three reasons: First, the economic policy is itself unclear. . . . Second, illegality must turn on judgments that are essentially evaluative in character, rather than on purely factual determinations. . . . Third, the inevitable development of novel circumstances and arrangements in the dynamic areas under regulation would soon make precise formulations obsolete, even to the limited extent they prove feasible.").

[224] *See id.*

[225] *See id.*

[226] *See* Weg, *supra* note 31.

Greg Norman has stated that he is willing to sit down with Jay Monahan and discuss the problems and issues with the LIV Golf business model and reach a potential solution.[227] Monahan has been less willing to do so, handing out suspensions to any defector to LIV Golf without exception.[228] Both sides have made clear that they like their chances in the courtroom, and this is arguably due to the inconsistent decisions stemming from alleged Sherman Act violations in the past.[229] Amending the lack of detail in the definitions of key terms within the Sherman Act would allow for a more predictable outcome and potentially lead to settlement before a massive lawsuit even comes to fruition.[230]

V. CONCLUSION

Today, the Sherman Act, as applied to group boycott activity, is uncertain and victims cannot feel comfortable as they head into court unsure of whether they will receive a per se, rule of reason, or a "quick-look" analysis to their problem.[231] Additionally, the precedent set by the Supreme Court has not been helpful to victims, adding unnecessary burdens by requiring a tough-to-prove horizontal requirement for a per se analysis to be used on their case.[232] The Sherman Act's lack of a clear definition for key terms within the body of the act leaves too much room for inconsistent legal decisions for alleged violations.[233]

LIV Golf and the PGA Tour are headed towards a long and costly legal battle with no end in sight, keeping top golfers separated and the world of golf at odds for both viewers and the athletes.[234] The suspensions for LIV defectors will continue unless a possible amendment clarifying key terms accelerates the legal process or perhaps encourages a settlement, avoiding all future court proceedings.[235] Defining more clearly "group boycott" within the Sherman Act itself, along with setting a standard for the application of a per se analysis, involving the removal of the horizontal requirement in group boycotts, via an amendment to the act, may help courts find more easily that competition is healthy within the world of golf and players should be free to play wherever they want as the independent contractors that they are.[236]

Applying the per se analysis to the case at hand, because of the amendment's clearly set standards, would potentially provide LIV Golf relief as a victim of group boycott activity between the PGA Tour and DP World Tour.[237] An expected result in court, rather than a flip-of-the-coin outcome, may even encourage the rival tours to sit down and come to a resolution,

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[227] *See* Cannizzaro, *supra* note 35.

[228] *See* Beall, *supra* note 2.

[229] *See* Cannizzaro, *supra* note 35.

[230] *See* 15 U.S.C §§1, 2.; *see also* Cannizzaro, *supra* note 35.

[231] *See* Bona, *supra* note 39.

[232] *See* Eichlin, *supra* note 28, *see also* Bona, *supra* note 39.

[233] *See Sherman Anti-Trust Act (1890)*, *supra* note 40.

[234] *See* Bob Harig, *Phil Mickelson Among 11 LIV Golf Players to File Lawsuit Against PGA Tour for Antitrust Violations*, SPORTS ILLUSTRATED (Aug. 3, 2022), https://www.si.com/golf/news/phil-mickelson-liv-golf-sues-pga-tour-for-antitrust-violations [https://perma.cc/2FC9-MUJX].

[235] *See id.*

[236] *See* Cannizzaro, *supra* note 35, *see also* McCormick, *supra* note 32.

[237] *See* Porter, *supra* note 91.

avoiding litigation altogether, which would clearly exemplify the major benefits discussed of reduced costs and conserved judicial resources.[238]

[238] *See* Cannizzaro, *supra* note 35, *see also* Weg, *supra* note 31.