

GIMME STANDING

HOW THE PGA TOUR GAVE ITS MEMBERS ANTITRUST STANDING

Andrew Ascher

I. INTRODUCTION

Golf has long represented meritocracy in its purest form. Players are rewarded for performance on the course and nothing more. Players receive no salary, no guaranteed money, and no signing bonuses. The PGA Tour (the “Tour”) is able to sustain this model in part because it is not required to collectively bargain with a player’s union to determine the terms of compensation.¹ Rather, the Tour is governed by a “Policy Board” wherein Tour members are a minority.²

Tour members in a search for a change to these working conditions—of which there is at least one prominent name³—could follow the lead of other non-unionized athletes by utilizing antitrust law.⁴ The recent use of two little known Tour rules has likely given members the perfect opportunity. This paper argues that the Tour’s recent use of its “media rights” and “conflicting events” rules (the “rules”) kills the defense the Tour used to defeat a previous antitrust challenge and brings into question the future of golf’s payment structure.

II. BACKGROUND

The Tour has two rules that restrict the its member’s movement. First, the “medial rights” rule requires the commissioner’s permission before a member can appear in any televised golf event not approved by the Tour.⁵ Second, the “conflicting events” rule requires the commissioner’s permission before a member can participate in any non-Tour event that conflicts with a Tour event for which the member has qualified.⁶

The rules laid relatively dormant until recently when the Tour used them to prevent some of its members from participating in future iterations of a tournament operated by a potential rival.⁷ The use of the rules, along with more stronghanded anticompetitive behavior, have revived questions about whether the Tour can restrict its top golfer’s ability to play when and where they choose.⁸

¹ Tim Rostaforte, *What’s Behind The Policy Board?*, GOLF DIGEST (Jan. 28, 2008), <https://www.golfdigest.com/story/gw20080201rosaforte>.

² *Id.*

³ John Huggan, *Phil Mickelson says PGA Tour’s ‘obnoxious greed’ has him looking elsewhere*, GOLF DIGEST (Feb. 2, 2022), <https://www.golfdigest.com/story/phil-mickelson-pga-tour-media-rights-obnoxious-greed>.

⁴ See e.g. Michael A. Carrier & Christopher L. Sagers, *The Alston Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461 (2021) (describing a lawsuit brought by student-athletes against the NCAA); Jason J. Cruz, *Rethinking the Use of Antitrust Law in Combat Sports*, J. LEGAL ASPECTS OF SPORT 63 (2018) (describing a recent case filed by fighters against the Ultimate Fighting Championship).

⁵ PGA Tour Member Handbook & Tournament Regulations 2019-2020, §V(B).

⁶ *Id.* at §V(A).

⁷ James Colgan, *PGA Tour grants Saudi International exemptions ... with strings attached*, GOLF (Dec. 21, 2021), <https://golf.com/news/pga-tour-grants-saudi-exemptions-strings/>.

⁸ Compare Joel Beall, *Can members be banned legally from the PGA Tour for joining the Saudi Golf League?*, GOLF DIGEST (Feb. 4, 2022) <https://www.golfdigest.com/story/pga-tour-sgl-ban> (citing a source who claims “the tour is operating within the law”) with Alden Abbott, *Calling the PGA Tour’s Bluff*, INSIDESOURCES (Feb. 21, 2022), <https://insidesources.com/calling-the-pga-tours-bluff/> (arguing that “imposing a lifetime ban on players would trigger a slam-dunk antitrust lawsuit”).

Antitrust challenges to the rules have twice failed. The FTC considered action against the Tour's rules in the early 1990s but ended its pursuit after persuasion from lawmakers.⁹ Soon after, a suit brought by a PGA Tour Champions member failed on standing grounds.¹⁰

A. Harry Toscano's Challenge

PGA Tour Champions¹¹ member Harry Toscano challenged the rules, along with some of the Tour's eligibility rules,¹² in a nine-million-dollar antitrust suit filed in the late 1990s. As a private litigant, Toscano had to prove that the Tour's anticompetitive behaviors injured *him*, as opposed to the FTC's broad interest in economic competition.¹³ This difference led to Toscano's ultimate downfall.

Toscano brought suit under Section 4 of the Clayton Antitrust Act which grants individuals the right to file suit when injured "by reason of anything forbidden in antitrust laws."¹⁴ His suit alleged a violation of Section 1 of the Sherman Antitrust Act of 1890.¹⁵ This section states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."¹⁶ A successful Section 1 claim must prove (1) an agreement, (2) which unreasonably restrains competition, and (3) which affects interstate commerce.¹⁷ The first and final of these elements are rather simple; cases are typically depend on whether a restraint on trade is unreasonable.

But before advancing to the merits, Toscano was required to establish standing to file suit under the Clayton Antitrust Act.¹⁸ The District Court for the Eastern District of California considered Toscano's standing claim in light of the five-factor test governing federal antitrust law: "(1) the nature of the plaintiff's injury, that is, whether it was the type the antitrust laws were intended to prevent; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages."¹⁹ These factors are weighed against each other; no one factor is dispositive.²⁰

The District Court found that two factors favored Toscano.²¹ It held that the rules were the kind that antitrust laws intended to prevent because Toscano alleged that he was entirely excluded

⁹ David William, *PGA Outclubs FTC in Antitrust Fight*, LOS ANGELES TIMES, (Oct. 22, 1995) <https://www.latimes.com/archives/la-xpm-1995-10-22-fi-59876-story.html>.

¹⁰ *Toscano v. PGA Tour, Inc.*, 201 F.Supp.2d 1106, 1121–22 (E.D. Cal. 2002).

¹¹ The PGA Tour Champions is owned and operated by PGA Tour, Inc., which also owns and operates the PGA Tour. The media rights and conflicting events rules apply to both tours.

¹² For a discussion of the eligibility rules claim, see generally Ryan M. Rodenberg, *Toscano v. PGA Tour: Par for the Course of an Antitrust Mulligan?*, 3 TEX. REV. ENTERTAINMENT AND SPORTS L. 183 (2003).

¹³ See Miles W. Kirkpatrick, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 62 n.10 (1989) (noting that FTC enforcement is useful when antitrust standing prevents private enforcement).

¹⁴ Clayton Antitrust Act §4.

¹⁵ Rodenberg, *supra* note 12, at 74

¹⁶ Sherman Antitrust Act §1.

¹⁷ *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 632–33 (9th Cir. 1987).

¹⁸ *Toscano*, 201 F.Supp.2d at 1115–16.

¹⁹ *Id.* at 1116.

²⁰ *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540–44 (1983).

²¹ *Toscano*, 201 F.Supp.2d at 1119.

from the senior professional golf market outside of the PGA Tour Champions.²² Similarly, the court found that there was no risk of duplicative recovery because Toscano's injury was distinct from injuries to other golfers subject to the rule.²³ The claim ultimately failed due to the remote and speculative nature of the harms alleged, which weighed heavily on the other three factors.²⁴ The court noted that Toscano "d[id] not claim that the rules were ever applied to him."²⁵ The court discussed what market changes would be necessary to confer standing to a challenger of the PGA Tour's media rights and conflicting events rules.

[H]is claims depend on a multitude of speculative intervening events including: the formation of competing senior professional golf tours in the absence of the media rights and conflicting events rules, the ability of competing tours to attract sufficient sponsors to remain solvent, Toscano's ability to qualify to play on such hypothetical tours, and Toscano's ability to actually win prize money on these tours.²⁶

Toscano's claim failed because there was no indication that the rules prevented the formation of a competing senior professional golf tour. And while that may still be true on the senior level, recent developments in traditional professional golf change the analysis.

B. Modern Use of the Rules

The Tour most recently used its rules to hinder the development of its most formidable competitor in decades, the Super Golf League (SGL). The SGL is a proposed golf league set to be funded primarily by the Saudi Arabian Government's Public Investment Fund (PIF).²⁷ The league represents a concerted effort on behalf of the Saudi government to enter the sports entertainment business.²⁸ Many have called for PGA Tour members to abstain from participating in the league, alleging that the Saudi's entrance onto the national sporting stage is an attempt to "sportswash" its poor human rights record.²⁹

These calls did not stop many of the world's top golfers from accepting the millions in appearance fees offered by the PIF when it operated its first golf tournament in 2019.³⁰ The Saudi International has attracted PGA Tour members from up and down the Official World Golf Rankings, with former world number one Dustin Johnson winning in two of the first three

²² *Id.* at 1116.

²³ *Id.* at 1118.

²⁴ *Id.* at 1119.

²⁵ *Id.* at 1117.

²⁶ *Id.*

²⁷ Alex Miceli, *Battle Line Between PGA Tour, Saudi Arabia Being Drawn in Sand*, SPORTS ILLUSTRATED (Dec. 3, 2021), <https://www.si.com/golf/news/battle-between-pga-tour-and-saudi-arabia-only-beginning>.

²⁸ See Tariq Panja & Rory Smith, *Saudi-Led Group Completes Purchase of Newcastle United*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/10/07/sports/soccer/newcastle-saudi-premier-league.html> (describing PIF's purchase of English Premier League club Newcastle United).

²⁹ See e.g. Barry Svrluga, *Take note of the PGA golfers who play in Saudi Arabia. They're accepting blood money.*, WASH. POST (Jan. 6, 2022, 4:30 AM), <https://www.washingtonpost.com/sports/2022/01/06/pga-members-saudi-international-phil-mickelson-rory-mcilroy/> (criticizing those willing to accept payment from the PIF because its main operator, Mohamed bin Salman, has been accused by American intelligence forces of ordering the brutal murder of Washington Post journalist Jamal Kashoggi).

³⁰ Mark Cannizzaro, *Golfers take money over morals playing in Saudi Arabia tourney*, N.Y. POST (Jan. 28, 2019, 1:58AM), <https://nypost.com/2019/01/28/golfers-take-money-over-morals-playing-in-saudi-arabia-tourney/>.

tournaments.³¹ Similar tournaments on the PGA Tour's schedule cannot offer appearance fees, but PIF's ability to ensure a significant financial gain to members no matter their performance has certainly proved enticing. A total of 30 PGA Tour members participated in the 2022 rendition of the Saudi International and many were rumored to be interested in the SGL, which would utilize a similar payment structure.³²

The SGL's strategy to lure the top golfers away from the PGA Tour is through appearance fee payments. It is reported that Ian Poulter³³ and Bryson DeChambeau³⁴ have been offered roughly \$30 million and \$135 million, respectively, to join the SGL. DeChambeau has denied the reporting.³⁵ At one point, a PGA Tour member stated that 17 golfers have agreed to join the new league set to begin this in June of this year.³⁶ But just weeks later, many of the prominent names associated with the league announced that they would not leave the PGA Tour.³⁷ It seems clear that the public at large will remain in the dark about what exactly transpired because non-disclosure agreements are in place with those golfers who negotiated with SGL.³⁸

The PGA Tour's initial reaction to rumblings of competition was to threaten the expulsion of those members who expressed interest in joining a rival tour.³⁹ When plans for a rival tour began to solidify, the Tour employed its media rights and conflicting events rules to obstruct the SGL and give itself grounds for future expulsion. The 30 members intending to participate in the 2022 Saudi International filed for exemptions under the rules, which were granted in full the previous three seasons.⁴⁰ This time around, however, the exemptions were granted conditionally.⁴¹ Members would

³¹ Saudi International (golf), WIKIPEDIA, [https://en.wikipedia.org/wiki/Saudi_International_\(golf\)](https://en.wikipedia.org/wiki/Saudi_International_(golf)), (last accessed Jan. 31, 2022).

³² Stuart Hall, *Phil Mickelson and Saudi Golf League Timeline: Beginning to Now*, SPORTS ILLUSTRATED (Feb. 24, 2002), <https://www.si.com/golf/news/2022-phil-mickelson-saudi-golf-league-timeline>.

³³ James Corrigan, *Exclusive: Saudi Arabia offers Ian Poulter £22m to ditch Ryder Cup and join rebel golf tour*, TELEGRAPH, (Feb. 1 2022, 7:09PM) https://www.telegraph.co.uk/golf/2022/02/01/saudi-arabia-offers-ian-poulter-22m-ditch-ryder-cup-join-rebel/?utm_content=sport&utm_medium=Social&utm_campaign=Echobox&utm_source=Twitter#Echobox=1643729434.

³⁴ Derek Lawrenson, *Exclusive: Bryson DeChambeau is offered a staggering £100MILLION to be the poster boy of the new Saudi Golf League, despite stars facing up to a lifetime ban from the PGA and DP World Tours if they sign up*, THE DAILY MAIL, (Feb. 2, 2022, 5:57PM), <https://www.dailymail.co.uk/sport/golf/article-10469879/Bryson-DeChambeau-offered-staggering-100MILLION-poster-boy-new-Saudi-Golf-League.html>.

³⁵ Joel Beall, *DeChambeau says report he's been offered \$135 million to join Super Golf League is 'wrong'*, GOLF DIGEST, (Feb. 3, 2022), https://www.golfdigest.com/story/bryson-super-golf-league?utm_medium=social&utm_source=twitter&utm_campaign=golfdigest.

³⁶ The Stripe Show, *PGA Tour Pro Kramer Hickok*, (Feb. 15, 2022), <https://podcasts.apple.com/us/podcast/pga-tour-pro-kramer-hickok/id1488963583?i=1000551162560>.

³⁷ Bob Harig, *Dustin Johnson, Bryson DeChambeau End Saudi Speculation, Pledge Allegiance to PGA Tour*, SPORTS ILLUSTRATED (Feb. 20, 2020), <https://www.si.com/golf/news/dustin-johnson-bryson-dechambeau-end-saudi-speculation-pledge-allegiance-to-pga-tour>.

³⁸ See Joel Beall, *Lee Westwood says he's signed an NDA when asked about Super Golf League*, GOLF DIGEST, (Feb. 2, 2022), <https://www.golfdigest.com/story/lee-westwood-super-golf-league-saudi-nda> (noting that both Westwood and Dustin Johnson refused to answer questions about SGL at the 2022 Saudi International).

³⁹ Alex Miceli, *It's us or them: Inside Jay Monahan's speech to PGA Tour members*, SPORTS ILLUSTRATED (May 4, 2021) <https://www.si.com/golf/news/feature-2021-05-04-pga-tours-jay-monahan-to-members-its-us-or-them>.

⁴⁰ Eamon Lynch, *Exclusive: Eight players ask PGA Tour permission to play controversial Saudi event*, GOLF WEEK (Oct. 22, 2021, 2:23PM), <https://golfweek.usatoday.com/2021/10/22/golfweek-exclusive-eight-pga-tour-players-ask-permission-saudi-international/>.

⁴¹ Press Release, PGA Tour, *PGA TOUR grants Saudi International conflicting-event releases* (Dec. 20, 2021) <https://www.pgatour.com/news/2021/12/20/pga-tour-grants-saudi-international-conflicting-event-releases.html>.

be required to participate in future iterations of the AT&T Pebble Beach Pro-Am, the PGA Tour event regularly scheduled on the same weekend as the Saudi International, if they played in the 2022 Saudi International instead of the 2022 AT&T.⁴² The PGA Tour has—at least for now—successfully prevented an overwhelming majority of its prominent members from joining this competitor,⁴³ likely in large part due to its use of the rules and corresponding threats of punishment for their violation.

III. ANALYSIS

The Tour's recent use of the rules has revived conversations surrounding their legality.⁴⁴ While the previous challenge brought by Toscano failed to establish antitrust standing, a claim based on the PGA Tour's conditional exemptions for the 2022 Saudi International would likely clear the threshold standing issue.

A modern court will consider the same five-factor test used in *Toscano*.⁴⁵ Toscano succeeded on the first and fourth factors; a modern challenge would succeed on those factors for the same reasons. On the first factor, both Toscano and current Tour members are professional golfers subject to the rules and thus the rules exclude them from other portions of the professional golf market. The district court in *Toscano* held that this exclusion was an injury that antitrust laws were intended to prevent, thus satisfying the first factor.⁴⁶ In regard to the fourth factor, both Toscano and any modern plaintiffs have distinct damages discernable from any other plaintiff and therefore the risk of duplicative recovery is low. Considering modern circumstances, a new analysis of the other three factors is needed.

A. Directness

The plaintiff must allege an injury caused by the alleged defendant's restraint and not by a third party's action.⁴⁷ In holding that Toscano's alleged injury was too remote from the Tour's rules, the court noted that "[Toscano] does not claim that the rules were ever applied to him."⁴⁸ The court also noted that because the rules had not been applied to Toscano, the organizers of a potential competing tour would have a more direct injury.⁴⁹

But unlike in *Toscano*, the rules have been utilized and the members will directly suffer from their application. The Tour's use of the rules requires the members to participate in the AT&T Pebble Beach Pro-Am at least once over the next two seasons.⁵⁰ They are, consequentially, forced to miss future iterations of the Saudi International which will almost certainly take place on the same weekend, meaning they are forced to turn down the offered appearance fees. While the organizers of

⁴² Colgan, *supra* note 7.

⁴³ Harig, *supra* note 37.

⁴⁴ *Supra* note 19 and accompanying text.

⁴⁵ *Toscano*, 201 F. Supp.2d. at 1116.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1116–17.

⁴⁸ *Id.* at 1117.

⁴⁹ *Id.* at 1117–18.

⁵⁰ PGA Tour, *supra* note 41.

the Saudi International certainly suffer direct injury,⁵¹ the members' financial injury is just as, if not a more direct result of the Tour's use of the rules.

B. Speculative Harm

In *Toscano*, the court reasoned that the measure of harm was speculative because the injury may have been produced by independent factors like a lack of demand, a lack of skill, and a lack of competency on behalf of a rival tour.⁵² These issues are solved in a modern case by the SGL's concrete and established operation of previous events and the existence of appearance fees. While the Saudi International's source of funding is shadowy at best, the fact that some of the world's top golfers continue to appear at the event indicates that the PIF is willing and able pay those who participate.⁵³ Members need not show that they would perform at a level commiserate with traditional measures of golfing success as they may have previously, but simply that they were offered an appearance fee to play in the tournament.

C. Complex Damages

The court reasoned that Toscano's claim involved a complex apportioning of damages because the injuries were both indirect and derivative.⁵⁴ The court reasoned that this fact left it unable to determine what amount of damages should be awarded to a theoretical rival tour, any potential sponsors, and what Toscano's would earn as a member of another tour.⁵⁵ The court acknowledged that this would involve estimating the size of purses and who might have won what amount of those theoretical purses.⁵⁶ But, in the modern application of the rules, the appearance fee serves as a clear and quantifiable damage amount, regardless of any theoretical success at the event.

IV. CONCLUSION

A current player subject to the Tour's most recent use of the rules would successfully establish antitrust standing. The Tour's aggressive use of the rules has stripped it of its previous successful defense to an antitrust challenge of the rules and given a group of individual members the ability to challenge two of the Tour's most foundational rules. For better or worse, a successful antitrust challenge to the rules that underpin golf's traditional payment structure are more likely now than ever before.

⁵¹ See Letter from Greg Norman, CEO of LIV Golf Investments, to Jay Monahan, Commissioner of the PGA Tour (Feb. 24, 2022), <https://sports.yahoo.com/commissioner-jay-monahan-says-pga-174205795.html> (expressing LIV Golf Investment's frustration with the PGA Tour).

⁵² *Toscano*, 201 F. Supp.2d. at 1118.

⁵³ *But see Facing Criticism, Saudi Arabia to pay private sector bills on time: Finance Minister*, CNBC (Jan. 18, 2017) (noting that Saudi Arabia has "fac[ed] criticism in the past over delayed payments.")

⁵⁴ *Toscano*, 201 F. Supp.2d. at 1118–19.

⁵⁵ *Id.*

⁵⁶ *Id.*