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Out of Bounds? The Legal Implications of the Emerging Rivalry Between LIV Golf and the PGA Tour

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Michael Dube, Libba Galloway, Chantel McCabe, Michael
McCann, and Alan Milstein



OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR

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ABSTRACT – AN INTERNATIONAL TALE OF TWO GOLF LEAGUES AND MANY BILLIONS OF DOLLARS – BY MICHAEL DUBE AND MICHAEL MCCANN. The legal controversy between LIV Golf (LIV) and the PGA Tour (Tour)—two leagues for elite men’s golfers—could reshape professional golf. It could also spark lasting questions about the exclusivity of professional sports leagues’ relationships with their athletes.

The controversy began in 2022, when LIV Golf was launched. Funded by the Public Investment Fund of the Kingdom of Saudi Arabia (PIF) and its \$676 billion in assets, LIV recruited some of the Tour’s top golfers. LIV offered more lucrative compensation and guaranteed payments. In response, the Tour suspended and fined golfers who joined LIV. The Tour reasoned that those golfers signed membership contracts with the Tour, and those contracts stated the Tour must grant permission before they can join another league.

On August 3, 2022, a prominent golfer, Phil Mickelson, and ten other suspended golfers sued the PGA Tour in the U.S. District Court for the Northern District of California.¹ They alleged the PGA Tour has violated Sections 1 and 2 of the Sherman Antitrust Act² by adopting membership and competition rules that deny opportunities for non-PGA Tour play. As the golfers see it, the PGA Tour maintains an illegal monopsony by possessing too much control over where elite golfers can market their services.³

That same day, three of the plaintiffs, Talor Gooch, Hudson Swafford, and Matt Jones, sought a temporary restraining order that would have permitted them to play in the Tour’s FedEx Cup Playoffs, a three-tournament competition.⁴ The golfers argued playing in the FedEx Cup was crucial for earning Official World Golf Ranking

¹ Phil Mickelson, et al. v. PGA Tour, Inc., N.D. Cal. (August 3, 2022).

² 15 U.S.C. §§ 1 and 2.

³ Mickelson, *supra* note 1.

⁴ Michael McCann, *Breaking Down LIV Golfers v. PGA Tour as they Tee Off in Federal Court*, SPORTICO, (Aug. 9, 2022), <https://www.sportico.com/law/analysis/2022/liv-golfers-lawsuit-restraining-order-1234685072/> [<https://perma.cc/C8TN-4MA4>].

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

points, which are unavailable in LIV play, and they would suffer irreparable harm if denied entry. In an opinion dated August 10, 2022, District Judge Beth Labson Freeman was not persuaded, finding the golfers failed to show any harm, reparable or irreparable. She stressed LIV offered “large upfront payments” and other monetary value that eclipsed what the golfers earned on the Tour and, in a blow to a potential finding of irreparable harm, LIV’s own expert acknowledged a calculation to financially compensate for the rankings impact.⁵

As the summer of 2023 approaches, the case is nowhere near a resolution. An initial trial date of January 8, 2024, has been postponed to May 17, 2024, and could face further delays due to disputes over pretrial discovery. The delay is disappointing for LIV, which argues it can’t viably compete for elite golfers while the Tour (allegedly) suppresses competition.⁶

The parties have changed considerably too. LIV joined as a plaintiff, and all but three of the golfers—Jones, Peter Uihlein, and Bryson DeChambeau—dismissed their claims against the Tour. The Tour, meanwhile, filed a counterclaim against LIV for tortious interference with contract, alleging the league induced Tour golfers to breach their contracts. The Tour also brought counterclaims against the PIF and its governor, Yasir Othman Al-Rumayyan, who the Tour contends is calling LIV’s shots. (Al-Rumayyan holds the rank of “minister” in the Saudi government and is called by the honorific “His Excellency” in Saudi Arabia, and in U.S. court documents.) Judge Freeman ordered the PIF and Al-Rumayyan to comply with subpoenas in New York. They currently seek an interlocutory appeal in the U.S. Court of Appeals for the Ninth Circuit, insisting they enjoy sovereign immunity under the Foreign Sovereign Immunities Act.⁷

The *UNH Sports Law Review* panel on this dispute features a dynamic group of speakers with important and varied insights.

⁵ Michael McCann, *Judge Details Golfers’ Errors in First Round of Antitrust Fight*, SPORTICO, (Aug. 11, 2022), <https://www.sportico.com/law/analysis/2022/liv-golf-lawsuit-1234685595/> [https://perma.cc/ZYU4-BMJJ].

⁶ Michael McCann, *Judge Postpones Trial Date for LIV Golf, PGA Tour Case*, SPORTICO, (Apr. 7, 2023), <https://www.sportico.com/law/analysis/2023/liv-golf-trial-date-1234718858/> [https://perma.cc/93GC-W6VD].

⁷ 28 U.S.C. § 1602, *et seq.*

Introduction..... 178

I. History of PGA Tour.....179

II. LIV Golf..... 180

III. Revolutionizing and Modernizing Golf..... 181

 A. Concept of Guaranteed Pay for Players.....182

 B. Team Tournaments.....183

IV. Restricting Players’ Access to Tournaments and Antitrust
 Violations..... 184

V. Questions..... 192

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

MR. MICHAEL DUBE [MODERATOR]: I want to thank everybody for attending, and welcome everybody both here at UNH Franklin Pierce School of Law and on the Web to this afternoon's symposium on the *LIV Golf v. PGA Tour Inc.* case, which is currently pending in federal court in California, and could reshape the world of golf. It is certainly a uniquely transformative time in golf and the legal issues that have surfaced are quite interesting.

My name is Michael Dube and I teach Amateur Sports Law here at the law school, and also this semester, Civil Procedure and Drug Law. I want to introduce this afternoon's panelists. We have via Zoom Professor Libba Galloway. Professor Galloway has done it all. After receiving her J.D. from Duke University School of Law, and then beginning her career practicing law in a large Cincinnati firm, she served as Deputy Commissioner and Chief Legal Officer of the Ladies Professional Golf Association or LPGA. She is currently an Assistant Professor of Practice in business law at Stetson University – the alma mater of the great Jacob deGrom.

We also have with us Chantel McCabe. Chantel is a proud graduate of the University of New Hampshire. When Chantel and I first met, she was working as a local television reporter here in Concord, and her profile has grown just a bit since then. She left Concord for Florida, and she joined the Golf Channel's broadcast of the PGA and LPGA Tours and hosted the Golf Channel's flagship shows, Golf Central and Morning Drive. If you've watched the Golf Channel, you certainly have seen her interviewing some of the biggest names in the sport. She now works both in the studio and on the sidelines for Sirius XM, PGAT Live, and ESPN.

We also have with us the estimable Alan Milstein, who is a shareholder at Sherman Silverstein in Moorestown, New Jersey, though his reach is national, too. He has litigated bioethics cases around the country, and he's regarded as a pioneer in the field of clinical trials litigation. I should add he is no slouch in sports law, either. He served as lead counsel to Maurice Claret in his challenge to the NFL's eligibility rule. Professor McCann and I also participated in that case. And Alan has represented some of the biggest names in sports. But my favorite credential of his relates to Deflategate. Alan was also one of the few to correctly predict that Tom Brady was going to prevail in the district court in the Deflategate matter. And for that, *The Washington Post* named Alan, along with Tom Brady and the NFLPA, one of the three biggest winners of Deflategate.

And finally, we have here in-person Professor Michael McCann, who is the founding director of the Sports and Entertainment Law Institute here at UNH, and one of the nation's leading sports law experts. Mike currently serves as a legal analyst for the publication *Sportico*. Chances are, if an athlete is involved in a legal manner,

Professor McCann is going to be on the news that night. And chances are, if Congress is considering federal name, image, and likeness legislation, Professor McCann is going to be testifying alongside folks such as Marc Emmert. He is a prolific scholar and best-selling author and, might I add, one of the best teachers I've ever seen in the classroom.

Introduction

Before we get to some questions, I have a very brief introduction with regard to *LIV Golf v. PGA Tour, Inc.* If we were to engage in some free association and I said the word “sports,” pretty soon somebody would say the word “rivalry.” Think of the Yankees and the Red Sox, think of Duke versus North Carolina. And, yes, think of Arnold Palmer and Jack Nicklaus who, in the 1960s, put aside their rivalry to form what was then a breakaway golf league that became the PGA Tour. In doing so, they broke away from the Professional Golfers Association of America. By the beginning of this decade, the PGA Tour had emerged from a breakaway renegade league, you might say, into an alleged monopoly, or more precisely, a monopsony.

Enter the upstart LIV Golf, funded by Saudi Arabia's Public Investment Fund, which signed some of the biggest players in the sport. For every action, though, there is an equal and opposite reaction. The PGA Tour has taken countermeasures. Most significantly, it interpreted its Media Rights Regulation and its Conflicting Events Regulation to prohibit LIV golfers, so to speak, from participating in PGA Tour events.

In *Mickelson v. PGA Tour*, which was filed in early August 2022, the plaintiff golfers alleged violations of the antitrust laws. Specifically, they alleged that the PGA Tour engaged in illegal conduct by prohibiting golfers who signed up with LIV Golf from playing in PGA Tour events. And simultaneously with the filing of the complaint, certain golfers moved for a temporary restraining order and claimed that the refusal to allow them to participate in the upcoming playoffs warranted immediate relief.

Judge Freeman denied the motion though and, in doing so, had occasion to talk about the merits of the claims, and had occasion to determine that the plaintiffs, at least the moving plaintiffs, were unlikely to prevail on those claims. There was some language in the opinion that rang out around the golf world, if not rang out around the world: “TRO Plaintiffs are not barred from playing professional golf against the world's top players, from earning lucrative prizes in some of golf's highest-profile events, from earning sponsorships, or from building a reputation, brand, and fan following in elite golf. The only thing TRO Plaintiffs are barred from is pursuing these goals at PGA Tour events.” This tended to shift public perception about the situation, and shortly thereafter LIV Golf joined as a plaintiff.

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

I. History of PGA Tour

Let's start with our esteemed golf reporter, Chantel McCabe. Can you tell us a little bit more about how the PGA Tour came into existence and how it morphed from a breakaway into a behemoth?

MS. CHANTEL MCCABE: Thank you. Yes, thanks so much for having me. And this is a complicated matter that I have been following for a couple of years now, even though it just recently, relatively speaking, came into the light of not just golf, not just sports, but worldwide real-life news and reality.

So, going back to your question, there are so many nuances as there is with any legal matter, but specifically with this case, because when you talk about many other professional sports, whether that be football and Deflategate, whether that be something happening in the NBA with happening to think about a certain Celtics coach or matters in MLB, NHL, there's kind of an understood basic language that happens with those sports.

But when it comes to golf, a lot of people confuse the PGA of America with the PGA Tour. And that difference is extremely important because the PGA Tour is the group of paid professionals that travel around and tour in the tournaments, for example the Travelers Championship that probably many of you have actually been in attendance of or the US Open. It's a PGA Tour sanction event, even though it's run by another golf entity, the USGA, the US Golfers Association. So, there's all these kind of pieces that no other mainstream professional sports has. So, you have to kind of dissect all of that to really get to the root of what's going on and the players in this game.

So, the PGA Tours, as I just explained, are Bryson DeChambeau and Phil Mickelson. But anytime you go to a golf course, there is a PGA teaching professional. He is part of the PGA of America. And so, once upon a time before these massive contracts started rolling out and before there was any professional golf tour circuit, at least an organized fashion. There were these amateur events that popped up and these people started playing in these events and winning, and they would start touring around the country. Well, those same people were not making enough money, so they were still teaching and that is kind of the birth of the PGA of America. And when they were all lumped together, there were people with different interests and intentions. The PGA of America Teaching Professionals tended to stay home and taught at their own respective golf courses and still are to this day. But for those that were elite golfers and wanted to take the show on the road, so to speak – that was headed up by Arnold Palmer and the great Jack Nicklaus and several others that you probably haven't quite heard of because they didn't have the same amount of success on the golf course, but

they broke away and formed the PGA Tour. So, that's where this thing really started in the division process. And remember that because down the road, I'm going to circle back to that again and why it's different with LIV branching off, so to speak, from what we know in 2022 as the PGA Tour.

MR. DUBE: And, Chantel, one more question for you before I get to Professor Galloway and Alan: how did LIV Golf come to be then?

MS. MCCABE: Yes, we'll circle back to that right now. So, if you think about other sports – guaranteed contracts, guaranteed money for, no matter if you get injured, if you have bonuses, another nuance that is tied into any professional sport. But Ricky Fowler puts butts in seats, so to speak. So, if he shows up at a tournament, which he has done plenty of times over the last 15 years, he is not getting any guaranteed money. So, he is already spending his own pocket money on travel to find a place to stay for his own coach. None of these training professionals, coaches, and PT staff are part of the PGA Tour. That's money out of the player's own pockets.

Well, LIV came into existence because somebody like Greg Norman, who is a multiple time major champion and has had the success he has had in his résumé, decided that golfers should be guaranteed money, especially with a baseball player making a guaranteed \$54 million a year. If you are a golfer and you go on-site and are selling all these tickets, and if you do not make a cut, you go home with \$0. In fact, you'd go home with negative money because of money spent. So, even though you probably were a big reason why tickets were sold for some of these more recognizable faces, you almost lose out. And so, Greg Norman always felt that that structure within the professional golf ranking on the PGA Tour was flawed. So, he sought out the money and the personnel to get this thing going. And that is how the emergence of the LIV Golf Tour, as we know it, came into existence.

II. LIV Golf

MR. DUBE: So, Professor Galloway, let's talk a little bit about that money. LIV Golf is quite notably funded by Saudi Arabia's Public Investment Fund. We've all heard of entities that are allegedly engaged in whitewashing or greenwashing, as the case may be. There certainly have been allegations that Saudi Arabia has a questionable human rights record and that it's engaging in something called sports-washing here. Are critics of LIV Golf correct to say that this is an issue here?

MS. LIBBA GALLOWAY: Well, are you asking are they actually in their intent in getting into professional golf? Is their intent to sport wash? Is that your question?

MR. DUBE: Well, I mean, you can take my question as you will. I guess the question is, are critics correct to identify this as an issue?

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

MS. GALLOWAY: I think they are because I look at what's the business model for LIV golf, they're paying what could be considered in the professional golf world, astronomical sums of guaranteed money. And these players are making more money on live golf than they are on the PGA Tour. Well, what's their business model? What's behind that? If you look at professional golf, it primarily relies on media rights fees and sponsorship fees, particularly title sponsorship fees. As there are they're making, where are those in LIV Golf? I haven't seen a business plan. Their media rights. While I hear that they're looking for other packages, they don't have a significant media rights media platform now. I don't see significant sponsors, particularly title sponsor. So, where are they getting the money, where's their business plan? So, the fact that we don't see that business plan and they're paying so much out to the players leads me to believe that it is, what they are trying to do is sport wash. Maybe there's a business plan I don't see. But yeah, I think that I think sport washing is going on. That's behind what LIV Golf is doing.

MR. DUBE: Alan, I think you know what my question is going to be for you. You're our resident ethicist and this sort of piggybacks off the question I asked Professor Galloway, which is, is this an ethical situation?

MR. ALAN MILSTEIN: Well as to LIV Golf, that's a different question than asking whether Saudi Arabia is an ethical entity. And I think a lot of the criticism of LIV Golf just derives from the fact that it's Saudi money that's financing it. But who was the first really to sports wash his fortune: Donald Trump with Herschel Walker. I don't think anybody at that point accused Donald Trump of sports washing, but if he currently owned a franchise, I think we could certainly say it. I know the owner of your franchise, the New England Patriots, is a Trumper. Or perhaps you could argue that he's sports washing. I think it's unfair essentially to criticize what's going on with LIV Golf because of the entity that is financing the operation.

MR. DUBE: Fair enough.

MR. MILSTEIN: If anyone is unethical in this case, it's the PGA, which is a walking, swinging antitrust violation. I don't think there's any doubt about that.

III. Revolutionizing and Modernizing Golf

MR. DUBE: And again, we'll certainly get to that. The Department of Justice may or may not someday agree with you. So, putting all this aside, let's bring it back to golf and bring it back to Chantel here. Taking LIV at face value, it seeks to revolutionize golf. So, my question for you Chantel is, is golf in need of revolutionizing?

MS. MCCABE: Well, I think there's evidence of that, and I like to lay out all

the pieces here because I think people are quick to judge certain parts of what is going on and quite frankly, I do not blame them. But I think there is also a lot of conversation about things that are quite frankly missing. So, in terms of this question, golf does need a complete revamp because, as it has been seen and known in the past, it is for an older audience who can afford to be a member at places. There are so many private clubs, if those members are quite literally dying off and people are finding different hobbies, whether that be tennis, pickleball, just like any sport, you have to grow and evolve with what the culture looks like and the demand.

It has been well documented, the discrimination that has been forced even as recently as two decades ago by places that have now hosted major championships. Not allowing women, female members, not allowing black members. So, golf has always had an image issue and this is really a revolutionary time, not just in golf but across, I would say, the entire world. Being more inclusive, finding ways to make things more fun.

I've seen the comments of people kind of mocking the concert kind of form and the 54-hole, which, for people who might not be as familiar with golf, it's usually a 72-hole stroke play event, each individual players' score counts against the other. People really enjoy the group and team aspect of it. In fact, I've seen a lot of media members that are very critical of LIV, give them a round of applause for that. Golf is different in the sense that it is happening at all holes all the time. So, if you want to watch something, if you want to watch a player but you also want to watch this other player, you can't be in two places at once if they're not in the same group on the same hole. So, all of those nuances that happen in golf, it's really hard just based on how the sport is played on massive pieces of property, to translate that. So, do they need an injection of fun of a different kind of energy? I would say there's evidence that Top Golf has formed. It's not your average kind of golf course, it's a place where you hang out, enjoy some good food, sip on an adult beverage, and swing away. It can be as competitive or as non-competitive as you want. That appetite is the reason why businesses like that are now multi-million if not billion-dollar models.

A. Concept of Guaranteed Pay for Players

MR. DUBE: Professor Galloway, another innovation that we haven't quite gotten to talk about, although Chantel wisely alluded to it, is the notion of players being paid a lot of money, win or lose. Is this good as a business model or bad as a business model, vis-à-vis golf in particular?

MS. GALLOWAY: You mean the guarantee pay regardless of whether you make a cut or not?

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

MR. DUBE: That's exactly it, yeah.

MS. GALLOWAY: Frankly, I have no problem with that. It does change the model of golf. That's what it's all about. A lot of traditionalists would say golf is about making a cut. But why does it have to be? Even a lot of tournaments, you take the PGA Champions Tour for example, they're no cut tournaments. So, I don't have a problem with guaranteed money and not making cuts. The players still have to earn it and at the end of the day, if they're not bringing in fans, if they're not performing, they're not going to be making that guaranteed money apart from that period of time. We've got players and teams making more guaranteed money, who end up being quite frankly, duds, the first-round pick that doesn't pan out. So, the guaranteed money doesn't bother me.

B. Team Tournaments

MR. DUBE: Chantel, what about the team concept. Is this good or bad for the sport of golf?

MS. MCCABE: Well, to me, I kind of come from the standpoint that it can be oversaturated. I use the example coming from someone who covered hockey extensively for several years: the Winter Classic. It used to be once a year, between two different teams. A very exciting, maybe once in a lifetime opportunity because it would travel around to different cities, so your team might only get the chance to play once in this outdoor tournament and it would be held at Fenway Park, it would be held at some of these incredible outdoor venues. It might not be the best hockey because the ice doesn't hold up well, but you'd get a totally different experience.

Now, that concept, which was once really exciting and captivating, is so oversaturated. They do about ten of these every year. Even though we have the lure of team golf, when it comes to a couple of PGA Tour tournaments, I'm talking niche golf, so work with me here. There is a team tournament and component called the QBE Shootout coming up, ironically used to be run by Greg Norman, which may or may not have been the breeding ground of his recruitment style. There is the Zurich Classic, which the PGA Tour has as a regular season "event" to qualify for their post-season tournaments. The Ryder Cup and the Presidents Cup are international team events and they draw eyeballs like you would not believe. I think if they start doing more of this, even the PGA Tours consider it. But, if it's your only model, which is what is happening on LIV, it is a nice concept, but I think the oversaturation portion of it is going to show its teeth.

MR. DUBE: Alan, is it allowable for the PGA Tour to not want to have this competitor?

MR. MILSTEIN: I mean, to not want to have a competitor? Yeah, they cannot want to have it all they want or not want. The problem is how they are going about, essentially, destroying any competitor as they destroyed Greg Norman when he tried the World Golf Tour in 1994. Just for an example, it would be one thing if the PGA said that if you join LIV golf, you cannot play PGA tour events and they left it at that. But that was not enough for him, so they joined a group boycott with the European Tour. They joined a group boycott and pressured Augusta National. They even pressured the royal and ancient golf association to say that if you played LIV golf you cannot essentially be in the British open. Here's the worst thing that they did, that is just a clear antitrust violation. They told college golfers that if they play in one of these LIV events, that they couldn't then join the PGA Tour. What could be worse than doing that? To amateur athletes playing on college teams, to essentially strong arm them from playing in the LIV events.

IV. Restricting Players' Access to Tournaments and Antitrust Violations

MR. DUBE: Now a question for Professor McCann who is here in the room. So once LIV Golf came into existence, and once LIV Golf started handing out these massive, guaranteed contracts, so to speak, to certain PGA Tour superstars, you might say that there were a couple of countermoves on the part of the PGA Tour. Alan's hinted at some of them. That's a great entrée to ask you, what are these countermoves and what do you think they're intended to accomplish?

MR. MICHAEL McCANN: I think the countermoves are clearly to restrict access to ensure that golfers who are on the PGA Tour comply with their contractual obligations to the Tour—including an obligation to not play in unsanctioned events. The countermoves are to suspend golfers or ban them. I think whenever there is a multi-year suspension with the prospect of being indefinite, to me, that sounds like a ban more than a suspension, and they have taken that measure.

Now, the counterargument is, if everything that Alan has said is correct — and this came up in a proceeding before the judge in this litigation — what are the damages? The golfers on LIV Golf are making more money than they did on the PGA Tour. And Judge Beth Labson Freeman asked, how do you establish either irreparable harm or actual harm if the other entity is paying more money? She clearly found that to be a conceptual hurdle in the motion for a temporary restraining order. I can understand why because, if LIV is paying more than the PGA Tour, it's difficult to argue that the golfers are being harmed in a way that law would remedy. Now, they're excluded from OWGR rankings so there are professional harms. Maybe they don't get

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

the same endorsement deals, though I don't know if that's been empirically proven. So, that's definitely an issue for LIV Golf. Now, LIV Golf joined the antitrust case, and they addressed that issue. They said, in so many words, we were paying more because the PGA Tour is so anticompetitive. The only way in which we can credibly compete is to pay above market rates. That's probably true, but then the counterargument is the beneficiary of that bidding war are the golfers, right? So, it's an interesting set of issues, where there may be an antitrust violation but there may not be damages.

MR. MILSTEIN: Well how about LIV? How about damage to LIV?

MR. McCANN: So, LIV is paying more? Well, the argument is that LIV is paying more because it's not as prestigious and is basically a startup league, right? It's trying to buy its way in when the dominant company has gained prominence and credibility over the years. Like any business that may be excluded from the same sort of acclaim or recognition as another business, they might have to pay more money to get that kind of access.

MR. DUBE: No, I think that's a great point. Let's use that as sort of an entrée into a little bit of a deeper dive into the antitrust case. Let's talk with Chantel for a second about this money, the elephant in the room here. What are some of the deals that top golfers, like Phil Mickelson, have struck?

MS. McCABE: Yeah, Phil Mickelson I guess you could call him the fall guy in all of this, and a lot of it, I know he now admits it took a few interviews and probing for him to essentially acknowledge the fact that comments that he made whether or not that be on or off record formally, but ultimately he is aware how dangerous the Saudi regime and their reputation are. When he, when the comments that he, many of you know what I'm referencing when they came to light, he lost sponsors one after another after another. KPMG, Mizzen + Main, some big-time sponsorships that he's had for years, including Calloway. And so, people scrambled as fast as they possibly could because not only were these damaging to the PGA Tour, they were damaging to the Saudi's as well.

So, this was a double sword on both ends. The fact that he's still playing actually shocks me to be honest but what I find interesting in all of this, because I think you got to go to the roots of each leg of every specific topic within what we're talking about, KPMG, for example, I think it's a compelling case, they have multiple offices in Saudi, so they were the first to pull the plug because of damaging comments. And we all know in today's day and age, how pivotal it is to be seen in the public eye, and how that has some very real and severe consequences, but there are details like that with the PGA Tour, for example having two events in China for several years and is there any merit to some controversy in that. Uber sponsors plenty of things in all of sports

that is majority owned by Saudi. So, there are all these places you could go, and I think it is important to present all the information. Certainly, one is different than the other, but to explain and be aware of those nuances, I think is part of this conversation.

MR. DUBE: Alan, I know that you have been outspoken at times about restrictive covenants. This situation obviously lies at the intersection of antitrust law and the law of private associations and obviously contract law. The PGA Tour—and hopefully this really tees up the meat and potatoes of the antitrust case—the PGA Tour is essentially contending that the golfers who were joining LIV Golf teams were in violation of at least two particular provisions in the bylaws, namely the Media Rights Regulation and the Conflicting Events Regulation. Alan, what is your take on the notion of individuals joining this new tour and these provisions being enforced against them?

MR. MILSTEIN: Well, I think both of those provisions are antitrust violations. Apparently, the government back in the 90s, had concluded that they were antitrust violations. And then, as you can imagine, the PGA Tour has quite a few friends in Washington, pressure from various Congressmen and women led to the government deciding not to say that the PGA Tour was in violation of the antitrust laws. But, you know, these two provisions are not just provisions in a contract. They basically say that if you want to be on the PGA Tour, you cannot play in any event that goes on at the same time a PGA Tour event goes on, unless we give you the approval and you cannot be on any television broadcast, at all, without our approval. That is the kind of restraint that I think is untenable. The PGA Tour has overdone it, they cannot help themselves. I think, in the end, the judge is going to say the PGA Tour is in violation of the antitrust laws. Even if the individual golfers in LIV have no damages. LIV is going to have damages. It is such a peculiar case because, if LIV was being sponsored, if an investor was anyone other than Saudi Arabia or China or North Korea, there wouldn't be any question that the PGA is in violation of the antitrust laws. But LIV has chosen Saudi Arabia to be its partner and we will see what the consequences are of that choice.

MR. DUBE: I can resist asking you this no longer, Alan. I know that we've been in prior panels together and I love to ask you this question, which is, essentially, could you briefly explain exactly what antitrust law is and does? I know briefly is the tough part.

MR. MCCANN: Because there are many first-year students here!

MR. MILSTEIN: I hope you saw Steve A. on ESPN explain the antitrust laws, the only way Steven A. can, which was, “Hey, I'm not a lawyer, but I love America and isn't America all about capitalism and competition? And what's fair?” And so that's

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

essentially what the antitrust laws do. It says essentially that you can't do anything that's anti-competitive. If we're not talking about destroying another entity, we are talking about essentially reducing competition in the marketplace. I don't think there's any question that is what's going on. The interesting thing about the antitrust aspects of this case compared to the antitrust claims in MLB or NFL is, in those cases you have entities that are corporations, that is, each individual team is a corporation, and they form an association called the NFL or the NBA. In this case, you've got individuals who essentially are sole proprietorships, and they have combined. That is, they have agreed, because they're all part of this PGA Tour, essentially to try to destroy their major competitor, which is LIV at this point, and to do so by essentially conducting a group boycott with entities like Augusta National, the various sponsors, the Golf Network, and others. The Golf Network is in it up to its ears in this case. And that's what's going on: the PGA Tour and its players are essentially combining with other entities in an attempt to destroy competition.

MR. DUBE: Perfect. Professor Galloway, I won't ask you any specific antitrust questions, but what I want to focus on is an antitrust concept: was the PGA Tour a monopoly prior to the existence of LIV Golf?

MS. GALLOWAY: Well, I don't know if you're asking that in the general sense of a monopoly or the legal sense of a monopoly.

MR. DUBE: Put aside the Sherman Act and the Clayton Act for a second. In the practical sense, to golfers on the ground, was this a monopoly?

MS. GALLOWAY: I would say in the practical sense, not in a legal sense, they are not a monopoly because if you look worldwide, there are a lot of golf tours and there have been a lot of golf tours for maybe, not since the sixties when, when the PGA Tour broke away from the PGA of America. But, they've grown up, there are Asian tours, Japanese tours that have been pretty strong. There's the European Tour now known as the DP Tour that has been pretty strong. So, you can't say from a global standpoint that they're a monopoly because there are all these other tours. But, I would say if you look at it in the United States, yes, they are clearly the professional men's professional golf tour in the United States. And, they don't have any competitors. How they've operated on a global stage is before the LIV Tour came around or I came onto the stage. Everybody kind of stayed in their own lanes and they had these kinds of agreements. Sometimes they would co-sponsor events, the DP Tour or there would be World Golf events. But everybody can have this understanding, this is what you'll do, this is what I'll do, and they got along pretty well.

Well, the LIV Golf has pretty much upset that apple cart of these agreements and staying in your own lane. What kind of concerns me about this, and I'm not sure

I agree with Alan that it's necessarily an open or shut case from an antitrust standpoint, when you analogize with the other professional leagues. But as a practical matter, what concerns me about the future of golf, which is one thing that we started talking about, what is the future of golf, if you look at the other leagues, there has not been a viable competitor for the NFL, Major League Baseball, the NBA, National Hockey League, and it seems like Chantel talked about oversaturation of the market. Introducing LIV Golf into this picture, is that going to create an oversaturation of professional golf in the marketplace? When you have two major players, and we have never seen two major players succeed in any of the other leagues. So that, that concerns me a little bit about the future of golf. I'm getting a little off topic about the monopoly thing, with your monopoly question, but that's kind of a concern.

The leagues seem to be able to operate, practically, the major leagues, the big four, seem to be able to operate as monopolies in the practical sense of the word, and maybe that's the only way that a professional league can continue to survive. I don't know the answer to that. But if you can't, if golf can't survive with two major players on the stage, who's going to fall off the radar screen? What concerns me about this incident is that I personally believe the PGA Tour would be better, golf would be better served, with the PGA Tour surviving, because it's a non-profit membership-based association, so its purpose is to provide playing opportunities for players. LIV Golf, if its purpose is sports watching, is it going to have the same type of legs, the same type of traction, if it's the surviving entity, at the end of the day? I don't know about that. And at the end of the day, it's going to be who wins or loses in this. Losing in this is going to be that entity that's more compelling to the ultimate consumer, to the fans. So, that may be determining.

MR. DUBE: *Mickelson v. PGA Tour* was filed in the Northern District of California, which has become sort of an antitrust and sports hotbed in the same way that perhaps the Western District of Texas has become a hotbed for patent litigation. The *O'Bannon* and *Alston* cases were filed there, and the *House* case I believe is pending there. In case my Civil Procedure students are wondering, there's a special statute laying venue in essentially any district court in an antitrust action against an incorporated entity. So, this case is filed in the Northern District of California. Judge Wilken did not draw the case. Why don't you tell us, if you don't mind, about where the case has been and where you think it's going?

MR. MCCANN: The case is being litigated in California, which for purposes of establishing antitrust harm, is good for the plaintiffs. There's case law there and in the Ninth Circuit which suggests that the courts are closely scrutinizing potential antitrust violations. So that probably, all things being equal, helps LIV a bit. But I think

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

damages are going to be a hurdle for LIV. As we talked about earlier, if LIV has the financial wherewithal to pay golfer's more money, and also to sustain itself in a way that it is competitive with the PGA Tour, it might be argued that the PGA Tour is not acting as monopoly or a monopsony, right? If there are two rival leagues that are functioning, getting the same sort of caliber talent, we haven't seen that in the US. Alan talked about USFL earlier, that was one attempt in the eighties to try to have a rival league to the NFL. It ultimately didn't work out, and I think what we've seen is it's difficult to have a rival league.

Here, if in fact LIV Golf is as well financed as it appears to be, it might last awhile. That's good for the golfers because they're going to have these two leagues. It's like when the ABA and NBA merged right? We saw the antitrust litigation there, where the players said, well, this isn't good, we're losing one of the leagues that was offering those contracts. And here, even though there's an antitrust case, it might actually be healthy for the golfers to have this sort of rivalry because now they're able to get two leagues competing.

MR. DUBE: Let's jump back to Chantel for a second and talk about what PGA Tour has done vis-à-vis its own golfers, the members who are on Tour events. Has it made their working conditions better in response to the suit, or at least in response to the emergence of LIV Golf?

MS. MCCABE: Oh, by a large, large fraction. That's one of the talking points that is outlined quite regularly by the media is that PGA Tour was sitting on what you can casually call a stash of money, and a lot of that was in case of emergency, and the facts of how it is filed with the federal government. You can't be spending frivolously, or you'll draw attention to yourself. So, a few factors in this matter, they've recently built a brand-new PGA Tour headquarters.

There are several reasons why you could argue that they were not distributing the kind of purses, the money, that gets given out to the players each tournament. More than anything, a conversation that I hear, is the media rights. That's where a huge chunk, as it is with any sport, gets a lot of those zeros from, and they recently signed that, and COVID hit, so, they had to rework their infrastructure and distribution of those funds. And obviously that money isn't front-loaded, so that comes over time, but more than anything, gripes from players were, "hey, we need at least a stipend for all of this travel." Why are some of these things not happening that have been talked about and asked, because one thing I just wanted to draw attention to while I have the floor for a second. A couple of things that were happening on the PGA Tour were treatment of player caddies, some of the housing, not having the full-blown help that you need with the travel when you don't make the cut and you need to

change your flight and you had it scheduled for Sunday because you are planning on playing two additional days, but you don't. So, some real concerns that have been boiling over the years, which I should have mentioned earlier, are more factors outside of the monetary value of going over to LIV that made a big difference in the decision-making.

So, I think that those things need a lot of our focus, but also, what's going on with the ladies' tour? The LPGA, people are very familiar with, but they have their own version of the LIV Golf Tour, and players are interchangeably playing back and forth. It's called the Aramco series and that is co-sanctioned by the LET tour. Now, I wish I had a diagram to follow this map here. You have the PGA Tour in the states, the DP World Tour, which Professor Galloway alluded to earlier, that's the premier tour across Europe and parts of the world. Then for the ladies, you have the LPGA tour based stateside and the LET tour. This LET tour has agreed in partnership with the Aramco series, which is funded by the same Saudi funds, and the LPGA players are coming and going on that tour as they please and allowed to play in both. So that's another component that I always just like to make people aware of because I do think that it has a place in this conversation.

MR. DUBE: So, Professor Galloway, I want to give you a second to respond to that. I know that you must want to jump in here.

MS. GALLOWAY: I agree that there are different elements in play with the LPGA tour, then the PGA Tour, and I think Chantel, there are some restrictions on going back and forth, playing on the Aramco Tour and the LET. But the LET and the LPGA have a pretty good, close, official relationship on that. And they tend to work it out pretty well and it's much more flexible than it is with the PGA Tour. Part of it is by necessity, if we think about the dollars involved, there's a crazy difference in the amount that women are getting paid for playing professional golf and what men are getting paid, and a lot of that is the function of the marketplace and the demand, sponsor demand, fan demand, and consumer demand. But, I think that for the women to have the opportunity to go back and forth and play on the different tours, having more opportunities, I think that's wonderful. But I also think it's needed from a financial standpoint, it's more important to the women than it is to the men because of the disparity in the amount of money that they're making. Chantel, would you agree with that?

MS. MCCABE: I would interject for a moment. I don't know the specific restrictions, but I was talking about, overall, that an LPGA player is allowed to play the Aramco series, unlike on the PGA tour, playing LIV is double-dipping, so to speak. But I would argue that most of these are really small fields for the Aramco series and the

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

players that are winning are already the most lucrative on the LGPA. So, the argument of “they need the money,” I don’t quite subscribe to that. I definitely agree with the concept, and the purses are vastly different from PGA Tour to LPGA and all across the mini-tour board. But I do... It’s hard for me to get on board with that train of thought when most of these women that are winning these events are multimillionaires.

MR. DUBE: For those who are attending online, if you’d like to submit any questions, I’d certainly like to leave a few minutes for questions. Just a couple more questions from me to the panelists. Alan, I want to talk with you about what happened in early August of 2022. Mr. Mickelson files his suit against PGA Tour, Inc. A few golfers, though not Mr. Mickelson himself, moved for a temporary restraining order. They claim that there’s an emergency at hand, that they need to be allowed to play in the upcoming FedEx Cup playoffs. The judge denied the TRO. Did the judge do the right thing?

MR. MILSTEIN: Well, the judge did the right thing with respect to whether or not there was an emergency, whether these players were going to get harmed if she didn’t rule immediately, because again, Mickelson supposedly got something like 300, 400, 500 million dollars. But you know what would have made this a much more interesting case? If Michael, if you and I were looking for a plaintiff in this case, and we brought Professor McCann in, the perfect plaintiffs in this case would have been members of the PGA Tour, you know, who aren’t making that much money. Because they’re the ones being essentially damaged by the anti-competitive aspects of the way the PGA operates. And you know, the thing with professional golfers: you might think, “Gee, these guys make so much money.” No, no they don’t. The top money winner last year, Brooks Koepka, I think he made \$9 million on the tour, and he had to pay his expenses. If you look at the best players in the NFL, his salary would have been about a 130th of the players in the NFL or the NBA or MLB. They’re not making a lot of money. And remember, it’s only the top guys, the guys who are doing well in the tournaments, that make that kind of money.

The players have to make money by sponsorships. You know, they’ve gotta be walking billboards, which is, I think, offensive. I mean, can you imagine if Bryce Harper, you know, the member of the next World Series champions... Bryce Harper had to wear, to make some money, had to wear, you know, a little Wendy’s sticker on his helmet. But these players have to make money that way because they don’t make it from the tour. And particularly the ones at the bottom who don’t have the sponsorships. That’s what was interesting about Mickelson being in there, because he and Tiger Woods were really the two golfers making fortunes by doing commercials. But most of these golfers don’t get that opportunity at all. So, you know, let’s have

some free competition, but maybe not have the Saudis as the ones sports washing their money in the process. Sports washing their essentially terrible culture.

MR. DUBE: Professor McCann, my last question is for you. *Sportico* has reported on comments that were made by Greg Norman. He said that the PGA Tour's actions are "anti-golfer, anti-fan, and anti-competitive." What struck me about Greg Norman's quote is that that actually did a pretty good job of summing up what the antitrust laws seek to prevent, right? Decreased amount of product and things of that nature, all to the detriment of consumers. I know none of us is Nostradamus, but where do you see this case ultimately heading up?

MR. MCCANN: I think that is a good summary, because we haven't really talked about the consumer impact, which is typically a crucial consideration in antitrust cases. Are golf fans better off with this competition? Or are golf fans better off with the PGA Tour restricting opportunities for golfers to do other tournaments since that ensures a certain set of golfers will be playing in PGA Tour events? Where will this end up? I think a settlement would seem like a fairly decent bet as to how this ultimately ends, though the PGA Tour and LIV Golf have to be careful to not spawn new antitrust problems by agreeing to divide up the golf world in some anticompetitive way. I think these leagues will continue and will compete against each other, and it could be, and Alan, Professor Galloway and Chantel all talked about this, that this pressure on the PGA Tour makes the PGA Tour less restricted. And that may be the best outcome of all, is that the golfers are beneficiaries. And maybe that will trickle down to the golfers that Alan talked about, the ones that are not making \$300 million, the ones that are very much impacted by restrictions on competition.

MR. MILSTEIN: I don't think it's going to be a settlement. I think this is a blood war to the end.

V. Questions

MR. DUBE: So, I did save a few minutes, about five minutes, for questions. I know we have folks online, and we have folks here in the room. There was a question, and I think this may be best directed to Chantel, which was about the Official World Golf Ranking criteria, and how that plays into this situation, the notion of LIV golfers not being able to earn those points.

MS. MCCABE: I did answer that. The question was, could other major governing bodies follow suit while leaving past winner exemptions in place. And so my response was, it's long been suspected that that would be the ultimate goal, and based on a lot of the things that we talked about today so far, the pressuring, the elbowing, the nudging of the PGA Tour, whether that be through big-time

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

manufacturers like Callaway, like Taylor-Made, who have longtime lucrative partnerships with the PGA Tour, you can't tell me that they do not have an influence on how they treat players who have now gone over to LIV.

Through what we mentioned, Augusta National is the who's who of the entire nucleus of our world, and you have to be somebody with a lot of money to be a member there. And I think that that alone as the premier major has a lot of influence in how things are going down. So, again, all of the layers, just like any case, but since I study this day in, day out, specifically with the official world golf ranking point system, and that is one thing I know we didn't get to as a question.

You were going to ask me how I think, or how I react to what the judge set for precedent with this case. And they neglected to talk about official world golf ranking points. Like the money, yes, we get it, they're not necessarily losing out on money, but opportunity and the legacy and the dignity that comes with being able to qualify through tournaments... If you aren't familiar with official world golf ranking, you get points for any tournament you enter, whether it's the best tournament in the world, the Masters, or whether it's what I'm at this week in a Korn Ferry Tour tournament, which is the minor league tournament backed up to the PGA Tour. So, no matter what tournament, you're going to get some kind of official world golf ranking points, and it's weighted based on who else is in the field, who you're playing against. Fields are made with the masters, with the Open Championship, and with the US Open, by way of how many or what your ranking is in the official world golf ranking — as well as other fields as well, but those are the most important. So, if LIV, which does not get world golf ranking points, many of those players will not be eligible any longer. So, forget about the rest of the PGA Tour, they're unable to play in that. The RNA Reese who runs the open championship, formerly known as the British Open, just said last week they are not banning LIV players from participating. So, I wonder if that is setting the tone for the rest of what's to come with announcements of the other major championships.

MR. DUBE: Great, thank you. There was a great question from one of the online viewers. Does LIV's success in signing many highly ranked golfers and attracting significant media attention during the very first year damage their antitrust claims that they've been restricted from competing in the industry? Alan, this may be best directed to you.

MR. MILSTEIN: No, I don't think so. They're just trying to buy their way in. And it's interesting what Chantel just said because that world golf ranking organization is a separate entity. It's not the PGA Tour, although the chairman of the PGA Tour is a member of the commission for that ranking. But it just tells you how

the PGA Tour is combining with other entities to essentially violate the antitrust laws.

MR. DUBE: I want to see — I'm sorry, Alan.

MR. MILSTEIN: It would be a nice way to settle the case, which is to say, "All right, we'll give you rankings if you do well in these other events."

MR. DUBE: I want to see — otherwise I will have to do a "cold call" — see if we have any ... yes, Seth.

Question from MR. SETH CORWIN: Yeah, I'm thinking about this issue in the lens of, kind of like, collective bargaining, and I guess do any of the panelists foresee this ultimately leading to the PGA either giving its players the ability to form a union and collectively bargain so that they have more incentive to stay within the PGA, or on the contrary to try to shield themselves from any antitrust liability to the non-statutory labor exemption?

MR. MCCANN: Oh yeah, Professor Galloway.

MS. GALLOWAY: Well, I would just say because I've faced this with players before, saying, "Why don't we have a union? Why can't we form a union?" And the fact is that legally, you can't be a part of a union under the National Labor Relations Act because you're not an employee, you're an independent contractor. But also, if you think about it outside legal terms and the clout that you have, you're probably as players, at least on the LPGA Tour and to some extent the PGA Tour, you have more clout, because the LPGA's board of directors, the governing body of the LPGA, half of the members are actually players. So, you know, if you analogized — now it's a membership organization, not a for-profit corporation that has shareholders — but if you analogize to corporate law, the board of directors have the overall power and authority to direct the strategy and operations of the entity. So, you really have more power being able to direct the organization and its future as being a member with representatives, voted representatives on the board of directors, than you would have as a union. So, you know, but until you get over legally the issue of whether independent contractors can form a union, which now they can't, you really don't even get to that point.

MR. DUBE: Are there any more questions here in the room?

Question from MR. KEVIN FROST: I think the whole ballgame is about the Official World Golf Rankings and the major championships. And I'm going to frame this as a question: what are the antitrust law burden-of-proof challenges in a lawsuit between the PGA Tour and LIV, when arguably the restraint on trade is of the five most important events in golf? Brooks Koepka, who is now with LIV, has been vocal in his career saying that all that really matters to a top golfer are the four majors and the Ryder Cup. Only the Ryder Cup is arguably controlled by one of the parties to the

**OUT OF BOUNDS? THE LEGAL IMPLICATIONS OF THE
EMERGING RIVALRY BETWEEN LIV GOLF AND THE PGA TOUR**

lawsuit, and that's indirectly through the PGA Tour's investments in the DP World Tour on the European team side and the connection between performance on the PGA Tour and qualification for the U.S. team. But the governing bodies for the majors plus PGA Tour make up the OWGR board, and OWGR status is a primary qualification standard for the majors. So again, I am curious about the challenges in taking this antitrust argument to access to the majors as non-parties, as opposed to, can I play or can I not play on the PGA Tour.

MR. DUBE: You want to take that?

MR. McCANN: Yeah, so the judge talked a little bit about that in denying the restraining order, where she did acknowledge that rankings were important and the denial of rankings was a sort of harm. I think she, from what I can tell, focused on the apparent disconnect between that and the amount of money that golfers are making. And I think for the going forward, the lawyers for LIV will need to do a better job explaining what you just said, which is that by being denied an opportunity to compete in certain high-level events, that the harm goes beyond just a strict monetary number, or it's just simply not calculable, right? That it has this lasting impact on reputation. And she didn't seem to agree with that, but I think going forward, my guess is lawyers will do a better job trying to articulate it. I think if they could say something along those lines that you just said, Professor Frost, they'd have more traction.

MR. DUBE: It's great that Professor Kevin Frost asked a question, because one of the people who I wanted to thank was Professor Frost for his very engaging conversations about the golf world, which helped to inform my questions. They were much appreciated. I also want to thank everyone who attended today, everyone who attended online, and thank the Sports and Entertainment Law Society as well as Sports and Entertainment Law Institute, as well as the third co-sponsor of the event, which was the UNH Sports Law Review. So, thank you to everybody for attending. And thank you of course to the panelists.

MR. McCANN: Thank you.

MS. GALLOWAY: Thank you for having us.

MR. McCANN: See you all soon.