Golf's Civil War: The Antitrust Lessons to Learn from the PGA Tour's Rivalry with LIV Golf

ABSTRACT

The regulation of professional sports leagues under the Sherman Act presents a unique and, up to this point, unsolved problem. Increased regulation of the United States' beloved sports is not something that many US citizens would necessarily welcome. And yet, courts are consistently confronted with the dilemma of checking competition "off the field" while attempting to leave unaffected the competition "on the field." In doing so, courts must reconcile the principles and objectives of the Sherman Act (the Act) with the restraints necessary for the success of sports as an enterprise. While mirroring some of the aspects of traditional trade and business usually subject to the Sherman Act, the inescapable fact is that sports leagues are unique entities and, as such, require different perspectives in the application of governing law.

Using a now-resolved lawsuit filed against the PGA Tour as a case study, this Note explores the application of the Sherman Act to professional sports leagues and how the results have led to an inconsistent, noncommittal string of decisions, leaving the state of the law in flux. Furthermore, this Note addresses the proposition of a more consistent application of the Sherman Act and its intricacies, comparing economically grounded goals of preserving "on the field" competition with the Act's inherent goals of promoting a competitive "off the field" marketplace.

TABLE OF CONTENTS

For decades, the Professional Golfers' Association Tour ("PGA Tour" or the "Tour") has dominated the landscape of professional golf, organizing and operating a series of professional tours on both US and international soil.[1] And yet, besides an investigation by the Federal Trade Commission (FTC) into potential anticompetitive features of the Tour's governing rules in 1990, the PGA Tour's majority share of the sport has progressed largely unchecked for a number of years.[2] Competition with the PGA Tour has also been few and far between. After all, the Tour already has media rights agreements worth over $6 billion with broadcast giants CBS, NBC, ESPN, and Warner Brothers.[3] However, the establishment of a controversial rival organization, LIV Golf, rocked the sport to its core, introducing a sharp divide in golf for the first time since the PGA Tour itself struck out on its own.[4]

Despite threats of lifetime bans from the PGA Tour and many closed-door negotiations with interested players and LIV Golf, LIV successfully signed several high-profile golfers from the PGA Tour along with a number of up-and-coming amateur college golfers.[5] The PGA Tour remained firm in its conviction banning any and all LIV

1. *PGA TOUR History*, PGA TOUR HIST., https://www.pgatourmediaguide.com/intro/tour-history-chronology [https://perma.cc/48DB-JTLN] (last visited Feb. 5, 2024).

2. Charles R. Daniel II, *The PGA Tour: Successful Self-Regulation or Unreasonably Restraining Trade?*, 4 SPORTS L.J. 41, 41–42, 55 (1997).

3. Kevin Draper, *LIV Golf Has Marquee Names and Giant Purses. So Why No TV Deal?*, N.Y. TIMES (June 16, 2022), https://www.nytimes.com/2022/06/16/sports/golf/liv-golf-tv-deal.html#:~:text=NBC%2C%20CBS%20and%20ESPN%20are,to%20show%20the%20tour%20worldwide [https://perma.cc/2TXP-FJGW].

4. Dylan Dethier, *The Inside Story of LIV Golf vs. the PGA Tour: Money, Innovation and Loyalty*, GOLF (Sept. 8, 2022), https://golf.com/news/liv-pga-tour-inside-story/ [https://perma.cc/X3JY-AAC6].

5. *Id.*

players from further PGA Tour tournaments, even if otherwise eligible.[6] However, a turbulent first half of 2022 led to a lawsuit against the PGA Tour filed by eleven of the newly-defected LIV players, which alleged antitrust law violations under Sections One and Two of the Sherman Act.[7] Among the claims described in the complaint was the allegation that the PGA Tour conspired with a tour known as the DP World Tour (European Tour) to engage in a group boycott of LIV Golf and its players in an effort to eliminate competition and prevent LIV's entry into the golf market.[8]

While the PGA Tour and LIV have recently executed a landmark merger, unifying all of professional golf,[9] the leagues' rivalry provides a paradigmatic example of a common phenomenon in the landscape of professional sports—an upstart sports league attempting to enter a market dominated by an established organization. Therefore, while the newly formed PGA/LIV entity might resolve golf's current disputes, it will certainly not be the end of allegations of anticompetitive behavior lobbied against established professional sports leagues. By detailing the history of the PGA Tour and LIV Golf rivalry, this Note endeavors to provide context for future disputes in hopes of more efficient judicial resolution of challenges under Section One of the Sherman Act (Section One).

Although federal antitrust law, specifically the Sherman Act, has been the primary legal authority for regulating competition in professional sports leagues in the United States, its application and regulatory effect has largely been diminished due to these leagues' historical entrenchment in the United States.[10] The "Big Four" sports leagues (the NFL, MLB, NBA, and NHL) are made up of established teams and owners that must coordinate to ensure the ultimate success of their respective leagues.[11] Although the PGA Tour, as a "non-team" sports league, differs in respect to the "Big Four" in its composition—the Tour is not governed by owners of different teams but instead by a centralized regulatory body—it is clear that the Tour has benefited from

6. *PGA Tour Confident in Authority to Ban Players Amid LIV Lawsuit*, SPORTS BUS. J. (Aug. 8, 2022), https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/04/Leagues-and-Governing-Bodies/LIV-PGA-Tour-Lawsuit.aspx [https://perma.cc/D73T-GWEW].

7. Complaint at 2, 91, 93, Mickelson v. PGA Tour, Inc., No. 22-CV-04486-BLF, 2022 WL 3229341 (N.D. Cal. Aug. 10, 2022) [hereinafter Complaint].

8. *Id.* at 2.

9. Kevin Draper, *The Alliance of LIV Golf and the PGA Tour: Here's What to Know*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/06/07/sports/golf/pga-liv-golf-merger.html [https://perma.cc/V2WC-UHHP].

10. Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 576 (2015).

11. *Id.* at 585–89.

a similarly entrenched position given its long-standing history and dominant share of the market.[12] Yet, it is precisely its centralized and singular composition that could aid the PGA Tour or similar leagues in defense of any alleged violations of Section One of the Sherman Act.[13] Section One prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce."[14] Inherent in Section One is the implication that two or more parties must have participated and that a single entity acting alone cannot violate Section One.[15] The invocation of this "single entity" principle is known as the single entity defense, and its application to professional sports leagues obviously has a substantial impact on any league's liability under Section One of the Sherman Act, perhaps eliminating liability altogether.[16]

This Note analyzes the history, application, and future of the single entity defense as it pertains to professional sports leagues and the role it may have played in the PGA Tour's defense against LIV's lawsuit. Part I provides an overview of the Sherman Act and the single entity defense. Additionally, Part I provides a brief description of the PGA Tour and the events that led to the rise of LIV Golf and the resulting tension. Part II follows by analyzing how the single entity defense has been applied to professional sports leagues.[17] It then goes on to apply the defense to the LIV lawsuit in an attempt to hypothetically resolve the case.[18] Finally, Part III places the resolution of the lawsuit in perspective and address whether non-team professional sports leagues, like the PGA Tour, should benefit from a more consistent application of the single entity defense in response to Section One allegations.

I. BACKGROUND

A. The Sherman Act, Generally and in Professional Sports

Enacted in 1890, the Sherman Act is widely regarded as the most important piece of federal regulatory legislation for business and

12. *See PGA TOUR History*, *supra* note 1; Draper, *supra* note 3.

13. Cyntrice Thomas, Thomas A. Baker III & Kevin Byon, *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 VA. SPORTS & ENT. L.J. 296, 307–08 (2013).

14. 15 U.S.C.A. § 1 (West 2004).

15. Grow, *supra* note 10, at 582.

16. Thomas et al., *supra* note 13, at 299.

17. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010); Seabury Mgmt., Inc. v. Pro. Golfers' Ass'n of Am., Inc. (*Seabury II*), 52 F.3d 322 (4th Cir. 1995).

18. *See generally* Complaint, *supra* note 7.

trade in existence today.[19] Together with the Clayton Act and the Federal Trade Commission Acts, the Sherman Act addresses how businesses should operate and compete in the market and generally provides the basis on which all antitrust actions are levied against US business entities.[20] While the Act's regulatory importance is undoubted, it is understood as enshrining the foundational capitalist principle that "more competition is better than less competition."[21] Yet, regardless of its evolution and eventual importance, the Act itself is brief and its language is vague.[22]

One explanation for this conundrum is the circumstances surrounding the Act's passage.[23] The Act became law in 1890, at a time when a significant amount of lobbying, coordinated by big business, attempted to block any efforts that might lead to a more consumer- or worker-friendly economy.[24] Despite those efforts, the Act passed in the Senate with a 52-1 vote and unanimously in the House, with little debate and almost no resistance.[25] The explanation for the Act's passage is the "simple, if unpalatable" conclusion that the business lobby greenlit its passage under the assumption that the Act, given its vague construction, could never effectively be used to regulate the anticompetitive tendencies of established trusts and businesses.[26] Of course, this prediction would not hold true. In fact, it is precisely the Act's brevity and vagueness that has afforded courts the ability to fill in the details and pave the way for anticompetitive economic policy for years to come.[27]

Section One of the Sherman Act provides 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."[28] Early applications of Section One began with a literal construction of the statute and the Supreme Court's prohibition

19. Peter R. Dickson & Philippa K. Wells, *The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared*, 20 J. PUB. POL'Y & MKTG. 3, 3 (2001).

20. *Id.*; Timothy S. Bolen, *Singled Out: Application and Defense of Antitrust Law and Single Entity Status to Non-Team Sports*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 80, 80 (2010).

21. Dickson & Wells, *supra* note 19, at 3–4.

22. *Id.* at 4; *see* 15 U.S.C.A. § 1 (West 2004).

23. Dickson & Wells, *supra* note 19, at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; *see* Thomas et al., *supra* note 13, at 298.

28. 15 U.S.C.A. § 1 (West 2004).

of any and all agreements that restrained trade.[29] Several years later, the Court refined its interpretation of the statute in *Standard Oil Co. of New Jersey v. United States*.[30] In *Standard Oil*, the Court jettisoned the literal approach and held that the term "every" did not indict all agreements in restraint of trade but instead only those agreements that would place an "undue restraint" on trade and commerce.[31] In so holding, the Court noted that Congress's intent in passing the Sherman Act was to promote competition, not to place categorical bans on certain contracts or agreements.[32] As a result, the Court introduced the concept of reasonability into the antitrust analysis with the "Rule of Reason," effectively placing the determination of any violation of the Sherman Act within the purview of the court.[33]

Since then, courts have also identified certain agreements or conduct that could be considered so pernicious and so likely to be anticompetitive that they could be in violation of the Act without thoroughly examining the facts or circumstances.[34] Examples of such restrictive agreements include obvious price fixing,[35] purposeful regional division,[36] or group boycotts.[37] Consequently, the presence of any of these more obvious agreements triggers the application of a per se violation, circumventing the need for analysis under the Rule of Reason.[38] Yet, while some restraints require little factual deliberation, others necessitate a more detailed approach.[39] As a result, the Supreme Court has employed per se rules on a rather limited basis, requiring that the scrutinized conduct be "manifestly anticompetitive."[40]

Perhaps not immediately thought of as the primary targets of federal antitrust laws, professional sports leagues have nonetheless been subject to the Sherman Act's reach and regulatory authority.[41] The "Big Four" sports leagues have been challenged under the Act for over

29. Edward D. Cavanagh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 LOY. U. CHI. L.J. 123, 130 (2013); *see, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897).

30. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62 (1911).

31. *Id.* at 60, 63.

32. *Id.* at 60.

33. *Id.* at 60, 63–64; Cavanagh, *supra* note 29, at 131.

34. Cavanagh, *supra* note 29, at 131–32.

35. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

36. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 605, 612 (1972).

37. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

38. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 129 (2002).

39. *Id.*

40. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–50 (1977).

41. Grow, *supra* note 10, at 580–81.

sixty years,[42] with "non-team" sports leagues outside the "Big Four," like the PGA Tour, experiencing similar challenges in more recent years.[43] Generally, antitrust cases against professional sports leagues are of two types: (1) interleague challenges, where a different or rival league challenges the actions of a more established league; and (2) intraleague challenges, where a member of a league (e.g., a team or player's association) alleges that a league rule or action constitutes an unlawful restraint of trade.[44]

As a general matter, the Sherman Act's application to and regulation of professional sports have been far from perfect.[45] The Act's inefficient application stems, at least in part, from what has been described as the "peculiar economics" of professional sports.[46] Because individuals themselves or individual teams within the league must operate in a coordinated fashion so that the league may function properly, courts have failed to apply the Act's anti-collusion restrictions in a consistent and reliable fashion.[47] Additionally, established sports leagues undeniably enjoy a well-entrenched status in their respective sports simply by having had the first bites at the apple.[48] As a result, the line between actual exclusionary practices and mere popularity or success as a league becomes blurred.[49] Much of the scholarship on the subject is in flux; many call for a totally different regulatory regime as a result of these aforementioned failures,[50] while some argue that sports leagues should occupy a special status given their "peculiar economics."[51]

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42. *Id.* at 580. *But see* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208–09 (1922) (holding that the MLB was exempt from antitrust law because its operation did not constitute interstate commerce).

43. *See, e.g.*, Toscano v. PGA Tour, Inc., 201 F. Supp. 2d 1106, 1116 (E.D. Cal. 2002).

44. Gary R. Roberts, *Professional Sports and the Antitrust Laws in* THE BUSINESS OF PROFESSIONAL SPORTS 135, 135 (Paul D. Staudohar & James A. Mangan eds., Univ. of Ill. Press 1991) [hereinafter Roberts I] (explaining the impact of antitrust laws on professional sports).

45. *See* Paul J. Tagliabue, *Antitrust Developments in Sports and Entertainment*, 56 ANTITRUST L.J. 341, 348 (1987); Grow, *supra* note 10, at 582–83.

46. Walter C. Neale, *The Peculiar Economics of Sports*, 78 Q.J. ECON. 1, 3 (1964) (describing professional sports leagues as "natural monopolies" and their objective to promote and simultaneously prevent competition).

47. Grow, *supra* note 10, at 576, 589.

48. *Id.* at 598.

49. *Id.* at 597–98.

50. *See id.* at 575–76.

51. *See, e.g.*, Neale, *supra* note 46, at 1–3, 5. The league product "is a peculiar mixture: it comes divisible into parts, each of which can be and is sold separately, but it is also a joint and multiple yet indivisible product." *Id.* at 3. The league members "sell an indivisible product (once divided it is no product at all)." *Id.* at 5.

B. The Single Entity Defense

Regardless of any deficiencies in the Act's application, the reality is that sports leagues are indeed subject to the Sherman Act's reach and regulation. Yet, before any court can get to the more specific determinations of whether the Rule of Reason applies to a particular activity or whether the activity is of such a character that it may be deemed a per se violation of the Act, a reviewing court must first determine whether the Act's application is precluded.[52] In other words, the first inquiry is whether the challenged entity can offer any sort of defense before subsequently examining the merits of the case. To succeed on an alleged Section One violation, a plaintiff must show that there is a clear restraint on trade with an adverse effect on interstate commerce; inherent in Section One is the requirement of some form of concerted action.[53] That is to say, a Section One plaintiff must demonstrate that there are actually two separate actors involved in whatever conduct or agreement is alleged to have been an unlawful restraint of trade or commerce.[54]

Given this extra step in a plaintiff's Section One action, businesses, corporations, and professional sports leagues alike have sought to contest the applicability of Section One to their activities by claiming that they are, in fact, a single actor producing or managing a single product.[55] This concept has become known as the "single entity defense."[56] The Supreme Court first recognized the single entity defense as a potential way to escape antitrust scrutiny in the 1984 case of *Copperweld Corp. v. Independence Tube Corp*.[57] In *Copperweld*, a tubing company and its subsidiary attempted to prevent a former employee from establishing his own tubing company pursuant to a noncompetition agreement.[58] The employee sued under Section One of the Sherman Act, alleging that the company and its subsidiary conspired to unlawfully prevent his entry into the market.[59] The Supreme Court, reversing the decision below, held that subsidiary divisions of the same company cannot constitute concerted action and is thus incapable of violating Section One of the Sherman Act.[60]

52. *See* Thomas et al., *supra* note 13, at 301–02, 310.
53. *See id.* at 299.
54. *See id.*
55. *See* Grow, *supra* note 10, at 582.
56. Bolen, *supra* note 20, at 85–86.
57. *Id.*
58. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 755–77 (1984).
59. *See id.* at 757–58.
60. *Id.* at 777.

Notably, the court opted not to view the two companies as separate but instead having "a complete unity of interest."[61]

The language used by the court in describing the connection between a parent and its subsidiary would go on to provide the foundation for the test by which the applicability of the single entity defense is judged.[62] To state the language directly, "[the parent and subsidiary's] objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."[63] While no specific factors were listed explicitly in Justice Burger's opinion, his opinion eschewed getting bogged down in the intricacies of the corporate form and structure, instead opting to examine the substance of the relationship with regard to the surrounding economic realities of the situation.[64] Commenters on the single entity defense's foundation differ markedly with regard to the scope of its application. Many limit the case's holding strictly to its facts, functionally establishing a prerequisite that "single entities" mirror that of a parent and wholly owned subsidiary.[65] Others construe Justice Burger's language as having provided the building blocks for allowing professional sports leagues to operate in the eyes of the Sherman Act as single entities.[66]

Since the Supreme Court's ruling in *Copperweld*, professional sports leagues have repeatedly attempted to assert their statuses as single entities in federal courts when facing similar challenges.[67] More recently, however, the Supreme Court rejected an invocation of the defense in the 2010 case *American Needle v. National Football League*.[68] In the case, American Needle, an apparel corporation, possessed a nonexclusive license for design and manufacture of headgear bearing logos and names of the NFL and its teams.[69] In 2000, the NFL and its teams voted on the granting of an exclusive license to Reebok, a similar apparel corporation, and terminated all other nonexclusive licenses, including American Needle's.[70] American Needle filed suit alleging

61. *Id.* at 771.

62. *See* Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 40 (1991).

63. *Copperweld Corp.*, 467 U.S. at 771.

64. *See id.*; Thomas et al., *supra* note 13, at 30 (2013).

65. *See, e.g.*, Jacobs, *supra* note 62, at 37.

66. *See* Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562, 588 (1986).

67. *See* Thomas et al., *supra* note 13, at 301.

68. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186, 89–91 (2010).

69. *Id.* at 187.

70. *Id.*

violations of both sections of the Sherman Act.[71] In its defense, the NFL argued that the NFL and its teams were incapable of conspiring within the meaning of Section One because they were "a single economic enterprise, at least with respect to the conduct challenged."[72] The US District Court for the Northern District of Illinois and US Court of Appeals for the Seventh Circuit agreed.[73] After granting certiorari, the Supreme Court reversed, holding that the NFL and its teams could not be regarded as a single entity and the alleged conduct was not beyond Section One's purview.[74]

Justice Stevens, however, echoed much of the sentiment expressed by Justice Burger in *Copperweld*.[75] Justice Stevens noted that the Court had long held "that concerted action under [Section One] does not turn simply on whether the parties involved are legally distinct entities. Instead, [the Court has] eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[76] Having affirmed that achieving single entity status does not necessarily turn upon whether the form of a particular organization is actually a single entity, Justice Stevens highlighted the "special characteristics" of the sports industry that may provide justification for many different kinds of agreements.[77] While *American Needle* undoubtedly placed the single entity defense on the back burner for the NFL and similar, more traditional professional sports leagues, the future of the defense as applied to more centralized, non-team sports leagues, like the PGA Tour, is still very much open to interpretation.[78]

C. The PGA Tour and LIV Golf

In late 2021, professional golf faced a significant upheaval. The establishment of LIV Golf, a rival organization led by former PGA Tour legend Greg Norman and backed by Saudi Arabia's Public Investment Fund, began to grow rapidly as several PGA Tour players were rumored

71. *Id.*
72. *Id.* at 187–88.
73. *Id.* at 188.
74. *Id.* at 200–01, 204 (2010).
75. *Id.* at 190–91, 195, 197.
76. *Id.* at 191.
77. *Id.* at 202.
78. *See* Bolen, *supra* note 20, at 106.

to be joining the new league.[79] Phil Mickelson, one of golf's most decorated and celebrated, was one of those players.[80] The rumors were well-founded; in an interview with Alan Shipnuck, a journalist covering the sport, Mickelson issued controversial comments that provided the proverbial match to the fire.[81] In the interview, Mickelson provided the context for his involvement with the new league—the PGA Tour, the organization responsible for providing the highest level of professional golf for nearly a century, had failed to adapt to a growing trend in sports empowering players to develop their own brand both on and off the field, court, or course.[82] Mickelson felt the Tour had mismanaged the media rights of its player-members, something that the Tour has significant control over, as well as the handling of event purses and other financial decisions.[83]

The feelings Mickelson expressed in his interview were not in isolation; frustration and calls for change within the PGA Tour had been increasing for years, particularly around rewarding the sport's top stars.[84] Before the 2021 season, the Tour announced the Player Impact Program (PIP) in which the Tour promised to financially reward players who, through a series of third-party measurement devices, had demonstrated the most positive interest in the growth of the Tour for that given year.[85] The PIP fund was just one of the tools by which the PGA Tour attempted to respond to LIV's growing presence.[86]

Nevertheless, within a few months of Mickelson's interview, the golf world was embroiled in a civil war.[87] LIV Golf had gained organizational structure, lucrative investments, and, above all,

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79. *See* Dethier, *supra* note 4; Alan Blinder, Tariq Panja & Andrew Das, *What Is LIV Golf? It Depends Whom You Ask.*, N.Y. TIMES (May 22, 2023), https://www.nytimes.com/article/liv-golf-saudi-arabia-pga.html [https://perma.cc/8GNT-9J7A].

80. *See* Alan Shipnuck, *The Truth About Phil Mickelson and Saudi Arabia*, FIRE PIT COLLECTIVE (Feb. 17, 2022), https://firepitcollective.com/the-truth-about-phil-and-saudi-arabia/ [https://perma.cc/6VH9-6ZK6].

81. *See id.*

82. *See id.*

83. *See id.*

84. *See, e.g.*, Colgan, *supra* note 91; Dylan Dethier, *5 Ways the PGA Tour Just Got Better (And 3 Ways It Got Worse!)*, GOLF (Mar. 1, 2023), https://golf.com/news/5-ways-pga-tour-got-better-3-ways-got-worse/ [https://perma.cc/3EFP-PTQM].

85. Dan Rapaport, *The PIP Explained: PGA Tour Reveals Details on Its Controversial New Program*, GOLF DIG. (Dec. 14, 2021), https://www.golfdigest.com/story/pga-tour-player-impact-program-breakdown [https://perma.cc/SV2X-HTT8]; *see also* Cameron Morfit, *Tiger Woods Finishes Atop Inaugural Player Impact Program*, PGA TOUR, https://www.pgatour.com/news/2022/03/02/tiger-woods-tops-player-impact-program-pip-phil-mickelson-finsihes-second.html [https://perma.cc/J4PU-YARS] (last visited Feb. 5, 2023).

86. *See* Dethier, *supra* note 4.

87. *See id.*

commitment from players.[88] "Golf, But Louder" was LIV's mantra, promising to provide a more player-focused model with more scheduling freedom off the course and a reimagined format and event setup.[89] Perhaps LIV's most gravitational factor, at least to many critics, was the exorbitant sums apparently being offered up front to players defecting from the PGA Tour.[90] Mickelson himself was reportedly offered $200 million just to sign with LIV, with several other high-profile players also receiving significant nine-figure offers.[91] LIV's CEO, Norman, appeared on the Fox News Network in August 2022 and claimed that LIV had offered Tiger Woods, arguably the most successful and well-known golfer of all time, as much as $800 million to sign with the league.[92] These offers placed the PGA Tour and its commissioner, Jay Monahan, in a precarious position that forced the Tour to respond or continue to lose its high-profile players to a rival tour.[93] Monahan responded emphatically by banning any and all players that had joined LIV, further reiterating that any player who joined LIV would not be welcome back to the PGA Tour.[94]

The culmination of these events was a lawsuit filed in August 2022 by Mickelson and eleven former PGA tour players alleging that the Tour had violated both Sections One and Two of the Sherman Act, as well as the similarly protective California Cartwright Act.[95]

While the new PGA and LIV merger could still be subject to Section Two scrutiny,[96] this Note only addresses and analyzes LIV's original Section One claim. The alleged Section One violation stated that the PGA Tour unlawfully reached an agreement with the European Tour, and possibly others, to prevent the entry of LIV Golf

88. *See id.*

89. *See id.*

90. *See* Blinder et al., *supra* note 79.

91. *See id.*

92. Dethier, *supra* note 4; *see* Jeff Kimber, *20 Incredible Tiger Woods Records*, GOLF MONTHLY (Aug. 15, 2022), https://www.golfmonthly.com/features/20-incredible-tiger-woods-records [https://perma.cc/VM8D-GLF8].

93. *See* Dylan Dethier, *Inside the PGA Tour-PIF Negotiations: What Does LIV's Future Hold?*, GOLF (Dec. 29, 2023), https://golf.com/news/inside-liv-golf-pga-tour-negotiations/ [https://perma.cc/2JQ3-BSLC].

94. James Colgan, *'They Sued Us:' Jay Monahan Says Suspended LIV Players Can't Return to the PGA Tour*, GOLF (Aug. 24, 2022), https://golf.com/news/jay-monahan-suspended-liv-players-no-return/ [https://perma.cc/DAX3-49ZW]; *see also PGA Tour Confident in Authority to Ban Players Amid LIV Lawsuit*, *supra* note 6.

95. *See generally* Complaint, *supra* note 7.

96. *See* Andrew Beaton & Louise Radnofsky, *PGA Tour's Deal with LIV's Saudi Backers to Be Investigated by the Justice Department*, WALL ST. J. (June 15, 2023, 7:32 PM), https://www.wsj.com/sports/golf/pga-tour-liv-golf-merger-investigation-antitrust-28d014bf [https://perma.cc/TY6P-UAV5].

into the market for the services of professional golfers.[97] The European Tour is the top organizer of professional golf in Europe and an incredibly significant partner with the PGA Tour.[98] The two have worked cooperatively for years, officially forming a strategic alliance in 2020 and further strengthening that relationship again in 2022.[99] In light of the alleged Section One violation, their relationship was highly scrutinized and would have undoubtedly informed a court's resolution of LIV's claim.

II. ANALYSIS

A. Organizational Structures of Non-Team Sports Leagues and the PGA Tour

To properly apply the single entity defense to the actions of the PGA Tour and its alleged conspirators, it is necessary to assess how it fits into the unique context of individual-player sports leagues, taking into account their historical background. As discussed, the single entity defense's application has not produced a consistent body of law or legal standard under which the defense can be asserted with guaranteed success.[100] *American Needle* certainly limited its invocation by traditional, team sports leagues, but the Supreme Court has yet to revisit the issue in the context of non-team leagues.[101] Some commenters acknowledge that a potential explanation for courts' apparent lack of assertiveness is the variance in the structure and organization of non-team leagues as compared to traditional ones.[102] Non-team leagues differ substantially from traditional leagues in

97. Complaint, *supra* note 7, at 17.

98. *See The Evolution of the DP World Tour*, DP WORLD TOUR (Apr. 12, 2022), https://www.europeantour.com/dpworld-tour/news/articles/detail/the-evolution-of-the-dp-world-tour/ [https://perma.cc/2CMY-EU3L]; *see also DP World Tour, PGA TOUR Expand and Strengthen Alliance*, PGA TOUR, https://www.pgatour.com/article/news/latest/2022/06/28/dp-world-tour-pga-tour-european-tour-expand-strenghten-alliance [https://perma.cc/GX52-GH3F] (last visited Feb. 5, 2024).

99. *See PGA Tour and European Tour Announce Details of Historic Strategic Alliance*, DP WORLD TOUR (Aug. 3, 2021), https://www.europeantour.com/dpworld-tour/news/articles/detail/pga-tour-and-european-tour-announce-details-of-historic-strategic-alliance/#:~:text=It%20was%20also%20confirmed%20today,at%20Mount%20Juliet%20last%20month [https://perma.cc/8RDW-RKQR]; Matt Bonesteel, *PGA Tour Strengthens Ties with European Golf to Blunt LIV Threat*, WASH. POST (June 28, 2022, 4:02 PM), https://www.washingtonpost.com/sports/2022/06/28/pga-tour-dp-liv/ [https://perma.cc/Z934-XKD3].

100. *See* discussion *supra* Section I.B; Thomas et al., *supra* note 13, at 301, 305–06.

101. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010); Thomas et al., *supra* note 13, at 306, 313.

102. Thomas et al., *supra* note 13, at 307; *see* Bolen, *supra* note 20, at 94–95.

meaningful ways, which contributes to the inconsistency of the defense's application and unpredictability of its success.

1. Organizational Structures of Non-Team Sports Leagues

Importantly, governing bodies of non-team leagues generally have centralized ownership and rulemaking authority.[103] Conversely, traditional team sports leagues are unique in that cooperation is required between entities that would otherwise be competitors.[104] For example, traditional leagues like the NFL or the NBA must rely on horizontal coordination between the fractured ownership groups of individual teams within the league to ensure the quality of the sport.[105] In addition to the horizontal coordination, however, teams in traditional leagues have diverging individual interests.[106] While teams do have incentives to promote the league brand, the popularity of the team itself, even if in contravention of league leadership's desires, can be a motivating factor in an ownership group's decision-making.[107] By contrast, governing bodies in non-team leagues are able to act much more authoritatively; a decision emanating from the top rung of the non-team league's organizational hierarchy is followed from top to bottom.[108] In short, the organizational structure of non-team leagues and the resulting decision-making processes are more centralized.

Non-team leagues' governance centrality becomes all the more evident given that most non-team sports, golf included, are not unionized and thus do not have a collective bargaining agreement with their members or players.[109] The "Big Four" leagues all engage in collective bargaining negotiations between league leadership and player's associations to develop an agreement that controls the terms and conditions of the players' employment.[110] Given that this

103. Thomas et al., *supra* note 13, at 307; Bolen, *supra* note 20, at 94.

104. *See* discussion *supra* Section I.A; Neale, *supra* note 46, at 4, 6; Thomas et al., *supra* note 13, at 307.

105. Thomas et al., supra note 13, at 307–08; Bolen, *supra* note 20, at 91–92.

106. Thomas et al., *supra* note 13, at 308.

107. *Id.* at 308. *See also* AP, *Raider Trial Opens*, N.Y. TIMES (Mar. 30, 1982), https://www.nytimes.com/1982/03/30/sports/raider-trial-opens.html [https://perma.cc/C59X-ZVQE].

108. *See* Thomas et al., *supra* note 13, at 307–08; Bolen, *supra* note 20, at 99.

109. Thomas et al., *supra* note 13, at 307; Bolen, *supra* note 20, at 94; Tim Graham, *PGA Tour Players Fought to Unionize and Failed 25 Years Ago. Today's Pros Could Have Used It*, ATHLETIC (July 10, 2023), https://theathletic.com/4652836/2023/07/10/pga-tour-players-union-history/ [https://perma.cc/GGX6-FJZS].

110. Thomas et al., *supra* note 13, at 307; *see* Lenah Ann, *A Detailed List of the Major Professional Sports Leagues in the United States and Canada*, SPORTS BRIEF (Feb. 2, 2023, 12:14

relationship is akin to an employer-employee relationship, the regulation of collective bargaining is left to separate statutory schemes like the Clayton Act.[111] The Clayton Act provides a statutory exemption from antitrust laws by excluding labor from being categorized as commerce.[112] Non-team leagues do not benefit from this antitrust exemption, consequently leaving any instance of vertical coordination between league leadership and its players more vulnerable to Section One scrutiny.[113]

Additionally, non-team league governing bodies generally do not own and operate the facilities that the sport utilizes for events, tournaments, and the like.[114] At first glance, it would seem that this would contradict the proposition that non-team leagues employ a more centralized leadership approach. However, there is an argument that given a non-team league's reliance upon sponsors and facility owners' roles in the running of a league event, this collaboration might reinforce, at least among the parties involved, the complete unity of interest theory espoused in *Copperweld*.[115] In light of these foregoing differences, many commenters argue that non-team leagues have a better chance in court successfully invoking the single entity defense.[116] Yet not all non-team leagues are similarly structured and the organization of each league and the league's actions ultimately dictate Section One's applicability.

2. Organizational Structure of the PGA Tour

Focusing specifically on the organization and makeup of the PGA Tour at the time of the lawsuit, the Tour followed many of these non-team league distinctions, albeit with important caveats. Executive leadership of the Tour was—and still is—headed by Commissioner Jay Monahan and several accompanying corporate officers who are responsible for both the day-to-day and general operation of the Tour.[117] The source of governance within the PGA Tour is its Tournament Regulations, promulgated annually and administered by the

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PM), https://sportsbrief.com/other-sports/33238-a-detailed-list-major-professional-sports-leagues-united-states-canada/ [https://perma.cc/QHZ8-AHTX].

111. Thomas et al., *supra* note 13, at 307; *see* 15 U.S.C.A. §§ 12–27 (West).

112. *See* 15 U.S.C.A. § 17 (West).

113. Thomas et al., *supra* note 13, at 307.

114. *Id.* at 308; Bolen, *supra* note 20, at 94.

115. *See* Bolen, *supra* note 20, at 99, 103; Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984).

116. *See, e.g.*, Thomas et al., *supra* note 13, at 313–14; Bolen, *supra* note 20, at 105–06.

117. *PGA TOUR History*, *supra* note 1.

Commissioner.[118] Among an exhaustive list of policies, the regulations include rules and requirements for the eligibility of PGA Tour members, their conduct, rights, and responsibilities.[119] The Commissioner has the power to interpret and apply the regulations as he deems fit, including waiver or suspension of any one or more of the regulations.[120] The regulations themselves, however, are voted on and approved by the PGA Tour Policy Board, consisting of four PGA Tour players, one officer of the Professional Golf Association of America, and five outside, independent directors.[121] In sum, while the inception and approval of Tour policies and regulations requires coordination among the Commissioner, the Policy Board, and the players themselves, the Commissioner retains ultimate authority in the regulations' implementation and operation.[122]

It is no surprise, then, that leadership of the PGA Tour is considerably centralized given its status as an archetypal non-team sports league. Yet the Tour differs from many non-team leagues in that the PGA Tour umbrella encompasses several other competitive tours.[123] The existence of and collaboration with other entities, regardless of whether they fall under the PGA Tour's control, necessarily opened the Tour to Section One vulnerability.[124] Among those directly under the Tour's control are the PGA Tour Champions, a tour for professionals over the age of fifty, and the Korn Ferry Tour, a developmental tour equivalent to minor leagues seen in other sports.[125] The PGA Tour also operates three international developmental tours—PGA Tour Latinoamérica, PGA Tour Canada, and PGA Tour China.[126] Less directly, the PGA Tour also has significant ties to the European Tour.[127]

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118. PGA TOUR, PGA TOUR PLAYER HANDBOOK & TOURNAMENT REGULATIONS 2022-2023 1, 2 (2022), https://qualifying.pgatourhq.com/static-assets/uploads/2022-2023-PGA-TOUR-HBandRegs-DEC%202022.pdf [https://perma.cc/H7WP-MARY].

119. *Id.* at 6–10.

120. *Id.* at 94.

121. *Id.* at 155, 157.

122. *Id.* at 94.

123. The PGA Tour opens and operates a number of subsidiary tours that function as separate tours, holding their own tournaments and competitions with their own players. *PGA TOUR History*, *supra* note 1.

124. *See* Thomas et al., *supra* note 13, at 299.

125. *PGA TOUR History*, *supra* note 1; *Champions Tour*, BLUEGOLF, https://www.bluegolf.com/pro/programs/championstour/about.html [https://perma.cc/7C5M-V5QX] (last visited Feb. 5, 2024); *Korn Ferry Tour*, KORN FERRY, https://www.korn-ferry.com/about-us/tour#:~:text=Owned%20and%20operated%20by%20the,win%20on%20golf%27s%20biggest%20stage [https://perma.cc/X9EK-U3PC] (last visited Feb. 5, 2024).

126. *PGA TOUR History*, *supra* note 1.

127. *See* discussion *supra* Section I.C; *The Evolution of the DP World Tour*, *supra* note 98; Bonesteel, *supra* note 99.

In 2023, the Tour had a 40 percent stake in the European Tour, increased from 15 percent in 2020.[128] As part of what was termed a "strategic alliance" in 2020, the two tours announced they would both co-sanction several tournaments and include in their schedules tournaments that would have otherwise been restricted to one tour's respective membership.[129] Additionally, European Tour members also had direct and formal access to the PGA Tour—the leading ten players at the end of the European Tour season automatically qualified for PGA Tour membership.[130]

It was clear that the relationship between the PGA Tour and the European Tour was tightly bound; the organizations said as much. Upon announcement of the 2020 strategic alliance, Commissioner Monahan stated:

> I am pleased to say that the PGA Tour and the European Tour are both stronger than at any time in our history, as we are positioned to grow—together—over the next ten years faster than we have at any point in our existence . . . . We are committed to continuing to evolve and adapt, and with our ever-strengthening partnership with the European Tour, to take the global game to the heights we all know it is capable of.[131]

The two tours were distinct entities, at least in form, maintaining distinct executive leadership and organizational structure, yet the makeup of the two tours was strikingly similar.[132] A board of directors dictates policy decisions and the direction of the European Tour, while day-to-day operation is left in the hands of a Chief Executive Office.[133] The foregoing analysis evinces a tension between organizational form and reality, and the question of whether the PGA Tour truly encompassed the European Tour, at least within the context of Section One liability and the availability of the single entity defense, was one of immense significance to LIV's lawsuit.[134]

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128. Bonesteel, *supra* note 99.

129. *PGA Tour and European Tour Announce Details of Historic Strategic Alliance*, *supra* note 99.

130. Bonesteel, *supra* note 99.

131. *PGA Tour and European Tour Announce Details of Historic Strategic Alliance*, *supra* note 99.

132. *Compare* PGA TOUR, *supra* note 118, at 155–57, *with* FARRER & CO., ARTICLES OF ASSOCIATION OF PGA EUROPEAN TOUR 13 (2022), https://www.europeantour.com/api/images/image/upload/PROD/arhrk75h9dmhwvfkfrr8.pdf?_ga=2.18239417.1024628576.1665412411-1576022541.1659969651 [https://perma.cc/X589-LQNE].

133. FARRER & CO, *supra* note 132, at 5.

134. *See* discussion *supra* Section I.C, II.A.2.

B. Non-Team League Invocations of the Single Entity Defense

There have been several instances of traditional leagues invoking the single entity defense since the Supreme Court first addressed whether the Sherman Act applied to professional sports in *Federal Baseball*.[135] One of the first cases in which the defense may have been invoked was *Blalock v. LPGA*, decided in 1973 prior to the *Copperweld* decision.[136] Blalock, an LPGA member and player, was disqualified from an ongoing tournament and suspended from future participation on the LPGA based on allegations that she had cheated during the tournament.[137] The LPGA Executive Committee, comprised of other LPGA members, voted in favor of a one-year suspension, pursuant to the LPGA's Constitution and By-Laws.[138] The US District Court for the Northern District of Georgia found that the Sherman Act did apply, and that both Section One prerequisites were present: (1) the LPGA and its business clearly fell under interstate commerce; and (2) the LPGA, the Executive Committee, and Blalock's competitors combined to form an agreement to prevent Blalock from further competing on the tour.[139]

Interestingly, the court found that the suspension was a "naked restraint of trade" and thus a per se violation of Section One.[140] The significance in the decision, however, is the finding that the composition of the governing body, competitors who were members of the LPGA themselves, was sufficient to conclude that a combination and agreement had been formed within the meaning of Section One.[141] As Timothy Bolen notes, had the single entity defense been more prevalent, or had the LPGA framed the single entity issue more carefully, it is likely that the court could have reached a different conclusion, perhaps precluding Section One application altogether.[142] Nevertheless, *Blalock* provides insight to and affirmation of a key factor that should inform future courts' single entity analysis—the composition of the league's governing body.[143]

Volvo North America Corp. v. Men's International Professional Tennis Council offers another example of a combination or conspiracy

135. *See* Bolen, *supra* note 20, at 90–93.
136. Blalock v. Ladies Pro. Golf Ass'n, 359 F. Supp. 1260, 1265–66 (N.D. Ga. 1973).
137. *Id.* at 1262.
138. *Id.* at 1262–63.
139. *Id.* at 1268.
140. *Id.* at 1265.
141. *See* Thomas et al., *supra* note 13, at 310.
142. Bolen, *supra* note 20, at 100.
143. *Id.* at 103–04.

that can satisfy Section One's requirements in the context of sports.[144] Men's International Professional Tennis Council (MIPTC), the governing body for men's professional tennis, faced a challenge under the Sherman Act to an alleged agreement between its leagues purporting to limit and restrain the number of non-sanctioned events in which its players could participate.[145] Under the regulations established by MIPTC, players needed to participate in a minimum number of sanctioned events, but were restricted in their participation in all other types of events.[146] Volvo was a sponsor and producer of several MIPTC sanctioned events, yet when MIPTC decided to award the sponsorship of a Volvo event to Nabisco, the relationship began to deteriorate.[147] Volvo eventually filed suit alleging an agreement between MIPTC, its leagues, and other entities from associating with Volvo and preventing it from sponsoring any further events.[148] Key to the Section One claim was Volvo's allegation that MIPTC "acted as a vehicle through which certain entities . . . established a cartel in the market for men's professional tennis."[149]

The US District Court for the Southern District of New York held that Volvo failed to state a claim for relief under Section One because they failed to show an agreement between two or more entities.[150] The district court reasoned that the only co-conspirators involved were the leagues under MIPTC's umbrella, and since the leagues originally formed MIPTC, participated in its operation, and made up part of its membership, MIPTC and its leagues were not distinct entities and thus could not legally conspire with one another.[151] On appeal, the US Court of Appeals for the Second Circuit disagreed with the district court's holding, finding that the reality of MIPTC's organizational makeup indicated that MIPTC was "an association consisting of representatives of national tennis associations, tournament owners and directors, and professional tennis players."[152] The Second Circuit's single entity discussion lasted only four sentences, quickly dismissing any potential defense but nonetheless offering

144. Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988).
145. *Id.* at 57.
146. *Id.* at 58–59.
147. *Id.* at 59.
148. *Id.* at 60.
149. *Id.* at 66.
150. *Id.* at 62.
151. *Id.* at 70–71.
152. *Id.* at 71.

further insight into the importance of the makeup of entities not only in form but also reality.[153]

Contrary to the holding in *Volvo* but similar in its brevity, the US Court of Appeals for the Fourth Circuit, in *Seabury Management v. Professional Golfers Association of America*, found no difficulty in holding that the PGA of America, the organization of which the PGA Tour was a former branch, was a single entity and thus protected from Section One liability.[154] The PGA of America functions as an umbrella organization for the sport of golf, mainly made up of club professionals, the individuals who run golf courses and country clubs.[155] However, the organization also hosts several events that are a part of the PGA Tour's schedule, such as the Ryder Cup and PGA Championship.[156] Seabury Management had a contract with the Mid-Atlantic Section of the PGA to promote golf trade shows within its region.[157] When Seabury failed to find an adequate location for the trade show within the Mid-Atlantic Section's region, the PGA of America ordered the Mid-Atlantic Section to withdraw its sponsorship of Seabury's shows.[158] Seabury sued and, among other claims, alleged that the PGA of American and the Mid-Atlantic Section conspired in restraint of trade and thus violated Section One.[159]

The Fourth Circuit affirmed the US District Court for the District of Maryland's holding that the PGA and its Mid-Atlantic Section were a single entity, thereby expanding *Copperweld*'s limited holding to entities that are merely parent and subsidiary.[160] The district court reasoned that even though the entities were separately incorporated, the evidence demonstrated that the two functioned as a single unit.[161] The court noted that while "each section maintains its own revenues, has its own by-laws, elects its own officers and often conducts programs intended to benefit members of that section only," the PGA of America still retained an element of control and the two entities acted for the benefit of the whole.[162] Though the PGA of America

153. *See id.*; *see also* Thomas et al., *supra* note 13, at 311.

154. Seabury II, 52 F.3d 322, 3 (4th Cir. 1995).

155. *See* PGA OF AMERICA, https://www.pga.com/pga-of-america/about [https://perma.cc/DDG6-HEPN] (last visited Feb. 5, 2024).

156. *Major Events*, PGA OF AMERICA, https://www.pga.com/major-events [https://perma.cc/8VHA-EHH7] (last visited Feb. 5, 2024).

157. *Seabury II*, 52 F.3d at 1.

158. *Id.*

159. *Id.* at 1–2.

160. *See id*. at 6; Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984).

161. Seabury Mgmt., Inc. v. Pro. Golfers' Ass'n of Am., Inc. (Seabury I), 878 F. Supp. 771, 777 (D. Md. 1994), *aff'd in part, rev'd in part*, 52 F.3d 322 (4th Cir. 1995).

162. *Id.* at 778.

is not the typical non-team sports league, the holding in *Seabury* nonetheless purports to broaden the single entity defense's application beyond parent-subsidiary relationships.[163]

One of the more recent invocations of the single entity defense occurred in the 2010 case *Deutscher Tennis Bund v. ATP Tour*.[164] The Association of Tennis Professionals (ATP) worldwide professional tennis circuit, faced a Section One challenge upon the tour's reorganization.[165] The tour's new format reallocated certain tournaments into separate hierarchical tiers.[166] Unhappy with the downgrade of one of their tournaments, several countries' tennis federations brought suit, alleging that ATP and its other tournament members had conspired to limit the ability of lower tier tournaments to attract popular players and sponsors.[167] At trial, ATP asserted the single entity defense, and, having received instructions, the jury returned a verdict in favor of ATP.[168] On appeal, the federations challenged the jury instructions, and while the US Court of Appeals for the Third Circuit ultimately did not need to rule on their appropriateness, the court offered a thoughtful analysis of the necessary components of the defense.[169]

Citing *Copperweld*, *American Needle*, and several other traditional league cases, the Third Circuit noted that joint ventures that bring together the economic power and strategic direction of separate decisionmakers can benefit from single entity status.[170] Additionally, the court reinforced the necessity of favoring the substance, or economic reality, of the joint venture over formalistic organizational structuring.[171] The pertinent inquiry, therefore, was whether there was a contract or combination among separate economic actors pursuing separate economic goals and interests.[172] The court, however, did caution against an over-zealous application of the defense, stating, "the fact that joint venturers pursue the common interests of a

163. *See Seabury II*, 52 F.3d. at 2; *see also* Thomas et al., *supra* note 13, at 311; Bolen, *supra* note 20, at 85–86, 95.

164. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 824 (3d Cir. 2010).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 827–28.

169. *Id.* at 827.

170. *Id.* at 834–35; Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 761–72 (1984); Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010).

171. *Deutscher*, 610 F.3d at 835.

172. *See id.*

whole is generally not enough, by itself, to render them a single entity."[173]

It should be noted, though, that the aforementioned courts, including the Third Circuit in *Deustcher Tennis Bund*, primarily utilized traditional team league cases to fuel their analysis.[174] The reality, however, is that the nature of traditional leagues and their non-team counterparts are such that using one to singularly support the other is akin to attempting to fit a square peg through a round hole.[175] These cases demonstrate not only the differences in how courts view the single entity defense, but also their reluctance in making too confident a statement regarding the consistency of its application.[176] Given their different qualities and organizational structures, non-team leagues should not shy away from invoking the single entity defense when challenged under Section One.[177] Whether they will be successful, particularly after *American Needle*, remains to be seen.

III. SOLUTION

A. Could the PGA Tour Have Successfully Invoked the Single Entity Defense?

There are no concrete or strictly agreed upon tests for the application of the single entity defense, especially in the context of non-team sports leagues.[178] Further complicating the matter is that the defense's application to specific conduct, similar to many inquiries under the Sherman Act, requires extensive discovery not only in league organization and decision-making but also in their underlying intentions and strategies.[179] However, using *Copperweld* and *American Needle* as guideposts while simultaneously emphasizing more explicit non-team league cases, the PGA Tour could have forged a cogent and persuasive argument for its single entity status in response to LIV's

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173. *Id.*

174. *See id.* at 834–37; Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988); Seabury II, 52 F.3d 322, 2 (4th Cir. 1995);

175. *See supra* Section II.A.

176. *See generally Volvo*, 857 F.2d at 63 (2d Cir. 1988); *Seabury II*, 52 F.3d at 335; *Deutscher*, 610 F.3d at 836.

177. Thomas et al., *supra* note 13, at 313–14; Bolen, *supra* note 20, at 97–98.

178. Bolen, *supra* note 20, at 97–98.

179. *See id.* at 97–98. *See also* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 925 (2008) (explaining that, at least for traditional team leagues, determining single entity status requires facts sufficient to support at least five different factors in the "complete unity of interest" analysis).

allegations of conspiracy. The preceding analysis has evinced several factors that courts should consider in determining whether the decision-makers have "complete unity of interest": the composition of the entity's governing body, the entity's organizational structure both in form and substance, and the degree of similarity and overlap in economic interest, mission, and purpose.[180]

To begin, the composition of the PGA Tour's governing body and its immediate organizational structure strongly indicated single entity status.[181] While the decision-making power of the Tour and its subsidiary tours was fueled by distinct parties, such as the Commissioner, the PGA Tour Policy Board, and the respective heads of each subsidiary tour, the ultimate power and authority resided with Commissioner Monahan and the regulations that he administered.[182] Though the "subsidiary" tours like the PGA Tour Champions and the Korn Ferry Tour offer distinct and wholly separate events and schedules, they were (and still are) entirely owned and operated by the PGA Tour, and in turn, under the purview of Commissioner Monahan.[183]

Using similar language employed by the court in *Seabury*, even though the tours might maintain their own bylaws, separate leadership, and conduct events to solely to benefit their own players, they still remain under PGA Tour control and exist to better promote the PGA Tour.[184] Thus, they pursue the same economic goals and function as "a single economic unit."[185] Accordingly, if LIV Golf's charge of conspiracy between the PGA and "others"[186] were to be interpreted as an agreement between the PGA Tour and its wholly owned counterparts, the Commissioner's authority would support single entity application, regardless of any other decision-makers involved,[187]

180. *See supra* Section II.B.

181. *See supra* Section II.A.2.

182. PGA TOUR, *supra* note 118.

183. *See PGA TOUR History*, *supra* note 1.

184. Seabury I, 878 F. Supp. 771, 777 (D. Md. 1994), *aff'd in part, rev'd in part*, 52 F.3d 322 (4th Cir. 1995).

185. *Id.*; Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 834–35 (3d Cir. 2010).

186. Complaint, *supra* note 7, at 342 ("The PGA Tour has unlawfully reached an agreement, with the purpose to eliminate competition, with the European Tour . . . (*and possibly others*)") (emphasis added).

187. It should be noted that this proposition stands in direct opposition to the conclusion reached by the *Blalock* court. Blalock v. Ladies Pro. Golf Ass'n, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973). While the evidence of multiple decision-makers allowed the *Blalock* court to easily find a conspiracy, such a conclusion in the case of PGA Tour would entirely ignore the "complete unity of interest" analysis advanced by the Supreme Court in *Copperweld*. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984). Formalistically, this characterization would also neatly fit a

because any such decision by any one tour must necessarily have the Commissioner's approval, and thus demonstrate a complete unity of interest.[188]

However, the single entity conclusion is not so simple when viewed through the lens of LIV's more concrete allegation of a conspiracy between the PGA Tour and the European Tour.[189] As mentioned previously, the notion that the governing bodies of the PGA Tour and the European Tour were meaningfully distinct is inescapable.[190] Unlike the PGA Tour's immediate subsidiary tours, the European Tour's governing body operated outside of the PGA Tour and Commissioner Monahan's authority, at least in day-to-day and more managerial affairs.[191] The organizational structure and economic reality of the European Tour, however, provided a murkier picture. While the two tours were distinct in form, the PGA Tour owned a 40 percent stake in the European Tour and both tours had been building upon a "strategic alliance" for a number of years.[192] That "strategic alliance" had seen the PGA Tour's stake increased from 15 percent to 40 percent, the introduction of co-sanctioned tournaments and an overlap in tour schedules, and the establishment of a pipeline for European Tour players to gain membership on the PGA Tour.[193]

Therefore, following the emphasis on economic reality first introduced in *Copperweld*, and followed by the courts in *Seabury* and *Deutscher Tennis Bund*, the PGA Tour could have argued that the nature of their relationship with the European Tour was more akin to that of the PGA's direct subsidiaries.[194] In other words, the objectives of both tours were "common, not disparate" and their actions "guided or determined not by two separate corporate consciousnesses, but one."[195] Given that the pertinent inquiry under Section One analysis is whether there is a contract or combination among separate economic actors pursuing separate economic goals, the argument that the PGA and European Tour's relationship was, at least in substance, more akin to that of a parent and subsidiary than a mere joint venture could

narrow interpretation of *Copperweld* as the tours could easily be viewed as wholly owned subsidiaries. *Id.*

188. *See Copperweld Corp.*, 467 U.S. at 771.

189. *See* Complaint, *supra* note 7, at 343.

190. *See supra* Section II.A.2.

191. *See* FARRER & CO, *supra* note 132, at 9–10.

192. *See supra* Section II.A.2.

193. *See supra* Section II.A.2.

194. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984); Seabury I, 878 F. Supp. 771, 777 (D. Md. 1994), *aff'd in part, rev'd in part*, 52 F.3d 322 (4th Cir. 1995); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 835 (3d Cir. 2010).

195. *See Copperweld Corp.*, 467 U.S. at 771.

overcome the *Deutscher Tennis Bund* court's warning that the pursuit of "common interests of a whole" is not, by itself, sufficient to achieve single entity status.[196]

No single entity defense assertion, however, is complete without attempting to surmount the significant obstacles that *American Needle* places in the path of would-be single entities. Though this Note argues that the *American Needle* analysis should not be outcome determinative for non-team sports leagues' invocations of the defense, the Supreme Court's last word on the topic undoubtedly hampers its future application.[197] Additionally, if the PGA Tour invoked the defense in response to LIV's lawsuit, LIV would have done well to emphasize the result reached by the court in *American Needle*.[198] Yet, *American Needle* is not without meaningful distinctions. Unlike the NFL teams in *American Needle*, the PGA Tour and European Tour have not merely "given a name and label" to their actions in an attempt to evade Section One scrutiny.[199] Instead, the alliance between the tours is solidified with meaningful financial staking and strategic combination.[200] While teams in the NFL cede no ownership to others and, outside of on-field competition, have little to do with each other's affairs, the PGA Tour and European Tour co-sanction tournaments and maintain a pipeline that allowed for the mutual participation of each respective player base.[201]

In sum, if the PGA Tour had asserted the single entity defense in response to LIV's claims, it would have likely been successful in avoiding Section One liability at least as it applied to its own subsidiary tours. Doubtlessly a closer call, evaluation of the PGA and European Tour's single entity status would have hinged upon the district court's dissection of their corporate relationship and particular conduct. If the district court followed the principles set forth in *Copperweld* and then followed non-team league cases more specifically, the economic reality of that relationship could have given way to the conclusion that the two

196. *See Deutscher Tennis Bund*, 610 F.3d at 835.

197. *See supra* section II.A; Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 198 (2010).

198. *See Am. Needle, Inc.*, 560 U.S. at 196 ("The NFL teams do not possess either the unitary decision-making quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business.").

199. *Id.* at 197.

200. *See supra* Section II.A.2.

201. *Am. Needle, Inc.*, 560 U.S. at 198; *see supra* Section II.A.2.

tours function as a single economic unit, and thus acted as a single entity.[202]

B. Should Non-Team Leagues Like the PGA Tour Benefit from a More Consistent Application of the Single Entity Defense?

The increasingly divergent body of law surrounding the application of the single entity defense has also produced a breadth of scholarship regarding its efficacy. Along the spectrum are assertions in support of widespread recognition of the defense's application,[203] that the availability of the defense should be stripped in favor of certain legislatively granted exceptions,[204] and even that sports leagues are so uniquely situated such that the Sherman Act itself is not the most effective form of regulation.[205] While these solutions certainly attempt to simplify, or altogether eliminate, the defense's application within the context of professional sports, none attempt to grapple with the inherent differences between traditional and non-team leagues, opting instead to view the issue only as it applies to the more popularized, linchpin leagues. As this Note advocates, analysis of non-team leagues avoids much of the difficulty associated with team leagues' single entity status in that non-team leagues adhere more closely to a prototypical firm or business, allowing for a simpler application.[206] This proposition provides logical ground for the conclusion that, even in light of *American Needle*, non-team leagues should maintain the ability to invoke the single entity defense and should be able to do so in a non-trivial fashion.

Affirmatively establishing single entity status availability specifically for non-team leagues will not only benefit the leagues themselves and, in turn, the product delivered to the consumer, but also judicial evaluation of Section One challenges.[207] The shortcomings of the abovementioned solutions help elucidate the appeal of a consistent application of the defense. First, widespread adoption of single entity

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202. *See generally* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 775 (1984); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010).

203. Roberts I, *supra* note 44, at 119.

204. Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 779 (2010).

205. Grow, *supra* note 10, at 640–41.

206. *See supra* Section II.A.1.

207. *See generally* Daniel A. Rascher & Andrew D. Schwarz, *Competitive Balance in Sports: "Peculiar Economics" over the Last Thirty Years*, 29 COMPETITION J. ANTITRUST, UNFAIR COMPETITION & PRIV. SEC. CAL. LAWS ASS'N 58, 62, 69 (2019) (discussing the importance of competition on the field, i.e., ensuring that the best athletes are a part of the best league, and the market forces that drive sports to center into one dominant league).

availability for all sports leagues would further blur the distinction between traditional and non-team leagues, providing more confusion and potentially frustrating the purpose of Section One of the Sherman Act.[208] Though authored before *American Needle*, Gary Roberts argues that sports leagues should benefit from single entity status in circumstances where the league has acted in furtherance of "intraleague governance, rules, and practices," the implication being that such decisions are made with a singular focus and more apt for single entity protection from Section One liability.[209] The difficulty with such a position stems first from defining what is and is not purely "intraleague" action.[210] Additionally, attempting to tie single entity status to particular league actions logically indicates that other league actions might not be able to achieve such a benefit. As a result, the application becomes more fact-intensive and perhaps even more confusing than it already was.[211] Limiting single entity status to non-team leagues simplifies its application both in scope and form, avoiding unnecessary or arbitrary definitional line-drawing.

Additional problems arise at the other end of the spectrum as well. To start, a blanket rejection of the single entity defense to professional sports leagues would subject many claims to Rule of Reason analysis—claims that might be better suited for handling under single entity defense.[212] Examples of such claims include alleged concerted action that may not raise the anticompetitive concerns the Sherman Act seeks to remedy.[213] Allowing the single entity defense to serve as the first step in the analysis for Section One challenges to non-team leagues would prevent subjecting the leagues to potentially unnecessary and protracted fact-intensive litigation when concerted action is unlikely to be found.

Michael McCann is one commenter to suggest a general rejection of single entity status in favor of issue-specific legislatively granted exemptions.[214] Such an approach, he argues, comports with the history of already granted legislative exemptions from antitrust laws, like the labor exemption in the Clayton Act.[215] McCann posits that the legislative branch, given the judiciary's documented inability to

208. Jacobs, *supra* note 62, at 40–43 (discussing the pitfalls of the solution proffered by Gary Roberts in his article, *The Antitrust Status of Sports Leagues Revisited*).

209. Roberts I, *supra* note 44, at 120.

210. Jacobs, *supra* note 62, at 44–45.

211. *Id.* at 46.

212. McCann, *supra* note 204, at 778.

213. *Id.* at 778.

214. *Id.* at 779.

215. *Id.* at 779–80.

generate a framework for single entity recognition of sports leagues, might be better suited to enact such exemptions.[216] While specific exemptions from Section One scrutiny might help eliminate the ambiguity associated with single entity analysis, placing the matter in the federal legislative process would present ramifications beyond the context of professional sports. While narrowly strewn at first, the mere act of creating more antitrust exemptions might open the metaphorical floodgates to a slew of similarly situated lobbying efforts for more Section One protection.[217] McCann's suggested rejection is also primarily based on the absence of legal authority for the defense and a narrow reading of *Copperweld*.[218] Of course, it is precisely this lack of judicial precedent, combined with a broader reading of *Copperweld*, that informs this Note's call for a recognized and consistent application of the single entity defense with regard to non-team leagues.[219]

IV. CONCLUSION

Within the context of the federal antitrust laws, the longstanding difficulty the judiciary has had with analyzing and evaluating professional sports leagues' unique organizational structures is no secret.[220] Courts must reconcile the Sherman Act's ultimate purpose of fostering competition with the necessary reality of horizontal collaboration essential to the success of professional sports.[221] To help remedy this tension, courts should begin first by recognizing the inherent distinctions between traditional and non-team leagues. Doing so will help embolden judicial decision-making as it pertains to application of the single entity defense and aid in the swift resolution of Section One claims.

LIV Golf's lawsuit against the PGA Tour provided the perfect example for the analysis that underlies the argument for single entity status and, thus, a successful defense of a Section One challenge. If the district court recognized the PGA Tour's distinct status as a non-team sports league, the Tour could have avoided Section One liability altogether. In order to have done so, the Tour must have demonstrated that its subsidiary tours and the European Tour maintained a complete unity of interest, emphasizing the shared economic interests and reality of their relationships. Though *American Needle* has undoubtedly

216. *Id.*
217. *Id.* at 780–81.
218. *Id.* at 777.
219. *See supra* Section I.B.
220. *See generally* Thomas et al., *supra* note 13, at 312–13.
221. *Id.* at 307.

limited the defense's application traditional team leagues, its application to non-team leagues is still very much up for debate. Combined with a liberal reading of *Copperweld* and a firm grounding in economic reality, the PGA Tour's potential invocation of the single entity defense could have provided the consistency that this area of law needs.

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[*] J.D. Candidate, Vanderbilt University Law School, 2024; B.A., Sewanee: The University of the South, 2019. The Author would like to thank the editorial staff of the *Vanderbilt Journal of Entertainment & Technology Law* for their aid and guidance in writing this Note. The Author would also like to thank his parents, John and Vera Vandeventer, and his partner, Natalie Javadi, for their unwavering support throughout his academic career. The Author would also like to make a plea for the sport of golf to return its focus to the play on the course rather than the unnecessary organizational drama and current petty rivalries.