CHAPTER 13

INDIVIDUAL SPORTS

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This chapter introduces a different part of the sports world: sports played by individual competitors rather than by teams, and sports played in tournaments rather than in leagues. Sports such as golf, tennis, auto racing, boxing, track and field, and bowling have been able to tap spectator interest and generate large revenues from live attendance, television broadcasts, and merchandising arrangements. A by-product of this expanding financial success has been increased litigation.

Individual sports pose the same challenge to courts as do professional and college team sports. How can one accommodate private regulation designed to foster vigorous and appealing athletic competition with public laws designed to protect both participants and outsiders from the misguided, arbitrary, or even illegal exercise of power by those in charge of the sport? This chapter presents a number of judicial variations on this perennial theme, all drawn from the world of individual sports.

As a prelude to these case selections, it is useful by way of background to underline some of the distinctive characteristics exhibited by individual sports off (rather than on) the field.

1. Most importantly, the athletes compete as individuals rather than as members of an interactive team of athletes. In the eyes of the law, this makes tennis players, for example, independent contractors rather than employees. One variation on this are the drivers on company teams in motorsports like IndyCar or Formula One open wheel racing and NASCAR stock car racing where they are employees of the company team but compete in each race as individuals (along with their "pit crews") against all the other drivers, including their own "teammates."

2. In several sports, the players have organized themselves into associations that govern their respective sports in the best interests of the performers, as contrasted with team sports where the dominant forces are the owners who contribute financial capital. The pioneer in this respect has been the Tournament Players Division of the Professional Golfers Association (PGA Tour).

3. Fan interest focuses much more on individual tournaments than on season-long championship races. The tours

in several sports have developed systems for accumulation of points from each event that entitle the top players to participate in a lucrative final event, such as the Association of Tennis Professionals (ATP's) Masters' Championship, the PGA Tour's FedEx Cup Championship, or the NASCAR Chase for the Sprint Cup Championship. However, much greater fan and media interest is aroused by the major or "Grand Slam" events. Hence, authorities in charge of a tournament such as the Masters in golf, Wimbledon in tennis, and the Indianapolis 500 in auto racing, have a great deal of clout in their sports, while sponsors of lesser-known tournaments have substantial economic concerns about how tour officials and players treat their events.

4. For decades, many of the major individual sports (though not boxing, golf, or auto racing) were fully committed to the ideal of "amateurism"—athletes playing without compensation simply for the love of the game. These sports excluded from major events any players who openly earned their living from playing the sport. However, unlike college football and men's basketball, the tennis world in the early 1970s, and track and field in the early 1980s, responded to the growth of "under the table" payments to top stars in a profitable sports enterprise by accepting professionalism among their performers.

5. The combination of the large sums of money generated by a sport and the professional status of its athletes produces a demand for sports agents. Individual sports have been the setting for some of the most prominent and successful sports agents—Mark McCormack, for example, who represented Arnold Palmer and Jack Nicklaus, and Donald Dell, who represented Arthur Ashe and Jimmy Connors. This agency work served as the stepping stone for McCormack's International Management Group (IMG) and Dell's ProServ to become major forces in the business of individual sports, managing and promoting the same tournaments their clients played in—which evoked some delicate questions about how these many-sided relationships could coordinate.

6. Equipment used in individual sports usually plays a much larger role than in team sports in determining who wins the contest—most conspicuously, the engines in racing cars, but also the rackets, clubs, and balls used in tennis and golf. Many equipment manufacturers have a major financial stake in having their products used on professional tours because of the influence star athletes exert on purchases by the general sporting public. Thus, manufacturers are another group with a distinct economic interest in decisions about the rules of the game.

7. The professional and college sports examined in previous chapters are played by teams located almost entirely in the United States. (The exceptions in 2014 were one MLB team, one NBA team, six NHL teams, and one NCAA member university based in Canada, a country whose laws are similar to those in the United States.) In contrast, several of the major individual sports have a large share of their events set in (as in tennis), or players drawn from (as in golf and open wheel auto racing), numerous countries around the world. This international dimension to individual sports poses a major challenge to American judges asked to apply and enforce domestic laws.

The foregoing provides a capsule summary of the distinctive real-world flavor of individual sports. The cases in this chapter exhibit some of the legal differences that result from these factual distinctions.

A. UMPIRING THE GAME

A revealing illustration of the extent of sports litigation is that, in the 1980s, auto racing produced *two* appellate court decisions about whether aggrieved contestants could go to court to snatch victory from the jaws of defeat. In both cases, suit was brought against the National Association of Stock Car Auto Racing (NASCAR). We should focus on the relationship between the judicial system and the private entity managing a sports enterprise. See generally, Roger I. Abrams, *Sports Justice: Law and the Business of Sports* (Hanover, NH: U. Press of New England, 2010); Matthew J. Mitten, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities,* 8 Va. Sports & Ent. L.J. 71 (2008).

Stock car racing itself began in the 1920s as contests between moonshine runners in several Southeastern states whose primary occupation was transporting illegal liquor and who had to develop souped up cars to try to outrun Prohibition-era authorities, but these races were disorganized, ad hoc, and performed without any uniform set of rules. By the time Prohibition was repealed in 1933, these races had become popular and continued between the same moonshine hot-rodders who were now trying to evade the tax collectors. NASCAR was formally created in February 1948 by a young auto mechanic, Bill France, as a vehicle to standardize and commercialize stock car racing. More than six decades later, the third generation of the France family still owned and operated this for-profit organization whose major Sprint Cup series (which for 33 years was known as the Winston Cup sponsored by the R.J. Reynolds tobacco company, and then from 2004–08 as the Nextel Cup) had expanded across the country. Attendance at these races averages almost 200,000 an event, or nearly 7 million a season, with total revenues from all sources reportedly approaching $3 billion (thus placing it second only to the NFL in revenue generation among sports organizations). To participate in these

very popular and lucrative racing events, the racing team had to be a member of, and pay an annual licensing fee to, NASCAR. Membership does not, however, entitle a team to elect NASCAR officials or participate in its decisions. Might such a member seek judicial review of one of those decisions? Is it relevant that the decisions were not, as with intra-league challenges like the *Raiders* case in Chapter Seven, made by a group of rivals?

CROUCH V. NASCAR

United States Court of Appeals, Second Circuit, 1988.
845 F.2d 397.

MESKILL, CIRCUIT JUDGE.

[The plaintiff, Crouch, was declared the victor in a 1985 stock car race held in Vermont under the auspices of NASCAR. Another driver, LaJoie, actually crossed the finish line ahead of Crouch but was disqualified by the NASCAR official at the track. LaJoie appealed the official scorer's verdict to NASCAR headquarters on the ground that the scorer had improperly penalized him a lap during a restart of the race; this missing lap had led to LaJoie's disqualification for allegedly passing Crouch's car in the face of the yellow accident caution flag displayed later in the race. NASCAR headquarters first characterized the track rulings as an appealable "scoring," rather than an unappealable "race procedure" decision, and then, after reviewing the race tapes, declared LaJoie the victor.

Crouch took the matter to court even though, under the NASCAR constitution, competitors in all races were required to sign entry forms that stipulated that everyone agreed to abide by the decisions of officials relating to the event and "that such decisions are non-appealable and non-litigable." The trial judge nonetheless upheld Crouch's claim on the theory that NASCAR's interpretation and application of its rules—in particular its characterization of this dispute as a "scoring" rather than a "race procedure" matter—was "unreasonable and arbitrary." NASCAR and LaJoie appealed to the Second Circuit.]

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The threshold issue that we must resolve is the proper standard for judicial review of NASCAR's interpretation of its own rules. Our decision in *Koszela v. National Association of Stock Car Auto Racing, Inc.*, 646 F.2d 749 (2d Cir.1981), provides some guidance. In that case, we considered claims that NASCAR misapplied its rules in determining the rightful winner of two races and that its decisions regarding the two races were arbitrary and clearly erroneous. We first reasoned that the principle of judicial noninterference set forth in the law of voluntary associations was not strictly applicable, noting that NASCAR was a for-profit company that completely dominated the field of stock car racing and that its members

have no rights whatsoever with respect to the internal governance of the organization. We added, however, that a reviewing court is not free to reexamine the correctness of the official track decisions in question because NASCAR's rules "do not provide for any administrative appeal, much less judicial review, of official decisions." We also noted that the only provision granting a competitor the right to challenge occurrences at the track is the protest mechanism, and that "this provision is not intended to be a device by which disappointed competitors may challenge an official's interpretation of the rules or the application of the rules to the facts." We accordingly refused to reexamine the correctness of the official track decisions in question.

In the instant case, the district court cited *Koszela*, and concluded that because of the considerations discussed in that case it was "precluded from reviewing the official decisions of NASCAR officials with respect to the Catamount race." It added that "[t]o allow competitors to challenge the assessment of lap and time penalties or the timing and scoring of laps would result in the same type of protracted disputes that the finality rule is meant to prevent. . . . By according final weight to the official NASCAR track decisions, this court avoids placing itself in the position of 'super-referee.' "

The court also concluded, however, that the considerations that preclude review of the correctness of the official track decisions do not necessarily prevent the review of the procedures used to implement these decisions. The court added that "[w]hile courts may be hesitant to unnecessarily interject themselves into the private affairs of an association, where the association enforces its rules in a manner that is unreasonable or arbitrary courts may intervene." In applying this standard, the court did not defer to NASCAR's judgment that under its rules, the disputed actions of the local track officials did not constitute the imposition of a lap or time penalty, or to NASCAR's decision that disqualification is not a race procedure decision. Rather, the court apparently believed that under its adopted standard, it was appropriate to undertake a *de novo* review of the NASCAR rules in order to determine whether the national NASCAR officials had acted unreasonably or arbitrarily by reviewing the local track officials' decisions.

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The court's decision in *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir.1978), is relevant. In that case, the court concluded that a waiver of recourse to the courts that was signed by the major league baseball clubs was valid, noting that such a waiver coincides with the common law standard disallowing court interference. The court added that there are exceptions to this general rule of nonreviewability of the actions of private associations, however, "1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of

the charter or bylaws of the association and 2) where the association had failed to follow the basic rudiments of due process of law."

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In the instant case, Crouch and Wright are not claiming that they were deprived of any procedural safeguards or that their due process rights were violated, however. Rather, the crux of their complaint is that NASCAR improperly provided LaJoie with a procedural safeguard, i.e., review of the local track officials' decisions by the NASCAR headquarters. In fact, LaJoie maintains that if the district court correctly held that the local track officials' actions constituted a disqualification, then he was entitled to be informed of the disqualification and to have the disqualification decision reviewed by NASCAR headquarters pursuant to Section 13 of the rulebook. Section 13 provides that all violations of NASCAR rules are to be reported in writing to the NASCAR Vice President for Competition, and that this Vice President can review these reported violations. We therefore do not believe that the cases discussing the occasional need for a court to intervene in the internal affairs of an association because of the lack of adequate safeguards support the district court's decision.

Although here there was no allegation of inadequate procedural protections, the district court still thought that it was appropriate to conduct its own analysis of NASCAR's interpretation of its procedural rules. Moreover, despite the court's recognition that NASCAR possesses considerable stock car racing expertise upon which it may rely in interpreting its own rules, the court apparently did not give much weight to that expertise in reaching its decision that NASCAR acted unreasonably by overturning a race procedure decision made by a local track official. Rather, the court evidently felt that in order to determine whether NASCAR acted unreasonably or arbitrarily, it should itself delve into NASCAR's rulebook and decide *de novo* whether the lap 68–71 incident involved a disqualification, and whether a disqualification constitutes a lap and time penalty and is therefore a nonreviewable race procedure decision.

We believe the district court erred in making this inquiry. As the Seventh Circuit noted [in *Finley*] when rejecting the argument that the Commissioner of Baseball's actions were "procedurally unfair," certain standards, such as "the best interests of baseball, [and] the interests of the morale of the players and the honor of the game . . . are not necessarily familiar to courts and obviously require some expertise in their application." The court accordingly proclaimed that the judiciary should not be professional baseball's "umpire and governor." We believe that federal courts are equally unfamiliar with standards such as "race procedure decision" and "lap and time penalty," and thus should decline the plaintiffs' invitation to become the "super-scorer" for stock car racing disputes. Furthermore, there is no contention that NASCAR acted "in disregard of [its] charter or bylaws." Rather, plaintiffs-appellees contend

essentially that NASCAR misinterpreted its own internal regulations. Accordingly, we conclude that the district court should have deferred to NASCAR's interpretation of its own rules in the absence of an allegation that NASCAR acted in bad faith or in violation of any local, state or federal laws. . . . We believe that adopting any lower standard for reviewing an organization's interpretation of its own procedural rules would create too great a danger that courts will become mired down in what has been called the "dismal swamp"—the area of a group's activity concerning which only the group can speak competently. . . .

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Indeed, the district court implicitly acknowledged that the national officials acted in good faith. Specifically, the court noted that the national officials believed that the local officials' decision to penalize LaJoie in connection with the lap 68–71 incident resulted in part from the scoring error the local officials made in connection with the lap 1–2 incident. The national officials therefore thought it was appropriate to correct both decisions. Moreover, as we noted in *Koszela*, it is common practice to refer race procedure questions to the national NASCAR office. We thus believe that the district court should have deferred to NASCAR's interpretation of its own rules, under which NASCAR had the authority to review and decide the disputed issues.

Reversed.

QUESTIONS FOR DISCUSSION

1. What is the formal legal source of a court's authority to review decisions made by a sport's ruling body—especially with regard to who has won an event? Should the court have dismissed Crouch's suit, regardless of the asserted grounds, because Crouch apparently had agreed (through both his membership in NASCAR and his entry form for the Vermont race) that he would not appeal adverse decisions to the courts? In an earlier decision, *Koszela v. NASCAR*, 646 F.2d 749, 754 (2d Cir.1981), the Second Circuit stated:

> The policies supporting [judicial] noninterference are considerably weaker where the organization is "primarily a business run for profit" in which the " 'members' have no rights whatsoever with respect to the internal governance of the organization." Moreover, NASCAR's complete dominance in the field of stock car racing leaves competitors little choice but to join. Where an organization has achieved such a "stranglehold," rigid adherence to a "hands off" policy is inappropriate. See Chafee, *The Internal Affairs of Associations Not for Profit*, Harv. L. Rev. 993, 1021–23 (1930).

In that light, compare the judicial treatment of NASCAR in *Crouch* with the treatment of decisions rendered by baseball commissioners in the *Finley*, *Turner*, and *Chicago Cubs* cases discussed in Chapter One.

2. If courts are prepared to intervene, at least upon some occasions, what are the appropriate occasions? Is it relevant, for example, that Crouch was at first named the winner at the end of the race and that he challenged a later decision made at NASCAR headquarters that reversed the scorer's decision made at the track? Is it significant that, in *Koszela*, the decision made at headquarters reversing Koszela's announced victory at the race site was rendered by the Competition Director without hearing from either of the contestants (a hearing that would take place only upon further appeal to the NASCAR Commission)?

B. ELIGIBILITY TO PLAY

Before players can win races or tournaments, they must be eligible to compete in the first place. One of the major functions of the organization in charge of any sport is to determine who can play in each event.[a] In team

[a] For additional discussion of eligibility issues in individual sports, see Shawn M. Crincoli, *You Can Only Race If You Can't Win? The Curious Cases of Oscar Pistorius & Caster Semenya*, 12 Tex. Rev. Ent. & Sports L. 133 (2011) (examining the eligibility cases of Oscar Pistorius' use of prosthetics and the questioned gender of Caster Semenya); Sara M. Lewis, Comment, *Man, Machine, or Mutant: When Will Athletes Abandon the Human Body?,* 20 Jeffrey S. Moorad Sports L.J. 717, 723 (2013). (discussing the use of prosthetics in sports and offering suggestions on where to draw the line between accommodating for disabilities and unfair competitive advantage by means of modern technology); Patricia J. Zettler, *Is It Cheating to Use Cheetahs?: The Implications of Technologically Innovative Prostheses for Sports Values and Rules,* 27 B.U. Intl. L.J. 367, 371 (2009) (suggesting rule changes for the International Association of Athletic Federations (IAAF) regarding the use of prostheses); Christopher Bidlack, Comment, *The Prohibition of Prosthetic Limbs in American Sports: The Issues and the Role of the Americans with Disabilities Act*, 19 Marq. Sports L. Rev. 613, 614 (2009) (examining the American ban on the use of prosthetics in sports and the likelihood that the ban would be upheld in US courts despite the ADA); Erin Buzuvis, *Caster Semenya and the Myth of A Level Playing Field*, 6 Mod. Am. 36 (2010) (discussing sex verification testing); Anna Peterson, Comment, *But She Doesn't Run Like A Girl . . . : The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, 19 Tul. J. Intl. & Comp. L. 315 (2010) (discussing allowing intersex athletes to be classified by their aligned gender and the effects of intersex on the concepts of fair play and discrimination); Daniel Gandert et. al., *The Intersection of Women's Olympic Sport and Intersex Athletes: A Long and Winding Road*, 46 Ind. L. Rev. 387 (2013) (providing an overview of the new rules promulgated by the IOC and IAAF to use androgen levels in the determination of gender qualification); Stacy Larson, Comment, *Intersexuality and Gender Verification Tests: The Need to Assure Human Rights and Privacy,* 23 Pace Intl. L. Rev. 215, 230–248 (2011) (providing a history of gender testing in the Olympic Games and recommends the addition of human rights laws that protect intersex athletes); Raheel Saleem, Comment, *The Olympic Meddle: The International Olympic Committee's Intrusion of Athletes' Privacy Through the Discriminatory Practice of Gender Verification Testing,* 28 John Marshall J. Computer & Info. L. 49 (2010) (recommending that any gender verification rule promoted by the IOC and the IAAF should protect the anonymity of the athlete); Emily J. Cooper, Note, *Gender Testing in Athletic Competitions-Human Rights Violations: Why Michael Phelps Is Praised and Caster Semenya Is Chastised*, 14 J. Gender Race & Just. 233 (2010) (recommending changes to the sex segregation methods used in sports to ensure the protection of intersex athletes' human rights); Sarah J. Wild, Comment, *On Equal Footing: Does Accommodating Athletes with Disabilities Destroy the Competitive Playing Field or Level It?*, 37 Pepp. L. Rev. 1347 (2010) (discussing accommodating disabilities in sports); Thaddeus Matthew Lenkiewicz, *Green Jackets in Men's Sizes Only: Gender Discrimination at Private Country Clubs*, 44 Vand. J. Transnatl. L. 777 (2011) (discussing men-only golf clubs in the United States, United Kingdom and Ireland); Jennifer Ann Cleary, Note, *A Need to Align the Modern Games with the Modern Times: The International Olympic Committee's Commitment to Fairness, Equality, and Sex Discrimination,* 61 Case W. Res. L. Rev. 1285 (2011) (analyzes the IOC's decision to exclude women's ski jumping in the 2010 Winter Olympics and the lawsuit filed in Canada that resulted from that exclusion); Cathryn L. Claussen, *The LPGA's English Proficiency Rule: An-E-Yo, Kamsa-Hamnida*, 20 J. Leg. Aspects Sport 135 (2010) (discussing the LPGA's proposed English proficiency rule); Jonathan Stensvaag, Note, *English-*

sports, the key decisions are made by the management of each team, which decides whether to keep an existing player or to bring in a replacement. In individual sports such as golf and tennis, these decisions are now made by a body composed of, or at least accountable to, the players themselves. In a similar setting, medicine, the Supreme Court has questioned on antitrust grounds the delegation of authority to committees of doctors to judge whether one of the members of their specialty should gain or retain staff privileges in a hospital where they might compete for the same patients.[b] Judicial concern is likely to be even greater in the world of sports, where there is no compelling need to protect patients from risky medical treatment.

The violent and, at times, corrupt world of professional boxing produced a distinctive strategy of public regulation of sports. Boxing was once outlawed as savagery in violation of state criminal laws. Starting in the early twentieth century, boxing was allowed only under the comprehensive regulation of state public authorities, typically called "athletic commissions." State legislatures established these administrative bodies to set eligibility and licensing standards for all persons involved in the sport in their states. The New York and Nevada Athletic Commissions have been the most important public players because most important boxing matches have taken place in those jurisdictions. (Interestingly, the sport of Mixed Martial Arts appears to be following the same history a century later, with many states allowing it under state regulation but some states, most notably New York, still outlawing it as of 2014.)[c] We saw, in

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Only Rules: Title VII, Title II, and the Ladies Professional Golf Association's Proposed English-Only Rule, 13 J. Gender Race & Just. 241 (2009) (discussing the LPGA's proposed English proficiency rule and possible Title VII protections available to non-English speaking players); Aaron T. Lloyd, Note, *You're Next on the Tee, Just Remember to Speak English! Could the LPGA Really Force Players to Learn and Speak English?,* 9 Va. Sports & Ent. L.J. 181 (2009) (applying Title VII and EEOC guidelines to LPGA's proposed English-only rule under an employer-employee framework); Erin DeNatale, Note, *Fore: The Problem with the LPGA's Proposed Language Policy*, 30 Whittier L. Rev. 623 (2009) (providing a history of English-only clauses and rules in the United States and compares these to the LPGA's proposed English-only rule); Jennifer Paul, *Age Minimums in the Sport of Women's Artistic Gymnastics*, 7 Willamette Sports L.J. 73 (2010) (discussing the reasoning behind the minimum age requirement in women's gymnastics set by the International Gymnastics Federation (FIG) and the implications of this rule).

[b] See *Patrick v. Burget*, 486 U.S. 94 (1988). See also James F. Blumstein and Frank A. Sloan, *Antitrust and Hospital Peer Review*, 51 L. and Contemp. Prob. 7 (1988); Josephine M. Hammack, *The Antitrust Laws and the Medical Peer Review Process*, 9 J. Contemp. Health L. & Pol'y 419 (1993).

[c] For more on the regulation of MMA, see Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts,* 32 Hastings Commun. & Ent L.J. 209 (2010) (providing an overview of the history and regulations of MMA); Jordan T. Smith, Note, *Fighting for Regulation: Mixed Martial Arts Legislation in the United States,* 58 Drake L. Rev. 617 (2010) (arguing that states should adopt laws and administrative rules to regulate MMA); Michael R. Daum, *Intelligent Defense: A Call for Federal Regulation of Mixed Martial Arts*, 21 Seton Hall J. Sports & Ent. L. 247 (2011) (suggesting federal regulation for safety and uniformity); Geoff Varney, Note, *Fighting for Respect: MMA's Struggle for Acceptance and How the Muhammad Ali Act Would Give It A Sporting Chance,* 112 W. Va. L. Rev. 269 (2009) (arguing that the Muhammad Ali Boxing Reform Act should be applied to MMA); Michael Kim, *Mixed Martial Arts: The Evolution of A Combat Sport and Its Laws and Regulations,* 17 Sports Law. J. 49 (2010) (suggesting changes for increased safety and economic value); Daniel Neyra, Note, *Fight Kids: The Future of Mixed Martial Arts or*

our discussion of best interests of sport in Chapter Two, how courts reviewed the allegedly discriminatory determination by the New York State Athletic Commission to withhold a boxing license to Muhammad Ali.[d]

The legal response to this problem is best glimpsed through the world of professional golf, which has undergone a lengthy evolution toward its present regime of player control.[e] Golf came to the United States in the late nineteenth century with the creation of several clubs in the northeast. In 1894, two clubs, St. Andrews and Newport Country Club, both staged a "national" amateur championship within weeks of each other, each championship producing different winners. To eliminate the confusion and produce one national amateur championship, the Country Club in Brookline, Mass., the Chicago Golf Club, and the Shinnecock Hills Club in Long Island, N.Y., joined with the two tournament clubs to charter the U.S. Golfers Association (USGA). The USGA staged its first Open Championship at St. Andrews in 1895 to accompany the first U.S. Amateur Championship.

Almost all of the rising number of clubs employed professionals to keep the course in playing condition, to sell and store equipment, and to teach members how to play the game. In 1916, club professionals formed the

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A Detriment to America's Youth? A Call to Regulate Children's MMA, 51 Fam. Ct. Rev. 727 (2013) (discussing children's MMA competitions and suggesting specific regulations for these competitions); Cody Kay, Comment, *Leveling the Playing Field: The Call to Require States to Make and Follow Minimum National Standards for Licensing Mixed Martial Artists That Use Testosterone Replacement Therapy,* 34 J. Leg. Med. 91 (2013) (arguing that some MMA participants should be granted a therapeutic use exemption for testosterone replacement therapy); Daniel Berger, *Constitutional Combat: Is Fighting A Form of Free Speech? The Ultimate Fighting Championship and Its Struggle Against the State of New York over the Message of Mixed Martial Arts*, 20 Jeffrey S. Moorad Sports L.J. 381 (2013) (discussing a filed in New York State challenging the state's ban on MMA fighting); Ulysses S. Wilson, Comment, *The Standard of Care Between Coparticipants in Mixed Martial Arts: Why Recklessness Should "Submit' to the Ordinary Negligence Standard*, 20 Widener L.J. 375 (2011) (arguing that the negligence standard of care should be applied instead of the recklessness standard for MMA)

[d] See Brad Ehrlichman, *In This Corner: An Analysis of Federal Boxing Legislation,* 34 Colum. J.L. & Arts 421 (2011). (discussing the Muhammad Ali Boxing Reform Act); Jonathan H. Koh, Note, *Performance-Enhancing Drugs in Boxing: Preventing the Sweet Science from Becoming Chemical Warfare,* 87 S. Cal. L. Rev. 335 (2014) (arguing in support of federal legislation regulating the use of performance enhancing drugs in professional boxing); Jeremy Camacho, *I Could Have Been A Contender: Arbitration and the Ali Act,* 20 Sports Law. J. 135 (2013). (arguing for increased use of arbitration instead of litigation to resolve disputes in boxing and proposes that Congress form a Boxing Arbitration Commission); John Larios, Comment, *Promoting the Safety of Knockout Kings: Maintaining Administrative Hearings in the Texas Department of Licensing and Regulation*, 13 Tex. Tech Admin. L.J. 141 (2011) (discussing the history and current functioning of combative sports licensing in Texas).

[e] For a comprehensive picture of the development of the professional golf tours, see Al Barkow, *The History of the PGA Tour* (New York: Doubleday, 1989). The definitive history of the game of golf is Robert Browning, *A History of Golf: The Royal and Ancient Game* (London: J.M. Dent & Sons, Ltd., 1955). For detailed analysis of the current tours, IMG Chairman Mark McCormack's annual survey of the PGA Tour provides a constantly revised and updated version of such information. See Mark H. McCormack, *The World of Professional Golf* (Cleveland: International Merchandising Corporation, 1997). See also William Wartman, *Playing Through: Behind the Scenes on the PGA Tour* (New York: William Morrow and Company, Inc., 1990).

Professional Golfers' Association (PGA), which staged its own professional championship and, during the 1920s and 1930s, coordinated golf tournaments in several cities. Most of these tournaments were held in the south in the winter, and most of the players were club professionals whose northern clubs were closed for that same winter. While there were a few golfing greats who successfully concentrated on tournament golf alone—Walter Hagen, Gene Sarazan, Sam Snead, Byron Nelson, and Ben Hogan—there rarely was a shortage of tournament slots for club professionals who wanted to enter.

The situation began to change in the 1950s when the combination of spectator interest and television broadcasting brought much more money into the game—by 1958, total PGA Tour prize money surpassed $1 million. For the first time, PGA Tour officials found that the qualifying event held early in the week of each tournament was not sufficient to reduce the number of entrants to a manageable field. New eligibility rules, which still favored club professionals, resulted in many tournament players being dropped from the Tour roster. One such player, Herb Deesen, brought an antitrust suit, *Deesen v. PGA*, 358 F.2d 165 (9th Cir.1966), one of the earliest substantive antitrust decisions rendered about any sport.

By the time Deesen had ended his unsuccessful legal challenge to PGA Tour eligibility rules in 1966, the character of the golf enterprise had undergone another major change. Although Tour revenues were still soaring—to $5 million in prize money by the late 1960s—new stars of the game, such as Arnold Palmer, Jack Nicklaus, and Gary Player, had become impatient with the continuing role of club professionals. The result was formation of the Tournament Players Division (TPD) of the PGA, which took full charge of the Tour under a commissioner (Tim Finchem in 2004) ultimately accountable to players on the tour.

Coincident with this constitutional change was a new set of eligibility rules that sharply reduced access to tournaments for club professionals and based admission to the Tour on successful completion of qualifying school and competition. Spots for newcomers, many of whom now come from the lower-ranking NGA/Hooters Tour (which had originally been called the Ben Hogan Tour, then the Nike Tour, and after that the Buy.com Tour) were created by dropping from the eligibility list players who had placed near the bottom of tour winnings in the prior year. This new system produced yet another antitrust challenge and the closest judicial look yet at tour limits on player eligibility.

WESER V. PGA

United States District Court, Northern District of Illinois, 1979.
1979–2 Trade Cases (CCH) ¶ 78,180.

MARSHALL, DISTRICT JUDGE.

[Between 1949 and 1958, Emil Weser participated in tournament golf as a PGA-approved player—an individual eligible to compete on the pro tour. The PGA terminated his status as an approved player in 1958. Although he did participate in some non-TPD/PGA tournaments, Weser maintained his involvement with golf primarily through the operation of his driving range and golf shop where he gave golf instructions. In 1976, Weser decided to become active in tournament golf again and to enter the Western Open tournament. The Western Open tournament was co-sponsored by the Western Golf Association (WGA) and the TPD. The WGA and the TPD entered into a written agreement on September 29, 1975, which provided that "[p]layers eligible to apply to enter the Tournament shall be those prescribed in the TPD Tournament Regulations." The TPD Tournament Regulations established ten categories of persons eligible to participate in TPD co-sponsored events. Eligibility for entry into the Western Open was limited to members of the TPD, members of professional golfers' associations that were recognized by the TPD, the Illinois section PGA champion, the head professional at Butler National (the course where the 1976 Western Open was played), 19 members of the Illinois section of the PGA, and the PGA National club professional champion.

Weser had never been a member of the PGA or the TPD. Because he did not fit into any of the eligibility categories, he did not submit the entry form for the Western Open. Instead, he sued the PGA, the TPD, and the WGA for alleged violations of the antitrust laws. This was the district court's ruling on a motion for summary dismissal.]

Eligibility Requirements

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Defendants have asserted that the purpose for the eligibility requirements is not to exclude able competitors from the field of professional golf but rather is to foster competition by guaranteeing to sponsors, participants, and spectators that the golfers participating in tournaments are of the highest caliber. There is no evidence that this purpose is illusory and the regulations support it. The golfing proficiency of each member is constantly reviewed. When a member is consistently defeated in tournament play he must prove his competence as if he were a new player. The regulations, at least on their face, are designed to allow only those golfers of proven ability to participate in TPD events. This purpose is not exclusionary; rather the restrictions are intended to foster

the highest degree of competition. Therefore, the proper standard to apply in this case is the rule of reason.

"The focus of an inquiry under the rule of reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary." The restraint that plaintiff has complained of is the "membership" requirement of the TPD regulations. First it should be noted that membership in the PGA and the TPD are not the only methods for gaining admission into a TPD cosponsored event. Foreign professional golfers are permitted to compete provided the golf association they belong to is recognized by the TPD. Also, the sponsor organization is allowed to invite up to eight non-members to compete in the tournament which they sponsor. However, these other methods for admission into the golf event are *de minimis* compared to the number of positions on the field which are available to members of the TPD and PGA. The proper inquiry is whether there is a legitimate business purpose for limiting the players to members of the PGA and the TPD.

Limit on Number of Players

Defendants have provided sufficient evidence which shows that the number of participants in a one-day tournament of professional golf is limited to between 144 and 156 players by the physical and extrinsic factors of the course. Each tournament golf course consists of 18 holes which are played in two waves, one wave starting from the first tee and the second from the tenth. These waves then interchange starting positions after they complete their first nine holes. It takes approximately 4.5 hours for a player to finish the entire 18 holes. Normally, the first two waves start out at 7:30 a.m. and the second two waves of the day start out at noon. It takes approximately two hours to get the last group in a wave off its first tee. The last group in the wave that starts at noon therefore actually tees off around 2:00 p.m. and would be expected to finish at about 6:30 p.m. Each of the four waves consists of 12 to 13 groups of three players. Thus if 12 groups comprise a wave, 144 players can be accommodated in one day; if 13 groups make up the wave, 156 players can participate. This evidence has not been controverted by plaintiff.

In addition the number of days the tournament may last at each golf course is controlled by the limited resources available to the sponsor. Defendants assert that the tournaments are generally played at private clubs across the country. Any time allotted by the club for a tournament results in the members of that club being deprived of the use of their golf course. At the present time, an 18-hole qualifying competition is held on the Monday preceding the major event if more than 144 applications from "qualified" golfers are received. Therefore many tournaments require a minimum of five days to complete. Many of the TPD tournaments are sponsored by civic and charitable organizations. Functions such as marshalling and scorekeeping are performed by volunteers of these sponsor

organizations and the number of available volunteers is naturally limited. Plaintiff has not disputed these facts. We therefore conclude that there are legitimate business reasons for limiting the number of participants in a golf tournament.

Method to Select Players

The next inquiry is whether the method selected by defendants to limit the number of participants is reasonable or whether less restraining alternatives are available. All persons falling into one of the categories set forth in the TPD eligibility regulations are permitted to compete in the Monday pretournament qualifying rounds. Therefore the natural starting place for determining if the field is limited in a manner consistent with the anti-trust laws is with the TPD's eligibility regulations. These regulations will be considered reasonable if they are consistent with the stated purpose of the TPD—to foster competition at the highest level. But if the regulations permit entry to some golfers who have not proven their competitive ability, while denying it to others, or if the regulations are so restrictive that those persons who have proven their competitive ability are refused entry into the tournaments in order to favor less qualified members, the regulation may not be reasonable.

The 1977 TPD regulations set forth ten categories of persons who are eligible to compete in TPD co-sponsored tournaments. The first category consists of "members in good standing of TPD." The methods for becoming a member in the TPD are set forth in the TPD bylaws. The 1977 bylaws specify six divisions of persons who are eligible to apply for membership in the TPD. . . . These classifications ultimately break down into three categories: approved tournament players, certain PGA members, and major tournament winners. The only method for becoming an "approved tournament player" is to successfully complete a TPD qualifying school. Those PGA members who may join the TPD on the strength of their PGA membership are full-time head professionals. The third category consists of some of the major tournament winners; however, there is clearly a built-in bias for those who participate in the PGA Club Professional Championship, a tournament sponsored by the PGA.

Plaintiff alleges that completing the TPD school is not a reasonable method for determining if one has the requisite skills for competing in the individual tournaments. He has asserted that the schools are held in a limited area of the country each year, and that golfers will fluctuate in ability depending upon the location of the school. However the papers show that the 1977 fall qualifying school, unlike those in years past, was divided into three parts; sectional qualifying, regional qualifying, and then final qualifying rounds. The sectional rounds were scheduled in 24 different locations, the regionals in four areas, and then the final competition in one location. This evidence has not been expanded upon by either the plaintiff or the defendants.

In addition the papers reveal that the number of persons who may "successfully" complete the school is determined to some extent by the number of openings on the tour. This type of subjective qualifying seems inconsistent with the entire scheme of the TPD and verges on a vertical group boycott as we have before defined that phrase. The effect of this practice would be to restrict entrance of new players in favor of the old pros, and has no relationship to competence.

As we noted in our denial of plaintiff's motion for preliminary injunction, there also seems to be some question of the reasonableness of allowing Class-A PGA members into the TPD without requiring them to complete the TPD school. The defendants have asserted that the 1977 amendments to the regulations restrict automatic eligibility to Class-A PGA members who are also full-time head professionals, and that this amendment alleviates our prior concern. Whether these individuals are given a higher priority than their skills would prove, were they required to complete the TPD school, is still an issue which must be resolved in order to determine whether the regulations coincide with the purpose of the TPD.

Two of the four remaining categories of persons who may apply for membership in the TPD are geared to the PGA Club Professional Championship. While these persons have undoubtedly proven their ability in tournament golf, we are concerned with the separation of this tournament from other major golf events. Although the sixth category permits automatic eligibility for "winners" of the World Series of Golf, the U.S. Open, the Masters and British Open, there is a definite bias for players in the PGA Championship—in addition to the "winner" of the PGA Championship tournament, the 25 lowest scoring golfers are also automatically eligible. The fifth category of persons who may apply for membership without completing the TPD school are "all current PGA Section Champions." Again the relationship between the PGA and competitive ability has not been sufficiently explained.

The same problems arise in the nine remaining categories of the TPD tournament eligibility regulations. Many of the categories are tied to the PGA and/or the PGA Championship Tournament. Although the skill of these members is not questioned, the differentiation between these members and others similarly situated but unaffiliated with the PGA is questionable and is still a material fact in issue. . . .

Partial dismissal granted.

Contrast the result in *Weser* with that in a much more recent challenge to the eligibility rules for participation on the PGA's Senior Tour (since 2003 called the Champions Tour), which is open only to players who are 50 years old or older. The Senior Tour was established in 1980 to provide opportunities for the public to see extremely popular older golfers like

Arnold Palmer, Gary Player, and Jack Nicklaus who were no longer competitive on the regular PGA Tour. The Senior Tour tournaments typically only have three rounds played on Friday through Sunday, rather than the four on the regular tour starting on Thursday, and all of the participants play all three rounds without any "cut," allowing for every participant to receive some prize money. To allow for this format and so that every golfer can start from the first tee, Senior Tour tournaments limit the field to 78 golfers, instead of the 144 usually included in regular tour events. This requires stricter qualifying rules than there are on the regular tour, causing some outstanding professional golfers to be excluded because they don't meet one of the eight qualifying categories (e.g., those with 75 or more PGA or Senior PGA tournaments wins; the top 31 money winners on the previous year's Champions (Senior) Tour; the top eight players from the annual qualifying tournament, etc.). One such nonqualifier was Harry Toscano, who in 1998 filed suit raising numerous claims, including that the then Senior Tour's eligibility categories violated the antitrust laws because they favored less worthy golfers over some more worthy, like himself.[f] The following is the district court's ruling.

TOSCANO V. PGA TOUR

United States District Court, Eastern District of California, 2002.
201 F.Supp.2d 1106.

* * *

III. Eligibility Rules

A. *Rule of Reason versus Quick Look Analysis*

* * *

The principles announced in *California Dental Ass'n* lead to application of the rule of reason in evaluating whether the eligibility rules are an unreasonable restraint. The eligibility rules are not so obviously anticompetitive that an observer with even a rudimentary understanding of economics would recognize their anticompetitive effect, nor are they so anticompetitive on their face that they would otherwise merit *per se* analysis. To the contrary, a rudimentary understanding of the market demonstrates that the eligibility rules may have net procompetitive effects:

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[f] For a closer look at how antitrust issues affect other individual sports, see Cyntrice Thomas et. al., *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 Va. Sports & Ent. L.J. 296 (2013) (examining the impact of American Needle on antitrust issues for non-team professional sports such as golf and tennis, particularly focusing on the single entity defense); Timothy S. Bolen, Note, *Singled Out: Application and Defense of Antitrust Law and Single Entity Status to Non-Team Sports,* 15 Suffolk J. Trial & App. Advoc. 80 (2010) (advocating for the use of the single entity defense for non-team sports); Ryan M. Rodenberg et. al., *Age Eligibility Rules in Women's Professional Golf: A Legal Eagle or an Antitrust Bogey?,* 19 J. Leg. Aspects Sport 103 (2009) (examining LPGA's age minimum rule in light of antitrust laws); Lynden Griggs and Leela Cejnar, *American Precedent, Australian Legislation—Are the Rules of Golf in Violation of Antitrust Law*, 6 B.Y.U. Int'l L. & Mgmt. Rev. 21 (2010) (providing an overview of antitrust issues presented by technological restrictions on golf equipment).

they ensure that spectators see the marquee players they want to see thereby helping to attract sponsors who ultimately finance the Senior PGA Tour and create the product. Moreover, it is not obvious that the eligibility rules affect economic competition at all. In producing an entertainment product, the Tour incorporates an element of competition as part of the product but the senior golfers are not in economic competition with one another any more than the celebrity participants in a game show or the runners in a track meet. The presence of obvious procompetitive justifications for the eligibility rules, in the sense that they help to create the product, and the corresponding absence of clear anticompetitive effect, require application of full rule of reason analysis.

B. *Rule of Reason Analysis*

Under the rule of reason, courts determine if a practice unreasonably restrains trade in violation of the Sherman Act by "analyz[ing] the degree of harm to competition along with any justifications or procompetitive effects to determine whether the practice is unreasonable on balance." *Bhan v. NME Hosps., Inc.,* 929 F.2d 1404, 1410 (9th Cir.1991). The rule of reason works by employing a burden shifting framework. *See California Dental Ass'n,* 526 U.S. at 775 n. 12, 119 S.Ct. 1604 (endorsing burden shifting approach to rule of reason). The plaintiff has the initial burden of establishing that "the restraint produces significant anticompetitive effects within the relevant product and geographic markets. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects, including, for example a showing that the restraint furthers consumer welfare by providing a product that would not otherwise exist. *See Nat'l Collegiate Athletic Ass'n,* 468 U.S. at 102, 104 S.Ct. 2948. The plaintiff must then show that 'any legitimate objectives can be achieved in a substantially less restrictive manner.' " *Hairston v. Pac. 10 Conference,* 101 F.3d 1315, 1319 (9th Cir.1996) (citing *Bhan,* 929 F.2d at 1413); *see also Law,* 134 F.3d at 1019 (applying similar burden shifting analysis).

The court finds that the eligibility rules withstand analysis under the rule of reason because Toscano has failed to carry his initial burden of demonstrating significant anticompetitive effects. Toscano's evidence of anticompetitive effect consists of statements by the PGA Tour's Chief Counsel, Edward Moorhouse, that the Senior PGA Tour is not "the finest raw competitive golf in the world" and that it is "an entertainment product and a product that we need to sell to sponsors and TV networks." Toscano's argument confuses economic competition in the sense of antitrust laws with athletic competition that is staged for purposes of entertainment. Plaintiff erroneously assumes that the Senior PGA Tour is not competitive in the marketplace because the participants are not selected solely on the basis of athletic ability. There is ample caselaw, however, that distinguishes between athletic competition on the one hand, and economic

competition on the other.[12] Further, courts uniformly reject the equation of athletic competition with economic competition because it leads inexorably to antitrust attacks on every sporting rule of eligibility. Indeed, Toscano's argument might preclude the PGA Tour from employing any eligibility rules or allowing any exemptions based on past performance.

Toscano offers no other evidence to demonstrate that the eligibility rules have significant anticompetitive effects. His own expert, Dr. Tollison, is not prepared to venture an opinion that the eligibility rules are anticompetitive. Thus, at the summary judgment stage, Toscano has not come close to carrying his burden of proving anticompetitive conduct.

Even if Toscano had provided evidence of significant anticompetitive effects, the defendants have amply demonstrated that the eligibility rules have a series of procompetitive justifications. The eligibility rules provide a product that would not otherwise exist and, therefore, they further consumer welfare. (*See Nat'l Collegiate Athletic Ass'n,* 468 U.S. at 102, 104 S.Ct. 2948 ("And the integrity of the 'product' cannot be preserved except by mutual agreement. . . . Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.")). As the defendants explain, the eligibility rules have the legitimate purpose of

(1) keeping as many prominent and proven players as possible in the pro-am events, (2) maintaining fan interest and sponsor support, (3) not cutting the field of players at the end of the first or second day of play so that prominent and proven players will enter tournaments and remain in them to the finish, and (4) maintaining consistent, long-term eligibility criteria so that proven, well-known players from the regular PGA TOUR will, upon turning age 50, consider the SENIOR PGA TOUR the best option to other alternatives then available to them.

Thus, the 78-player field ensures that Senior Tour tournaments can take place without a cut so that fans are able to watch the most popular players compete, a characteristic essential to maintaining sponsor interest. In short, the eligibility rules sustain the Senior PGA Tour.

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[12] *See, e.g., M & H Tire Co. v. Hoosier Racing Tire Corp.,* 733 F.2d 973, 977–78 (1st Cir.1984) ("The drivers are not in economic competition with one another and while they are specifying the parameters within which they will compete on the race track, what is missing is any effect upon economic competition among the drivers as was present in Fashion and Eastern States. While the tracks may be economic competitors in some sense, the rule does not limit economic competition among them either.") (rule that permitted only one tire to be used at race track did not violate antitrust law under rule of reason); *Mid-South Grizzlies v. Nat'l Football League,* 720 F.2d 772, 787 (3d Cir.1983) ("The essential facilities doctrine is predicated on the assumption that admission of the excluded applicant would result in additional competition, in an economic rather than athletic sense. The Grizzlies have simply failed to show how competition in any arguably relevant market would be improved if they were given a share of the NFL's monopoly power."); *Baseball at Trotwood, LLC v. Dayton Prof'l Baseball Club,* 113 F.Supp.2d 1164, 1172 (S.D.Ohio 1999) ("the Plaintiffs were seeking to join the Midwest League, rather than to compete in an economic sense with that League, the owners of its teams or the [national league organization]") (summary judgment for defendant, plaintiff did not suffer antitrust injury).

Having carried their burden of demonstrating significant procompetitive justifications for the eligibility rules, the burden shifts back to Toscano to prove that the defendants' procompetitive objectives could be achieved in a less restrictive manner. Toscano, however, has not offered even "a mere scintilla of evidence" in this regard. In his deposition, Toscano speculated that a field of between 108 and 144 golfers would be better, but he offers no evidence as to why this would make the market for professional golf more competitive in the antitrust sense, and he fails to consider the effects of an expanded field on the Tour's sponsors. (Finchem Depo. at 60:6–11 (noting strong objection from sponsors to increasing size of playing field and instituting a cut)). Finally, when pressed, Toscano conceded that he did not know how players should be selected and then suggested that perhaps a "commission based upon various bodies involved in golf" could make the selections.

Thus, even if Toscano had demonstrated that the eligibility rules had a significant anticompetitive effect, he would still lose under the rule of reason because he both fails to rebut the fact that there are procompetitive justifications for the rules and to show that the procompetitive objectives could be achieved in a less anticompetitive manner. For these reasons, the court finds that there is no merit to Toscano's attack on the eligibility rules.

QUESTIONS FOR DISCUSSION

1. Are the differing approaches in *Weser* and *Toscano* reconcilable? Notice that *Weser* was decided in 1979, during the same period that the Supreme Court was redefining the antitrust Rule of Reason in cases like *Professional Engineers*, *Broadcast Music*, *GTE Sylvania*, and *Northwest Wholesale Stationers* (see Chapter Three), none of which were cited in the opinion. The *Weser* court said that the issue under the Rule of Reason was whether the PGA restraint "was justified by legitimate business purposes and was no more restrictive than necessary." Is this test compatible with the current "procompetitive vs. anticompetitive effects" formula that seeks to balance efficiency benefits from a particular restraint against consumer welfare injury from increased market power? Does this explain the different outcomes, or are the cases materially different?

2. Is it appropriate for a court to decide whether each of the various categories for tournament eligibility furthers the stated TPD purpose of "foster[ing] competition at the highest levels," as the *Weser* court stated? To what extent should courts defer to the judgment of the private governing association on this issue? Is the *Weser* court's approach in this respect consistent with that adopted in *Crouch v. NASCAR*? Did the *Toscano* court give the PGA Tour that deference or did it simply resolve the question differently?

3. The *Toscano* court drew a sharp distinction between athletic and economic competition, indicating that professional golfers are not economic competitors. Do you agree with that conclusion? Of what significance is this

question for antitrust cases challenging the rules of individual sport governing bodies?

4. In an earlier decision, the *Toscano* court had dismissed as codefendants all of the Senior Tour's local and title sponsors on the ground that even though they entered into contracts with the Tour acquiescing in the eligibility rules, they did not participate in formulating them and thus were not engaged in any concerted action with the Tour for Section 1 purposes. See *Toscano v. PGA Tour*, 70 F.Supp.2d 1109 (E.D. Cal. 1999), aff'd, 258 F.3d 978 (9th Cir. 2001). That left only the PGA Tour itself (a non-profit corporation), the player members of the Tour's board of directors, and the current and former PGA Tour commissioners as alleged conspirators. Reflecting back on the single-entity issue explored in Chapter Seven in the context of sports leagues, should the Section 1 claim against these defendants have been dismissed as well on the ground that the eligibility rules were the conduct of a single entity, namely PGA Tour, Inc.? Are the governing bodies of individual sports, like NASCAR, the WTA, and USA Track & Field, single-entities? Does the answer depend on how each is legally organized and operated?

5. In the late 1980s, the PGA Tour adopted a controversial revision in its rules that denied general eligibility for tour events (above a specified number of sponsor invitations) to foreign players who did not commit themselves to play at least fifteen times on the American tour. Australian players such as Greg Norman were prepared to make that commitment, but star Europeans such as Nick Faldo and Seve Ballesteros were not, because of the conflicting demands of their expanding European tour. Indeed, in 1995, the PGA Tour revised its sponsor exemption rule to permit such invitations to European players only if they had played a minimum of eleven events on the European Tour. What are the objectives and likely effects of these PGA Tour policies? Should a player, whether American or foreign, have an antitrust claim if he is denied the opportunity to play in an event for these reasons, but has satisfied the tour's basic playing ability and accomplishment tests—i.e., victories and earnings?

6. Should the PGA Tour be entitled to alter its current rules and make it a condition of membership and playing rights on the Tour that each player grant to the Tour's marketing arm the right to offer the player's name and likeness as part of a group licensing package sold by the PGA Tour to manufacturers of golf clubs, clothes, or other paraphernalia? Suppose that a player objected because he had sold (or wanted to sell) an exclusive endorsement to a manufacturer of a different product line. Suppose that the firm insisted on its endorsement rights because it was a sponsor of the tournament that the player wanted to enter. See *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F.Supp. 362 (E.D.Pa.1947), and *Washington State Bowling Proprietors Ass'n. v. Pacific Lanes Inc.*, 356 F.2d 371 (9th Cir.1966).

C. DISCIPLINARY AUTHORITY OF THE TOUR

Once courts intervene to protect the right of individual players to compete in golf (or tennis or bowling) tournaments, inevitably courts will be drawn into tour actions that terminate the eligibility of existing players, whether through suspension or permanent expulsion.[g] The pioneering case in this area came from the LPGA Tour. In 1950, after the men's PGA had rebuffed a request in the 1940s for a separate women's division within that organization, women golfers created their own tour composed of eleven tournaments and eleven participants. The LPGA struggled through the 1950s and the 1960s, but in 1972 it appeared to have made a major gain in financial backing and popular status. That year, the Colgate Company, sponsor of the highly-rated Dinah Shore television show, decided to create the Dinah Shore Golf Classic, which became one of the Grand Slam events on the women's tour. In the same year, though, one of the top LPGA players, Jane Blalock, was suspended by her peers for her alleged practice of improperly moving her ball during play.

BLALOCK V. LPGA

United States District Court, Northern District of Georgia, 1973.
359 F.Supp. 1260.

MOYE, DISTRICT JUDGE.

[Following several complaints from competitors, the LPGA tournament director appointed four observers to watch Jane Blalock play during a May 1972 tournament in Louisville. The observers agreed that Blalock was, indeed, moving her ball, including advancing her ball on the green after she had cleaned it. A meeting was convened of the Tour Executive Board which was comprised of five players—Cynthia Sullivan, Judy Rankin, Linda Craft, Penny Zavichas, and Sharon Miller. The Board initially found Blalock guilty of cheating during play, fined her $500, and placed her on probation for the rest of the season. Two weeks later, the Executive Board reconvened, with two other players from the Tour's tournament committee, and changed the penalty to a suspension for one full year. Blalock sued, alleging an illegal group boycott under federal antitrust law, specifically Section 1 of the Sherman Act.]

* * *

Measured by the standard set forth in [previous cases], the Court finds that the purpose and effect of the arrangement in this case (the agreement by defendants Sullivan, Rankin, Craft, Zavichas and Miller to suspend

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[g] On the legal and policy questions, see John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 William and Mary L. Rev. 703 (1977), and Robert H. Heidt, *"Don't Talk of Fairness": The Chicago School's Approach Toward Disciplining Professional Athletes*, 61 Indiana L.J. 53 (1985); Marc Edelman, *Are Commissioner Suspensions Really Any Different From Ilolegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, Cath. U. L. Rev. 631 (2009).

plaintiff from defendant LPGA for one year) was to exclude plaintiff from the market, and is therefore a "naked restraint of trade." Plaintiff is a member in good standing of defendant LPGA. Suspension therefrom is tantamount to total exclusion from the market of professional golf. Not only would plaintiff be excluded from LPGA sponsored tournaments, but, as defendant LPGA's Constitution and By-Laws provide in Article VIII:

> A member of the Ladies Professional Golf Association may not compete for prize money in a tournament, professional-amateur, or qualifying event that is not co-sponsored by the LPGA Tournament Players Corporation, or approved in writing by the LPGA Executive Director. . . .

The suspension was imposed upon plaintiff by defendants Sullivan, Rankin, Craft, Zavichas and Miller in the exercise of their completely unfettered, subjective discretion, as is evident from the fact that they had initially imposed upon plaintiff only probation and a fine, but then, without hearing from plaintiff, determined to impose the suspension at issue here. Furthermore, the suspension was imposed by competitors of plaintiff who stand to gain financially from plaintiff's exclusion from the market.

The Court therefore determines that the arrangement in this case is illegal per se. Consequently, it is not necessary that it inquire as to the reasonableness of the suspension.

* * *

Defendants have cited the cases of *Molinas v. National Basketball Association*, 190 F.Supp. 241 (S.D.N.Y.1961), and *Deesen v. Professional Golfers' Association of America* 358 F.2d 165 (9th Cir.1966). The Court finds these cases to be inapposite. The facts in *Molinas* demonstrate that Molinas, a professional basketball player, was suspended by the president of the National Basketball Association who was acting pursuant to a clause in Molinas's contract and a league rule prohibiting gambling. The suspension was not imposed by Molinas's competitors.

In the *Deesen* case, Deesen, a professional golfer and a member of the Professional Golfers' Association, had his approved tournament player status terminated by the PGA's national tournament committee. The national tournament committee was largely composed of non-competitors of Deesen (the only exception being Bob Rosburg). Furthermore, the Court of Appeals relied heavily on the fact that notwithstanding that Deesen's tournament status had been terminated, Deesen was not completely excluded from the market (tournaments) as he could still participate therein, if he chose to become a golf teacher employed by a golf club. The termination in *Deesen* was based upon virtually a mathematical application of pre-determined standards. It did not involve a completely unfettered, subjective and discretionary determination of an exclusionary sanction by a tribunal wholly composed of competitors, as here. . . .

Partial summary judgment granted.

QUESTIONS FOR DISCUSSION

1. Look closely at the doctrinal analysis employed in *Blalock*, a case arising early in the evolution of sports antitrust law. Would a present-day court treat this as a question of *per se* illegality in light of the last twenty years of sports (and general) antitrust jurisprudence? Would a rule of reason analysis have made any difference in the final result?

2. After *Blalock*, most tours, including the LPGA's, altered their disciplinary procedures to ensure that the ultimate decision-makers are not solely fellow tour competitors of the player being charged. The typical present-day disciplinary model was at issue in the next antitrust suit, *O'Grady v. PGA*, 1986–2 Trade Cases (CCH) ¶ 67,361 (S.D.Cal.1986). O'Grady had been fined $500 by PGA Commissioner Deane Beman for insulting a worker at a New Orleans tournament. O'Grady was so infuriated by his discipline that he publicly described Beman as a dictator worse than Hitler, Mussolini, or Richard Nixon. O'Grady also made a disparaging comment about the Riviera Golf and Country Club, the site of the Los Angeles Open: O'Grady said that, while Riviera had once been "really great," it was now like a "cheap public course that today would make a great runway for LAX." Beman then fined O'Grady an additional $5,000 and suspended him from the tour for the next six weeks (and six golf tournaments) for "conduct unbecoming" a PGA Tour member. Having lost his appeal to the Tour's Appeals Committee (comprised of one tournament player and two non-players, the Chairman of the Tournament Policy Board and the President of the PGA), O'Grady filed an antitrust suit, relying on *Blalock*. The trial judge quoted the following testimony from Jack Nicklaus about the meaning of "conduct unbecoming a professional golfer":

> [B]asically, what it really amounts to is the PGA of America has always had a Code of Ethics and the PGA Tour has always had a Code of Ethics. We felt for the best interests of the game the players should conduct themselves in a manner that is in the best interests of the game. It is in the best interest of the tour. It is a collective image. The best interests of PGA of America, of all the club pros in the country, to be able to [promote] our position with the sponsor, our position with television, our position dealing with the public in general. I think it is important that the image of the player and the tour be for the good of the Association.
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> * * *
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> If the rules were not there and the players headed in any direction they wanted to head, first of all we would not have had an Association, we would not have had a tour, as we know it, nor do I think the public would have accepted us in the direction they have, which I think is good. Television contracts we have. The sponsors we have. Everything I think has grown largely because we, as an

> Association, have worked together for one common goal, which is for the benefit of the tour.

The judge then dismissed O'Grady's antitrust suit:

> Mr. O'Grady would better serve himself by polishing his clubs and his golfing skills which are apparently very considerable, and leave off his temptation for verbal engagements.

Do you agree? In a team sport such as the NFL, for example, suppose that the Patriots' Zeke Mowatt had publicly attacked Commissioner Paul Tagliabue as a "dictator" for fining him in the aftermath of the Lisa Olsen incident described in Chapter One. Should Tagliabue be able to penalize Mowatt for this added offense? Or suppose that during his hay day Charles Barkley had publicly criticized the parquet basketball floor in the Boston Garden as "old, in poor shape, and giving the Celtics an unfair advantage because they know where the ruts and cracks are." Is this a disciplinary offense?

3. Recall the cases and problems in Chapter One. Should baseball and football have a procedure for appealing disciplinary rulings by their commissioners as the *O'Grady* case exemplifies in golf (and as also exists in tennis)? Of course, when there is a players association with a collective bargaining agreement, the union for the suspended player (for example, Steve Howe) may be able to take the case to arbitration.[h] But outside the union context, should Pete Rose have had an avenue to appeal a decision by Bart Giamatti, or George Steinbrenner one by Fay Vincent?

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[h] For additional resources on arbitration in the individual sport context, see Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 Pepp. Dis. Res. L.J. 51 (2009). (discussing the potential for review of Court of Arbitration for Sport decisions); Maureen A. Weston, *Simply A Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 Ga. J. Intl. & Comp. L. 97 (2009) (discussing the role that CAS plays in sports arbitration and the potential for review of CAS's decisions); Andrea Marco Steingruber, *Sports Arbitration: How the Structure and Other Features of Competitive Sports Affect Consent As It Relates to Waiving Judicial Control*, 20 Am. Rev. Intl. Arb. 59 (2009) (discussing the case of tennis player Guillermo Canas, in which the Swiss Federal Tribunal set aside an arbitral award by the CAS); Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation,* 2 J. Int'l Media & Ent. L. 241 (2009). (discussing the ways that CAS has maintained a low profile and the potential development of lex sportiva); Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror,* 20 Marq. Sports L. Rev. 305 (2010); (providing a history of the CAS from its inception to the present); Richard H. McLaren and Geoff Cowper-Smith, *The Beijing Summer Olympic Games: Decisions from the CAS and IOC*, 10 Pepp. Dis. Res. L.J. 69 (2009) (discussing cases heard by the CAS and its Ad Hoc Division (AHD) immediately before, during and after the 2008 Beijing Olympic Games); Ian Blackshaw, *ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center,* 24 Marq. Sports L. Rev. 1, 15 (2013) (providing an overview of the background and structure of CAS); Annie Bersagel, *Is There A Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 Pepp. Dis. Res. L.J. 189 (2012) (examining whether CAS applies the doctrine of stare decisis or the doctrine of jurisprudence constante); Louise Reilly, Symposium, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. Dis. Res. 63 (2012) (providing an overview of CAS's structure and function); Ian Blackshaw, *Settling Sports Disputes by ADR: Some Major Sports Dispute Resolution Bodies Modeled on the Court of Arbitration for Sport*, 3 Disp. Resol. Int'l 169 (2009) (describing a few sports arbitration bodies from around the world that are modeled after the CAS).

4. Would courts uniformly find discipline imposed by boards made up of peers or competitors to be antitrust violations, regardless of the disciplined athlete's conduct? Consider the 1997 case when professional stock car driver Jerry Eckman and his car owner Bill Orndorff were both suspended for two years and fined $25,000 by the National Hot Rod Association. During a routine warm-up for first-round qualifying at a June race in Columbus, Ohio, Eckman's car exploded. Fortunately no other drivers or fans were injured, although many were in the vicinity of the car. A test done on the car's fuel revealed that it had been spiked with nitrous oxide, a highly volatile and banned fuel additive. Had the decision to suspend Eckman and Orndorff been made by a committee of drivers or car owners, or by a neutral committee at the insistence of drivers concerned for their safety, would a court reach the same result as it did in *Blalock*? What distinctions are there between the two cases that might justify a different result?

5. A different kind of disciplinary problem arose in 1983 in tennis. The Argentinean star Guillermo Vilas was discovered to have been paid $60,000 to appear at a tournament in Rotterdam. The Men's International Professional Tennis Council (MIPTC), then the governing authority for the men's tour, fined Vilas $20,000 and suspended him for a year for violating its rule against accepting appearance money or guarantees. Vilas exercised his right under the MIPTC constitution to appeal this decision to a three-member panel composed of one person selected by Vilas, another by MIPTC officials, and the third by these two nominees (all panel members were selected from a larger MIPTC roster). The panel confirmed the Council's finding of a rules violation by Vilas and upheld the fine. However, it revoked the suspension because this was the first time that the Council had enforced its rule against the growing practice of paying appearance fees to star attractions. Vilas paid the modest fine and the matter was closed.

Suppose, though, that the suspension had been upheld and Vilas had proceeded with his threatened antitrust suit against the MIPTC. How does a rule that bars individual tournaments from paying individual players more than the official prize money stand up under antitrust scrutiny? Such a rule has always been the norm in men's and women's golf and women's tennis, but as we shall see, the rule has recently been relaxed somewhat in men's tennis. To what extent does such a rule serve the interests of players (those who are regularly paid appearance fees and those who are not), of tournaments, and of fans?

D. ORGANIZING A SPORTS TOUR

The phenomenon of appearance money is best understood within the broader evolution of tennis (and other non-team) tournament tours. Lawn tennis, as the game was first called, was invented in the 1870s. The All England Lawn Tennis Club staged the first Wimbledon Championship in 1877 and the United States Lawn Tennis Association (now the USTA) staged its first championship in 1881. In 1900, twelve countries agreed to play for the Davis Cup, and in 1913 the national associations from these

and other countries formed the International Lawn Tennis Federation (now the ITF) as the game's world-wide governing authority.

Amateurism was the Federation's central principle. Unlike golf tournaments, "open" tennis championships were *not* open to players who earned their living from the game. Once top players established their reputations, to earn money they had to drop out of "Grand Slam" competition and barnstorm around the world playing exhibition matches. Beginning with Suzanne Lenglen in the 1920s, this was the path followed by superstars such as Bill Tilden, Don Budge, Jack Kramer, Pancho Gonzales, and Rod Laver. Meanwhile, ITF tennis had developed into a regime of "shamateurism," as it was labeled. Tournament organizers and national associations had always been permitted to pay players their travel expenses for an event, but it became common practice to pay sums substantially above actual expenses to the top players—in effect, appearance guarantees.

Some tournament tennis players were thus able to make a reasonably decent living from the sport—considerably better than college football players on scholarship, but not as good as avowedly professional golfers on the PGA Tour. By the 1960s, some tennis authorities—particularly the British—wanted to end this hypocrisy and make their events truly "open," but they were always out-voted within the ITF by authorities in smaller countries that were worried about losing money and control. The political logjam was broken not by litigation, but by market competition. In the mid-1960s, Lamar Hunt, fresh from his success with the American Football League, organized a new venture, World Championship Tennis (WCT), which successfully recruited most of the top players to a professional tour promising both serious competition and sizable prize money. Faced with that threat, in 1968 the All England Lawn Tennis Club declared Wimbledon open to professionals, and the USTA immediately followed suit with its U.S. Open.

These actions ushered in an era of top-flight tennis, fast-growing spectator and television revenues, constant controversy about the structure of the sport, and periodic litigation among parties fighting for a larger share of the pie. The following are some of the highlights of that history.[i]

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[i] The best treatment of the emergence of the present-day tennis tour is Richard Evans, *Open Tennis: 1968–1989* (New York: Viking, 1990). Other historical portrayals of the professional tennis circuits are Bud Collins, *My Life With the Pros* (New York: E.P. Dutton, 1989); Jack Kramer with Frank Deford, *The Game: My 40 Years in Tennis* (New York: G.P. Putnam & Sons, 1979); and Pam Shriver, Frank Deford & Susan Adams, *Passing Shots* (New York: McGraw-Hill, 1987). Narrower time frames are described in John Feinstein, *Hard Courts: Real Life on the Professional Tennis Tours* (New York: Villard Books, 1992), and Rich Koster, *The Tennis Bubble: Big-Money Tennis, How It Grew and Where It's Going* (New York: Quadrangle/The New York Times Book Company, 1976). See also, L. Jon Wetheim, *Venus Envy: A Sensational Season Inside the Women's Tennis Tour* (New York: HarperCollins, 2001) and Cecil Harris and Larryette Kyle-deBose, *Charging the*

In 1968, the ITF voted to allow professionals to enter Grand Slam events and Davis Cup competition. The Federation also developed its own set of Grand Prix tournaments to compete against Hunt's WCT Tour. Scheduling conflicts and competition for players between the two tours promoted a fierce rivalry; the ITF, after failing to negotiate cooperation in scheduling with the WCT, banned all WCT pros from ITF events. How would this action have fared had it been challenged as a Sherman Act, Section 1 agreement in restraint of trade, or a Section 2 attempt to monopolize? The absence of the WCT pros from the 1972 Grand Slams promoted a truce between the tours; WCT and ITF officials resolved their conflict by literally dividing the calendar between them. Had it been challenged under antitrust law, how would this "truce" have fared?

In 1972, the male players created an Association of Tennis Professionals (ATP), whose first presidents were Cliff Drysdale and Arthur Ashe and first executive director was Jack Kramer. Conflict between the ATP and the ITF produced another boycott of Wimbledon in 1973 by players supporting one of their members, who had been suspended by the ITF for not playing for his country in the Davis Cup competition.

Soon thereafter, with the help of Donald Dell—Arthur Ashe's agent and the founder of ProServ—the ATP and the ITF agreed to create the Men's International Professional Tennis Council (MIPTC) to run the men's game, with each given three places on the Council's governing board. The MIPTC later became a tripartite body with three board members added to represent the various tournaments and their directors.

Meanwhile, women players had not been faring nearly as well as men financially—women's prizes often amounted to only about 10% of those offered to men in the same Grand Prix tournament events. In response, a new Women's Tennis Association (WTA) was formed in the 1960s, led by Billie Jean King as President and Gladys Heldman as Executive Director. The new WTA successfully launched the Virginia Slims women's tour under the sponsorship of the Phillip Morris Tobacco Company. This challenge to the tennis establishment produced threats of expulsion of women members from Grand Slam tournaments and litigation in response (see *Heldman v. USLTA*, 354 F.Supp. 1241 (S.D.N.Y.1973)), until the ITF finally agreed with the WTA to create a Women's International Professional Tennis Council (WIPTC) to govern the women's game.

In 1974, yet another entrant appeared on the scene, World Team Tennis (WTT), which offered fans a schedule of matches between teams of players representing different cities. After the WTT recruited star players such as Jimmy Connors and Evonne Goolagong, the MIPTC threatened suspension of any players deserting its tour. That threat produced yet another lawsuit, *Jimmy Connors v. Arthur Ashe* (ATP President) and his

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Net: A History of Blacks in Tennis From Althea Gibson and Arthur Ashe to the Williams Sisters (Chicago: Ivan R. Dee, 2007).

colleagues, a suit that was dropped when the MIPTC backed down from its threat.

In fact, the new WTT model of teams playing in a league did not prove to be a serious threat to the traditional practice of individual players competing by and for themselves in tournaments. By the mid-1980s, the basic structure of present-day tennis had emerged. Tennis players drawn from around the world competed in tournaments staged around the world. Most tournaments consisted of separate events held on the men's and women's tours respectively; however, the four Grand Slam Tournaments (the Australian, French, All England (Wimbledon), and U.S. Opens) and a few other tournaments had both men's and women's competitions. Each tournament was staged by a local body with financial support from a local sponsor, but the tour as a whole had a general corporate sponsor. The men's tour, in particular, devised an elaborate system of ranking players by their overall performance throughout the year, paying bonus money for players who did best on tour events and staging a lucrative year-end Masters Tournament for the best players on the tour that year.

Along with these wider and more lucrative tournament opportunities came an extensive array of regulations by tour authorities, regulations that were embodied in contractual commitments signed by any player who wanted to appear in a tournament and by any organization that wanted to stage a tour event. Recall one example of such regulation—the ban on fees paid by an individual tournament to players in order to guarantee their appearance at that event. Instead, the tours sought to ensure widespread participation in tournaments by requiring each player to enter a minimum number of events (at least fourteen on the men's tour), and by offering a bonus pool created by contributions from each tournament.

These devices were felt necessary because star players such as John McEnroe and Chris Evert were constantly offered the chance to play in brief exhibition events that paid large sums of money with no risk to their computer rankings. Thus, the tours also imposed stringent limits on when players could perform in special events that conflicted with tournaments and on the ability of any party involved in conducting an official tournament to stage a special event off of the tour.

A particular target of such regulations were organizations such as Donald Dell's ProServ and Mark McCormack's International Management Group (IMG). ProServ and IMG initially emerged as agencies representing star tennis and golf players, but soon developed the ability to assist, manage, and even stage tour events themselves. Believing that this mix of functions involved a potential conflict of interest (Donald Dell even served as color commentator on telecasts of tournaments involving his clients), the MIPTC barred a player agency from conducting tournaments which, it was feared, would have an unfair advantage in getting the agency's clients to appear at their tour events. (In fact, it was this apparent conflict of interest

that in the late 1970s led Dell's partners, Lee Fentress and Frank Craighill, to leave ProServ and to create their own organization, Advantage International.)

We have provided the foregoing detail about the evolution and structure of the tennis tour as backdrop for the one appellate court decision that addresses the compatibility with American antitrust law of tour organization of individual sports (which in the case of tennis, but not golf, is an international structure). This litigation was actually initiated by the Volvo Corporation which had been the general sponsor of the men's tour as the latter evolved in the late 1970s and early 1980s, before being outbid for sponsorship by Nabisco Brands. Some time after the suit began, the MIPTC satisfied Volvo's concerns by giving favorable schedule treatment to the latter's New England tournament. By then, however, ProServ and IMG had become parties to the litigation and continued the legal attack on MIPTC regulation. After a federal district judge in New York granted summary dismissal of the suit, the plaintiffs appealed to the Second Circuit.

VOLVO NORTH AMER. CORP. V. MEN'S INT'L PROFESSIONAL TENNIS COUNCIL (MIPTC)

United States Court of Appeals, Second Circuit, 1988.
857 F.2d 55.

PIERCE, CIRCUIT JUDGE.

[The first question was whether Volvo, IMG, and ProServ had standing under antitrust law to challenge components of the MIPTC system to which they themselves were parties.]

* * *

Appellants claim on appeal that "MIPTC coordinates horizontal competitors banding together to eliminate competition among themselves and to use their collective power to limit the competitive opportunities of outsiders." In other words, appellants view MIPTC as a vehicle through which certain entities, primarily other tournament owners and producers, have established a cartel in the market for men's professional tennis; allegedly, this cartel has not only limited output and raised prices in the market for men's professional tennis events, but has also used its market power to inhibit competition from the owners and producers of Special Events. ProServ and IMG claim that the cartel has injured them, in their capacities as owners and producers of Special Events, (1) by restricting their ability to obtain a sufficient supply of players' services for Special Events; (2) by causing them to own and produce fewer Special Events than they otherwise would have owned and produced; and (3) by causing the Special Events that they have owned and produced to be less profitable than these events otherwise would have been. Volvo claims similar injuries as a potential owner and producer of Special Events. In addition, all three

appellants claim that they have been injured . . . because compliance with MIPTC's rules has prevented them from competing "freely and vigorously with the events owned and produced by the defendants and their co-conspirators."

In response . . . MIPTC raises the following argument in one form or another: if appellants' theory is correct, and MIPTC is the vehicle through which tournament owners and producers have organized a cartel in the market for men's professional tennis, then appellants lack standing to challenge the cartel because, as owners and producers of sanctioned tournaments, appellants themselves are members of the cartel who stand to benefit from the cartel's unlawful activity. Taken to its logical conclusion, appellees' argument suggests that we adopt a per se rule prohibiting putative cartel members from asserting antitrust claims against other members of the cartel.

We decline to adopt a rule precluding cartel members from raising antitrust challenges against the cartel. As one commentator has noted, "even absent legal restraint the cartel is inherently more fragile than the single-firm monopolist. The interests of the cartel as a whole often diverge substantially from the interests of individual members." H. Hovenkamp, *Economics and Federal Antitrust Law* § 4.1, at 83 (1985) ("Hovenkamp"). Individual members of the cartel may face different costs; some may be more efficient than others, and "some may produce slightly different products, which cost either a little less or a little more than the product sold by other cartel members." Thus, even though a particular trade restraint adopted by a cartel presumably operates to the cartel's aggregate benefit, the restraint may operate to the detriment of an individual member. . . . To the extent a cartel member credibly asserts that it would be better off if it were free to compete—such that the member's interest coincides with the public interest in vigorous competition—we believe that the individual cartel member satisfies the antitrust injury requirement. . . .

2. Applying Antitrust Injury Analysis

a. MIPTC's Administration of the Grand Prix Circuit

As noted above, appellants claim that, in administering the Grand Prix, MIPTC has denied appellants "the opportunity to produce tennis events in the manner they seek with respect to matters such as site location, player compensation and scheduling." In response, appellees argue that, to the extent appellants themselves are owners and producers of events sanctioned by MIPTC, they "are only helped by rules minimizing scheduling conflicts," and that "the MIPTC rule limiting the amount of prize money which can be awarded by an event . . . cannot possibly hurt appellants in their association with MIPTC sanctioned events" because appellants stand to "benefit from a ceiling on one of the key costs of running an event."

For the following reasons, we conclude that appellants have standing to challenge the administration of the Grand Prix circuit. Because the individual cartel member's interests may diverge from the interests of the cartel as a whole, MIPTC's decisions relating to site location and scheduling might not work to appellants' advantage, even though appellants are owners and producers of sanctioned events. Appellants claim that MIPTC uses its power "to shield tournaments favored by MIPTC from the rigors of competition," and, in our view, this allegation satisfies the antitrust injury requirement. Moreover, as Volvo argues on appeal, the rule limiting the amount of prize money that may be awarded by sanctioned events may injure appellants, as owners and producers of such events, by preventing them from "compet[ing] against other Grand Prix events for the services of highly ranked players by offering more prize money." Once again, although a particular rule may work to the aggregate benefit of the owners and producers of sanctioned events, it may not benefit an individual owner or producer such as Volvo, ProServ, or IMG. Thus, because appellants' individual interests may coincide with the public interest in promoting competition, we believe that appellants have satisfied the first element of the standing analysis.

* * *

c. Commitment Agreements

The amended complaint alleges that the Commitment Agreements inhibit men's professional tennis players from competing in Special Events. Appellees counter the attack on the Commitment Agreements by arguing, first, that "appellants stand only to gain from each of the alleged restrictions on the market for men's tennis playing services," because "any incentives for players to sell their services to the Grand Prix . . . can only benefit appellants" in their capacity as owners and producers of MIPTC-sanctioned events. . . .

Notwithstanding the foregoing arguments, we conclude that appellants have standing to challenge the Commitment Agreements. As alleged, the Commitment Agreements discourage players from participating in non-sanctioned events and, therefore, increase the cost of producing these events. Accordingly, IMG and ProServ, in their capacities as owners and producers of non-sanctioned Special Events, may have suffered "injury of the type the antitrust laws were intended to prevent." Moreover, by restricting the supply of players available for non-sanctioned events, the Commitment Agreements also discourage owners and producers from disassociating themselves from MIPTC. To the extent that owners and producers of sanctioned events, such as Volvo, would otherwise find it in their economic interests to compete against the alleged tennis cartel, these owners and producers also have suffered the type of injuries the antitrust laws were intended to forestall. Thus, in our view, all three appellants have satisfied the element of antitrust injury.

[For similar reasons, the court upheld the plaintiffs' standing to challenge the MIPTC rules requiring tournament contributions to the bonus pool and restricting special events. The court then turned to the merits of the plaintiffs' antitrust claims. The court first held that the MIPTC, made up of representatives of players, tournaments, and national tennis associations, was the type of joint venture that was capable of an antitrust conspiracy, explicitly following judicial precedents that had characterized the NCAA and professional leagues as multiple rather than single entities for purposes of § 1 of the Sherman Antitrust Act. After noting that the plaintiffs had attacked as horizontal price-fixing the MIPTC rule that specified prize money ranges for different kinds of tournaments, the court made the following comment about the reasonableness of such a practice.]

* * *

Assuming that appellants succeed in proving the foregoing allegations, however, we express no opinion at this time as to whether appellees' conduct should be condemned as per se unlawful or, instead, should be analyzed under the Rule of Reason. Normally, "agreements among competitors to fix prices on their individual goods and services are among those concerted activities" that are considered per se illegal under § 1 of the Sherman Act. The relevant inquiry, however, involves more than "a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.' " Instead, " 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable." Moreover, we recognize that professional sporting events cannot exist unless the producers of such events agree to cooperate with one another to a certain extent, and that the antitrust laws do not condemn such agreements when coordination is essential if the activity is to be carried out at all. Thus, on remand, the district court should carefully consider whatever arguments appellees may offer in support of their practices relating to player compensation before deciding whether the per se rule or the Rule of Reason should apply.

[The appeals court made essentially the same judgment about the plaintiff's attack on MIPTC's allocation of different dates to different tour sites and sponsors: this practice could constitute an illegal horizontal division of the tournament market, but no decision was made about whether the MIPTC practice was per se illegal or possibly justifiable under the rule of reason. With respect to the charge that eligibility conditions imposed by the MIPTC on players constituted a potential group boycott, the Appeals Court stated:]

* * *

According to appellant ProServ, "the Grand Prix tournaments have collectively agreed not to permit the participation by any player who fails to accept the conditions the group imposes upon the player's activities for

an entire year." Thus, men's professional tennis players "confront through the Commitment Agreements a horizontal agreement among competing producers of tennis tournaments setting forth the terms under which they will collectively decline to deal with the players."

Judge Duffy considered the Commitment Agreements to be "essentially employment contracts that require employee players to play only for MIPTC for thirty-six weeks a year." The court then stated that "[e]mployers may impose reasonable employment conditions for a reasonable period of time," and that "[e]ven accepting plaintiffs' assertion that creating an independent tennis event series is not feasible during the remaining weeks of the year, I cannot find that an exclusive employment contract for thirty-six weeks a year is imposed for an unreasonable length of time."

In our view, the amended complaint adequately alleges that appellees have threatened to engage in a group boycott or concerted refusal to deal. Generally, a group boycott is "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." To prevail on a group boycott or refusal to deal claim, a plaintiff must demonstrate that the defendant intends to restrain competition, or to enhance or expand his monopoly, and has acted coercively.

Whether the threatened boycott alleged in the amended complaint [should be legally appraised by a per se rule] is a matter for the district court to consider in due course.

[Finally, the court reinstated the appellant's claim that the MIPTC's organization and operation of men's tennis potentially constituted an illegal monopoly under § 2 of the Sherman Act.]

* * *

The offense of monopolization under § 2 of the Sherman Act consists of two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n. 19 (1985). Appellants clearly have alleged that MIPTC possesses monopoly power over the production of first-rate men's professional tennis events. Paragraph 50 of the amended complaint, for example, alleges that in 1985 the top one hundred men's professional tennis players all signed Commitment Agreements. Moreover, the amended complaint alleges that appellees have willfully maintained their monopoly power (1) by merging with WCT in 1983; (2) by requiring players to sign Commitment Agreements; and (3) by requiring owners of sanctioned events to contribute to the bonus pool. Although the facts may eventually bear out the district court's conclusion that MIPTC has not

willfully maintained its monopoly power, and that MIPTC instead has benefited from "the recent historical development of men's professional tennis," we do not believe that the district court was correct to draw this conclusion on a motion to dismiss.

Appeal granted.

The appellate court thus upheld the plaintiffs' appeal, reinstated the plaintiffs' antitrust suit, and returned the case to the district court for trial on the merits. As has happened with almost every lawsuit launched in the world of tennis, the litigants in *Volvo* soon settled the case without its legal merits ever being resolved in court.

The foregoing issues are as relevant to golf, stock car racing, bowling, and any other individual sports tours as to the tennis tours. While private litigation may not soon be forthcoming from among the players, sponsors, broadcasters, and others who participate in and profit from the current tours, the Justice Department and the Federal Trade Commission (FTC) are empowered to launch such proceedings on behalf of the general public. Indeed, an ongoing FTC investigation made the sports pages at the end of 1994 in connection with the rise and quick fall of a proposed World Golf Tour. This Tour was the brainchild of Greg Norman and his fellow Australian, Rupert Murdoch, owner of Fox Broadcasting. Their idea was to have the top 30 golfers in the world play an additional championship tour comprised of eight tournaments scattered throughout the year. Four of these events would be scheduled just before the four majors: half would be in the United States and half elsewhere in the world. All would have total purses of $3 million, with minimum guarantees for all participants. Much of the money would come from Fox, which, as part of its effort to become a major sports network and cable system, would telecast the events in the United States and elsewhere around the world.

While many of the top golfers, American and non-American, expressed interest in both this competition and its rewards, the PGA Tour stated that, under its rules, it was entitled to an exclusive commitment to its tour by its own playing members. In particular, the "conflicting events" rule bars PGA Tour members from taking part in U.S. golf events that conflict with the PGA schedule from January through October (even lesser tournaments that attract few star performers), while the "television release" rule requires PGA Tour consent to any Tour members appearing on non-PGA golf events televised in this country.

In mid-1995, Norman said that he was abandoning his plans for the World Tour because he did not want to jeopardize the success of the PGA Tour. In September, the FTC announced that it had terminated its investigation of the PGA without any legal action—a decision for which then-Senate Majority Leader Bob Dole and a number of his colleagues had

been pressing. Should the antitrust inquiry have been dropped? Would the PGA Tour rules pass or fail the rule of reason test? If not, should the PGA Tour be granted a special antitrust exemption by Congress to preserve its current status? In thinking about these questions, consider the broader issues of whether the restrictive organization of one (non-team) sport unduly burdens the sports market, and whether American antitrust law enforcement should target a sport such as tennis that operates on a world-wide basis.

Historically, the biennial men's Ryder Cup and Presidents Cup match play competitions that pit the top dozen U.S. golfers against the top dozen players from Europe (at the Ryder Cup, originally in odd-numbered years, but now in even-numbered years after the events were pushed back one year after the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001), or from non-European countries (at the Presidents Cup, since 2003 in odd-numbered years), has been operated by the PGA which does not pay the American players and donates profits to various charities. In 1999, a group of the U.S. golfers, led by Tiger Woods and David Duval, threatened to boycott the Ryder Cup competition in suburban Boston unless they were compensated for their appearance. The matter was resolved with the PGA agreeing to donate some portion of the money earned to charities designated by each golfer.

But suppose that not just Woods alone but several other star players said they were inclined to go play on the European Tour unless the PGA agreed to give them a defined percentage of the PGA's future television and merchandising contracts? As we saw in Chapter Six, Woods (and Greg Norman) have criticized the current Tour sponsorship deals that create "implied endorsements" by the players of products different from those for which the players sell their own publicity rights. And Richard Williams, father of Venus and Serena, has said that his daughters should receive the same kind of sharing of Women's Tennis Association (WTA) revenues, though in the form of guaranteed payments for coming to tournaments, rather than just prizes for winning them. For legal purposes should any such sister or other collective star action be characterized as a per se illegal "group boycott" under Section 1 of the Sherman Act, or alternatively should they be judged unreasonable restraints of trade in their athletic services under the rule of reason? For an arguably relevant nonsports case, see *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

Golf, tennis, bowling, and the various auto racing sports are unified under a central governing authority. (In 1996, though, Indy open-wheel car racing split into two competing tours organized under separate governing authorities—Championship Auto Racing Teams (CART) and the upstart

Indy Racing League (IRL), headed by Indianapolis Motor Speedway President Tony George.) Boxing, on the other hand, has historically been subject to a patchwork of inconsistent state regulation and as many as five or six sanctioning organizations (which often leads to multiple "world champions" at the same time in the different weight classifications). The lack of regulatory uniformity effectively penalized those states that took substantive action to reduce the economic exploitation and personal injury faced by boxers. In 1996, after several futile efforts over many years to establish federal regulation of the sport, Congress finally passed the Professional Boxing Safety Act (PBSA), codified at 15 U.S.C. §§ 6301 et seq. Four years later, in 2000, it also passed the Muhammad Ali Boxing Reform Act (MABRA), introduced by Sens. John McCain (R-Ariz.) and Richard Bryan (D-Nev.), amending the PBSA.

The PBSA (including the MABRA additions and amendments) attempts to deal with several perceived problems, only some of which are mentioned here. First, it establishes minimum safety and procedural standards that must be met before a match can be sanctioned by a state boxing commission. Second, the Act provides that no match may be held in a state that does not have a boxing commission unless it is supervised by a commission in another state and subject to guidelines promulgated by the Association of Boxing Commissions (ABC). Third, the Act attacks conflicts of interest by prohibiting anyone involved with the regulation of boxing in any state from receiving any compensation from anyone who either is involved in staging boxing matches or has an interest in an active professional boxer; it creates a fine of up to $20,000 and up to one-year imprisonment for anyone violating this provision. Fourth, the Act creates minimum requirements in contracts between boxers and their managers or promoters and renders void and unenforceable any coercive contract with a boxer. Fifth, the Act requires the development of "guidelines for objective and consistent written criteria for the ratings of professional boxers." Sixth, promoters and sanctioning organizations are required to make full disclosure to state boxing commissions of a range of information that might affect their behavior or judgment in dealing with boxers. Finally, the Act requires state boxing commissions to honor suspensions imposed by a sister state commission if the suspension was for (a) a knockout or consecutive losses; (b) a physical deficiency; (c) failing a drug test; or (d) using a false name or ID card.

This last provision became an issue after the 1997 heavyweight championship fight in Las Vegas between Mike Tyson and Evander Holyfield. Tyson was suspended by the Nevada State Boxing Commission the week after he was disqualified for biting off a section of Holyfield's ear during the match. Although the grounds for the suspension were not among those that triggered the PBSA requirement that other commissions honor the suspension, most state commissions across the country (with the exception of Florida's) announced that they would honor the suspension

nonetheless, in compliance with the spirit of the PBSA. Section 6306(b) of the Act provides that a state commission may allow a boxer under suspension in another state to fight in its state if either the grounds for the suspension are not on the list noted above or the boxer appeals and the commission finds that the suspension was "without sufficient grounds, for an improper purpose, or not related to the health and safety of the boxer or the purposes of this chapter." Would it have violated the PBSA for another state not to allow Tyson to fight, based on the Nevada suspension? (Interestingly, it is also unlikely that Tyson could have fought in another country, since one of the terms of his parole from prison after being convicted in Indiana of rape years earlier was that he not leave the country without permission of the Indiana parole authorities.)

Just before the Muhammad Ali Boxing Reform Act was passed, the credibility of boxing's governance was battered even further when four top officials of the International Boxing Federation (IBF), including the founder and president, Robert W. Lee, Sr., were indicted in federal court in New Jersey in late 1999 for taking over $338,000 in bribes over a period of 13 years from as many as seven promoters and managers of at least 23 boxers to manipulate the international rankings of certain boxers. These rankings are crucial in determining which boxers are able to get contracts to fight other boxers, particularly in championship bouts. The defendants were charged with 39 counts of racketeering and conspiracy under the 1970 RICO Act, mail fraud, money laundering, and tax evasion.

After a lengthy trial in the summer of 2000, during which a primary defense argument was that this was a racially motivated selective prosecution against boxing's only black-run sanctioning body, and fifteen days of deliberations, the jury returned a verdict acquitting the defendants of the bribery and racketeering charges. However, it found Lee guilty of tax evasion, money laundering, and interstate travel in aid of racketeering. This somewhat mixed verdict nonetheless indicates that boxing at the higher levels has likely been corrupted for some period of time. Indeed, immediately after the *Lee* verdict, promoter Bob Arum was fined $25,000 by the Nevada Athletic Commission for having done what he testified to—having his Top Rank body pay IBF $100,000 to sanction as a heavyweight title fight the 1995 bout between George Foreman and German champion Axel Schulz (which Foreman then won in a controversial split verdict).

Following the indictments but before the verdicts, the district court in New Jersey, acting under the authority of the RICO Act, appointed New Jersey lawyer Joseph Hayden, Jr., as the court's monitor over the IBF. Thus, while the IBF executive committee remained in control of the organization's governance, Mr. Hayden for several years had the authority to monitor all actions of the board and staff and to remove any who were not "acting in the best interests of the IBF and boxing."

These events raise many policy questions about how boxing should be governed and what role the government or courts should play in regulating the sport. Specifically, are the BPSA and MABRA measures sufficient? Should Congress go further and establish a federal commission that replaces the state commissions and/or establish the office of a federal "boxing czar"? Does the federal government's involvement in regulating an industry historically governed by the states concern you? Should this statute survive commerce clause scrutiny as the regulation of what might appear to be purely intrastate affairs? Alternatively, should an international body like the IOC or an international sports federation be entrusted with governing this sport? Or should we accept the more modest proposal of a Boxing Task Force of the National Association of Attorneys Generals that some formalized system of constant governmental oversight be established to monitor the relationships between boxers and their promoters/managers and the ranking system that determines who rises to the top of each weight class?

Yet another possibility is something that was begun in 2003 by a former light heavyweight champion, Eddie Gregory, who after changing his name to Eddie Mustafa Muhammad co-founded (with Walter Kane) a Joint Association of Boxers (JAB). After signing up as members more than 100 fighters, including the World Boxing Association's featherweight champion, Derrick "Smoke" Gainer, the JAB became an affiliate of the Teamsters Union under the leadership of Jimmy Hoffa, Jr. As Hoffa, Jr. put it, "[e]very other sport is organized. Now boxers will be organized. Boxers need health insurance, pensions . . . [and] a fair share of the proceeds of their labors." What are your views about the prospects of the JAB following the lead of the PGA Tour (as well as the MLBPA and other players unions) in enhancing the financial lives of boxers? And also, in improving the integrity of boxing for fans?

A final issue relating to the organization of sports tours concerns not market restraints, but gender disparities. Among the Grand Slam tournaments comprising both men's and women's events, Wimbledon and the French Open (but not the United States or Australian Opens) had paid smaller prize money for the women's than the men's championship. Was that practice discriminatory? Is it relevant that the separate men's tennis tour offered more than double the prize money as the women's tour (which is also roughly true of the PGA versus the LPGA golf tours)? What might have accounted for these large differentials in the financial rewards for the typical male and female athletes (Serena Williams and Annika Sorenstam being exceptions that prove the rule)? Does this have any bearing on the questions posed in Chapter Eleven about college sports under Title IX—for example, whether the men's and women's basketball programs should receive equal financial support? Finally, in 2007 the prize money at Wimbledon was equalized for men and women, joining the American, French and Australian Open Championships in this regard.

E. REGULATING PLAYING EQUIPMENT[j]

An additional source of protagonists and controversies is the manufacture of equipment used in a sport. The design of tennis rackets and golf clubs is an obvious target of tour regulation because of the impact that playing equipment can have on athletic competition. But private regulation of the tools that put individual athletes at an advantage displays the historical tensions felt by organizations whose manifest purpose is to serve the welfare of the game, but that also serve the entrepreneurial interests of participants. Could this regulation hold back the development of a sport by ignoring new technologies that could enhance the quality of play simply to protect player endorsements? For example, if a new alloy is made for a lighter, sturdier bike resulting in faster finishing times, why not let the bike in races?

One of the first cases in which a court grappled with these issues was *STP Corporation v. United States Auto Club (USAC)*, 286 F.Supp. 146 (S.D.Ind.1968). In the sport of auto racing, the USAC functioned not as the promoter of races, such as the Indianapolis 500, but as a non-profit body that merely sanctioned events, licensed participants, and regulated the safety and appeal of the races—including providing specifications for racing car engines. In the 1967 Indy 500, Studebaker's new turbine-powered car proved to be much faster than traditional piston-driven engines (although the Studebaker Turbocar had to drop out near the end of that race because of gear box troubles). Shortly thereafter, the USAC introduced a rule that limited the size of turbine-powered engines in order to make them equivalent in speed to piston-powered cars. In dismissing an antitrust suit brought by STP, Studebaker's subsidiary in charge of its racing program, a district judge held that such USAC rulemaking was perfectly acceptable under the rule of reason:

> One of the purposes of the USAC is to encourage the sport of automobile racing, which is a highly competitive sport of a very technical nature. The quickest way to bring about the demise of racing would be to permit a situation that developed for one car with superior qualities or such superior capabilities as to eliminate competition. It would be somewhat like allowing one basketball team to have a large hoop at one end of the court and a small regulation size basketball hoop at the other end for the other team. In order to have a continuation of racing, the Court concludes that USAC acted reasonably in trying to bring about an equivalency between the piston-powered automobiles with turbine-powered cars according to a formula that was prepared and cemented after consultation with those who are considered most expert in the field. . . . The making of competitive rules is

[j] Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137 (1999).

> something that any governing body of an organization such as USAC has a right to do. Such action goes to the very purpose of its existence, i.e., to encourage competitive racing.

286 F.Supp. at 151.

Ten years later, a similar dispute arose in tennis with two added features. Unlike the USAC, the U.S. Tennis Association itself ran several major tournaments, including the lucrative U.S. Open. In this case, the USTA adopted a new equipment rule issued by the International Tennis Federation (ITF), which had traditionally exercised responsibility to establish a single set of rules governing tennis matches wherever played.

GUNTER HARZ SPORTS V. USTA

United States District Court, District of Nebraska, 1981.
511 F.Supp. 1103.

SCHATZ, DISTRICT JUDGE.

[The ITF had banned a German manufacturer's new model of tennis racket—called the "spaghetti racket" because it had two layers of vertical strings, one on each side of the horizontal strings. The effect of this "double-stringing" was to impart a very powerful topspin to a tennis ball, such that when the ball hit the ground in front of a player, it would bounce sharply over his head. When the racket first appeared in European tournaments, it helped produce several astonishing upsets of star players by low-ranked opponents. In the face of a threatened player boycott of the 1977 French Open, the ITF issued a temporary emergency ban of this racket pending in-depth study of its effects; when the study was completed, the ITF permanently banned the double-strung racket. The ITF stated that "the spirit of this rule is to prevent undue spin on the ball that would result in a change in the character of the game." After the USTA had endorsed and adopted both ITF regulations, the racket manufacturer sued the USTA in Nebraska.]

* * *

While the Sherman Act is primarily aimed at conduct which has commercial objectives, ample authority exists for finding the activities of the USTA subject to Section 1. Non-profit voluntary associations which sanction and regulate professional sporting tournaments, races and other contests have been held subject to the antitrust laws in the exercise of their rule-making authority. Similarly, non-profit amateur athletic associations formed for the primary purpose of promoting amateur athletics have been found subject to the prohibitions of Section 1 of the Sherman Act. Courts have proceeded on the theory that while each such sanctioning organization has the primary noncommercial purpose of promoting organized sports in an orderly fashion, "its subsequent actions in carrying out its laudable objectives could trigger the applicability of the Sherman

Act if such conduct restrained interstate trade or commerce in an unreasonable manner."

* * *

The actions of the USTA in this case clearly cannot be characterized as the traditional type of group boycott to which the per se doctrine has been applied. The Court accepts plaintiff's contention that the USTA entered into a Sherman Act "agreement" when it joined other member nations of the ITF in the adoption of Rule 4 of the Rules of Tennis, and when it agreed to follow the temporary ban of double-strung rackets. However, the Court rejects any suggestion of "agreement," as that term is used in the Sherman Act, between the USTA or the ITF and any distributors or manufacturers of tennis equipment to prevent the plaintiff from competing in the sale or distribution of rackets or stringing systems. Totally lacking in this case is an agreement between "business competitors in the traditional sense." Nor can the actions of the USTA in adopting a rule defining tennis rackets be labeled as lacking in "any redeeming virtue."

Where the purpose of a "group boycott" has been to protect fair competition in sports and games, courts have eschewed a per se analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances.

* * *

Defendants contend that the actions of the USTA are exempt from this type of analysis under the circumstances of this case because the ITF actually initiated and promulgated the temporary ban and Rule 4, while the USTA was forced to adopt the rule as a condition of its membership. The Court finds that contention without merit. . . . "[C]ourts have uniformly rejected any defense that an antitrust violation was 'forced' onto the defendant," and the "Supreme Court has held that 'acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.' "

The Constitution of the USTA provides that it is "an independent tennis organization and as such cannot take any action at the request of any international tennis body which is inconsistent with the provisions of its Certificate of Incorporation or any By-Laws or Standing Orders issued hereunder." As an independent tennis organization the USTA's membership in the ITF is voluntary, and it cannot take any action at the request of the ITF, or as a condition of its membership in the ITF, which is a violation of the antitrust laws of the United States and escape liability.

* * *

Turning to an analysis of the actions of the USTA under the rule of reason, the Court specifically finds that the collective action of the USTA,

ITF, and other member national associations of the ITF was intended to accomplish the legitimate goals of preserving the essential character and integrity of the game of tennis as it had always been played, and preserving competition by attempting to conduct the game in an orderly fashion. The record is totally devoid of any evidence from which an intent to injure the plaintiff or any other manufacturer or distributor of tennis equipment can be inferred. As noted previously, the Court finds no agreement between the USTA or ITF and any manufacturer or distributor of tennis equipment to exclude plaintiff from competing in the market for rackets or stringing systems.

The evidence shows that the ITF solicited, received, and acted upon comments and suggestions from equipment manufacturers, including Fischer and Harz. The original draft of the proposed rule was revised partly in response to comments of manufacturers suggesting that many conventional rackets on the market would be banned by the original draft of the proposed rule, although such rackets did nothing to alter the character of the game. However, the Court finds nothing impermissible in such communication or response. Both the USTA and the ITF had the right to solicit such information and act upon it in attempting to make reasonable informed decisions concerning racket specifications and in attempting to draft the rule so that it would be the least restrictive of technological improvements and developments, but still address the legitimate concern that such development not adversely alter the character of the game of tennis as it had been played historically or artificially enhance the skill and ability of players, thereby harming the integrity of competitive tennis.

Secondly, the Court concludes that the actions of the USTA and the ITF were reasonably related to the goals discussed above. In reaching that conclusion, the Court is not to substitute its own judgment for that of the ITF or the USTA. It is irrelevant whether the Court might or might not independently reach the same decision based on the same evidence. In this regard, the Court agrees with the characterization of the latitude to be given a sanctioning organization contained in *STP Corp. v. United States Auto Club*:

. . . A membership organization . . . must be left to legislate its own rules and its own guidelines for participation of its members for the purposes for which it was created so long as that legislation is not done in an unreasonable manner and without malice or intention to harm a single member or segment of membership. Such membership organizations have the right to adopt such rules to protect their very existence.

Plaintiff contends that the actions of the ITF in enacting the temporary ban on double-strung rackets were arbitrary because the basis for the ban was a false and misleading assessment by the German Federation of a study made by the Braunschweig Technical University on the effect of double-strung rackets, and a playing demonstration using poor

copies of the Fischer double-strung racket, not strung according to Fischer's specifications on stringing tension.

The Court finds that despite the actual conclusion of the Braunschweig study that double stringing did not revolutionize the character of the game and should not be banned, the study's findings did lend support to the concerns which prompted the temporary ban. The study found that strokes at high speed, as well as stroke types which primarily utilized cross strings, could be played under certain conditions only; that double stringing resulted in strokes with a very strong spin being played almost exclusively since those strokes were most effective; and that on red gravel and coarse fiber courts, when high topspin strokes were played in the baseline area, balls could bounce over the back fence and such balls could only be returned when hit right after they bounced.

* * *

Contrary to plaintiff's assertions, the Court finds that the ITF's temporary ban bore a rational relationship to its goal of attempting to conduct organized tennis competitions in an orderly fashion. The COM at Barcelona acted not only on the basis of the demonstration, and the German Federation's assessment of the Braunschweig study, but also on the basis of actual and threatened players' strikes against use of the double-strung racket, publicity concerning upsets of high-ranking players by virtual unknowns using double-strung rackets, and adverse reports of several national federations based on their experience with the racket in match play and in training situations. This evidence provided an objective basis from which the COM could have concluded that a temporary freeze on the use of the rackets was necessary pending further investigation and subsequent action by the ITF Council.

* * *

The Court finds that a rule on racket specifications designed to prohibit rackets which impart exaggerated topspin to the ball on impact is rationally related to the goal of preserving the character of the game of tennis. In this regard, the Court especially credits the testimony of Cliff Drysdale and Vic Braden, who are both highly qualified to testify as experts on the subject. . . .

Both Drysdale and Braden testified that the ability to impart topspin to a ball is one of the most important skills in the game of tennis. As Braden put it, being able to hit topspin is the "name of the game." Drysdale testified that it was his opinion that a player who has never been able to hit topspin with a conventional racket could, with a double-strung racket, be able to hit great topspin lobs by making a very small adjustment in the way he hit the ball. Drysdale also testified that an average player using a double-strung racket would be able to serve much more effectively than with a

conventional racket, making it more difficult for an opponent to return a serve and correspondingly more difficult to get the ball into play.

Similarly, Braden testified that because a player using a double-strung racket could increase spin on a serve, there would not be many service returns, which would change the character of the game tremendously. As a result, the game would lend itself to people who develop a very efficient serve with a double-strung racket. Clearly, the ITF and the USTA could rationally consider a racket's artificial enhancement of fundamental skills of the game a threat to the integrity and character of tennis as it has been historically played.

Drysdale and Braden testified that widespread use of the double-strung rackets could change the character of the game in a number of other ways as well. Since other shots with double-strung rackets are substantially less effective than topspin shots, Drysdale testified that the end result would be a situation where everyone would be playing almost exclusively topspin shots. This tendency to adopt a similar style would reduce the variety of the game as it has been traditionally played, resulting in decreased spectator interest. Additionally, the result of the topspin that a double-strung racket can impart to the ball is a ball that bounces considerably higher, causing an opponent to move back to or past the baseline to get into a position where he can contact the ball. This also prevents an opponent from aggressively "attacking" by coming to the net. In Drysdale's opinion, players being forced to back away from the net would result in administrators of the game either having to expand the dimensions of the court or changing the composition of the ball in some way to accommodate the differences caused by the racket.

Braden also testified to his assumption that as people using double-strung rackets became proficient in hitting topspin lobs, court dimensions and structures would have to be changed. Braden's research indicated that on a typical 120-foot court with a twelve foot fence, a topspin lob hit hard enough with a spaghetti racket could force an opponent to climb to a nine-foot height against the back fence.

While plaintiff presented witnesses who testified that use of double-strung rackets would not change the character of the game, as previously noted, the Court infers from the expert testimony of Drysdale and Braden that the ITF and USTA could have reasonably concluded that rackets or stringing that impart excessive topspin to the ball alter the character of the game. This is all that is necessary since the Court is not to substitute its independent judgment for the ITF or the USTA in weighing the relative opinions of expert witnesses.

The Court also concludes that the actions of the USTA in honoring the temporary ban and adopting Rule 4 were not more extensive than necessary to serve the legitimate goals of the USTA and ITF. Based on the players' strikes and walkouts occasioned by use of the double-strung

racket, the Court concludes that the temporary freeze on the use of double-strung rackets in sanctioned play was no more extensive than necessary to further the legitimate goal of conducting the game in an orderly fashion, especially in view of the provision that member nations could apply for permission to experiment with the racket at club level. The Court finds it reasonable for the ITF and USTA to have concluded that the alternative of taking no action and letting the racket have a twenty-four month trial period would not have furthered that goal.

Rule 4 itself was narrowly drawn to proscribe only rackets and stringing systems that imparted exaggerated topspin to the ball, since the ITF concluded that it was that feature which changed the character of the game. The breadth of the rule was additionally narrowed by provision of appeal procedures whereby a racket that failed to conform to the face of the rule could be approved under the standard that it did not impart exaggerated topspin to the ball or change the character of the game.

* * *

Suit dismissed.

[In a brief *per curiam* decision, the Eighth Circuit upheld the district court decision on the merits, while making clear that the USTA, notwithstanding its non-profit status, was governed by antitrust law in making decisions such as this adoption of an ITF rule of the game. *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n*, 665 F.2d 222 (8th Cir. 1981).]

Despite the favorable precedents in the *STP* and *Gunter Harz* cases, in the late 1980s both the USGA and the PGA Tour became embroiled in serious antitrust litigation involving the new square-grooved (or U-shaped) golfing irons. Traditionally, grooves in golfing irons have been shaped like a "V" that angle to a point embedded in the face of the club. In the early 1980s, the USGA and the Royal and Ancient Golf Club of St. Andrew's, Scotland (the rule-making authority for golf outside the United States), had relaxed their traditional ban on square grooves (which are shaped like a "U" inside the iron's face). This provided a major market opportunity for a new club manufacturer, Karsten Manufacturing. Karsten Sollheim, head of the firm, designed a new Ping Eye2 golf iron whose U-shaped grooves helped make it the country's best selling golf club, generating revenues of $100 million per year.

According to golf's ruling authorities, the problem was that the new square-grooved club imparted much more backspin to the ball, especially with shorter irons used to hit balls out of the rough. PGA Tour players such as Jack Nicklaus, Tom Watson, and Greg Norman protested that Ping iron users such as Mark Calcavecchia gained an unfair playing advantage: long but less accurate drivers off the tee did not have to pay the usual price of

less control over approach shots hit from the rough toward the pin on the green. The response of the USGA was to adopt a new formula for club design that required a slightly broader gap between the grooves on the surface of the iron. While Karsten initiated an antitrust suit against this USGA rule, he eventually settled on the terms that the firm would manufacture all its new clubs in accordance with USGA specifications, but all existing Ping clubs would be grandfathered as acceptable to the USGA.

Neither the Tournament Players Division (TPD) of the PGA Tour nor its commissioner, Deane Beman, was prepared to accept that compromise. Instead, they instituted a ban on the use of any square-grooved irons in PGA Tour events. Because this was the first time that the PGA Tour itself had imposed special restrictions on equipment used in its tournaments, the step generated some procedural complications. Broader tour decisions such as this were normally made by the TPD's Policy Board, which was composed of ten directors—four players elected by the tour membership, three officials from the PGA, and three independent directors. Since the first seven directors all had endorsement agreements with other golf equipment manufacturers, they abstained from voting on the new rule to avoid the possible conflicts of interest. The three independent directors voted unanimously for the proposed new rule. However, such a small number of votes did not square with the Board's existing quorum rule. Thus, a new meeting was scheduled, at which all members voted to change the procedural requirements for such cases, and the same independent directors again voted for the ban on U-shaped irons.

Unsurprisingly, this course of events produced another lawsuit. The lead plaintiffs were Tour golfers who had used (and been paid to endorse) Ping Eye2 irons, but an additional plaintiff (and the party financing the entire litigation) was Karsten Manufacturing. The plaintiffs won a temporary injunction that banned PGA Tour enforcement of the Tour rule pending trial on the merits in early 1993. See *Gilder v. PGA Tour, Inc.*, 727 F.Supp. 1333 (D.Ariz.1989), affirmed, 936 F.2d 417 (9th Cir.1991). On the eve of trial in April 1993, this $100 million lawsuit was settled on the basis that Ping irons could be used on the PGA Tour but that the Tour Policy Board would establish an independent committee to evaluate the acceptability of golf equipment—including square-grooved irons—for tour competition. That led to the creation of a permanent Tour Equipment Advisory Committee, made up of five outside consultants who have both an interest in golf and a scientific background that enables them to make judgments about the effect of equipment modifications on the game. There has been no effort, however, to reinstate the rule against square-grooved irons, and they are now regularly used on the tour.

Golf equipment, however, continued to be at the center of controversy at the dawn of the new millenium as advances in club and ball technology led some golfers, most notably Tiger Woods, to proclaim that even average

players could hit the ball so far as to render current golf courses obsolete. To deal with this concern, the USGA, which governs the game of golf in the United States, adopted a new "spring-like effect" test in 1998 for driving clubs that established a "coefficient of restitution" (COR) maximum of .830—which meant when a ball came off the head of the club at a force exceeding specified limits, the club would be banned from use in USGA and PGA sanctioned events. The Royal & Ancient Golf Club of St. Andrews, which governs golf throughout the world except in the U.S., declined to adopt this test, leaving the standard in the U.S. different from that in the rest of the world. One of the first victims of the USGA's new standard was Callaway Golf's then new ERC Forged Titanium driver. With this driver banned in the U.S. but regularly used elsewhere, including on the European and Asian PGA Tours, Callaway threatened legal action against the USGA. The dispute was resolved, at least temporarily, when the USGA and the Royal & Ancient agreed in 2002 on a jointly recognized new standard, using the spring-like effect test but setting the maximum COR at .860. (thus allowing Callaway's new driver to be used everywhere for the time being).

QUESTIONS FOR DISCUSSION[k]

1. Remember that present-day rule of reason analysis requires courts to balance procompetitive benefits against anticompetitive harms. How would a sports governing body's decision to ban double-stringed tennis rackets or square-grooved golf irons be analyzed under that test? Do the statements in *Gunter Harz* and *STP Corporation* that courts should defer to the good faith judgment of governing bodies make sense for purposes of such balancing of competitive effects? Is a different test appropriate in reviewing the decisions of private sports regulatory bodies? Is the procedural history of the PGA Tour's ban on square-grooved irons relevant to such an analysis? What facts should the plaintiffs in *Gilder* have had to establish at trial to warrant a finding that the ban on square-grooved irons violated the antitrust rule of reason? And by the way, who are the multiple parties to the "conspiracy," or are these rules the conduct of a single entity immune from § 1 attack?

2. Is the rule of reason analysis different if the purpose of the equipment regulation is to protect the safety of players (as in the aluminum bat example we will examine in the next chapter) than if the purpose is to limit or equalize the level of performance of the players (as in the other cases)? Is it more or less procompetitive in the antitrust sense of the word to protect players' safety as compared to limiting the effect of equipment on performance?

3. Of what relevance to the rule of reason analysis would it be if different governing bodies, like the USGA and the Royal & Ancient, use different standards to regulate the same level of equipment performance?

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[k] Besides the cases mentioned in the text, other relevant precedents include Weight-Rite Golf Corp. v. United States Golf Ass'n, 1990 WL 145594, 1990–2 Trade Cases (CCH) § 69,181 (M.D.Fla.1990) (injunction request), and 766 F.Supp. 1104 (M.D.Fla.1991) (final decision), and Eureka Urethane, Inc. v. Professional Bowlers Ass'n. of Am., 746 F.Supp. 915 (E.D.Mo.1990).

Would Callaway have had a stronger case against the USGA because the Royal & Ancient did not have as limiting a standard and allowed Callaway's driver to be used?

4. How could Karsten establish that significant damages would be inflicted on its business if Tour players are not allowed to use the firm's square-grooved irons in PGA Tour tournaments? Did Bob Gilder, or Mark Calcavecchia more recently, and others actually pay for their Ping Eye2 irons? Should that matter?

5. Does the prior question imply that the USGA and the USTA, with their broad regulatory reach, are more exposed to antitrust litigation about their equipment rules than the PGA Tour and the ATP, which govern only professional tours? Or do the latter bodies display a characteristic antitrust exposure of their own?

6. Suppose that the ATP adopted a rule banning use of racket frame designs that imparted high levels of speed and power to the ball, especially on the serve. Why might the ATP be tempted to pass such a rule? Should adoption of such a rule be subject to antitrust challenge by either racket manufacturers or players? More so than if the ATP responded to the growing number of 130 miles-per-hour serves by shortening the service court, or by allowing only one serve per point?

7. Should the PGA Tour consider adopting a standardized golf ball for all its tournaments—a ball designed not to fly as far as existing balls? What practical arguments would be advanced within the Tour for and against such action? Would this be a risky legal step? Should it matter whether the Tour periodically sold to the highest bidder the exclusive right to manufacture and market the ball used in its events (with the PGA Tour distributing the proceeds among Tour members either *per capita* or *pro rata*, depending on the players' performance during the year)?

8. How should a court deal with litigation by a manufacturer complaining that a professional sports league (or the NCAA) had banned its type of equipment from being used in the league's games (like aluminum bats by MLB or composite bats now by the NCAA)? In the early 1980s, a manufacturer that had developed a laser-beam device to measure for first downs in football brought a § 1 antitrust claim against the NFL for refusing to allow a home team to use the device in its games. In an unpublished opinion, the district court in San Antonio summarily dismissed the case on the ground that the NFL decision had no anticompetitive effects. *Carlock v. NFL*, Case #SA–79–CA–133 (W.D.Tex.1982).

> The NFL's refusal to purchase the plaintiffs' invention was merely a business decision made by an entity charged with the orderly and uniform implementation of the rules of professional football. The decision was based on the League's own business judgment, in consideration of numerous factors, including public acceptance of the chain-and-stakes technique for measuring the progress of the football, the undesirability of over-elaboration of

> officiating techniques, risks of technical failure, additional cluttering of sidelines, additional training problems, line-of-sight problems, and the costs required for the purchase of such equipment. Disappointed by their rejection, the plaintiffs simply seek to have this court substitute its business judgment for that of the NFL, which the plaintiffs believe failed to appreciate the merits of their invention.
>
> Any purchasing decision by any organization, regardless of its form, has some effect on market conditions. The antitrust laws afford product sellers the right to compete for the sale of their products, but the antitrust laws are not designed to guarantee sales of their products. There is simply no antitrust principle that requires any buyer to purchase and make use of an unwanted product simply because the buyer's failure to do so might negatively affect an individual seller or have some effect on the market for the sale of that product.

Is this reasoning persuasive? Does it say anything about the single entity issue discussed in Chapter Seven? Is the court's analysis applicable to cases involving governing bodies for individual sports?[1]

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[1] While these topics are not discussed in this chapter, the following resources provide a look at other issues surrounding the world of individual sports, such as sports wagering, performance enhancing drugs, cycling, athletes' income, and extreme sports. Thomas A. Hamilton, *The Long Hard Fall from Mount Olympus: The 2002 Salt Lake City Olympic Games Bribery Scandal*, 21 Marq. Sports L. Rev. 219 (2010); Miguel A. Ramos, Comment, *Game, Set, Match-Fixing: Will International Anti-Doping Initiatives Pave the Way for Similar Reform for Corrupt Betting in Tennis?*, 32 Hous. J. Intl. L. 201 (2009); Travis Tygart & Anthony R. Ten Haagen, *The Americans with Disabilities Act, the United States Anti-Doping Agency, and the Effort Toward an Equal Opportunity: A Case Study of the United States Anti-Doping Agency v. George Hartman Matter,* 2 Harv. J. Sports & Ent. L. 199 (2011); Lisa Milot, *Ignorance, Harm, and the Regulation of Performance-Enhancing Substances*, 5 Harv. J. Sports & Ent. L. 91 (2014); Brain Dziewa, Comment, *USADA the Unconquerable: The One-Side Nature of the United States Anti-Doping Administrations' Arbitration Process*, 58 St. Louis U. L.J. 875 (2014); Matthew Hard, Note, *Caught in the Net: Athletes' Rights and the World Anti-Doping Agency*, 19 S. Cal. Interdisc. L.J. 533 (2010); Geoffrey Rathgeber, Comment, *Gold Medalist to Cheater?: Improving the World's Fight Against Doping in the Wake of Fina v. Cielo*, 26 Emory Intl. L. Rev. 1111 (2012); Thomas Wyatt Cox, Note, *The International War Against Doping: Limiting the Collateral Damage from Strict Liability*, 47 Vand. J. Transnatl. L. 295 (2014); Ryan Reszel, Comment, *Guilty Until Proven Innocent, and Then, Still Guilty: What the World Anti-Doping Agency Can Learn from the National Football League About First-Time Anti-Doping Violations*, 29 Wis. Intl. L.J. 807 (2012); Zachary Blumenthal, Note, *The Punishment of All Athletes: The Need for A New World Anti-Doping Code in Sports*, 9 J. Intl. Bus. & L. 201 (2010); Nicholas Hailey, Note, *A False Start in the Race Against Doping in Sport: Concerns with Cycling's Biological Passports*, 61 Duke L.J. 393 (2011); Bradley J. Schmalzer, Note, *A Vicious Cycle: The Biological Passport Dilemma*, 70 U. Pitt. L. Rev. 677 (2009); Peter Charlish, *The Biological Passport: Closing the Net on Doping*, 22 Marq. Sports L. Rev. 61 (2011); Blair H. Moses, *Eligibility of Athletes Receiving Necessary Gene Therapy: The Oscar Pistorius Case As Procedural Precedent*, 49 Jurimetrics J. 343 (2009); Joe Fore, *Moving Beyond "Gene Doping": Preparing for Genetic Modification in Sport*, 15 Va. J.L. & Tech. 76 (2010); James Halt, Comment, *Where Is the Privacy in WADA's "Whereabouts" Rule?,* 20 Marq. Sports L. Rev. 267 (2009); Luke P. Breslin, Comment, *Reclaiming the Glory in the "Sport of Kings"—Uniformity Is the Answer,* 20 Seton Hall J. Sports & Ent. L. 297 (2010); Geoffrey Rapp, Essay, *Blue Sky Steroids*, 99 J. Crim. L. & Criminology 599 (2009); Philip Jacques, *Is Congress' Latest Effort to De-Juice Professional Sports Unconstitutional?,* 6 DePaul J. Sports L. & Contemp. Probs. 97 (2009); Chris Deubert, *Putting Shoulder Pads on Schleck: How the Business of Professional Cycling Could Be Improved Through A More American Structure*, 37 Brook. J. Intl. L. 65 (2011); Andrew D. Appleby, *Leveling the Playing Field: A Separate Tax Regime for International Athletes*, 36 Brook. J. Intl. L. 605 (2011); Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DePaul J. Sports L. & Contemp. Probs. 81 (2012).