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NORTH CAROLINA LAW REVIEW

Volume 80 | Number 2

Article 6

1-1-2002

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Recommended Citation

Andrew I. Warden, *Driving the Green: The Impact of PGA Tour, Inc. v. Martin on Disabled Athletes and the Future of Competitive Sports*, 80 N.C. L. REV. 643 (2002).

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Driving the Green: The Impact of *PGA Tour, Inc. v. Martin* on Disabled Athletes and the Future of Competitive Sports

“We ought to take [the [J]ustices] all out and play golf. They’d change their minds. I promise you, [walking is] fundamental.”¹

-Jack Nicklaus

“I just don’t think riding a cart makes a big difference. I don’t see how it affects ball-striking, reading the green, hitting the putt.”²

-Phil Mickelson

INTRODUCTION

Casey Martin is a man chasing his dream.³ He simply wants to become a great golfer on the Professional Golfers’ Association Tour

1. Joan Biskupic & Harry Blauvelt, *Ruling to Reach Beyond Golf*, USA TODAY, May 30, 2001, at 1A (quoting Jack Nicklaus).

2. *What People Are Saying*, USA TODAY, Jan. 17, 2001, at 5C (quoting Phil Mickelson).

3. Martin was raised in Oregon where he won the state high school golf championship in 1989 and went on to win the Oregon State Amateur Golf Championship in 1993. Marcia Chambers, *Nike Has Its Money on Both Sides of Disability Dispute*, N.Y. TIMES, Feb. 2, 1998, at C5. Martin took his talents to Stanford University where he teamed with current PGA Tour players Notah Begay and Tiger Woods to win the 1994 NCAA Golf Championship. *Casey Martin Biographical Information*, at <http://www.pgatour.com/players/bios/20445.html> (last visited Nov. 27, 2001) (on file with the North Carolina Law Review). Martin, 29, turned professional in 1995 and earned his first professional win on the Nike Tour (now called the Buy.com Tour), a minor league tour one step below the PGA Tour, at the Lakeland Classic in January of 1998. *Id.* After playing two years on the Nike Tour, Martin qualified for the 2000 PGA Tour by virtue of finishing fourteenth on the Nike Tour money list. *A Look Back at the Martin Case* (May 29, 2001), at <http://www.pgatour.com/u/ce/feature/pgatour/0,1977,2106970,00.html> (on file with the North Carolina Law Review). Unfortunately, Martin’s initial season on the PGA Tour was met with much less success. Although he ended the season as one of the leaders in driving distance, Martin finished 179th on the money list and was unable to retain his PGA Tour privileges. See PGA TOUR ENCYCLOPEDIA, *Casey Martin’s 2000 Stats*, at <http://www.pgatour.com/players/stats/20445.html>; Brian Campbell, *On the Bubble . . . No More* (Nov. 11, 2000), at <http://www.golfonline.com/news/golfweek/2000/november/pgatourqschool1111.html> (on file with the North Carolina Law Review). Martin’s 2001 season on the Buy.com Tour has been equally frustrating as he has missed the cut in over half the events he has entered. See *Casey Martin, Player Profile*, at <http://sports.yahoo.com/pga/players/9/978> (last visited Nov. 27, 2001) (on file with the North Carolina Law Review) (showing Martin made the cut in only seven of sixteen events).

(“PGA Tour”).⁴ Martin certainly has the talent to tee it up with the world’s best, as evidenced by his previous achievements.⁵ Nevertheless, he has one characteristic that distinguishes him from every other golfer on the PGA Tour: his disability.

Martin was born with Klippel-Trénaunay-Weber Syndrome, a rare circulatory disorder in his right leg that has rendered it half the size of a normal leg.⁶ Because this condition limits his ability to walk lengthy distances during a round of golf, Martin asked the PGA Tour in 1997 to provide him with a golf cart so he could ride between shots and holes.⁷ Due to PGA Tour rules mandating that all players walk the course,⁸ the PGA Tour denied Martin’s request.⁹ Following this decision, Martin brought suit under the Americans with Disabilities Act¹⁰ seeking a waiver of the PGA Tour’s walking rule.¹¹ The next

4. “I’d love to be known as a great golfer. Not as a guy in a cart or with a disability—just a great golfer.” Nick Charles & Don Sider, *Fairway or No Way?*, PEOPLE WKLY., Feb. 9, 1998, at 48, 48 (quoting Casey Martin).

5. See *supra* note 3 and accompanying text.

6. Dave Kindred, *Martin’s on Par to Prove Himself*, SPORTING NEWS, June 29, 1998, at 63. Martin has Klippel-Trénaunay-Weber Syndrome. *Id.* The end result of this condition is that blood gets trapped in the leg due to its inability to circulate back through the body. *Id.* This condition causes an erosion of the leg bone as well as chronic pain. Charles & Sider, *supra* note 4, at 48. After caddying for Martin at the 2001 Richmond Open, *Sports Illustrated* columnist Rick Reilly said the leg looked like “a baseball bat somebody had used to hit a thousand rocks.” Rick Reilly, *On His Last Leg*, SPORTS ILLUSTRATED, June 4, 2001, at 102, 102. Because the condition is progressive, the leg may have to be amputated at some point in the future. Charles & Sider, *supra* note 4, at 48.

7. See *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1886 (2001). Martin’s first request for a cart came when he was trying to gain entry onto the PGA Tour through its qualifying school in 1997. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 996 (9th Cir. 2000), *aff’d* 121 S. Ct. 1879 (2001). Martin was permitted to ride a cart during the first two stages, but had to walk during the final round. *Martin*, 121 S. Ct. at 1886.

8. *Martin*, 121 S.Ct. at 1885.

9. *Id.* at 1886. While at Stanford, Martin successfully persuaded the Pacific 10 Conference and the National Collegiate Athletic Association to waive the requirement that golfers walk and carry their own clubs. *Id.* at 1886–86.

10. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101–12213 (1994)). After the PGA Tour denied Martin’s request for a cart, he obtained a preliminary injunction that allowed him to use a cart in all PGA Tour and Nike (Buy.com) Tour events. *Martin*, 121 S. Ct. at 1886. Pending a final resolution of the Martin case, the PGA Tour Policy Board, the rule making body of the PGA Tour, stated that it would abide by all judicial rulings that apply to Casey Martin, but it would not waive the rule for any other golfer. *Statement from PGA Tour*, at <http://www.pgatour.com/u/ee/multi/pgatour/0,1927,2145540,00.html> (May 29, 2001) (on file with the North Carolina Law Review). In contrast, officials on the Australian PGA Tour recently granted a request to allow a disabled golfer to use a cart. *Lane Becomes First Cart Using Australian*, GOLF TODAY (FEB. 29, 2000) at <http://www.golftoday.co.uk/news/yeartodate/news00/cart1.html> (on file with the North Carolina Law Review). Nigel Lane, who suffers from a mysterious foot and back ailment, was given a cart prior to the initiation of any legal action. *Id.*

four years witnessed a rare national debate that attracted attention in both the sports and news worlds.¹²

This debate came to a partial resolution in May 2001 when the United States Supreme Court issued an opinion in *PGA Tour, Inc., v. Martin*.¹³ In *Martin*, the Court affirmed the United States Court of Appeals for the Ninth Circuit's decision allowing Martin to use a cart.¹⁴ More specifically, a seven-member majority of the Court made two critical holdings. First, the Court stated that the PGA Tour was subject to the mandates of Title III of the ADA, and *Martin* was within its protection.¹⁵ Second, the Court stated that a cart would not fundamentally alter the nature of competitive golf tournaments.¹⁶

11. *Martin*, 121 S.Ct at 1885. Three sets of rules govern PGA Tour sanctioned tournaments. First, the "Rules of Golf," written by the United States Golf Association ("USGA") and the Royal and Ancient Golf Club in Scotland, apply a general set of rules that govern play for professionals as well as amateurs. *Id.* at 1884. The "Rules of Golf" do not specifically prohibit golfers from using carts during play. *Id.* at 1984-85. Second, the "Conditions of Competition and Local Rules," also called the "hard card," apply specific rules that govern all PGA Tour and Buy.com events. *Id.* at 1885. This set of rules has posed the biggest obstacle for Martin as it states that all competitors shall walk the course. *Id.* Third, "Notices to Competitors" govern the rules and conditions at individual PGA Tour tournament venues. *Id.* For example, these rules may explain how to deal with a particular hazard and may even permit golfers to use carts in order to speed up play if a lengthy distance exists between holes. *Id.*

12. Casey Martin has been the subject of numerous opinionated pieces by sports writers as well social commentators concerning whether he should be able to use a cart on the PGA Tour. *See, e.g.*, Ira Berkow, *Sports of the Times; Fairness and Riding a Golf Cart*, N.Y. TIMES, Feb. 1, 1998, at § 8 (arguing that because the PGA Tour has enacted several rule modifications in the past, the Tour should grant Martin a cart); John Leo, *Duffers in the Court; The Supremes Shouldn't Bend the Rules for a Disabled Golfer*, U.S. NEWS & WORLD REP., June 11, 2001, at 16 (criticizing *Martin* because the Supreme Court should not intrude into the rules of competitive sports); Scott Mills, *Casey Martin Case Sets Bad Precedent*, BALT. SUN, Feb. 22, 1998, at 6F (criticizing the *Martin* decision); Terrance Moore, *Ruling Allowing Martin to Use Cart Disregards the Essence of Golf*, ATLANTA J. CONST., Feb. 13, 1998, at E3 (criticizing the *Martin* decision); Rick Reilly, *Give Casey Martin a Lift*, SPORTS ILLUSTRATED, Feb. 9, 1998, at 140, 140 (supporting the position that Casey Martin should be allowed to use a cart); George Will, *Meddling in Games*, NEWS & OBSERVER (Raleigh, N.C.), June 3, 2001, at 31A (criticizing the *Martin* decision).

In addition, this debate divided many of the players on the PGA Tour. *Compare Golfers Speak Out*, USA TODAY, May 30, 2001, at 3C (quoting Steve Pate and Frank Nobile, current PGA Tour players, as stating that a cart provides Martin with an advantage over other players who have to walk), *with Golf a la Cart*, SPORTS ILLUSTRATED, Dec. 15, 1997, at 33, 33 (quoting several PGA Tour players as saying they support Martin's battle to obtain a cart), *and* Kindred, *supra* note 6, at 63 (quoting the late Payne Stewart as stating that Casey Martin should be allowed to ride a cart).

13. *Martin*, 121 S. Ct. at 1879.

14. *Id.* at 1898.

15. *Id.* at 1890.

16. *Id.* at 1892-93, 1897. Justice Scalia filed a dissenting opinion in which Justice Thomas joined. *Id.* at 1898 (Scalia, J., dissenting).

Although the Court's opinion ended Martin's specific case, it did not resolve the larger controversy surrounding the integration of disabled athletes into competitive athletics.¹⁷ What remains to be seen is whether the dire predictions of the various "Chicken Littles" of the sporting punditocracy will come to fruition.¹⁸ These critics have opined that the "sky is falling" because *Martin* represents the end of equality and uniformity in sports.¹⁹ They argue that the case was never only about Casey Martin or even about golf. Instead, the case was always about the next person who would want a cart or other assistance device and the flood of litigation that would surely ensue by amateur and professional athletes of all sports who desire a rule modification.²⁰

17. Prior to *Martin*, several courts confronted the issue of integrating disabled athletes into competitive sports. Compare *Schultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222, 1225–26 (C.D. Cal. 1996) (granting a little league baseball player with cerebral palsy the right to play in a younger age division despite the fact that he would otherwise be too old to play), *Johnson v. Fla. High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 587 (M.D. Fla. 1995) (permitting a nineteen year-old deaf athlete to play football even though he exceeded the eighteen year-old age limit for participation in high school athletics), *vacated as moot*, 102 F.3d 1172, 1173 (11th Cir. 1997), and *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 346 (D. Ariz. 1992) (granting a temporary restraining order to a wheelchair-bound first base coach so he could continue to coach on the field), *with Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 931 (8th Cir. 1994) (denying a learning disabled nineteen year-old baseball player's request for a waiver of a by-law requiring all Missouri high school athletes to be under the age of nineteen), and *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 225 (E.D. Mo. 1996) (rejecting a request by a youth hockey player with Attention Deficit Disorder that his father be allowed to be on the ice during competition).

18. JAMES FINN GARNER, *POLITICALLY CORRECT BEDTIME STORIES* 57–62 (1994). The story of Chicken Little is a famous children's tale in which the title character is unexpectedly struck on the head with an acorn. *Id.* at 57. In response, Chicken Little proclaims that, "The sky is falling, the sky is falling." *Id.* The analogy to *Martin*, 121 S. Ct. at 1879, is appropriate because many commentators incorrectly believe that the sky is indeed falling now that *Martin* is established precedent. See *infra* notes 19–21 and accompanying text.

19. Dave Kindred, *Doomsday Is Not Nigh*, SPORTING NEWS, June 11, 2001, at 62, 62 (quoting the Libertarian Party, "What's next? Federally mandated stilts so . . . midgets can play professional basketball? Should Roger Clemens be ordered by the court to throw slower fastballs to near-sighted hitters?"); Leo, *supra* note 12, at 16 (stating that the decision opens up significant room for other courts to adjust the rules of sport to advance their own ideas of social justice); Moore, *supra* note 12 (arguing that the rules of professional sports should not be altered to fit an individual's particular needs); Will, *supra* note 12, at 31A (stating that courts will be confronted with cases from various athletes seeking alterations in the rules in order to accommodate different disadvantages).

20. E.g., David Broder, *Decreeing the DH?*, NEWS & OBSERVER (Raleigh, N.C.), June 3, 2001, at 31A ("I am scared to death of the precedent that may have been set [by the *Martin* decision]."); Suzanne Fields, *High Court Shanks One in Casey Martin Decision*, ARIZ. REPUBLIC, June 2, 2001, at B7 (stating that "nearly everybody is worried about the next guy (or gal) who will step up and apply for a golfer's cart or the lame racer who will qualify for wheels"); *Golfers Speak Out*, USA TODAY, May 30, 2001, at 3C ("In Casey's

Despite these creative doomsday theories,²¹ the Supreme Court crafted an opinion that severely limits the possibility of wholesale changes across the American sporting landscape. By focusing on Martin's individual circumstances, the opinion provides qualified disabled athletes with the opportunity to participate in competitive sports while simultaneously minimizing the chance that the rules of competitive athletics will transform into a collection of individualized exceptions.

For example, the *Martin* decision might provide highly talented, disabled golfers like Ford Olinger²² the opportunity to play on one of golf's grandest stages, the U.S. Open.²³ Olinger suffers from a hip condition that limits his ability to walk a golf course.²⁴ In 1998, Olinger applied to play in one of the U.S. Open's local qualifying tournaments and requested a cart.²⁵ Like the PGA Tour, the United States Golf Association ("USGA")²⁶ has a set of established rules

particular case, there's no doubt about his disability. This is not about Casey Martin. It's about the possibilities it opens up. The next person's disabilities—it might not be as clear.") (quoting current PGA Tour player Hal Sutton); Leo, *supra* note 12 (stating that "[w]e will now have a great rush of litigation followed by more sports rules being bent or repealed").

21. See, e.g., Joe Queenan, *Differently-Abled Athletes*, WALL ST. J., Mar. 2, 1998, at A18 (envisioning that baseball players may petition for golf carts in order to circle the bases); Press Release, Libertarian Party, From Casey Martin in a Golf Cart to Basketball-playing Midgits on Stilts (May 29, 2001), at <http://www.lp.org/press/archive.php?function=viewofrecord=205> (hypothesizing "rowboats for would-be olympic swimmers" and head-starts for sprinters as a result of the *Martin* decision).

22. Olinger, 33, works as a local golf club professional in Warsaw, Indiana. *Golf Cart Rulings: The Battle Isn't Over Yet*, SPORTS ILLUSTRATED, Mar. 20, 2000, at 40. Although he has never qualified for the PGA Tour, Olinger has been a member of the Professional Golfers' Association since 1988. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1001 (7th Cir. 2000), cert. granted, judgment vacated and remanded, 121 S. Ct. 2212 (2001).

23. Qualifying for the U.S. Open is a very demanding competition. See *Olinger*, 205 F.3d at 1002. The USGA holds local and sectional qualifying tournaments at various courses around the country. *Id.* In an average year, over 7,000 players compete for the chance to be one of the chosen hundred to actually play in the Open. *Id.*

24. Olinger suffers from a degenerative hip disorder known as bilateral avascular necrosis. *Golf Cart Rulings: The Battle Isn't Over Yet*, *supra* note 22, at 40.

25. *Olinger*, 205 F.3d at 1004.

26. The PGA Tour and the USGA are entirely separate entities. See JOHN FEINSTEIN, *THE MAJORS: IN PURSUIT OF GOLF'S HOLY GRAIL* 222 (1999). The PGA Tour is a non-profit organization that runs the PGA Tour, the Buy.com Tour, and the Senior PGA Tour. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1884 (2001). In contrast, the USGA is a non-profit association of clubs, courses, and individuals that works to promote the best interests of golf. *Olinger*, 205 F.3d at 1002. The USGA runs tournaments each year in thirteen designated categories with the biggest being the U.S. Open. *Id.* at 1002. Although professional players take part in events run by both organizations, both the tournaments and organizations are autonomous from one another. See FEINSTEIN, *supra*, at 222.

that prohibit cart use in tournament play.²⁷ After his request was denied, Olinger filed suit against the USGA.²⁸

Although the *Martin* decision does not guarantee that Olinger will be able to use a cart in USGA tournament play,²⁹ the Supreme Court's opinion effectively corrected an erroneous decision by the United States Court of Appeals for the Seventh Circuit in Olinger's case that neglected to consider any of his individual circumstances and held that a cart fundamentally altered the nature of competitive golf.³⁰ In light of *Martin*, Olinger, and other similarly situated athletes,³¹ will now have the opportunity to convince the courts that

27. USGA competitions are governed by the USGA's "Rules of Golf." *Olinger*, 205 F.3d at 1003. In addition to this book, the USGA has supplemental rules for tournaments entitled "Local Rules and Conditions of Competition for USGA Championships." *Id.* Although no specific ban on carts exists within the "Rules of Golf," the supplement gives tournament officials the discretionary power to prohibit carts. *Id.* With respect to the U.S. Open, the tournament entry form expressly states that "[p]layers shall walk at all times during a stipulated round." *Id.*

28. *Id.* at 1004.

29. The Supreme Court's opinion in *PGA Tour, Inc. v. Martin* only applied to Casey Martin because the Court focused on Martin's individual circumstances. *See Martin*, 121 S. Ct. at 1896-1898. Although the opinion obviously has the potential to provide other athletes with athletic accommodations, such accommodations will only be necessary upon an analysis of the athlete's individualized circumstances. *See infra* notes 238-42 and 251-62 and accompanying text.

30. *See Olinger*, 205 F.3d at 1005-07. The Seventh Circuit's opinion read more like an homage to the virtues of golf than a consideration of Olinger's individual claim. Michael Waterstone, *Let's Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports*, 2000 BYU L. REV. 1489, 1529 (stating that the Seventh Circuit's opinion references twenty-two professional golfers by name and recounts at least nine irrelevant stories from golf's history). Rather than discuss the specifics of Olinger's disability as it related to his requested relief, the Seventh Circuit largely relied on the anecdotal testimony of Ken Venturi, a former PGA Tour player. *See id.* at 1518-19.

31. In addition to Olinger, a second golfer has also filed suit against the USGA seeking to use a cart during tournament play. JaRo Jones, 54, suffers from post-polio syndrome and petitioned the USGA for the right to ride a cart in the U.S. Senior Open. Michael Lutz, *Texas Golfer Hopes Supreme Court Ruling Will Help His Dream* (May 30, 2001), at <http://sports.yahoo.com/pga/news/ap/20010530/ap-disabledgolfer-jones.html> (on file with the North Carolina Law Review).

The U.S. District Court for the Western District of Texas granted a preliminary injunction in favor of Jones permitting him to use a cart during the 2000 qualifying rounds. *Id.* The USGA appealed this decision and the case is currently pending before the U.S. Court of Appeals for the Fifth Circuit. *Id.* In addition to *Martin*, *Jones*, and *Olinger*, several other courts have addressed the ADA's relationship to golf. *See, e.g.,* *Dorsey v. Am. Golf Corp.*, 98 F. Supp. 2d 812, 817 (E.D. Mich. 2000) (stating that the plaintiff made sufficient allegations to withstand a motion to dismiss by claiming that a golf course failed to provide specialized golf carts, handicap parking, handicap accessible facilities, and handicap accessible tee boxes); *Slaby v. Berkshire*, 928 F. Supp. 613, 615 (D. Md. 1996) (holding that a country club did not violate the ADA because its placement of ropes and barriers only mildly inconvenienced disabled golfers attempting to play the course).

their individual circumstances warrant modifications of the rules of competitive athletics.³²

Olinger's and Martin's individual circumstances illustrate why the Supreme Court correctly decided the *Martin* case. Both Olinger and Martin share a rare combination of physical affliction and athletic talent. The Supreme Court correctly recognized that Martin possesses these unique attributes and emphasized that future courts should give individualized treatment to similarly situated athletes who seek access to the world of competitive athletics.³³ As a result of this focus on the individual athlete, the *Martin* decision does not invite the opening of the litigation floodgates.³⁴ Instead, the Court's opinion effectively advances disabled athletes in the fight to pursue their athletic goals.

Additionally, the Supreme Court's focus on the individual circumstances of the athlete balances the rules of competitive sports and the desire for accommodation. Contrary to many critics' beliefs,³⁵ *Martin* will not lead to shorter baskets in the NBA or armored suits in the NFL.³⁶ Rather, *Martin* simply requires an individual examination of a person's circumstances with respect to his or her requested modification.³⁷ Because this analysis considers the requested modification's impact on the game and other competitors,³⁸ the Supreme Court has appropriately limited the reach of *Martin* to those rare instances when a rule modification would meet two criteria.

32. Like Martin, Olinger also petitioned the Supreme Court for a writ of certiorari. *Olinger v. United States Golf Ass'n*, 121 S. Ct. 2212, 2212 (2001). The Court granted Martin's request, but declined to rule on Olinger's request until Martin's case was decided. *Id.* Following the announcement of the *Martin* decision, the Supreme Court vacated the judgment of the Seventh Circuit and remanded Olinger's case for additional consideration in light of the *Martin* decision. *Id.*; see also Phil Richards, *Hoosier Golfer Gets Break with Supreme Court Ruling*, INDIANAPOLIS STAR, June 5, 2001, at D1 ("My first impression is 'Great. We won But until I see it from the 7th Circuit Court, in handwriting, I can't go anywhere.'").

33. *Martin*, 121 S. Ct. at 1896-98.

34. Since the *Martin* decision, only one person has requested to ride a golf cart during competition. Lee Penterman, who walks with a limp because of a disease, asked the USGA if he could use a cart while caddying for a friend in the U.S. Amateur Public Links Championship. John DeShazier, *It's the Attitude of the USGA That's Lame; Caddie's Plight Latest Slap in Face*, TIMES-PICAYUNE (New Orleans, La.), July 13, 2001, at D1. The USGA denied this request on the grounds that the *Martin* decision only related to players, not caddies or spectators. See *id.*

35. See *supra* note 12 and accompanying text.

36. See *supra* notes 19 and 21 and accompanying text.

37. See *Martin*, 121 S. Ct. at 1897 (explaining that a basic requirement of the ADA is an individualized need assessment of a disabled person).

38. See *id.* at 1893 (reasoning that some modifications are unreasonable even if they affect all competitors equally).

First, the modification must be absolutely necessary for a disabled athlete to participate in the athletic competition.³⁹ Second, the modification can only have a peripheral impact on the sport and the other participants.⁴⁰

This Comment analyzes the Supreme Court's decision in *PGA Tour, Inc. v. Martin*⁴¹ and assesses the decision's implications for disabled athletes and the future of competitive sports. Part I of this Comment focuses on the relevant portions of the American with Disabilities Act ("ADA"), as they apply to disabled athletes.⁴² Part II of this Comment addresses an issue that was not covered by the Supreme Court in *Martin*: Who qualifies as an athlete with a "disability" under the ADA?⁴³ Part IV of this Comment critically assesses the Supreme Court's decision in *Martin*, paying careful attention to three key questions. First, are sports organizations subject to Title III of the ADA?⁴⁴ Second, is an athlete's proposed accommodation a reasonable and necessary modification in policy, practice, or procedure?⁴⁵ Third, would the proposed modification fundamentally alter the nature of the competition or event?⁴⁶ This Comment concludes by summarizing *Martin*'s likely impact on disabled athletes and competitive athletics.⁴⁷

I. THE AMERICANS WITH DISABILITIES ACT: AN OVERVIEW

A. *History and Background of the ADA*

Before *Martin*'s impact can be properly assessed, one needs an understanding of the legal basis underlying the suit, the Americans with Disabilities Act ("ADA"). The ADA, enacted on July 26, 1990, is the most expansive and ambitious law protecting disabled citizens.⁴⁸

39. See *infra* notes 201–10.

40. See *infra* notes 229–50.

41. 121 S. Ct. 1879 (2001).

42. See *infra* notes 48–109 and accompanying text.

43. See *infra* notes 110–49 and accompanying text. The Court did not have to reach this issue because the PGA Tour did not contest the fact that *Martin* had a recognized disability under the ADA. See *Martin*, 121 S. Ct. at 1885–86.

44. See *infra* notes 150–84 and accompanying text.

45. See *infra* notes 185–213 and accompanying text.

46. See *infra* notes 213–62 and accompanying text.

47. See *infra* note 264 and accompanying text.

48. Diane Heckman, *Athletic Associations and Disabled Student Athletes in the 1990s*, 143 EDUC. LAW REP. 1, 11 (2000). Although it represents the most comprehensive law for the benefit of disabled citizens, the ADA was not the first law to assist disabled individuals in their struggle against discrimination. See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (1994 & Supp. V 1999) (requiring that all children

In passing the ADA, Congress sought to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁴⁹ The ADA's breadth derives in large part from its expansion upon ideas that were originally developed in the Rehabilitation Act of 1973.⁵⁰

The close relationship between the ADA and the Rehabilitation Act is important to the interpretation of the ADA.⁵¹ Both Congress and the courts have recognized that the ADA should be construed to provide at least as much protection to disabled citizens as the Rehabilitation Act afforded.⁵² This recognition means that courts should read the ADA and Rehabilitation Act in conjunction with one another.⁵³ For instance, the definition of the word "disability" within

with disabilities have a free public education with attention to their special needs); Design and Construction of Public Buildings to Accommodate Physically Handicapped, 42 U.S.C. §§ 4151-4157 (1994) (mandating that buildings constructed or financed by the federal government accommodate those with disabilities).

49. 42 U.S.C. § 12101(b)(1) (1994). Congress invoked a broad array of its powers in passing the ADA, including the Commerce Clause and the Fourteenth Amendment. *Id.* § 12101(b)(4).

50. *See* The Rehabilitation Act of 1973, Pub. L. No. 93-112, title V, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1994)). The Rehabilitation Act prohibits discrimination against disabled individuals who participate in programs that receive federal funds. *See* 29 U.S.C. § 794(a) (Supp. V 1999). These "programs" include universities, state and local government agencies, and corporations that receive federal money. *Id.* § 794(b). In addition to the Rehabilitation Act, the ADA was also modeled, in some respects, after Title II of the Civil Rights Act of 1964. *Compare* 42 U.S.C. § 2000a (1988) (prohibiting discrimination on the basis of race, color, religion, or national origin in specified places of accommodation), *with* § 12182(a) (prohibiting discrimination against disabled individuals by places of public accommodation).

51. *See, e.g.,* Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 845 n.6 (7th Cir. 1999) (stating that the standards applicable to the Rehabilitation Act also apply to the ADA); Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997) (holding that cases construing one act are instructive in construing the other because the two statutes are largely the same); Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995) (stating that cases involving claims under the Rehabilitation Act are instructive in evaluating claims under the ADA).

52. § 12201(a) (stating that unless otherwise provided, nothing in the ADA should be construed to apply a lesser standard than the standard of protection that applies to the Rehabilitation Act); Bragdon v. Abbott, 524 U.S. 624, 631-32 (1998) (noting that the ADA provides at least as much protection as the regulations implementing the Rehabilitation Act). Nevertheless, it should be noted that the ADA's coverage is more expansive than the Rehabilitation Act. Rhodes v. Ohio High Sch. Athletic Ass'n, 939 F. Supp. 584, 588 (N.D. Ohio 1996) ("The main difference between the Rehabilitation Act and the ADA is that the coverage of the ADA is broader, extending its [p]rohibition against discrimination to private individuals, including private owners and operators of places of public accommodation.").

53. Paul M. Anderson, *Spoiling a Good Walk: Does the ADA Change the Rules of Sport?*, 1 VA. J. SPORTS & L. 44, 47 (1999) (stating that the ADA should be read together with the Rehabilitation Act).

the meaning of the ADA is based upon the definition of "handicap" in the Rehabilitation Act.⁵⁴ Therefore, the word "disability," when used in conjunction with the ADA, should be interpreted in a manner consistent with the case law and regulations governing the meaning of "handicap" under the Rehabilitation Act.⁵⁵

In addition to analogous statutes, courts must also construe the ADA in light of its own legislative history. Most importantly, for present purposes, nothing in the ADA's legislative history indicates that Congress intended to exclude the ADA from the field of competitive athletics. In fact, the only mention of sports during the floor debates concerned the ADA's possible impact on drug testing policies in major professional sports leagues.⁵⁶ Although this silence might yield numerous interpretations, the ADA only gives explicit wholesale exclusions to two entities, private clubs and religious institutions.⁵⁷ This provision supports the inference that Congress did not intend to exclude competitive athletics from ADA coverage.⁵⁸

Because courts have applied the ADA to competitive athletics on numerous occasions,⁵⁹ an analysis of the ADA's various provisions is necessary for a full understanding of the statute's relationship to athletics. The ADA features five main sections in addition to a brief, yet significant, definitional provision.⁶⁰

54. *Bragdon*, 524 U.S. at 631 (holding that the similarity between the word "disability" as used in the ADA and "handicapped" as used by the Rehabilitation Act carries with it the implication that Congress intended the word "disability" to be construed in accordance with pre-existing interpretations of "handicapped"); *Bolton v. Scrivner, Inc.* 36 F.3d 939, 943 (10th Cir. 1994) (stating that Congress intended that the case law developed under the Rehabilitation Act's definition of "disability" be equally applicable to the ADA). Although the Rehabilitation Act once contained the word "handicap," it has since been amended and replaced by the word "disability." See Pub. L. No. 102-569, § 102(p) (32), 106 Stat. 4360 (1992) (codified at 29 U.S.C. § 794(a) (1994)).

55. *Bragdon*, 524 U.S. at 631; see also *Collings*, 63 F.3d at 832 n.3 (stating that the legislative history of the ADA points toward the conclusion that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA).

56. H.R. REP. NO. 101-485 (1990), reprinted in U.S.C.C.A.N. 303, 363-64; see also 136 Cong. Rec. S9692 (daily ed. July 13, 1990) (statement of Sen. Harkin).

57. § 12187 (exempting private clubs and religious organizations from ADA coverage).

58. Another possible inference from this silence is that Congress never considered applying the ADA to athletics. This inference is largely undercut by the fact that Title III of the ADA specifically addresses a number of recreational and sporting venues. *Id.* § 12181(7)(L) (stating that a public accommodation includes "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation").

59. See *supra* note 17 and accompanying text.

60. See § 12102 (definitions); §§ 12111-12117 (Title I); §§ 12131-12165 (Title II); §§ 12181-12189 (Title III); 47 U.S.C. §§ 225, 611 (Title IV); 42 U.S.C. §§ 12201-12213 (Title V). Titles IV and V have little impact on disabled athletes, therefore they do not

B. Definition Section of the ADA

The ADA's first section delineates who can receive protection as a "disabled" individual.⁶¹ This section specifically states that a person can only qualify as having a "disability" if possessed with one of the following: (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) "a record of such an impairment;" or (3) "being regarded as having such an impairment."⁶² Despite their brevity, these three broad statements have invited copious interpretation, especially concerning what constitutes a "major life activity" and a "physical and mental impairment."⁶³

With respect to the first definition of "disability," determining whether a person has a "physical or mental impairment" for purposes of the ADA is a relatively straightforward task. This clarity is largely due to the detailed and comprehensive definition put forth by the United States Department of Justice ("DOJ").⁶⁴ Nevertheless, determining which ailments falling outside the DOJ regulations

merit significant discussion. In short, Title IV applies the provisions of the ADA to the Federal Communications Commission. *See* 47 U.S.C. § 225. Title V contains a variety of miscellaneous provisions, most importantly for this analysis, stating that the ADA provides at least as much protection as the Rehabilitation Act. *See supra* notes 48–52 and accompanying text.

61. *See* 42 U.S.C. § 12102(2).

62. *Id.* § 12102(2)(A)–(C). With respect to the first category, the Supreme Court has adopted a three question test to determine whether an individual is disabled under the ADA: (1) is the individual physically or mentally impaired?; (2) is a major life activity implicated?; and (3) does the impairment substantially limit the major life activity? *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

63. *See infra* notes 64–74 and accompanying text.

64. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.104(1) (2000). A "physical or mental impairment" is:

- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
- (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; or
- (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious disease and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism; or
- (iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.

Id.

constitute a “physical or mental impairment” for purposes of the ADA has sparked substantial litigation.⁶⁵

Similarly, the question of whether an individual’s disability limits a “major life activity” has also proven difficult to answer in certain circumstances, as evidenced by the significant amount of litigation surrounding the topic.⁶⁶ Before much of this litigation began, the Equal Employment Opportunity Commission issued a regulation attempting to clarify the meaning of “a substantial limitation of a major life activity.”⁶⁷ Although the case law and administrative provisions give some guidelines for analyzing what constitutes a limitation on a major life activity, the broad language in these definitions still promotes a wide array of interpretations.⁶⁸

65. See, e.g., *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (holding that obesity unrelated to a physiological disorder is not a physical impairment under the ADA); *Paleologos v. Rehab Consultants, Inc.*, 990 F. Supp. 1460, 1464–66 (N.D. Ga. 1998) (holding that stress and depression disorders may or may not be disabilities under the ADA depending on the circumstances surrounding individual cases); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437, 1443–46 (D. Kan. 1996) (stating that a person with a low anger threshold who had the potential to “go postal” was not disabled under the ADA).

66. Numerous cases, within a variety of contexts, have dealt with the issue of what constitutes a limitation on a major life activity. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 638–42 (1998) (discussing whether reproduction is a major life activity and also whether HIV places a limitation on this activity); *Pritchard v. Southern Co. Servs.*, 92 F.3d 1130, 1132–34 (11th Cir. 1996) (discussing whether a nuclear engineer suffering from depression was limited in a major life activity due to the fact that her illness prevented her from contributing to nuclear related projects); *Langford v. County of Cook*, 965 F. Supp. 1091, 1095–96 (N.D. Ill. 1997) (analyzing whether a person suffering from a stress related disorder such that the person cannot work for a specific job supervisor constitutes a limitation of a major life activity).

67. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i)–(j) (2000). The regulation defines “substantially limits” as being unable to perform a major life activity that the average person in the general population can perform, or being significantly restricted in performing a particular major life activity as compared to an average person who can perform the same activity. *Id.* § 1630.2(j)(62)(i)–(ii). This regulation also lists three factors that should be taken into account when analyzing whether or not a person is substantially limited in a major life activity: (1) the severity of the impairment; (2) the duration of the impairment; and (3) the permanent or long term impact resulting from the impairment. *Id.* § 1630.2(j)(1)(i)–(iii). For example, caring for one’s self, walking, seeing, hearing, speaking, breathing, learning, and working all constitute major life activities. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.3(j)(2)(ii) (2000).

68. Compare *Bingham v. Or. Sch. Activities Ass’n*, 24 F. Supp. 2d 1110, 1116 (D. Or. 1988) (finding that a high school student diagnosed with attention deficit disorder was disabled under the ADA), with *Price v. Nat’l Bd. of Med. Exam’r*, 966 F. Supp. 419, 427–28 (S.D. W.Va. 1997) (holding that medical students with attention deficit hyperactivity disorder were not disabled under the ADA).

The second definition of “disability” covers individuals with “a record of such an impairment.”⁶⁹ This category primarily applies to individuals who have a record concerning some type of disability in the past, yet show no discernable signs or complications of the disability at the time they seek certification as “disabled” individuals under the ADA.⁷⁰

Finally, the last group of individuals covered by the definition of “disability” are people who are generally “regarded as having such an impairment.”⁷¹ This provision primarily assists two classes of people. First, it protects individuals who are mistakenly thought to have a limiting impairment, even though such a disability does not in fact exist.⁷² Second, it shields those citizens who in fact have an impairment, but are incorrectly classified as being limited in a major life activity because of the impairment.⁷³ The key point with respect to the “regarded as” group is that the entity subject to the ADA must

69. 42 U.S.C. § 12102(2)(B) (1994). The phrase “such an impairment” refers back to the first definition of “disability” listed in § 12102(2)(A). Namely, a “physical or mental impairment that substantially limits one or more of the major life activities.” *Id.* § 12102(2)(A).

70. *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 280–81 (1987) (stating that the plaintiff had a “record of such impairment” after a hospital stay for tuberculosis even though the plaintiff’s employment termination occurred more than twenty years after the hospitalization); Nathanson v. Med. Coll. of Pa., 926 F.2d 1368, 1382 (3d Cir. 1991) (“A person with a record of impairment can still qualify as a handicapped individual [under the Rehabilitation Act] even if that individual’s impairment does not presently limit one or more of that person’s major life activities.”); 29 C.F.R. § 1630.2(k) (2000) (defining a record of such impairment as a history or misclassification of a mental or physical impairment that substantially limits one or more major life activities).

71. 42 U.S.C. § 12102(2)(C) (1994).

72. *Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir. 1997) (stating that in order to bring a claim under the “regarded as” category, a plaintiff must allege that the discriminating party believed, however erroneously, that the plaintiff suffered from an impairment that, if it truly existed, would be covered under the ADA); *see* *Johnson v. Am. Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 819 (7th Cir. 1997) (stating that an employer may regard an employee as disabled under the ADA if the employer misreads a medical report and imputes the employee with a heart condition that the employee never even had); *Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 912–15 (11th Cir. 1997) (analyzing whether an employee who received cancer treatment was “regarded as having such an impairment” due to the fact that an employer gave the individual different job responsibilities following his return to work).

73. *See* *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489–94 (1999) (discussing whether an individual with poor eyesight could be classified as disabled under the ADA when the individual’s employer mistakenly thought the impairment limited a major life activity); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 519–23 (11th Cir. 1996) (holding that a female with a thyroid disorder was properly regarded as having a disability under the ADA because evidence illustrated that her employer modified her job responsibilities because of her medical condition even though her condition was properly controlled by medication).

misperceive the individual's disability; it must either erroneously believe that the person has a limiting impairment or a substantially limiting impairment when, in fact, the impairment does not limit a major life activity.⁷⁴

Once a plaintiff in an ADA action establishes a recognized disability under the ADA, plaintiff's suit may proceed under any one of three different Titles.⁷⁵ The remaining portion of Part I will detail each of these three Titles as they relate to disabled athletes.

C. Title I

Title I of the ADA protects disabled individuals against discrimination in an employment setting.⁷⁶ This provision generally applies to any employer who engages in a commercial enterprise and utilizes fifteen or more employees for a duration of at least twenty weeks.⁷⁷

In order to hold an employer liable for discrimination under Title I, an individual must first prove that he is disabled for purposes of the ADA.⁷⁸ Next, the individual must establish that he can perform all of the "essential functions" of the job,⁷⁹ with or without a reasonable

74. See *Sutton*, 527 U.S. at 489.

75. In any ADA action, the plaintiff has the burden of establishing a recognized disability under the ADA. This showing must be made to the trial court as part of the plaintiff's prima facie case. See, e.g., *Weigert v. Georgetown University*, 120 F. Supp. 2d 1, 6-7 (D.D.C. 2000). Quite obviously, if the plaintiff does not have a disability for purposes of the ADA, the plaintiff cannot seek relief under the statute. See, e.g., *Christian v. St. Anthony Med. Ctr., Inc.*, 117 F.3d 1051, 1053 (7th Cir. 1997).

76. See 42 U.S.C. § 12112(a) (1994). Title I protects disabled citizens in all phases of the employment process, including job application procedures, hiring, advancement, discharge, compensation, training, as well all as other terms and conditions of employment. *Id.*

77. See *id.* § 12111(5)(A). This provision has been referred to as the "mom-and-pop grocery store" exception because it generally excludes small businesses with less than fifteen employees from the mandates of the ADA. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1899 (2001) (Scalia, J., dissenting). The ADA also excludes the United States, any corporation owned by the United States, Indian tribes, and private membership clubs from Title I coverage. § 12111(5)(B)(i)-(ii).

78. See *supra* notes 61-74 and accompanying text.

79. § 12111(8). An essential job function is generally a primary duty of the job that does not include marginal functions. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(n)(1) (1999); see *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) (stating that when an employee's job relates to the safety of other people, an essential function of the job is demonstrating that he can perform those functions without endangering others). The following factors may help determine whether a job function is essential: the employer's judgment, written job descriptions, and the length of time spent performing the activity. 29 C.F.R. § 1630.2(n)(3)(i)-(iii).

accommodation.⁸⁰ In any case, Title I clearly states that an employer will not be required to make an accommodation for a disabled employee if the accommodation would impose an undue hardship on the employer's business.⁸¹

Within the field of athletics, a disabled athlete could certainly utilize Title I to prevent discrimination in an appropriate employment setting. In order to successfully raise a Title I claim, a disabled athlete would first have to establish that he is an employee⁸² and the sports organization is his employer.⁸³ For example, Title I could arguably apply to professional athletes employed by a professional sports franchise.⁸⁴ A professional athlete, however, has yet to successfully sue under Title I.⁸⁵ This lack of litigation results from the

80. *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 763 (5th Cir. 1996). The statute does not specifically define a "reasonable accommodation," however it lists several things that may qualify as such: making facilities accessible to disabled employees, modifying work schedules, and providing either readers or interpreters. § 12111(9)(A)-(B). The Equal Employment Opportunity Commission has expanded this definition to include "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. app. § 1630 (1999).

81. 42 U.S.C. § 12112(b)(5)(A). For purposes of Title I, any action that would require the employer to incur significant difficulty or expense constitutes an undue hardship. *Id.* § 12111(10)(A); see *Jackson v. Veterans Admin.*, 22 F.3d 277, 279-80 (11th Cir. 1994) (holding that the Veterans Administration was not required to accommodate for the absence of a disabled employee because finding another person at the last minute to do the employee's work would place an undue burden upon the employer). Factors to consider in determining whether an accommodation would present an undue hardship include the cost of the accommodation, the effect the accommodation would have on the employment facility, and the financial resources of the employer. *Id.* § 12111(10)(B)(i)-(iii).

82. Under the ADA, an "employee" is defined as "an individual employed by an employer." § 12111(4).

83. An employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." *Id.* § 12111(5).

84. In addition to the professional sports setting, one commentator has suggested that scholarship student athletes may be considered employees of the universities they attend. See Anderson, *supra* note 53, at 49 & n.18. But see *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1175 (Ind. 1983) (holding that a scholarship football player was not an employee of Indiana State University for workers compensation purposes); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 228 (Mich. App. 1983) (holding that a scholarship football player was not an "employee" of his university for purposes of Michigan's Workers' Disability Compensation Act).

85. Anderson, *supra* note 53, at 49. Casey Martin attempted to raise a Title I claim during his motion for summary judgment at the trial level. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323 (D. Or. 1998); *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1247 (D. Or. 1998). Martin argued that he was entitled to protection under Title I due to the fact that he was an employee of the PGA Tour. *Martin*, 984 F. Supp. at 1323. After holding

reality that only a select number of individuals possess both a physical disability and the athletic talent to compete within the able-bodied professional ranks.⁸⁶ Nevertheless, many disabled athletes compete at the amateur and scholastic level for their high schools and universities. For these disabled athletes, Title II of the ADA provides a more easily utilized basis for relief.

D. Title II

Title II of the ADA applies to "public entities, any state or local government agency or department."⁸⁷ This provision prohibits public entities from discriminating against disabled individuals or prohibiting them from participating in the entities' services or programs.⁸⁸ As with Title I, a disabled individual must first be considered a "qualified individual with a disability" under any one of the three definitional categories.⁸⁹ In addition, a successful Title II plaintiff must prove: (1) that the public entity discriminated against the individual in some fashion; and (2) that the discrimination was based upon the individual's disability.⁹⁰

Courts have generally regarded state high school athletic associations as public entities under Title II because public schools have delegated significant authority to these athletic organizations.⁹¹ As a result of this state involvement, several disabled high school

the issue over for trial, the trial court quickly dismissed this contention without significant discussion, incorporating by reference the argument contained in the PGA Tour's brief. *Martin*, 994 F. Supp. at 1247 n.7. Although a major sports organization has yet to be held as an employer under the ADA, the Professional Golfers' Association was held to be an employer under the Civil Rights Act of 1964 for purposes of a motion to dismiss. See *Naismith v. Prof'l Golfers' Ass'n*, 85 F.R.D. 552, 560-61 (N.D. Ga. 1979) (holding that a female golfer and the Professional Golfers' Association had an employment relationship for purposes of a motion to dismiss).

86. Title I's status as the only ADA section that provides for a jury trial and punitive damages bolsters this inference. § 1981a(a)(2), (c). Presumably, a disabled athlete who has valid claims under multiple provisions of the ADA would assert Title I as a first priority because of the potential for a trial in front of a sympathetic jury and a large financial judgment. The fact that no disabled athlete has raised a successful Title I case indicates that qualified plaintiffs simply do not exist.

87. *Id.* § 12131(1).

88. *Id.* § 12132.

89. *Id.* § 12131(2). Under Title II, an individual must have a disability within the meaning of the ADA. *Id.* Also, the person making the claim must be eligible to receive benefits or participate in the public entity's programs either with or without a reasonable modification in the rules or procedures governing the entity. *Id.*

90. *Darian v. Univ. of Mass.-Boston*, 980 F. Supp. 77, 84 (D. Mass. 1997).

91. Julia V. Kasperski, Comment, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?*, 49 BAYLOR L. REV. 175, 183 (1997).

athletes have sued their respective state high school athletic associations under Title II of the ADA.⁹² Title II would not apply to a professional athlete like Casey Martin, however, unless the discriminating actor could be classified as a “public entity.” Because many professional and amateur sports organizations are private entities unaffiliated with state and local governments, most disabled athletes must bring ADA claims under Title III.

E. Title III

Title III⁹³ is the most important section of the ADA with respect to disabled athletes seeking access to competitive sports.⁹⁴ Title III protects disabled individuals against discrimination in places of public accommodation.⁹⁵ Specifically, Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation⁹⁶ by any person who owns, leases (or leases to), or

92. Many Title II claims brought by high school athletes have involved mentally disabled student athletes seeking a waiver of an athletic association’s age eligibility requirement. The problem for these individuals is that their disabilities have forced them to repeat a year of school, thus they reach their final year of high school one to two years older than the rest of the student body. Disabled athletes in this position often confront athletic association rules that prohibit students from competing in athletics if they are either over the age of nineteen or have completed eight semesters of high school. For examples of cases involving this situation, see *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 853–54 (7th Cir. 1999) (affirming the district court’s decision to grant a waiver of Indiana’s eight semester rule to a learning disabled high school basketball player under Title II); *Pottgen v. Mo. State High Sch. Activities Ass’n*, 40 F.3d 926, 930–31 (8th Cir. 1994) (holding that a learning disabled baseball player was not a “qualified individual with a disability” under Title II of the ADA); *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 671 (D. Conn. 1996) (granting a preliminary injunction to a mentally retarded nineteen year old swimmer so he could participate on his high school swim team), *judgment vacated as moot*, 94 F.3d 96 (2d Cir. 1996).

93. §§ 12181–12189.

94. Both Martin and Olinger sued under Title III of the ADA. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1886 (2001); *Olinger v. United States Golf Ass’n*, 205 F.3d 1001, 1004 (7th Cir. 2000), *cert. granted, judgment vacated and remanded*, 121 S. Ct. 2212 (2001).

95. *See* § 12182. For example, Title III protects against the imposition of discriminatory eligibility criteria, the failure to remove structural barriers, and the general exclusion and segregation of disabled individuals. *Id.* § 12182(b)(2)(A)(i)–(v).

96. Title II of the Civil Rights Act was the first statutory provision to confer citizens with protection against discrimination by public accommodations. § 2000a (prohibiting discrimination on the basis of race, color, religion or national origin in specified places of public accommodation). Because both statutes, in addition to the Rehabilitation Act, use the term “place of public accommodation,” some courts confronted with claims from disabled athletes have looked to cases interpreting these other statutes for guidance. *See, e.g., Bowers v. Nat’l Collegiate Athletic Ass’n*, 118 F. Supp. 2d 494, 512 n.12 (D.N.J. 2000)

operates a place of public accommodation."⁹⁷ Rather than prescribing a specific definition of a "place of public accommodation," Title III recites a list of twelve categories of different entities covered by the ADA.⁹⁸ With respect to athletics, Title III applies to facilities like gymnasiums, health clubs, golf courses, bowling alleys, and other places of recreation and exercise.⁹⁹

Disabled athletes suing under the ADA because of discrimination by an owner or operator of one of these entities most frequently invoke 42 U.S.C. § 12182(b)(2)(A)(ii) of Title III.¹⁰⁰ Before proceeding under this provision, however, a plaintiff must satisfy two preliminary conditions. First, the plaintiff must establish a disability within the meaning of the ADA.¹⁰¹ Second, the plaintiff must prove that the entity that has allegedly engaged in the discriminatory conduct owns or operates a place of public accommodation.¹⁰²

(stating that courts have recognized the utility of interpreting similar Rehabilitation Act language in ADA cases); *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (noting that an analysis of Title II would be helpful in deciding the plaintiff's Title III ADA claim).

97. § 12182(a).

98. *Id.* § 12181(7)(A)–(L). For instance, this list of public accommodations includes hotels, restaurants, movie theaters, concert stadiums, retail stores, banks, museums, zoos, and schools. *Id.* In an attempt to clarify what constitutes a public accommodation, the U.S. Department of Justice has stated that the accommodation must be a facility operated by a private entity whose activities impact commerce and fall within one of the twelve protected categories listed in § 12181(7). See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 C.F.R. § 36.104 (1999); see also 42 U.S.C.A. § 12186(b) (2001) (stating that Congress expressly delegated authority to the Department of Justice to issue regulations implementing Title III of the ADA).

99. 42 U.S.C. § 12181(7)(L) (1994).

100. This section states that discrimination against a disabled individual is: a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

Id. § 12182(b)(2)(A)(ii).

For examples of cases in which disabled athletes have brought actions under this provision, see *PGA Tour, Inc., v. Martin*, 121 S. Ct. 1879, 1893 (2001); *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005 (7th Cir. 2000), cert. granted, judgment vacated and remanded, 121 S. Ct. 2212 (2001); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 118 F. Supp. 2d 494, 518 (D.N.J. 2000); *Schultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222, 1226–27 (C.D. Cal. 1996).

101. See *supra* notes 61–74 and accompanying text.

102. In short, the entity must own or operate a public accommodation that falls into one of the twelve categories listed in 42 U.S.C. § 12181(7). See *supra* note 97–99 and accompanying text. This issue was a crucial difference between the courts of appeals decisions in *Martin* and *Olinger*. In *Martin*, the Ninth Circuit held that golf courses under

After satisfying these two preliminary requirements, the plaintiff must then demonstrate that the place of public accommodation has failed to make a *reasonable modification* in either its policies or procedures.¹⁰³ Additionally, the plaintiff must establish that such alterations are *necessary* in order for the plaintiff to take advantage of the services or benefits that the place of public accommodation offers.¹⁰⁴ Once the plaintiff establishes these elements, the place of public accommodation must make the requested alteration unless it can prove that the plaintiff's modifications would *fundamentally alter* the nature of the accommodation.¹⁰⁵ Indeed, the fundamentally alter¹⁰⁶ provision was a major point of disagreement between the courts of appeals in *Martin* and *Olinger*.¹⁰⁷ The disagreement was finally resolved by the Supreme Court.¹⁰⁸

Although the Supreme Court was forced to address the fundamentally alter issue, it did not have to resolve the threshold issue of whether a plaintiff seeking relief is disabled for purposes of

the PGA Tour's control during tournaments are places of public accommodation. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 999 (9th Cir. 2000), *aff'd* 121 S. Ct. 1879 (2001). In *Olinger*, the Seventh Circuit never affirmatively stated that the PGA Tour was operating a place of public accommodation because it instead chose to resolve the case on the basis that a golf cart fundamentally altered the nature of competition. *Olinger*, 205 F.3d at 1005-07. Although the Supreme Court reframed this issue, the Court eventually held that both *Martin* and the PGA Tour were subject to the provisions of Title III. *Martin*, 121 S. Ct. at 1890-93. For further discussion of this issue, see *infra* notes 136-64.

103. § 12182(2)(A)(ii). Deciding whether a modification is reasonable involves a highly individualized inquiry into the facts and circumstances of each particular case. *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1996); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1995) ("[T]he determination of what constitutes reasonable modification is a highly fact-specific, requiring a case-by-case inquiry."). Several factors to consider in this analysis include the effectiveness of the modification in curbing the disability and the cost of the modification to the operator of the public accommodation. *Staron*, 51 F.3d at 356; *see also* *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (stating that reasonableness within the context of Title III is generally satisfied if the requested accommodation is proven to be reasonable in the general sense).

104. 42 U.S.C. § 12182(b)(2)(A)(ii).

105. *Id.* Evidence that focuses on the circumstances surrounding the disabled individual, and not evidence speaking to the general nature of the accommodation, is the type that will satisfy the public accommodation's burden of proving a fundamental alteration. *Johnson*, 116 F.3d at 1059.

106. § 12182(b)(2)(A)(ii).

107. *Compare Martin*, 204 F.3d at 999-1002 (holding that a golf cart does not fundamentally alter the nature of competitive golf), *with Olinger*, 205 F.3d at 1005-07 (holding that a golf cart fundamentally alters the nature of competitive golf).

108. *Martin*, 121 S. Ct. at 1893-97 (2001) (holding that *Martin's* use of a golf cart does not fundamentally alter the nature of competitive golf). For further discussion of this issue, see Part III.C.

the ADA.¹⁰⁹ As Part III details, this question is frequently the most difficult one for courts confronting ADA claims from disabled athletes.

II. WHO QUALIFIES AS A DISABLED ATHLETE UNDER THE ADA?

As discussed previously, athletes suing under the ADA must establish that they have a recognized “disability.”¹¹⁰ Although the statute provides three ways in which a person can qualify as having a “disability,”¹¹¹ disabled athletes frequently choose to invoke the “limitation on a major life activity” portion of this definition.¹¹² In short, the athlete must prove the following: (1) a physical or mental impairment; (2) that implicates a major life activity;¹¹³ and (3) substantially limits a major life activity.¹¹⁴ For disabled athletes seeking disability status under the ADA, the most controversial issues surrounding this provision are whether participation in competitive sports qualifies as a “major life activity” and whether the athlete’s disability limits this activity.

Courts considering the relationship between athletics and major life activities have reached inconsistent results.¹¹⁵ One reason for the dissimilar outcomes derives from uncertainty surrounding the standard used to determine whether athletics constitute a major life

109. In *Martin*, the PGA Tour conceded that Casey Martin had a disability for purposes of the ADA. *Martin*, 121 S. Ct. at 1885–86. Similarly, the USGA did not contest the fact that Olinger had a disability under the ADA. *Olinger*, 205 F.3d at 1001.

110. § 12102(2). See *supra* notes 61–74 and accompanying text.

111. See *supra* note 62 and accompanying text.

112. E.g., *Martin*, 121 S. Ct. at 1885, 1885 n.7; *Knapp v. Northwestern Univ.* 101 F.3d 473, 479 (7th Cir. 1996); *Pahulu v. Univ. of Kan.*, 897 F. Supp. 1387, 1390–91 (D. Kan. 1995).

113. The following is a list of recognized major life activities: caring for one’s self, walking, seeing, hearing, speaking, breathing, learning, and working. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.3(j)(2)(ii) (2000).

114. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). See *supra* notes 64–68 and accompanying text.

115. Compare *Knapp*, 101 F.3d at 479–82 (holding that a college basketball player with a heart condition was not disabled under the ADA due to the fact that participation in intercollegiate basketball was itself not a major life activity nor was it a substantial limitation on the major life activity of learning), with *Pahulu*, 897 F. Supp. at 1393–94 (finding that participation in intercollegiate football may be a component of the major life activity of learning, but holding that the plaintiff was not disabled under the ADA because barring the plaintiff from football would not substantially limit his learning opportunities at the university), and *Sandison v. Mich. High Sch. Athletic Ass’n, Inc.*, 863 F. Supp. 483, 489 (E.D. Mich. 1994) (holding that participation in cross country and track for a learning disabled high school athlete was integral to their education and thus a major life activity), *rev’d on other grounds*, 64 F.3d 1026 (6th Cir. 1995).

activity. Some courts apply an objective test that focuses on the nature of the athletic activity and the average person's participation in that activity.¹¹⁶ In contrast, other courts take a more subjective approach to this problem, confining the inquiry to whether athletics constitute a major life activity with respect to the particular disabled individual.¹¹⁷

Although no explicit holding has resolved whether an objective or subjective test should govern, the United States Supreme Court gave the lower courts some guidance in a decision involving non-athletes, *Bragdon v. Abbott*.¹¹⁸ In examining whether sexual reproduction was a major life activity under the ADA, a five-justice majority rejected the contention that a major life activity must necessarily correspond to a major public activity.¹¹⁹ This holding implies that the subjective test should govern. Because the Court held that a major life activity does not need to be something that is of a public, economic, or daily character, it follows that the activity need not be something objectively popular either.¹²⁰ As applied to disabled competitive athletes, the fact that the majority of the general public does not engage in either collegiate or professional athletics should have no bearing upon the disability inquiry. Instead, courts should focus on the individual circumstances surrounding the athlete's disability with an emphasis on the role athletics play in the life of the particular athlete.¹²¹

116. *E.g., Knapp*, 101 F.3d at 480–82. The court reasoned that playing basketball at a Big Ten university was not a major life activity in the general sense as it does not equate with activities that all citizens engage in such as breathing, walking, and working. *Id.* at 480. Although basketball was a major part of Knapp's experience at Northwestern, the court stated his overall educational experience would not necessarily be substantially diminished because he would still be able to participate in all other academic and social affairs. *Id.* at 481.

117. *Sandison*, 863 F. Supp. at 488–89. In this instance, the court focused its analysis on the disabled individual's particular circumstances. *Id.* Specifically, the court pointed to the fact that athletics had improved Sandison's academic and social skills, thus leading to the conclusion that participation on the track team was central to the major life activity of learning. *Id.* at 489.

118. 524 U.S. 624 (1998) (holding that an HIV infected female was disabled for purposes of the ADA because her condition limited her ability to engage in the major life activity of reproduction and child bearing).

119. *Id.* at 639.

120. *Id.*

121. *Id.* at 638–39 (noting that the use of the phrases "caring for one's self" and "performing manual tasks" in 34 C.F.R. § 104.3(j)(2)(ii) (1999) stands in direct opposition to the argument that a major life activity must have a widespread public character). In addition, the statute's plain text supports this conclusion as the definition of the term "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2) (1994) (emphasis added).

Even though the Supreme Court did not confront the major life activity issue in *PGA Tour, Inc. v. Martin*,¹²² the Court's opinion lends further credence to the conclusion that the subjective test should govern. In *Martin*, the Court emphasized on several occasions that inquiries under Title III of the ADA must focus on the specific individual seeking relief.¹²³ Because the Court conducted an individual analysis of the facts and circumstances surrounding a person's condition when confronted with a request for an accommodation under Title III, it stands to reason that this subjective individual inquiry should also govern threshold ADA questions, such as whether the individual is substantially limited in a major life activity. Accordingly, courts should consider the role athletics plays in the individual plaintiff's life, not whether the sport occupies a central position in the average person's life.¹²⁴

In addition to the difference between the objective and subjective tests, the fact that disabled athletes engage in various levels of competition is another reason courts have reached inconsistent results in their analyses of whether athletics constitute a major life activity. For instance, at least one court has been unwilling to deem participation in recreational athletics a major life activity,¹²⁵ but several courts have reached the opposite conclusion when confronted with ADA claims from scholastic athletes at the high school and

122. 121 S. Ct. 1879 (2001).

123. *Id.* at 1896 (stating that the PGA Tour's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the purpose and language of the ADA); see also *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (finding that the ADA expressly mandates that the "disability" inquiry must be made "with respect to an individual"); 29 C.F.R. pt. 1630, app. § 1630.2(j) (2000) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.").

124. To this end, the analysis in *Pahulu v. University of Kansas* is instructive. 897 F. Supp. 1387 (D. Kan. 1995). The plaintiff attempted to play collegiate football with a spinal cord injury but the university denied this request. *Id.* at 1388. Because the plaintiff's injury did not limit the plaintiff's "walking, seeing, hearing, speaking, breathing, learning, and working," the university argued that the plaintiff was not limited in a major life activity. *Id.* at 1390-91 (citing 45 C.F.R. § 84.3(j)(2)(ii) (1994)). Even though competitive football does not constitute a major life activity for a majority of the public, the court conducted an individual analysis and held that football was related to the major life activity of learning because the plaintiff's grades had improved, he had met new friends, and had learned the importance of teamwork. *Id.* at 1393. However, the court went on to hold that the plaintiff was not substantially limited in this major life activity because he had the opportunity to participate in a host of other educational activities. *Id.*

125. *Scharff v. Frank*, 791 F. Supp. 182, 184-85 (S.D. Ohio 1991) (holding that the plaintiff's inability to engage in recreational soccer and softball were not substantial impairments on a major life activity).

college level.¹²⁶ In fact, courts have been increasingly receptive to the argument that athletics is a major life activity at the college level, but many still disagree as evidenced by the inconsistent results in *Knapp v. Northwestern University*¹²⁷ and *Sandison v. Michigan High School Athletic Ass'n, Inc.*¹²⁸ In fact, the major life activity inquiry at the university level becomes very complicated because athletics represent a small component of an athlete's total college education. For example, in *Pahulu v. University of Kansas*,¹²⁹ the court concluded that the plaintiff's involvement in competitive football invoked the major life activity of learning because football had improved the plaintiff's grades and taught him teamwork skills.¹³⁰ Nevertheless, the court did not view the plaintiff's exclusion from football as a substantial limitation on this major life activity because the plaintiff had the chance to participate on the football team in a role other than a player, and had the opportunity to explore a host of other educational programs available at the university.¹³¹

In contrast to recreational and collegiate athletics, professional athletics offer a much different context for analysis of the major life activity issue. A disabled professional athlete may be able to establish a limitation in the major life activity of working because athletic competition is likely to provide the athlete's principal source

126. *Pahulu*, 897 F. Supp. at 1393 (holding that the plaintiff's involvement in college football was related to the major life activity of learning); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 863 F. Supp. 483, 489 (E.D. Mich. 1994) (holding that participation in cross country and track for a learning disabled high school athlete was integral to their education and thus a major life activity), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995). *Contra* *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996) (holding that a college basketball player with a heart condition was not disabled under the ADA due to the fact that participation in intercollegiate basketball was itself not a major life activity, nor was it a substantial limitation on the major life activity of learning).

127. 101 F.3d 473, 480 (7th Cir. 1996) (holding that a college basketball player with a heart condition was not disabled under the ADA because participation in intercollegiate basketball was itself not a major life activity, nor was it a substantial limitation on the major life activity of learning).

128. 863 F. Supp. 483, 489 (E.D. Mich. 1994) (holding that participation in cross country and track for learning disabled high school athletes was integral to their education and thus a major life activity), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995).

129. 897 F. Supp. 1387 (D. Kan. 1995).

130. *Id.* at 1393.

131. *Id.*; *see also* *Knapp*, 101 F.3d at 480 (stating that the major life activity of learning is not lessened by the fact that a student does not play major college basketball). Although *Pahulu* addressed this issue within a university setting, the same analysis would presumably apply to a high school athletic setting. For example, a court applying the *Pahulu* reasoning to the facts of *Sandison* would likely hold that the plaintiff's involvement in high school athletics is not a substantial limitation on the major life activity of learning because the student could engage in a number of other school sponsored learning opportunities outside of athletics.

of income.¹³² The Supreme Court, however, limited the breadth of the major life activity of working in a recent decision. In *Sutton v. United Airlines, Inc.*,¹³³ the Court considered an ADA challenge from two pilots with poor eyesight who applied for positions with a commercial airline.¹³⁴ The Court held that although the pilots could not occupy positions as global airline pilots with a major commercial carrier, they could still find work as regional pilots or pilot instructors. As a result, the Court concluded that the pilots were not “substantially limited in the major life activity of working.”¹³⁵

The *Sutton* decision presents a potential stumbling block for professional athletes seeking to establish that they are substantially limited in the major life activity of working. The Court’s holding suggests that disabled athletes must be prevented from holding a broad class of jobs, not simply the specialized job they prefer.¹³⁶ For example, even though a disabled athlete may be prevented from playing in one of the major professional leagues, the athlete’s disability may not prevent him from earning a living as a coach or local professional. Major professional athletics is a highly specialized job akin to the position of commercial airline pilot. Accordingly, an athlete seeking disability status because of a substantial limitation on the major life activity of working must be prepared to show that the condition limits a broad range of athletic professions beyond simply high profile competitive sports.

Notwithstanding *Sutton*’s restrictions on the major life activity of working, disabled athletes also have the potential to establish that they are substantially limited in several other major life activities, namely “walking, seeing, hearing, speaking, breathing, and learning.”¹³⁷ Because both Casey Martin and Ford Olinger have limited ability to walk,¹³⁸ neither the PGA Tour nor the USGA contested the major life activity issue.¹³⁹ Nevertheless, disabled

132. See Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.3(j)(2)(ii) (2000) (stating that working qualifies as a major life activity for purposes of the ADA).

133. 527 U.S. 471 (1999).

134. *Id.* at 475–76.

135. *Id.* at 492–93 (quoting 29 C.F.R. pt.1630, app. § 1630.2 (1998)).

136. *See id.*

137. 34 C.F.R. § 104.3(j)(2)(ii).

138. *Id.* (explaining that walking qualifies as a major life activity for purposes of the ADA).

139. See *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1885–86 (2001); *Olinger v. United States Golf Ass’n*, 205 F.3d 1001, 1001 (7th Cir. 2000), *cert. denied, judgment vacated and remanded*, 121 S. Ct. 2212 (2001). Had Olinger not been limited in his ability to walk, *Sutton* likely would have prohibited him from bringing his claim on the basis of a

athletes with less serious physical conditions could face significant obstacles in the major life activity analysis.¹⁴⁰

substantial limitation on the major life activity of working. For example, Olinger's participation in U.S. Open qualifying does not implicate the major life activity of working because it is only a single event and is unlikely to generate any significant income in Olinger's favor. In fact, playing in the qualifying stage of the U.S. Open takes on more of a recreational quality as participants must pay entry fees to play and face long odds of even making the final field. *Olinger*, 205 F.3d at 1002-03. Because Olinger is a member of the Professional Golfers' Association and derives his primary living from playing and teaching golf at a local club in Indiana, *Sutton's* reasoning mandates that he is not substantially limited in a broad class of sports-related work opportunities. *Id.* at 1001; see *Golf Cart Rulings: The Battle Isn't Over Yet*, SPORTS ILLUSTRATED, Mar. 20, 2000, at 40, 40.

140. Disabled athletes may confront problems due to the Supreme Court's holding that corrective and mitigating measures must be considered when determining whether an individual is substantially limited in a major life activity and thus disabled under the ADA. *Sutton*, 527 U.S. at 482-83. For example, disabled athletes may have a disability in name, but not in actuality because of mitigating measures like artificial aids and pharmaceutical products. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999).

In *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, a unanimous decision issued in January 2002, the Supreme Court further clarified the meaning of a substantial limitation on a major life activity. 2002 WL 15402, at *1. The Court held that the Sixth Circuit erred in holding that a female factory worker with documented carpal tunnel syndrome was disabled under the ADA. *Id.* at 12. According to the Court, submitting documented medical evidence of an injury or ailment is not enough to satisfy the requirements of the ADA. *Id.* at 10. Although the plaintiff clearly had a history of carpal tunnel syndrome, she did not have a substantial limitation on the major life activity of manual tasks because her ailment did not prevent her from performing "a variety of tasks central to most people's daily lives." *Id.* at 11. Although the plaintiff's injury clearly limited the number of manual tasks she could accomplish inside the factory, her disability did not limit her in a broad range of everyday activities, such as "household chores, bathing, and brushing one's teeth." *Id.* at 12. In the end, the Court found no support in the text of the ADA, its previous opinions, or the regulations for the "idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace." *Id.* at 11.

With respect to disabled athletes, *Williams*, like *Sutton*, has the potential to be a significant obstacle in the effort to establish a substantial limitation on a major life activity. After *Williams*, disabled professional athletes seeking to establish a substantial limitation on the major life activity of working will need to establish that their ailments prevent them from performing a broad range of tasks "central to most people's daily lives." *Id.* at 12. Instead of simply pointing to the fact that the disability limits their performance on the playing field, *Williams* will likely mandate that disabled athletes prove that their disability impacts rudimentary daily tasks as well. See *id.* Absent proof that the effects of the athlete's disability crosses over into the tasks of daily life, a disabled professional athlete seeking to establish a limitation on the major life activity of working will likely be denied relief under *Williams*.

Nevertheless, *Williams* does not have such a limiting effect on disabled athletes seeking to establish a limitation on one of the physical major life activities such as walking, breathing, seeing, and hearing because limitations on these activities presumably have similar impacts both on and off the playing field. For example, Casey Martin is substantially limited in the activity of walking whether he is walking on a golf course or walking down his driveway to get the mail, arguably a task central to most people's daily lives.

Indeed, the *Martin* decision will not lead to a flood of rule modifications because many disabled professional athletes will have a difficult time establishing a substantial limitation on a major life activity. First, disabled professional athletes seeking to prove a limitation on the major life activity of working will need to show more than an omission from the top tier of athletics.¹⁴¹ Because of the holding in *Sutton*, such a limitation will only exist if their condition prohibits them from working in a broad range of sports-related professions.¹⁴² Proving such a limitation would pose difficulty because presumably any athlete qualified to play competitive professional sports would also be able to earn a living as a coach or private instructor.

Second, although many recreational and professional athletes have the potential to establish a substantial limitation on one of the major physical life activities,¹⁴³ the requirement that these injuries be of a significant duration and degree reduces the number of likely plaintiffs. The cases interpreting the major life activity issue have uniformly stated that temporary and nonpermanent conditions are not disabilities under the ADA.¹⁴⁴ In fact, several courts have been particularly strict with respect to finding that a physical injury amounts to a substantial limitation on one's ability to walk.¹⁴⁵ These holdings indicate that plaintiffs with temporary physical injuries like sprained ankles and torn knee ligaments are not limited in a major life activity.¹⁴⁶ Furthermore, even plaintiffs with more chronic injuries

141. See *supra* notes 132–37 and accompanying text.

142. See *supra* notes 132–37 and accompanying text.

143. The physical major life activities include “walking, seeing, hearing, speaking, [and] breathing.” 29 C.F.R. § 1630.2(i) (2000).

144. *E.g.*, *Roush v. Weastec, Inc.*, 96 F.3d 840, 843–44 (6th Cir. 1996) (holding that the plaintiff with a temporary kidney ailment was not disabled for purposes of the ADA); *Hamm v. Runyon*, 51 F.3d 721, 725 (7th Cir. 1995) (holding that a temporary walking impairment is not a recognized disability under the ADA); *Blanton v. Winston Printing Co.*, 868 F. Supp. 804, 806–08 (M.D.N.C. 1994) (holding that a plaintiff with a temporary knee injury was not disabled under the ADA).

145. *E.g.*, *Penny v. United Parcel Serv.*, 128 F.3d 408, 415–17 (6th Cir. 1997) (holding that a plaintiff who limps and has pain everyday was not limited in the major life activity of walking); *Penchishen v. Stroh Brewery Co.*, 932 F. Supp. 671, 674–75 (E.D. Pa. 1996) (holding that a plaintiff who could walk at one-half her normal speed following an automobile accident was not substantially limited in the major life activity of walking), *aff'd*, 116 F.3d 469 (3d Cir. 1997).

146. *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (holding that a temporary ankle injury is not a disability under the ADA). According to the ADA's Regulations, “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.” 29 C.F.R. app. § 1630-2(j).

not severely inhibiting major physical activities are unlikely to establish a recognized disability under the ADA.¹⁴⁷

The combined effect of these cases illustrates that athletes will only qualify as having a disability under the ADA if they can establish a significantly limiting permanent physical characteristic. Casey Martin and Ford Olinger fit this criterion because they have serious physical impairments; however, they represent a small class of exceptional individuals who, in addition to their significant disabilities, simultaneously possess the athletic skill to warrant admission to the elite professional leagues. Because this combination of severe physical impairment and world class athletic talent will only be seen in a small number of people, the fact that Casey Martin obtained his requested accommodation will not lead to an avalanche of litigation in which every professional athlete with a bad back will attempt to modify the rules of major competitive sports.

For the small number of disabled athletes capable of establishing a recognized disability, the next step is to ensure that the mandates of the ADA apply to the sports organization implicated by the plaintiff's suit. As discussed earlier, this issue is easily determined in actions brought under Title I and Title II of the ADA.¹⁴⁸ Nonetheless, the question of whether Title III applies to the owner or operator of a public accommodation hosting a competitive sporting event was not resolved until *PGA Tour, Inc. v. Martin*.¹⁴⁹

III. DISABLED ATHLETES AND TITLE III OF THE ADA

A. *Are Athletic Organizations Subject to Title III of the ADA?*

Title III of the ADA protects disabled individuals from discrimination in places of public accommodation.¹⁵⁰ As stated earlier, the ADA does not specifically define the term "place of

147. *E.g.*, *Kelly v. Drexel Univ.*, 94 F.3d 102, 106 (3d Cir. 1996) (holding that a plaintiff with post-traumatic degenerative joint disease of the right hip that caused him to move slowly up stairs did not amount to a disability); *Hughes v. Bedsole*, 48 F.3d 1376, 1388–89 (4th Cir. 1995) (holding that a woman who developed "tennis elbow" after a car accident was not handicapped under the Rehabilitation Act).

148. *See supra* notes 77–92 and accompanying text. In order to bring a claim against a defendant under Title I, the defendant must be an employer as defined by 42 U.S.C. § 12111(5)(A). Plaintiffs may only pursue claims under Title II against a "public entity." 42 U.S.C. § 12131(1) (1994).

149. 121 S. Ct. 1879 (2001).

150. § 12182(a).

public accommodation."¹⁵¹ Instead, Congress lists various private entities that it considers places of public accommodation.¹⁵²

This list has presented problems for disabled athletes suing under Title III because these athletes frequently bring complaints against athletic membership organizations that are not themselves places of public accommodation.¹⁵³ Nonetheless, courts have held membership organizations accountable under Title III if they exercise sufficient control over the recreational or exercise facility deemed to be a place of public accommodation.¹⁵⁴ Even though a sports organization may not be a place of public accommodation, it may be subject to Title III if it exercises sufficient control over facilities qualifying as places of public accommodation.¹⁵⁵

Under this rationale, sports organizations like the PGA Tour and the USGA would be subject to Title III because they lease and control the golf courses where they conduct their tournaments.¹⁵⁶ In order to circumvent this reasoning in *Martin*, however, the PGA Tour presented three different arguments that ultimately proved unpersuasive. First, upon a motion for summary judgment, the United States District Court for the District of Oregon rejected the PGA Tour's initial argument that it was a private club exempt from Title III coverage altogether.¹⁵⁷

151. See *supra* note 98–99 and accompanying text.

152. § 12181(7). See *supra* notes 98–99 and accompanying text.

153. The case law has specifically held that membership organizations cannot be considered places of accommodation under the ADA. *Stoutenborough v. Nat'l Football League, Inc.* 59 F.3d 580, 583 (6th Cir. 1995) (holding that the National Football League cannot be considered a place of public accommodation); *Bowers v. NCAA*, 118 F. Supp. 2d 494, 514 (D.N.J. 2000) (stating that the NCAA itself is not a public accommodation); *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (stating that a youth hockey organization is not a place of public accommodation).

154. See, e.g., *Bowers*, 118 F. Supp. 2d at 516–17 (holding that the NCAA's regulation of virtually all facets of collegiate athletic eligibility subject it to the provisions of the ADA); *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (stating that the NCAA is subject to Title III of the ADA because it exerts sufficient control over the athletic facilities of its member schools); *Shultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (finding that a youth baseball league was subject to Title III even though it was not an actual physical structure). *Contra Matthews v. NCAA*, 79 F. Supp. 2d 1199, 1205–06 (E.D. Wash. 1999) (holding that the NCAA is not subject to the ADA because it does not operate a place of public accommodation).

155. For example, a youth baseball league would not be a place of public accommodation. But the club could be subject to Title III if it owns or operates baseball fields and other athletic venues that qualify as places of public accommodation. See *Shultz*, 943 F. Supp. at 1225.

156. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879, 1884 (2001).

157. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323–26 (D. Or. 1998), *aff'd*, 204 F.3d 994 (2000), *aff'd*, 121 S. Ct. 1879 (2001). The PGA Tour's argument was based on 42 U.S.C § 12187 (1994), which exempts private clubs and religious organizations from Title

Second, both the district court and the United States Court of Appeals for the Ninth Circuit declined to adopt the PGA Tour's "mixed-use" facility argument.¹⁵⁸ The basic premise of the PGA Tour's contention was that a golf course could be compartmentalized into enclaves where only certain areas would be subject to the provisions of Title III.¹⁵⁹ More specifically, the defendant predicated this argument on the fact that the areas "outside the ropes," where members of the public watched the golfers, was clearly a place of public accommodation, but the actual course "inside the ropes," where the golfers played, was not an area protected by the ADA.¹⁶⁰ Although the Code of Federal Regulations¹⁶¹ provides some support for this mixed-use argument, the Ninth Circuit ultimately rejected this position.¹⁶²

III coverage. *Id.* at 1233. After analyzing seven different factors, the court ultimately concluded that PGA Tour was not a bona fide private club. *Martin*, 984 F. Supp. at 1324–26.

158. *Martin v. PGA Tour, Inc.* 204 F.3d 994, 997–99 (9th Cir. 2000); *Martin*, 984 F. Supp. at 1326–27.

159. *Martin*, 204 F.3d at 997.

160. *Id.* The USGA also raised the "mixed-use" facility argument in *Olinger*. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1004 (7th Cir. 2000), *cert. denied, judgment vacated and remanded*, 121 S. Ct. 2212 (2001). In addition to the "inside the ropes" versus "outside the ropes" contention, the USGA also argued that a golf course could only be classified as a place of public accommodation when either "exercise or recreation" is being conducted on it. *Id.* at 1005. Because the U.S. Open is a tournament designed to identify the best golfer in the United States for a particular year, the USGA argued that such a competition cannot be deemed either recreation or exercise. *Id.* Although the Seventh Circuit seemed to accept the basic premise of this line of reasoning, it failed to render a decision on the validity of this argument. *Id.* Instead, the court decided the case on the ground that Olinger's use of a cart would fundamentally alter the nature of competition. *Id.* at 1005–107.

161. 28 C.F.R., § 36, app. A at 623–25 (2000). An example of a mixed-use facility would be a hotel with a residential wing attached to its guest wing. *Id.* at 624. Under the ADA, only the guest wing would be subject to the ADA. *Id.* Similarly, a factory or movie studio that allowed public tours would constitute a place of public accommodation only with respect to the route followed by the tour participants. *Id.* at 625. The areas viewed from this route where actors make films, for instance, would not be considered places of public accommodation. *Id.*

162. *Martin*, 204 F.3d at 998–99. The court based its decision on three factors. First, the court stated that the mixed-use reasoning only applied to commercial facilities that were not considered to be places of public accommodation. *Id.* at 998. In contrast to movie studios and factories, golf courses are specifically mentioned as being places of public accommodation under the ADA. 42 U.S.C. § 12181(7)(L) (1994). Second, the court stated that this line of reasoning was unpersuasive because Casey Martin was not a spectator attempting to use a golf cart inside an area reserved for tournament participants. *Martin*, 204 F.3d at 998. Rather, Martin himself was a competitor who had qualified to play on the PGA Tour and this status allowed him to access the area "inside the ropes" unlike the average fan who is limited to the area "outside the ropes." Finally, an athletic

Perhaps sensing the futility of raising the “mixed-use” argument before the Supreme Court, the PGA Tour shifted the focus of its ADA coverage argument once a writ of certiorari was granted.¹⁶³ Instead of trying to excuse itself from the mandates of the ADA, in its third argument, the PGA Tour reframed the coverage issue, arguing that Title III did not protect Casey Martin and other competing golfers.¹⁶⁴ More specifically, the PGA Tour contended that “clients and customers” are the only people who can sue under Title III of the ADA.¹⁶⁵ Because Martin is a provider of the entertainment that the PGA Tour sells to the public, he is neither a client nor a customer. Accordingly, the PGA Tour argued that Martin could not seek relief under Title III.¹⁶⁶

Notwithstanding the simplicity of this position, the Supreme Court disagreed with the PGA Tour’s assessment that Title III did not protect Martin.¹⁶⁷ Although the Court declined to state whether Title III’s protections are limited only to “clients or customers,”¹⁶⁸ the Court concluded that the PGA Tour’s argument failed on its own terms because golfers competing on the PGA Tour are clearly “clients and customers.”¹⁶⁹ The Court stated that PGA Tour tournaments afforded members of the public two types of “privileges,”¹⁷⁰ watching the tournament as spectators and competing

organization’s high degree of selectivity in who it allows to compete does not exempt it from Title III. *Id.*

163. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1890–91 (2001).

164. *Id.*

165. *See id.* at 1891. This argument is rooted in a section of Title III that states the following: “For purposes of clauses (i) through (iii) of this subparagraph, the term ‘individual or class of individuals’ refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.” § 12182(b)(1)(A)(iv). Clauses (i) through (iii) prevent operators of public accommodations from denying a disabled “individual or class of individuals” an opportunity to participate, receive equal benefits, or provide said individuals with separate benefits. § 12182(b)(1)(i)–(iii). For a more comprehensive statement of the PGA Tour’s position, see Brief For Petitioner, Martin v. PGA Tour, 204 F.3d 994 (9th Cir. 2000) (No. 00-24), available at 2000 WL 1706732.

166. *Martin*, 121 S. Ct. at 1890–91.

167. *Id.* at 1892–93.

168. Even though the Court did not squarely address this issue, it appeared hesitant to adopt such a sweeping limitation of Title III coverage. The Court’s skepticism can be traced to the fact that the “clients and customers” language only modifies the three provisions relating to participation and benefits, not to Title III’s general prohibition against discrimination by places of public accommodation. *Id.* at 1891.

169. *Id.* at 1891–92.

170. As discussed earlier, discrimination under Title III of the ADA is a “failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such . . . privileges . . . to individuals with disabilities.” § 12182(b)(2)(A)(ii). *See supra* note 100 and accompanying text.

in the tournament as players.¹⁷¹ Although playing in a tournament is more difficult than simply buying a ticket to watch from the gallery, the PGA Tour offers any citizen the chance to qualify for its tournaments.¹⁷² Given the broad purpose behind the ADA, the Court held that it would be classic discrimination for the PGA Tour to accommodate one set of “customers” (spectators) but not another (players).¹⁷³

The Court’s holding that Casey Martin has a viable Title III claim against the PGA Tour signifies that other sports organizations will likely be subject to ADA mandates as well. Most importantly, the Court clarified the ADA coverage issue that remained uncertain after the Ninth Circuit and Seventh Circuit reached conflicting results.¹⁷⁴ Although the Court only addressed Martin’s specific relationship with the PGA Tour, the Court’s tacit acknowledgement that athletic organizations offer two types of Title III “privileges” virtually guarantees that the ADA will apply to other sports entities. Like the PGA Tour, most competitive sports organizations holding their events at places of public accommodation offer citizens two types of privileges—the privilege to observe the competition and the privilege to play in the competition.¹⁷⁵ Obviously, the privilege of playing in the NBA or on the PGA tour is much more difficult to attain than simply playing in a local recreational league. Nevertheless, the “privileges” offered by these two organizations are identical, namely the chance to play in the game if certain baseline

171. *Martin*, 121 S. Ct. at 1892.

172. *Id.* The PGA Tour conducts an open qualifying school every year to fill open membership slots. *Id.* at 1884. Any member of the public can participate in this tournament as long as he pays \$3,000 and submits two letters of reference from other PGA Tour or Nike Tour professionals. *Id.*

173. *See id.* at 1892. The Court felt this holding was analogous to several similar cases interpreting the public accommodation provision of Title II of the Civil Rights Act. *Id.*; *see Daniel v. Paul*, 395 U.S. 298, 305–06 (1969) (stating that a “place of exhibition or entertainment” protects “spectators and listeners” as well as those individuals participating in “some sport or activity”); *Wesley v. Savannah*, 294 F. Supp. 698, 699–703 (S.D. Ga. 1969) (holding that a city golf tournament conducted at a public course violated Title II of the Civil Rights Act by refusing to allow black residents to participate); *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va. 1966) (holding that Title II of the Civil Rights Act “is not limited to spectators if the place of exhibition or entertainment provides facilities for the public to participate in the entertainment”).

174. In *Martin*, the Ninth Circuit held that the PGA Tour could be sued under Title III. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 999 (9th Cir. 2000). Conversely, the Seventh Circuit declined to rule on this issue. *Olinger v. United States Golf Ass’n*, 205 F.3d 1001, 1005 (7th Cir. 2000), *cert. granted, judgment vacated and remanded*, 121 S. Ct. 2212 (2001).

175. *Martin*, 121 S. Ct. at 1892.

criteria are met.¹⁷⁶ Because virtually all sports organizations offer some degree of public privilege, either in the form of open competition or tryouts, *Martin* ensures that athletic organizations offering public competition at places of public accommodation will be subject to the provisions of Title III.

In his dissent, Justice Scalia stated that one of the key lessons sports organizations should learn from *Martin* is to end open tryouts.¹⁷⁷ On its face, Scalia's point is well taken, because the majority based its holding in part on the PGA Tour's practice of allowing members of the public to compete for a spot on the tour.¹⁷⁸ Nevertheless, Scalia's "lesson" is indicative of the exclusionary thinking that has plagued athletics for too long.¹⁷⁹ If sports organizations want to build walls around themselves and prevent people from enjoying their amenities, then Justice Scalia is correct. Open tryouts and public competitions will certainly end. However, the reality of athletics in the twenty-first century is that talented athletes like Casey Martin and Ford Olinger want to participate alongside their able-bodied teammates and competitors. Inclusion, whether by judicial fiat or voluntary consent, is the only way these athletes can achieve their goals. Given this perspective, Scalia's "lesson" is but an added chirp to the growing chorus of "Chicken Littles" who see *Martin* as the end to competitive sports. When his point is carried to its logical end, Scalia actually has it backwards—open tryouts will most certainly continue. A sports organization faced with the prospect of accommodating a disabled athlete will not want to face another *Martin* scenario with protracted litigation

176. These baseline criteria will obviously differ depending on the skill level of the particular league. In *Martin*, any member of the public with \$3,000 and two letters of recommendation could enter the PGA Tour's qualifying school. *Id.* at 1884. Conversely, participation in a recreational sports league may only require a small entry fee.

177. *Id.* at 1905 (Scalia, J., dissenting).

178. *Id.* at 1892 (stating that the PGA Tour affords a public privilege to both spectators and potential golfers). If the PGA Tour had not allowed members of the general public to compete for an opportunity to play on the Tour, a major foundation of the majority's opinion would have been removed.

179. See, e.g., Stanley Mosk, *My Shot: The Tour's Fear of Carts Is the Same Form of Bigotry That Caused the Caucasian-Only Clause*, SPORTS ILLUSTRATED (GOLF PLUS SECTION), June 11, 2001, at G46, G46 (reporting a statement by California Supreme Court Justice that the PGA Tour's Caucasian-only rule was not abolished until 1961). Given the PGA Tour's history of exclusion, one commentator found it disheartening to see the PGA Tour preach the gospel of inclusion with respect to Tiger Woods and minority golfers on the one hand and fight off disabled golfers like Casey Martin with the other. Reilly, *supra* note 12, at 140.

possibly lasting for years.¹⁸⁰ With *Martin* serving as an illustration of what can happen when a sports entity resists accommodation, it follows that accommodation up front, namely, continued inclusion via open tryouts, presents the prudent course of action for sports organizations.¹⁸¹ Indeed, the vast majority of sports organizations are not multi-million dollar professional entities like the PGA Tour, but small voluntary associations formed at the local level.¹⁸² For these smaller entities that are largely funded by voluntary contributions and dues, it would be absurd to mortgage the organization's health by litigating a potentially lengthy ADA challenge in order to exclude a small number of disabled athletes.¹⁸³

180. Leo, *supra* note 12, at 16 (detailing the story of a nine year-old soccer player who was allowed to play with a walker "because the league preferred to avoid the cost and trouble of litigation").

181. In *Doe v. Eagle-Union Community School Corp.*, a disabled high school athlete suffering from psychological disorders sued the school district under the Rehabilitation Act because the basketball coach cut him from the team. 101 F. Supp. 2d 707, 714-15, 718 (S.D. Ind. 2000), *vacated as moot*, No. 00-2122, 00-2690, 2001 WL 246014, at *1-2 (7th Cir. 2001). Although the coach had knowledge of the student's disability and encouraged the student to try out for the team, the court granted summary judgment in favor of the school district because the plaintiff did not present any evidence of a causal connection between the plaintiff's disability and his failure to make the team. *Id.* at 719-20. According to the court, the coach gave every student the same opportunity to try out and made his decisions "consistent with his past knowledge and experience in coaching basketball." *Id.* at 719.

Although *Eagle-Union* involved a Rehabilitation Act claim prior to the Supreme Court's resolution of *Martin*, the case may be indicative of how many school districts may choose to respond to open try out requests by disabled athletes. Schools may allow the disabled athlete to tryout against able-bodied competitors and then opt not to select them for objective and athletic-related reasons. From the school's perspective, this policy would likely prevent a suit much like *Martin*, in which the athlete sues immediately after the athletic organization denies the athlete's requested accommodation or the opportunity to participate altogether. From the athlete's perspective, the open tryout gives him the opportunity to prove that he can compete with other able-bodied competitors.

182. For example, the United States Youth Soccer Association has over six thousand individual clubs and leagues in over fifty-five different state associations. US YOUTH SOCCER, *Mission and History*, at <http://www.usysa.org/office/mission.cfm> (last visited Oct. 26, 2001) (on file with the North Carolina Law Review). By comparison, Little League Baseball has over seven thousand individual leagues in more than one hundred countries. *Structure of Little League Baseball, Inc.*, at <http://www.littleleague.org/about/structure.htm> (last visited Oct. 26, 2001) (on file with the North Carolina Law Review).

183. The resiliency of Casey Martin and Ford Olinger should stand out as a potential warning sign to any athletic organization thinking that protracted litigation will be an avenue to resolution. Each of these men have pursued their claims for several years and never gave an indication that they would stop before a final resolution. See Richards, *supra* note 32 (stating that Olinger intends to pursue his claim in light of the Supreme Court's resolution of *Martin*). If Martin's and Olinger's experiences are representative of disabled athletes as a whole, then athletic organizations can expect a prolonged fight to exclude members of this class.

In the end, the issue of inclusion largely comes down to a policy choice on behalf of sports organizations. On one hand, they can devote their resources toward exclusion—hiring lawyers, engaging in litigation, and creating policies designed to keep athletes off the playing field. On the other hand, these entities can devote these same resources toward the very purpose of the ADA, namely inclusion and “the elimination of discrimination against individuals with disabilities.”¹⁸⁴

In short, the Court’s holding that Title III applies to the PGA Tour and other similarly situated athletic entities has the potential to provide a very powerful weapon for disabled athletes seeking accommodations under the ADA. Although all athletic organizations conducting some degree of open public competition at places of public accommodation will likely be subject to the mandates of Title III, it does not follow that a rush of suits by disabled athletes will soon flood the federal court system. Expansive litigation is unlikely, not only because the prospect of litigation may force accommodation, but also because disabled athletes seeking assistance under Title III still must establish an accommodation that is both necessary and reasonable.

B. Is a Disabled Athlete’s Requested Accommodation Reasonable and Necessary?

In order to receive relief under Title III of the ADA, a disabled athlete must establish that the requested accommodation is a reasonable modification in a policy, practice, or procedure of the place of public accommodation.¹⁸⁵ Courts have interpreted the “reasonable” language to mean that the accommodation must be “reasonable in a general sense, that is, reasonable in the run of cases.”¹⁸⁶ An accommodation is not reasonable if the place of public

184. 42 U.S.C. § 12101(b)(1) (1994).

185. *Id.* § 12182(b)(2)(A)(ii).

186. *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997). When conducting the reasonable accommodation analysis, courts must pay close attention to the particular facts and circumstances of each individual case. *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 (9th Cir. 1998) (“Whether a particular accommodation is reasonable depends on the circumstances of the individual case.”), *amended by* 196 F.3d 979 (9th Cir. 1998), *cert. granted by* 121 S. Ct. 1600 (2001); *see supra* note 103 and accompanying text. In short, “[r]easonableness is not a constant.” *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992) (stating that what may be reasonable in one context may not be reasonable in another, even if the differences between the two are relatively slight).

accommodation incurs an undue financial or administrative burden.¹⁸⁷ Additionally, the ADA specifically exempts all accommodations that “pose a direct threat to the health and safety of others” as unreasonable.¹⁸⁸

In *Martin* and *Olinger*, each respective court concluded that the requested use of a golf cart was reasonable in the general sense.¹⁸⁹ Although the PGA Tour did not raise this issue before the Supreme Court,¹⁹⁰ the Ninth Circuit justified its holding on the grounds that golf carts are permitted in other types of PGA Tour competitions¹⁹¹ and do not present either logistical or practical difficulties on golf courses.¹⁹²

187. *E.g.*, *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1031 (6th Cir. 1995); *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 U.S. Dist. WL 6800000, at *14 (N.D. Ill. Nov. 21, 1996).

188. § 12182(b)(3). The Supreme Court has interpreted this language to mean that potential danger posed by the accommodation must be significant. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *see* 28 C.F.R. § 36.208(b) (2000) (stating that a direct threat is a “significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures”).

189. *Martin v. PGA Tour, Inc.*, 121 S. Ct. 1879, 1893 (2001) (stating that the PGA Tour did not contest the reasonableness of Casey Martin’s requested accommodation); *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1006 (7th Cir. 2000) (stating that the accommodation sought was “reasonable in a general sense”), *cert. denied, judgment vacated and remanded*, 121 S. Ct. 2212, 2212 (2001).

190. *Martin*, 121 S. Ct. at 1893.

191. Although carts are not normally allowed on the PGA Tour, carts are permitted in several other PGA Tour sponsored competitions. *Martin*, 121 S. Ct. 1895. The PGA Tour has allowed golfers to use carts in some of its tournaments if a great distance lies between holes. *Id.* at 1885. The PGA Tour allows golfers on the Senior Tour to use carts if they so desire. *Id.* at 1895. The Tour justifies this rule by the fact that the golfers are over fifty years of age. *See* Curtis Strange, *Protecting the Game*, GOLF MAGAZINE, March 1998, at 34, available at <http://www.golfonline.com/tours/pga/strange/mar98.html> (on file with the North Carolina Law Review). Additionally, the PGA Tour allows carts in the first two rounds of the Qualifying School. *Martin*, 121 S. Ct. at 1895. The rationale behind this policy is that a large number of golfers qualify in a short amount of time during the initial rounds and carts are needed to keep the pace of play moving forward. *See* Strange, *supra*. The PGA Tour also permits carts in the weekly “open” qualifying events conducted before each PGA Tour Tournament. *Martin*, 121 S. Ct. at 1895.

192. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 999 (9th Cir. 2000), *aff'd*, 121 S. Ct. 1879 (2001). In *Olinger*, the district court justified its holding on the grounds that the “Rules of Golf,” promulgated by the USGA, acknowledge the potential involvement of carts in the game of golf. *Olinger v. United States Golf Ass'n*, 55 F. Supp. 926, 934 (N.D. Ind. 1999), *aff'd* *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), *cert. granted, judgment vacated and remanded*, 121 S. Ct. 2212 (2001). In addition, the court noted that of the thirteen major tournaments conducted by the USGA, two allow competitors to ride carts during play. *Id.* Both the U.S. Senior Men’s Amateur and the U.S. Senior Women’s Amateur allow carts due to the fact that the events are conducted in the fall when caddies are in short supply. *Id.* Unlike the U.S. Open, for which *Olinger* attempted to qualify, these two events are not designed to identify the national champion of golf. Thus, the USGA saw no problem with allowing carts in these lower caliber competitions. *Id.*

Although the reasonable accommodation issue did not present a significant obstacle for either Casey Martin or Ford Olinger, disabled athletes should recognize that not all accommodations will pass judicial scrutiny so easily. If a disabled athlete's requested accommodation imposes an undue financial burden or administrative burden on the athletic organization, then it will be deemed unreasonable.¹⁹³ In fact, the United States Court of Appeals for the Sixth Circuit invoked the undue burden reasoning in holding that a high school athletic association was not required to waive its age limit rule.¹⁹⁴ The court explained that implementing a waiver system for the age limit would impose an undue burden on the Michigan High School Athletic Association because schools would have to analyze individually every student requesting an age waiver and determine whether the student's age posed an unfair competitive advantage.¹⁹⁵

The financial or administrative burden limitation has the potential to impact most significantly disabled athletes seeking accommodations from recreational and non-profit sports organizations. Unlike professional sports organizations, recreational athletic organizations are often non-profit entities formed by a small number of people or a local community.¹⁹⁶ These organizations may not have either the administrative resources or the financial capital to accommodate a request made by a disabled athlete.¹⁹⁷

193. See *supra* note 187 and accompanying text.

194. *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1035 (6th Cir. 1995).

195. *Id.*

196. A perfect example of this phenomenon is the proliferation of youth soccer organizations over the past twenty years. See U.S. YOUTH SOCCER, *Mission and History*, at <http://usysa.org/office/mission.cfm> (stating that the United States has over 6,000 local youth leagues and clubs) (last visited Nov. 27, 2001) (on file with North Carolina Law Review). Virtually all of these organizations are formed at the local level by parents and players who attempt to achieve both social interaction and community involvement. See Statement of Virgil I. Lewis II, U.S. Youth Soccer Chairman, at <http://www.puaf.umd.edu/Affiliates/CivicRenewal/usyouth.htm> (last visited Nov. 27, 2001) (on file with North Carolina Law Review). In fact, youth soccer has been one of the most progressive organizations with respect to accommodating disabled athletes though the use of its TOPSoccer Program. UNIROYAL TIRE TOPSOCCER, at <http://usysa.org/field/tsoccer.cfm> (last visited Nov. 27, 2001) (on file with North Carolina Law Review).

197. The Sixth Circuit's holding in *Sandison* stands out as a particularly noteworthy limitation in this area because the court held that evaluating every student's request for a waiver of an athletic rule would constitute an undue burden. *Sandison*, 64 F.3d at 1035. Similarly, in *Olinger*, the Seventh Circuit held that the administrative burden on the USGA of distinguishing between those golfers who truly need a cart to compete and those who do not would be too great. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1007, (7th Cir. 2000), cert. granted, judgment vacated and remanded, 121 S.Ct. 2212 (2001). In deciding whether an individual poses a direct threat, "public accommodations must make

The “direct threat” limitation also has the potential to pose a significant barrier to disabled athletes seeking modifications to the rules of competitive sports.¹⁹⁸ Although the direct threat limitation primarily has been used to shield athletic entities covered by the ADA from making accommodations for individuals with contagious diseases,¹⁹⁹ it has the potential to apply to requests for rule modifications within competitive athletics as well. For example, wheelchair basketball players will not soon be found in the NBA as they would likely pose a significant health risk to the able-bodied competitors. Because many modifications to the substantive rules of sport have the potential to subject other participants to some danger, disabled athletes have limited options with respect to their requested accommodations.²⁰⁰

Beyond the general reasonableness of the requested accommodation, a disabled athlete must also establish that the modification is necessary for his participation.²⁰¹ On balance, this requirement will not impose a significant obstacle for many disabled athletes, whose participation would be impossible absent the

an individual assessment to determine: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; (3) and whether reasonable modifications or policies, practices, or procedures will mitigate the risk.” 28 C.F.R. § 36-208(c) (2001).

198. The direct threat limitation is based upon the idea that individuals with disabilities should not be discriminated against, yet accommodations for these individuals should not significantly jeopardize the health and safety of others. See *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1979).

199. *Doe v. Bd. of Educ.*, 213 F.3d 921, 924–26 (6th Cir. 2000) (holding that a high school violated neither the ADA nor the Rehabilitation Act when it placed a basketball player with hemophilia on “hold” status after the school had concerns for the health and safety of other athletes); *Montalvo v. Radcliffe*, 167 F.3d 873, 879 (4th Cir. 1999) (holding that the exclusion of an HIV-infected twelve year old child from martial arts did not violate the ADA because the child’s participation would constitute a “direct threat” to the health and safety of other participants and the risk could not be eliminated by way of a reasonable accommodation).

200. At least one court has addressed the direct threat issue within the context of rule modification. In *Anderson v. Little League Baseball, Inc.*, a coach confined to a wheelchair sued under the ADA in order to enjoin the enforcement of a new rule prohibiting wheelchairs on the field. 794 F. Supp. 342, 343–44 (D. Ariz. 1992). The court rejected the Little League’s defense that wheelchairs on the field posed a direct threat to the playing participants largely because the coach had been on the field for the last three years without incident. *Id.* at 343, 345. Although *Anderson* received his accommodation, one is left to wonder whether the same result would occur if the situation involved a player requesting to use a wheelchair within the field of play as opposed to a coach who is outside this boundary.

201. See 42 U.S.C. § 12182(2)(A)(ii) (1994).

requested accommodation.²⁰² Nevertheless, the individual situations of both Casey Martin and Ford Olinger raise some interesting issues with respect to whether an accommodation is *necessary* for a disabled athlete. Both men can walk, albeit with pain and substantial difficulty.²⁰³ Although both the Ninth and Seventh Circuits recognized that walking a full eighteen holes was nearly impossible for both men, and held a cart to be a necessary accommodation, neither court discussed the exact meaning of a “necessary” accommodation for purposes of Title III.²⁰⁴

The Supreme Court attempted to clarify this issue in *Martin*, but left a significant question open for discussion. In stating that Casey Martin’s request for a golf cart was a necessary accommodation, the Court added crucial dicta that limits the potential impact *Martin* will have on other athletes seeking accommodations: “Martin’s claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary.”²⁰⁵ The Court, however, did not define what it meant by a “necessary” accommodation within the context of athletics. Therefore, the *Martin* decision left unresolved the question of the degree of necessity at which an athlete’s requested modification becomes indispensable.

Clearly, the Court did not intend for “necessary” to mean that athletes must have an absolute physical inability because Casey Martin would not have prevailed as he can walk to some degree.²⁰⁶ Given this inference, the level of disability needed for an accommodation to rise to an athletic necessity is something more than “uncomfortable or difficult, but not beyond [one’s] capacity,”²⁰⁷ yet less than absolute physical inability

202. For instance, all modifications involving disabled athletes suing amateur athletic organizations for a waiver of an age rule must be “necessary” for purposes of the ADA because the athlete could not participate unless the organization waives or modifies the rule.

203. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1885–86 (2001); *Olinger*, 205 F.3d at 1001; see Charles & Sider, *supra* note 4, at 48 (quoting Martin as saying that he could walk, “[i]f you put a gun to my head.”).

204. *Martin*, 121 S. Ct. at 1893. Although neither the district court nor the Seventh Circuit discussed the necessity of the cart in *Olinger*, it must be presumed that such an accommodation was necessary or else the case would have been decided on this ground.

205. *Id.*

206. *Id.* at 1885–86.

207. *Id.* at 1893.

Although the distinction between necessity and convenience remains ripe for clarification in future cases,²⁰⁸ the Court's dicta regarding "less serious afflictions" limits the number of potential plaintiffs who can bring rule modification claims after *Martin*. The Court has crafted an opinion that virtually excludes all disabled athletes with minor physical ailments. This limiting language means that accommodation requests from athletes with bad backs or sprained knees will not overwhelm federal courts because these types of insignificant ailments only make athletics "uncomfortable or difficult, but not beyond their capacity."²⁰⁹ From this perspective, *Martin* cannot be viewed as a Pandora's box that will transform all of competitive athletics into a series of individual rules exceptions. Instead, the Supreme Court made a well-reasoned decision that appropriately distinguishes between qualified disabled athletes who genuinely need an accommodation in order to compete and those athletes who do not.²¹⁰

For the disabled athletes that establish both a reasonable and necessary accommodation, a final inquiry awaits: Does the requested accommodation fundamentally alter the nature of the place of public accommodation?²¹¹ Within the field of athletics, courts considering this question have reached inconsistent results.²¹² In fact, the

208. The recent story of South African swimmer Terence Parkin illustrates a perfect test case for determining whether an accommodation is truly necessary. Parkin is a deaf swimmer who won the silver medal in the 200 meter breaststroke at the 2000 Sydney Olympics. Ron Sutton, *Parkin Turns Deaf Ear to Handicap*, at <http://www.teleport.com/~kford/webwatch/0066.html> (Sept. 21, 2000) (on file with the North Carolina Law Review). As a result of this hearing impairment, Parkin used a strobe light rather than an air horn to signal him to begin the race. *Id.* Parkin could have used hearing aids and been signaled via a horn like the rest of the competitors, but opted for the visual signal after the sounds picked up by the hearing aids made him nervous and less focused before the race. *Id.* The first issue raised by this accommodation is whether it is truly necessary. Specifically, if Parkin can use his hearing aids, why should he be allowed to use a strobe light simply because it makes him more comfortable? Secondly, because light travels faster than the speed of sound, does this starting device give Parkin a competitive advantage in the sport of swimming where first and second place are often separated by hundredths of a second? *Id.*

209. *Martin*, 121 S. Ct. at 1893.

210. *Id.* (stating that "Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking difficult, but not beyond their capacity").

211. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994). Unlike the previous inquiries under Title III, the burden of proof for the fundamental alter question rests with the place of public accommodation. *E.g.*, *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997); *Lieber v. Macy's West, Inc.*, 80 F. Supp. 2d 1065, 1077 (N.D. Cal. 1999).

212. *Compare, e.g.*, *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (holding that a waiver of the MHSAA's age limit for high school athletes would constitute a fundamental alteration of the state's baseball program), *with*

fundamental alteration issue was the central difference between the *Martin* and *Olinger* decisions at the appellate level.²¹³ Before proceeding to the Supreme Court's resolution of this dispute, however, a brief review of the relevant law addressing this question within the field of competitive athletics is necessary.

C. Does a Requested Accommodation Fundamentally Alter the Nature of Competitive Athletics?

The U.S. Supreme Court first developed the fundamentally alter concept in *Southeastern Community College v. Davis*.²¹⁴ Although this case involved a plaintiff suing under the Rehabilitation Act, the Court's reasoning applies equally to the ADA due to the statutory and regulatory provisions calling for both laws to be read in concert with one another.²¹⁵ In *Davis*, the Court held that a hearing-impaired nursing student's request to modify portions of the curriculum to accommodate her disability would result in a fundamental alteration of the basic courses that one must pass in order to become a practicing nurse.²¹⁶ In reaching this conclusion, the Court reasoned that the law does not mandate such curriculum modifications when the outcome would result in a significant educational disparity between the disabled individual and the remaining nurses who comply with all the requisite courses.²¹⁷ Although the Court did not articulate any criteria to serve as guidelines for what constitutes a fundamental alteration, the *Davis* decision illustrates the Supreme Court's reluctance to construe the fundamentally alter concept as a vehicle to place disabled individuals who cannot comply with a set of material provisions on the same footing as those who can.²¹⁸

Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 852 (7th Cir. 1999) (holding that a modification of the IHSA's age requirement would not fundamentally alter the nature of competitive high school basketball).

213. Compare *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 999-1002 (9th Cir. 2000) (holding that a golf cart does not fundamentally alter the nature of competitive golf), *aff'd*, 121 S. Ct. 1879 (2001), with *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005-07 (7th Cir. 2000) (holding that a golf cart fundamentally alters the nature of competitive golf), *cert. denied, judgment vacated and remanded*, 121 S. Ct. 2212 (2001).

214. 442 U.S. 397 (1978).

215. See *supra* notes 51-55 and accompanying text; see also *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) (holding that courts have the ability to refer to decisions interpreting the Rehabilitation Act in order to find the meaning of terms used in the ADA).

216. See *Southeastern Cmty. Coll.*, 442 U.S. at 407, 409 (stating that the nurse wanted individual instruction as well as a waiver of certain academic courses).

217. See *id.*

218. See *id.* at 409-10 (stating that the plaintiff's requested modifications would not allow her to receive "even a rough equivalent of the training a nursing program normally

As a result of the Supreme Court's lack of guidance regarding the specific evidence necessary to establish a fundamental alteration to a place of public accommodation, lower courts have generally focused on the disabled individual's particular circumstances instead of the general nature of the requested accommodation.²¹⁹ Within the field of athletics, this individualized focus has led to inconsistent results. For instance, the United States Court of Appeals for the Seventh Circuit held that a modification of the Indiana High School Athletic Association's age requirement would not fundamentally alter the nature of competitive high school basketball.²²⁰ In contrast, several courts hearing claims from learning disabled high school athletes have held that a modification or waiver of the eligibility requirements for student-athletes would fundamentally alter the nature of sports programs.²²¹ Similarly, college athletes suing the NCAA for modifications of its eligibility requirements have rarely succeeded.²²²

What separates the high school athletic association and NCAA cases from both *Martin* and *Olinger* is the type of accommodation being requested. In the former cases, the disabled athletes were seeking either a waiver or a modification of a rule that would grant them access to the playing field. Conversely, *Casey Martin* and *Ford*

gives," thus such modifications would constitute a "fundamental alteration in the nature of [the] program").

219. *E.g.*, *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059-60 (5th Cir. 1997) (stating that the focus of the inquiry should be on the plaintiff's or defendant's individual circumstances); *Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs*, 872 F. Supp. 682, 687 (W.D. Mo. 1995) (stating that the ADA requires a case-by-case analysis of the disabled individual and the benefits that he or she seeks).

220. *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 852 (7th Cir. 1999).

221. *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 462 (6th Cir. 1997) (holding that a waiver of the age restriction would fundamentally alter the nature of high school athletics because it would allow older and more physically aggressive students to compete against younger less developed athletes); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995) (stating that a waiver of an age requirement for high school athletes would fundamentally alter the nature of competition because it would inject older and generally more physically mature students into athletic programs); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (holding that a waiver of the MHSAA's age limit for high school athletes would constitute a fundamental alteration in nature of the state's baseball program).

222. *Bowers v. NCAA*, 974 F. Supp. 459, 466-67 (D.N.J. 1997) (denying a preliminary injunction on the grounds that a complete abandonment of the NCAA's core course requirement would constitute a fundamental alteration of the NCAA's eligibility requirements); *Ganden v. Nat'l Collegiate Athletic Ass'n, Inc.*, No. 96 C 6953, 1996 U.S. Dist. WL 680000, at *15-16 (N.D. Ill. Nov. 21, 1996) (holding that a waiver or modification of the NCAA's minimum GPA requirement would fundamentally alter the NCAA's eligibility procedures).

Olinger were asking for an accommodation that changed a substantive rule of sport inside the field of play.²²³ Due in large part to this unique request, the Seventh and Ninth Circuits reached differing results with respect to the issue of whether a golf cart would fundamentally alter the nature of competitive golf.²²⁴ This disagreement forced the Supreme Court to address this issue directly in *PGA Tour, Inc. v. Martin*.²²⁵

At the outset, the Court envisioned that a modification of the rules of the PGA Tour's tournaments might work a fundamental alteration in two possible ways.²²⁶ First, a modification might change an essential aspect of the game of golf such that the alteration would be unacceptable even if it impacted all of the competitors equally.²²⁷ Second, a modification may have a less noticeable impact on the sport as a whole, but may fundamentally alter the sport by giving a disabled player a competitive advantage over the other tournament participants.²²⁸ With respect to Casey Martin's request for a waiver of the PGA Tour's walking rule, the Court held that such a waiver would not constitute a fundamental alteration in either sense.²²⁹

In order to reach this conclusion, the Court noted that the use of carts was not at odds with the basic character of golf.²³⁰ Put simply, the basic elements of the game are to hit the ball in the hole in the least number of strokes.²³¹ Furthermore, walking can hardly be fundamental when the "Rules of Golf" only mention it as an optional

223. Prior to *Martin*, only one other court had the opportunity to address whether an alteration of a rule inside the field of play constituted a fundamental alteration for the purposes of the ADA. In *Elitt v. USA Hockey*, the parents of a youth hockey player with Attention Deficit Disorder brought an action under the ADA requesting that the hockey league allow the child's father or brother to be on the ice during practices and games. 922 F. Supp. 217, 218 (E.D. Mo. 1996). According to the court, this accommodation would constitute a fundamental alteration because the presence of family members on the ice "would disrupt the flow of play and prevent players from experiencing conditions of a regular scrimmage." *Id.* at 225. Alternatively, the parents requested that their child be permitted to "play down" in a younger age group because of his disabled condition. *Id.* at 218. Again, the court held that this would be a fundamental alteration of the hockey program because the child had attention problems and was larger than the other players in the "squirrel" level. *Id.* at 225. Accordingly, the child's presence would increase the chance of injury and disrupt the overall nature of the hockey program at that level. *Id.*

224. See *supra* note 213 and accompanying text.

225. 121 S. Ct. 1879 (2001).

226. *Id.* at 1893. For example, the court hypothesized that enlarging the golf hole might constitute such an alteration. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

rule in the appendix.²³² Indeed, the PGA Tour admitted as much because it permitted golfers to ride carts in several of its tournaments.²³³

The Court also rejected the PGA Tour's argument that the walking rule was an "outcome-affecting" one, a waiver of which would most certainly rise to a fundamental alteration.²³⁴ First, the Court stated that many other factors, such as weather and luck, have as much potential to impact the outcome of a golf tournament as fatigue from walking.²³⁵ Second, the factual evidence in the district court's record disclosed that the fatigue endured from walking a golf course is not significant.²³⁶ Third, the Court noted that even if a cart was available in tournament competition, many able-bodied golfers would not choose to ride one.²³⁷

Finally, and most importantly, the Court stated that consideration of Casey Martin's individual circumstances led to the conclusion that waiving the cart rule would not fundamentally alter the nature of competitive golf.²³⁸ Because walking is largely tangential to the game of golf, the rule can be modified in individual

232. *Id.* at 1894–95.

233. *Id.* at 1895; *see supra* notes 183–84 and accompanying text.

234. *Martin*, 121 S. Ct. at 1895.

235. *Id.*

236. *Id.* During the district court proceeding, Dr. Gary Klug, an exercise physiologist, testified that the average person expends about five hundred calories when walking a golf course. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1250 (D. Or. 1998), *aff'd*, 204 F.3d 994 (2000), *aff'd*, 121 S. Ct. 1879 (2001). According to his testimony, this figure basically amounts to the nutritional equivalent of a Big Mac. *Id.* Due to the fact that fatigue is caused by stress, psychological phenomenon, and a loss of fluids, rather than expenditure of energy, the court concluded that the simple act of walking a golf course cannot be deemed significant under normal circumstances. *Id.* at 1250–51. Interestingly, the *Olinger* court excluded Dr. Klug's testimony from the record due to the fact that the methodology used to formulate these conclusions was never disclosed. *Olinger v. United States Golf Ass'n*, 52 F. Supp. 2d 947, 950 (N.D. Ind. 1999), *aff'd* 205 F.3d 1001 (7th Cir. 2000), *cert. granted, judgment vacated and remanded*, 121 S. Ct. 2212 (2001).

237. *Martin*, 121 S. Ct. at 1896. For example, in a single tournament where one shot can be the deciding factor in who wins and loses, knowledge of the greens, rough, and general course conditions are essential to a championship caliber performance. The golfer who speeds along quickly in a cart does not get to experience the course's texture and the subtle traps that could be lurking beneath the surface. In contrast, the golfer who takes the time to walk can physically feel as well as observe the course from a closer perspective and arguably has a better knowledge of the course as a whole. Even assuming that walking may induce a mild fatigue factor, the overall strategic advantage gained by walking would seem to outweigh the energy one saves by riding. *See Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1251 n.13 (D. Or. 1998) (referring to the testimony of current Buy.com professional Eric Johnson who described the comparative advantage of walking over riding a cart), *aff'd*, 204 F.3d 994 (2000), *aff'd*, 121 S. Ct. 1879 (2001).

238. *Martin*, 121 S. Ct. at 1896.

cases without causing a fundamental alteration.²³⁹ With respect to Martin's individual circumstances, the factual record illustrated that he easily suffered more fatigue with a cart than the other competitors who walk the course.²⁴⁰ Accordingly, providing Martin with a cart would not compromise the PGA Tour's walking rule, which was designed to inject an element of fatigue into the game.²⁴¹ In sum, "[a] modification . . . to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the [sport]."²⁴²

Taken as a whole, the Supreme Court's analysis of the fundamental alteration issue strikes the appropriate balance between maintaining the integrity of competitive sports and accommodating qualified disabled athletes. The most common criticism of the *Martin* decision is that it will create an avalanche of litigation in which the rules of competitive sport will be whittled down to a series of individualized exceptions.²⁴³ Despite these often dire predictions, careful consideration of the Court's analysis reveals that these forecasts will not come to fruition.

First, by holding that modifications to the rules of sport can work two types of fundamental alterations, the Court recognized that certain types of athletic rules simply cannot be altered, regardless of the circumstances of the disabled individual seeking the accommodation.²⁴⁴ Moreover, some rules are simply so integral to athletics that a *per se* modification of them would constitute a fundamental alteration.²⁴⁵ In *Martin*, the PGA Tour's walking rule was held to be a "peripheral" rule that could be waived without changing the foundation of the sport of golf. The same cannot be said for all rules in all sports. For example, the sport of soccer is premised on the rule that field players cannot use their hands to advance the ball. Under the Court's analytical framework, a modification of this rule would most certainly rise to a fundamental alteration because

239. *Id.* Conversely, the waiver of an essential rule would certainly cause a fundamental alteration. *Id.*

240. *Id.* at 1897.

241. *Id.*

242. *Id.*

243. *Id.* at 1904 (Scalia, J., dissenting) (imagining that a Little League player would request a court for four strikes at bat instead of three); see *supra* notes 19–21 and accompanying text.

244. See *supra* notes 226–28 and accompanying text.

245. *Martin*, 121 S. Ct. at 1896 (stating that a waiver of an essential rule of competition would work a fundamental alteration); see *id.* at 1903 (Scalia, J., dissenting) (stating that at some point, modification in the rules of sport change the game in such a way that it is no longer the same game).

such a change would alter “an essential aspect of the game.”²⁴⁶ Even though drawing the line between peripheral rules and essential rules may involve a highly fact-specific inquiry,²⁴⁷ the Court recognized that such a line does, in fact, exist. As a result of this recognition, the foundational rules of sport that form the bedrock of athletics will be immune from modification.²⁴⁸ Conversely, those rules that tangentially relate to the game will be the only ones subject to alteration.²⁴⁹ Given this critical distinction, the critics who say that *Martin* is just a first step toward stilts in the NBA or jet-propelled javelins are way off base.²⁵⁰

Second, the Supreme Court’s focus on Casey Martin’s individual circumstances ensures that future courts will give adequate consideration to the unique situations of disabled athletes.²⁵¹ At the same time, the consideration of a disabled athlete’s personal circumstances has a limiting effect because the reviewing court can also consider how the modification will impact athletic competition as a whole.²⁵² The result of this dual function is that the Court’s analytical framework permits accommodations for qualified disabled

246. *Id.* at 1893.

247. This inference is clearly justified by the Court’s consideration of the PGA Tour’s walking rule. *Id.* at 1893–98. At least one commentator has proposed an analytical framework in order to determine which rules of sports are essential. Waterstone, *supra* note 30, at 1535–39 (proposing a seven-question test to analyze rule modifications).

248. For instance, the following could be considered foundational rules: dribbling in basketball, skating in hockey, and running the bases in baseball.

249. An example of a tangential rule would be major league baseball’s so-called “motionless” rule. Once a pitcher steps on the pitching rubber, he is required to stand completely still until he begins his delivery. Waterstone, *supra* note 30, at 1536. This rule created a problem for Jim Abbott, a one-armed pitcher, who could not comply with this mandate given his physical limitations. *Id.* Nevertheless, Major League Baseball granted Abbott an exception from this rule. *Id.*

250. See *supra* note 19–21 and accompanying text.

251. *Martin*, 121 S. Ct. at 1896–97 (discussing Martin’s individual circumstances). The Court’s decision to focus on an athlete’s individual circumstances is buttressed by an earlier athletic accommodation case. In *Shultz v. Hemet Youth Pony League, Inc.*, a child with cerebral palsy attempted to play youth baseball with crutches in a division reserved for younger players. 943 F. Supp. 1222, 1223–24 (C.D. Cal. 1996). The league refused this request and the child’s parents brought an action under the ADA to compel the league to adhere to this accommodation. *Id.* at 1224. The court granted summary judgment in favor of the parents because the league failed to examine the particulars of the child’s condition when it made its decision to deny the requested accommodation. *Id.* at 1225–26. Moreover, the league based its decision on “assumed and unsubstantiated concerns of a possible risk of harm to Plaintiff and other players, and insurance ramifications.” *Id.* at 1225. The court went on to hold that the league violated the ADA because it did not make any effort to find out about the child’s “individual needs” or consider whether the child could in fact run or engage in athletic activity. *Id.* at 1225–26.

252. *Martin*, 121 S. Ct. at 1897 (stating that granting Martin an accommodation did not give him a competitive advantage).

athletes while simultaneously limiting these accommodations only to those situations in which competition will not be adversely affected.

In addition to crafting an opinion that protects the integrity of competitive athletics, the Court's focus on Casey Martin's individual situation has the broader effect of resolving the disagreement between the circuits as to how they should approach an ADA claim by a disabled athlete. In considering Martin's claim, the Supreme Court reiterated the position that the purpose and language of the ADA require a personal inquiry into both the reasonableness of the requested accommodation and the fundamental alteration issue.²⁵³ This affirmation was crucial because one of the key differences between the Ninth Circuit's *Martin* opinion and the Seventh Circuit's *Olinger* opinion was the way in which the courts approached the fundamental alteration analysis. More specifically, the Ninth Circuit centered its analysis on the individualized nature of Casey Martin's condition, whereas the Seventh Circuit looked at the more general issue of whether carts altered the nature of competitive golf.²⁵⁴ The Supreme Court's emphasis on Martin's personal circumstances clarifies any discrepancy between the courts by sending the message that due consideration must be paid to a disabled athlete's individual features. In sum, this holding, consistent with both the purpose and language of the ADA,²⁵⁵ guarantees that disabled athletes seeking modifications to the rules of competitive athletics will have their cases decided by courts assessing their individual circumstances rather than the general issue of whether the accommodation fundamentally alters the nature of the sport.

At the same time, however, this individualized analysis correctly limits the breadth of the *Martin* decision to only those situations in which an accommodation will not disrupt the competitive balance of the sport in question. As illustrated by *Martin*, the Court considered the impact that a waiver of the PGA Tour's walking rule would have on the competition level in its tournaments. Because Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking," a waiver of the walking rule would neither compromise the competitive balance of the PGA Tour nor

253. *Id.* at 1896.

254. Compare *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1002 (9th Cir. 2000), with *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1007 (7th Cir. 2000).

255. 42 U.S.C. § 12101(b)(1) (1994) (stating that the ADA was enacted to eliminate discrimination against *individuals* with disabilities) (emphasis added); see *supra* notes 103, 186, 219 and accompanying text (discussing the ADA's emphasis on individualized inquiries).

the fatigue-related purpose behind the walking rule.²⁵⁶ Nonetheless, several reasons suggest that not all future cases will necessarily proceed along these precise lines.

First, the logical corollary of the Court's analytical framework in *Martin* is that a waiver of an athletic rule that gives a player a competitive advantage will likely constitute a fundamental alteration.²⁵⁷ Therefore, any rule modification that would give a disabled athlete even the slightest competitive advantage over the able-bodied participants would risk being labeled a fundamental alteration.²⁵⁸ Importantly, this limitation ensures that the competitive nature of athletic competition will not be compromised by future ADA claims. The Court correctly drew the line between rule modifications that provide access and those that provide a competitive advantage. Because the Court appears unwilling to permit accommodations that tread into the latter of these two categories, the integrity of competitive athletics will not be compromised by the *Martin* holding.

Second, the requested rule modification cannot jeopardize the underlying purpose of the rule. Because Casey Martin's fatigue with a cart outweighed the fatigue of able-bodied walkers, a waiver of the walking rule did not rise to the level of a fundamental alteration.²⁵⁹ Despite Martin's success on this issue, future plaintiffs may have difficulty with this inquiry because modifications to many athletic rules will likely compromise the purposes behind these rules.²⁶⁰ In Martin's case, the Court held that such a compromise did not occur

256. *Martin*, 121 S. Ct. at 1897.

257. *See id.* at 1893 (stating that a modification in rule of sport may give a player an advantage in competition and thus fundamentally alter the nature of the sport).

258. This inference is consistent with the underlying purpose of the ADA because Congress intended the Act to prevent discrimination against disabled individuals, not provide advantages to them. *See* § 12101(b).

259. *Martin*, 121 S. Ct. at 1897.

260. A simple hypothetical may help to illustrate this point. For example, the purpose behind the rule of running the bases in baseball is to inject the elements of speed and agility into the game. A request by a disabled athlete for a waiver or modification of this rule would arguably compromise this underlying purpose; that is, a waiver would remove these elements from the game as it is played by the disabled athlete. Under the analytical framework adopted in *Martin*, this type of rule modification would constitute a fundamental alteration unless the athlete could somehow show, as Casey Martin did, that a waiver would neither compromise the rule's purpose nor give the athlete a competitive advantage. *See id.* at 1896-97. Although future cases will undoubtedly be needed to determine how courts will interpret this portion of the *Martin* holding, one forecast appears likely: rarely will a situation like Martin's occur in which an athlete obtains a waiver or modification of a substantive athletic rule without compromising the fundamental purpose behind the rule.

because Martin's physical condition injected the element of fatigue into the sport, thus eliminating the necessity of the walking rule.²⁶¹ Given this holding, future disabled athletes will need to demonstrate both that their conditions correlate to the purpose behind the rule, and rise to such a level that a waiver of the rule will not compromise its purpose or give the athlete an advantage. This rather strict set of criteria has the potential to provide disabled athletes with modifications to the substantive rules of athletics; however, this restriction also serves to limit modifications to only those rules whose purposes will not be compromised.²⁶² Such a balance adequately addresses both the dual concerns of accommodation and the integrity of competitive athletics.

CONCLUSION

The ADA has reconfigured the landscape of America for disabled individuals over the course of the last decade. It has modified the "rules" of employment, government programs, and places of public accommodation in order to provide access and opportunity to disabled members of society. *PGA Tour, Inc. v. Martin*²⁶³ represents an important step forward in this social progression by treating the rules of competitive athletics no differently than any other barrier that prevents disabled citizens from enjoying full participation in society.²⁶⁴

Too often disabled citizens are viewed as being merely "human interest" stories that should inspire the rest of the able-bodied world. Casey Martin is not a human interest story, he is a sports story. More specifically, he is an athlete with tremendous talents that faces unfortunate barriers to realizing his professional dreams. The United States Supreme Court correctly recognized that granting Martin a golf cart would not fundamentally alter tournament golf. Moreover, such

261. *See id.*

262. Because Casey Martin endures more fatigue with a cart than his able-bodied competitors, the purpose of the walking rule was not compromised by allowing Martin to ride a cart. *Id.* at 1897. Accordingly, the Court held that the modification of such a peripheral rule would not constitute a "fundamental alteration." *Id.* The logical corollary to the Court's reasoning is that a modification that does in fact compromise a rule's underlying purpose will rise to the level of a fundamental alteration for the purposes of the ADA.

263. 121 S. Ct. 1879 (2001).

264. *Schultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222, 1226 (C.D. Cal. 1996) (quoting *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Az. 1992)) ("It is imperative that Americans with disabilities be brought fully into the mainstream of society 'in other words, full participation and access to all aspects of society.'").

an accommodation was both reasonable and necessary in order for him to pursue his dream of playing golf alongside the world's greatest players.

At the same time, however, the Court's opinion, as well as preexisting limitations of the ADA, prevent the likelihood that *Martin* will lead to a litigation boom that transforms the rules of competitive athletics into a series of individualized exceptions. First, many athletes will have difficulty establishing a recognized "disability" under the ADA, either because the ailment may not impact a major life activity or because it may only be a temporary condition. Second, not all accommodations will be both reasonable and necessary. Third, as the Supreme Court recognized in *Martin*, some rules may be essential to the sport in question and therefore may never be modified or altered. Finally, modifications can neither provide a disabled athlete with a competitive advantage, nor compromise the purpose of an athletic rule.

In the end, *Martin* strikes the appropriate balance between accommodating qualified disabled athletes and maintaining the integrity of competitive athletics. If sports are indeed an accurate reflection of society, then *Martin* represents a significant advancement towards a tangible illustration of this ideal through the Supreme Court's recognition that the athletic playing field should be accessible to all athletes, whether able-bodied or disabled. At the same time, the Court correctly recognized the prominent place that athletics occupy in the American social fabric and crafted an analytical framework that will ensure the integrity of competitive sports for years to come.

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