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The Supreme Court Appeal of the Casey Martin Case: The Court's Two Options--Martin's Hole-in-One or Olinger's Slice into the Bunker

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THE SUPREME COURT APPEAL OF THE CASEY MARTIN CASE: THE COURT'S TWO OPTIONS—*MARTIN'S* HOLE-IN-ONE OR *OLINGER'S* SLICE INTO THE BUNKER

I. INTRODUCTION

A famous, yet trite, philosophical question asks, “If a tree falls in the forest and nobody hears it, did it make a sound?” Although often over-used in the rhetorical circles to the point of annoyance, this hypothetical cliché is applicable in some contexts. For instance, consider the predicament of Casey Martin. Martin is a talented golfer who suffers from Klippel-Trenaunay-Webber Syndrome (KTS), a rare disorder affecting circulation to his legs which significantly impairs his mobility.¹ As a youth, Martin was an excellent golfer, winning seventeen junior championships as an amateur.² At Stanford University with his collegiate teammates, current professional golfers Tiger Woods and Notah Begay, Martin helped to propel his team to the national championship in 1994.³ Sympathetic to Martin’s disability, the National Collegiate Athletic Association (NCAA), the United States’ governing body of collegiate athletics, allowed Martin the use of a golf cart enabling him to compete and complete an entire round of golf.⁴ Without the use of a golf cart, Martin would have otherwise been unable to walk the three or four mile length of a golf course due to his disability. Had Martin not been allowed to use a golf cart as a youth and during college, would the world have known how talented a golfer he was? Would the thunderous sound of his club have been heard outside the tree-lined rough of the golf course?

1 United States Department of Justice, *Faces of the ADA* (visited Sept. 21, 2000) <<http://www.usdoj.gov/crt/ada/fmartin.htm>>.

2 *Id.*

3 *Id.*

4 *Id.*

Like the tree in the forest, would his ability have made a sound or would it just have gone unnoticed?

After college, Martin sought the opportunity to fulfill his dream of becoming a professional golfer on the Professional Golf Association Tour (PGA), the pinnacle of competition for the world's professional golfers.⁵ Unfortunately, the PGA was not as receptive to Martin's disability as was the NCAA. The PGA Tour refused to allow Martin the use of a golf cart, thereby denying him the opportunity to fulfill his dream.⁶ Due to the PGA's inflexibility, Martin sued the PGA, alleging discrimination violating the Americans with Disabilities Act of 1990 (ADA),⁷ and seeking modification of the PGA's rules to allow him the use of a golf cart. The resulting lawsuit went to trial in an Oregon federal district court in 1998.⁸ The district court found in favor of Martin and ordered the PGA to allow Martin's use of a golf cart in events sponsored by the PGA Tour.⁹

The PGA appealed the decision, and oral arguments before the Court of Appeals for the Ninth Circuit occurred the following year. This appellate opinion by the Ninth Circuit, *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000) (hereafter "*Martin*"), is one of the two subject opinions of this article. In *Martin*, the court of appeals affirmed the district court's decision that Martin's use of a golf cart was reasonable and that the PGA must allow Martin the use of a cart in PGA-sponsored events.¹⁰ The Ninth Circuit issued its opinion on March 6, 2000.

The following day, the Court of Appeals for the Seventh Circuit issued an opinion involving another professional golfer, Ford

⁵ *Id.*

⁶ United States Department of Justice, *Faces of the ADA* (visited Sept. 21, 2000) <<http://www.usdoj.gov/crt/ada/fmartin.htm>>.

⁷ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

⁸ *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) (order granting partial summary judgment) and 994 F. Supp. 1242 (D. Or. 1998). The first opinion granted partial summary judgment to Martin, resolving the issue that the PGA was subject to the ADA. The second decision was the district court's actual dispositive opinion stating its holding in favor of Martin.

⁹ *Martin*, 994 F. Supp. at 1253.

¹⁰ *Martin*, 204 F.3d at 1002.

Olinger, who experienced a similar obstacle in his attempt to secure the use of a golf cart in a professional golf tournament.¹¹ That opinion, *Olinger v. United States Golf Association*, 205 F.3d 1001(7th Cir. 2000) (hereafter “*Olinger*”), the other subject opinion of this article, held that the plaintiff, Olinger, did not have the right to use a golf cart in the qualifying rounds of a professional golf tournament.¹² In *Olinger*, the court of appeals affirmed a district court decision, holding that Olinger’s request to use a golf cart was not required by the ADA.¹³ Olinger, like Martin, has a disability which impairs his ability to walk an entire golf course without significant pain and risk of further injury. In this case, however, the United States Golf Association (USGA),¹⁴ the administrating organization of the United States Open golf tournament to which Olinger sought modified access (through the use of a cart), was not required to allow Olinger’s request.

Both *Olinger* and *Martin* were litigated under the ADA. Both opinions raised similar issues including the reasonableness of the plaintiff’s accommodation, the fundamental nature of a golf tournament, and the ability of the respective golf associations to preserve the nature of such a tournament. In theory, both courts used the same framework to reach its conclusion. The results, however, are radically different. The *Martin* court held that the ADA required the use of a golf cart to accommodate a disabled professional golfer. At the other pole, the *Olinger* court held that the use of a golf cart by a disabled professional golfer was not required by the ADA. To borrow a metaphor from golf, both courts used the same golf club to hit the same ball off the same tee,

11 *Olinger v. United States Golf Association*, 205 F.3d 1001, 1007 (7th Cir. 2000).

12 *Id.* at 1007.

13 *Olinger v. United States Golf Association*, 55 F. Supp.2d 926, 938 (N.D. Ind. 1999).

14 The USGA is a separate, although not wholly unrelated, entity from the PGA. The USGA administers amateur and professional golf tournaments and is the administrative and regulatory body of golf in the United States. The PGA, on the other hand, is the administrative body of professional golf which operates several professional golf tours, including the PGA Tour, the LPGA Tour (a professional tour for women), and the Senior PGA Tour.

but one of the courts sliced the ball into a sand trap, while the other hit a hole-in-one.

This case comment will explore the respective decisions and the rationale of the two federal Courts of Appeal in the *Martin* and *Olinger* opinions in light of the PGA's appeal of *Martin* to the Supreme Court. Part I provides background information relating to the purpose and the legislative history of the ADA, the controlling legislation in the two subject opinions. Part II examines the decisions and the rationales of the subject opinions, including both the district court and court of appeals opinions in *Martin* and *Olinger*. Part III analyzes several reasons illustrating why, in the *Martin* appeal, the Supreme Court must affirm the Ninth Circuit's opinion in *Martin* which correctly interpreted the ADA and must overrule the Seventh Circuit's decision in *Olinger* which was decided erroneously. Part IV concludes by discussing the impact of any Supreme Court decision either narrowly, applying only to professional golf, and more broadly, including the application of the ADA to the realm of other professional sports.

II. BACKGROUND OF THE AMERICANS WITH DISABILITIES ACT AND THE FRAMEWORK FOR ADA ANALYSIS

A. Congressional Findings

Ten years have passed since Congress ratified the most sweeping and effective legislation, arguably, since the Civil Rights Act of 1964, the Americans with Disabilities Act.¹⁵ The ADA was ratified in 1990 as a result of a Congressional inquiry into the problems faced by disabled individuals.¹⁶ The Congressional findings, included in the Act, illustrate the necessity of such important legislation. Congress estimated that more than 43,000,000 Americans have at least one recognized physical or

¹⁵ See generally 42 U.S.C. §§ 12101 - 12213 (2000).

¹⁶ See 42 U.S.C. § 12101(a) (2000).

mental disability affecting their lives,¹⁷ a number sure to grow as the Baby Boom generation ages into its golden years. These affected individuals have historically experienced segregation and isolation from mainstream society, resulting in invidious discrimination.¹⁸ This form of discrimination, deemed “a serious and pervasive social problem,” takes hold in vital areas such as employment, housing, public accommodations, education, transportation, communication, recreation, voting rights, and health care.¹⁹

The findings continued, stating that disabled individuals “are a discrete and insular minority,”²⁰ which is the same language used to characterize African-Americans and other racial minorities in the aforementioned Civil Rights Act. Based on “characteristics that are beyond the control of such individuals and resulting from stereotypic [sic] assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society,”²¹ the discrimination against disabled Americans is comparable, in some ways at least, to other discrete and insular minorities who have received federal protection through remedial federal legislation. Disabled individuals, “faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,”²² had no legal recourse at the federal level to address their discrimination claims or to remedy their discrimination claims,²³ prior to the enactment of the ADA.

17 42 U.S.C. § 12101(a)(1) (2000).

18 *Id.*

19 42 U.S.C. § 12101(a)(2)-(3) (2000).

20 42 U.S.C. § 12101(a)(7) (2000).

21 *Id.*

22 *Id.*

23 42 U.S.C. §12101(a)(4) (2000).

B. Purposes of the ADA

In conjunction with its nine preliminary findings, Congress offered a four-pronged statement of purpose for the ADA.²⁴ Congress presented the following purposes for the ADA:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.²⁵

The ADA gave to Congress broad, remedial power--similar to that given to Congress in enacting legislation addressing racial discrimination--to address the nation's sad history of discrimination.²⁶ In its findings, Congress found the stigma attached to being a disabled individual similar to that of being a racial minority, and as a result, it granted a similarly broad legislative remedy. Many scholars and commentators, however, have criticized the ADA as being too vague, too broad, and unworkable, claiming that "Congress laid out the mandate [for the ADA], but left the interpretation [of the Act] to the courts."²⁷

24 42 U.S.C. §12101(b)(1)-(4) (2000).

25 *Id.*

26 *Id.*

27 Matthew Kensky, *Casey Martin v. PGA Tour, Inc.: Introducing Handicaps to Professional Golf by Widening the Scope of the ADA*, 9 GEO. MASON U. CIV. RTS. L. J. 151, 153, (1998).

The ADA defines the term, *disability*, with respect to a disabled individual, in three ways: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such an impairment.²⁸ The Code of Federal Regulations (CFR) offers insight and aid to fill in some of the gaps in the Congressional definitions in the ADA. For example, the CFR provides definitions for physical and mental impairment²⁹ and major life activity,³⁰ and it notes several factors for determining whether an activity is substantial enough to be deemed a major life activity.³¹

C. Application of the ADA to Public Accommodations

The ADA has three distinct sections or spheres of application. Title I encompasses employment and provides protections against employment disability-based discrimination. Title II offers equal access to public services for disabled individuals. Title III of the ADA prohibits discrimination against the disabled in public accommodations. Title III is the subject of both the *Martin* and *Olinger* cases, despite the objections of the respective golf entities.

Keeping with its previously-noted characteristic of sweeping broadly across many areas of coverage, the ADA includes a broad and sweeping list of the examples of public accommodations subject to the Act.³² The ADA includes many otherwise private entities which are considered public accommodations when the operation of that entity affects commerce.³³ The following entities are examples of public accommodations, according to the Act:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within

28 42 U.S.C. § 12102(2)(A)-(C) (2000).

29 28 C.F.R. § 36.104(1) (2000).

30 28 C.F.R. § 36.104(2) (2000).

31 29 C.F.R. § 1630.2(j)(2) (2000).

32 42 U.S.C. § 12181(7)(A)-(L) (2000).

33 *Id.*

a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, or other place of exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store, store, shopping center, or other sales or rental establishment; (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of public display or collection; (I) a park, zoo, amusement park, or other place of recreation; (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.³⁴

Although exhausting to read, this list is not exhaustive with respect to listing all public accommodations subject to Title III. The list, however, provides a rather comprehensive idea of what types of entities are subject to Title III.

Title III's general rule prohibiting discrimination by public accommodations is that "no individual shall be discriminated

³⁴ *Id.*

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 accommodation, by any person who owns, leases (or leases to), or operates a place of public accommodation.”³⁵ This provision states simply that public accommodations cannot discriminate against disabled individuals. What qualifies as discrimination is another issue explained in Title III. In the following section, the ADA answers that question with this definition of discrimination:

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.³⁶

The two major areas of focus in this definition, and as will later be seen in the cases at issue, are (1) whether or not a particular requested modification is a reasonable modification of a public accommodation and (2) whether or not that particular modification, if reasonable, would fundamentally alter the nature of that specific public accommodation. After a finding that Title III of the ADA applies, meaning that the entity at issue is a public accommodation, the determination of whether or not the public accommodation has discriminated against the disabled individual hinges on these two issues. If the accommodation is not reasonable, then the public accommodation cannot be expected to provide that modification to its disabled patrons because the Act does not require unreasonable modifications to public accommodations. However, if the modification is reasonable, the public accommodation must make it, unless that particular

35 42 U.S.C. § 12182(a) (2000).

36 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

modification would fundamentally alter the nature of the public accommodation. As a result, if the modification would fundamentally alter the public accommodation, the entity is not required to make such a modification, similar to the scenario in which a modification is not reasonable. The determination of what exactly is *reasonable* or how a public accommodation can be *fundamentally altered* is a difficult one which will be explored fully in the conjunction with the cases at issue.

III. SUBJECT OPINIONS: *MARTIN V. PGA TOUR, INC.*, 204 F.3d 994 (9TH CIR. 2000) AND *OLINGER V. UNITED STATES GOLF ASSOCIATION*, 205 F.3d 1001 (7TH CIR. 2000)

A. *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000).

1. *District Court Opinions: Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) (order granting partial summary judgment) and 994 F. Supp. 1242 (D. Or. 1998) (dispositive opinion).

The district court judge, both in the order and the opinion, presented an illustrative background of Martin's condition and his situation with respect to the effect of his disability on his golf career. Martin is a professional golfer who suffers from KTS which is a malformation of veins halting blood circulation from his right leg to his heart and has eroded the bone in his right tibia, causing significant atrophy in his right leg and substantially limiting his ability to walk.³⁷ Even the slightest touching of Martin's right leg, which is only half the size of an average leg, causes him extreme pain.³⁸ Martin's disorder has steadily worsened throughout his life.³⁹ The only way for Martin to relieve the swelling is by elevating the leg, but even that simple activity is

³⁷ *Martin*, 994 F. Supp. at 1243-4.

³⁸ *Id.* at 1243.

³⁹ *Id.* at 1244.

painful for him.⁴⁰ Martin claims that each step he takes not only places him at great risk for suffering either hemorrhages or blood clots but also places him at significant risk of fracturing his already-weakened tibia with little likelihood of recovery from such an occurrence.⁴¹

After considering the testimony of several of Martin's expert witnesses, the district court granted a preliminary injunction requiring the PGA to allow Martin's use of a cart for the final round of qualifying school.⁴² Qualifying school is one of the ways a golfer can gain access to PGA events and includes three stages designed to filter out less-talented golfers at each stage.⁴³ The third and final stage narrows the competition to 168 golfers, after which the top thirty-five advance to the PGA Tour and the next seventy golfers qualify for the Nike Tour, a second-tier tour also sponsored by the defendant.⁴⁴ Because of his play in the third stage, the plaintiff qualified for the Nike Tour.⁴⁵ The district court extended the injunction to cover the first two events on the Nike Tour.⁴⁶

a. PGA Tour Is not Exempt from Application of the ADA

At this point, the defendant moved for summary judgment, the plaintiff made a cross-motion for partial summary judgment⁴⁷ and the real essence of the trial began--a trial which attracted widespread media attention mainly sympathizing with the plaintiff. The first issue at trial was whether the ADA applied to the defendant.⁴⁸ The defendant's major claim was that the PGA Tour

40 *Id.* at 1243-4.

41 *Id.* at 1243.

42 *Martin*, 984 F. Supp. at 1322.

43 *Id.* at 1322.

44 *Id.* at 1321-2. The Nike Tour, also operated by the PGA, is a less prestigious tour comprised of less skilled and experienced professionals than those on the PGA Tour.

45 *Id.* at 1322.

46 *Id.*

47 *Martin*, 984 F. Supp. at 1322.

48 *Id.* at 1323. *See also Martin*, 994 F. Supp at 1244.

was exempt from the ADA because it is a private club.⁴⁹ The court used a seven factor balancing test in order to determine whether the PGA qualified for the private club exception.⁵⁰ In the order granting partial summary judgment, the court weighed the seven factors--genuine selectivity, membership control, history of organization, use by nonmembers, club's purpose, advertising for membership, and non-profit status--and held that PGA Tour was not a bona fide private club and did not benefit from that exception.⁵¹

After ruling that the defendant did not qualify for the private club exemption, the court determined that the PGA was a public accommodation subject to Title III of the ADA.⁵² The court's strongest argument asserted that a golf course is explicitly listed as an example of a public accommodation in the statute.⁵³ The defendant argued that its courses are public accommodations only in the areas in which the public at large has access. Through its "zones of application" argument, the PGA claimed that the area outside the ropes, also known as the gallery, is a publicly accessible area, while the area inside the ropes, the competitive arena of the golf course, is not accessible to the public and not a public accommodation.⁵⁴ The court rejected this argument for two reasons. First, if this logic held true, the zones of application would render meaningless the private club exception.⁵⁵ Second, the court held that neither the ADA nor the accompanying regulations such as the Code of Federal Regulations (CFR) support such an argument.⁵⁶ A public accommodation cannot pick and choose where it wishes to apply the law because the ADA applies uniformly to all entities under its jurisdiction. A mixed use facility, one which has portions zoned specifically for private use, qualifies

49 *Martin*, 984 F. Supp. at 1323. See 42 U.S.C. § 12187 (2000) (Title III's exception from ADA coverage for bona fide private clubs).

50 *Martin*, 984 F. Supp. at 1324.

51 *Id.* at 1324-6.

52 *Id.* at 1326.

53 *Id.* at 1326. See 42 U.S.C. § 12181(7)(L) (2000).

54 *Id.* at 1326.

55 *Martin*, 984 F. Supp. at 1326.

56 *Id.* at 1326.

as an exception to the ADA, but the defendant's golf course was not a mixed use facility; the defendant merely wanted to "relegate the ADA to hop-scotch areas" for its own benefit.⁵⁷ The court cited a recent case in Oregon regarding Portland's Rose Garden Arena in which it held that the sports arena's executive suites, although not open to the public, were subject to Title III,⁵⁸ and held the defendant to the same standard.

b. The Use of a Golf Cart Is a Reasonable Modification

After settling the issue of the applicability of the ADA to the defendant, the court turned to the second issue, whether the plaintiff's modification was reasonable. To provide insight into its mindset about this issue, the court offered an analogy about a disabled international traveler.⁵⁹ This hypothetical traveler wanted to fly from Oregon to Germany. The first leg of the flight took him from Oregon to Chicago, and he was accommodated on this leg. On the international leg, however, the plane's captain decided that it would provide no accommodation for his special needs and refused to allow the disabled passenger on the flight. Although the traditional adage held that the captain is in control of his ship, the court asked whether the captain should have refused to allow the passenger on the flight. Translated, the analogy asked the same question: Should the PGA refuse to waive its rule, denying Martin the opportunity to use a cart? In both cases, the rule has an obvious purpose, and in the language of the PGA, is "substantive," but the court stated a belief that even a substantive rule, such as allowing a captain to control his airplane, must be modified to provide reasonable accommodations for a disabled passenger in light of the ADA.⁶⁰

⁵⁷ *Id.* at 1326-7.

⁵⁸ *Id.* at 1327. *See also* Independent Living Resources v. Oregon Arenas Corp., 982 F. Supp. 698, 758-9 (D. Or. 1997) (holding that many facilities classified as public accommodations, such as banquet facilities, political conventions, and private schools, are subject to ADA).

⁵⁹ *Martin*, 994 F. Supp. at 1247.

⁶⁰ *Id.* at 1247.

With this in mind, the court decided that the plaintiff's requested modification was reasonable.⁶¹ Defining discrimination, Title III states, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . facilities. . . of any place of public accommodation, by any person who owns, leases (or leases to), or operates a . . . public accommodation,"⁶² and the plaintiff cannot claim full and equal enjoyment without the use of a golf cart. In order to prevail in his claim, the plaintiff must satisfy a three-pronged burden. The plaintiff must demonstrate (1) that he actually has a disability, (2) that he has requested a modification and (3) that the requested modification is reasonable in the general sense.⁶³ Martin satisfied the burden of proving that he has a disability.⁶⁴ His condition satisfied the ADA's standard as a physical or mental impairment that limits one or more major life activities,⁶⁵ because KTS is a physiological disorder qualifying as a physical impairment,⁶⁶ and walking is a major life activity.⁶⁷ Martin's degenerative disorder is a permanent affliction of constant duration and with a permanent impact which is exactly the type of condition the ADA sought to classify as a disability.⁶⁸ The court stated that the second and third burdens of the plaintiff were satisfied by the plaintiff's showing that the requested modification was reasonable in the general sense.⁶⁹ The court then held that the use of a golf cart in the game of golf, in the general sense, is a reasonable accommodation to the plaintiff's disability.⁷⁰

61 *Id.* at 1248.

62 42 U.S.C. § 12182(a) (2000).

63 *Martin*, 994 F. Supp. at 1248. *See also* *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997).

64 *Martin*, 994 F. Supp. at 1248. *See also* *Johnson*, 116 F.3d at 1059.

65 42 U.S.C. § 12102(2)(A) (2000).

66 28 C.F.R. § 36.104(1) (2000). *See also* *Martin*, 994 F. Supp. at 1247.

67 28 C.F.R. § 36.104(2) (2000). *See also* *Martin*, 994 F. Supp. at 1247.

68 29 C.F.R. § 1630.2(j)(2) (2000). *See also* *Martin*, 994 F. Supp. at 1247.

69 *Martin*, 994 F. Supp. at 1248. *See also* *Johnson*, 116 F.3d at 1059.

70 *Martin*, 994 F. Supp. at 1248.

c. The Use of a Golf Cart Does Not Fundamentally Alter the Nature of the PGA Tour

Under the framework specified by the court, after the plaintiff had satisfied his burden, the burden shifted to the defendant to prove that the plaintiff's requested modification would fundamentally alter the nature of the defendant's public accommodation.⁷¹ If the modification would fundamentally alter the nature of the defendant's public accommodation, the defendant would not be required to make the modification.⁷² The argument that Martin's accommodation would fundamentally alter the nature of its tour was the defendant's primary claim. Citing precedent in both the Fifth⁷³ and Ninth Circuits,⁷⁴ the court stated that the determination of whether a fundamental alteration exists must focus on the specifics of the disabled plaintiff's circumstances, not on the generalized nature of the accommodation.⁷⁵ The defendant claimed that an individualized assessment of Martin's case would be inappropriate, but the court rejected this rationale, asserting that such a fact-specific inquiry was not only appropriate but also necessary for the purposes of determining this issue.⁷⁶ The ultimate question in this case is whether allowing the plaintiff, given his individual circumstances, the requested modification--the use of a golf cart--would fundamentally alter the nature of the PGA Tour. In other words, the court asked whether a modification of the walking rule to allow the use of a cart fundamentally alter the nature of the game being played in Tour events.⁷⁷

The PGA cited the *Rules of Golf* ("Rules"), promulgated by the United States Golf Association, a separate entity, in support of its view that the use of a cart fundamentally alters the nature of the PGA Tour. The body of the Rules contains no express prohibition

⁷¹ *Martin*, 994 F. Supp. at 1249. See also *Johnson*, 116 F.3d at 1059; 42 U.S.C. § 12182 (b)(2)(A)(ii) (2000).

⁷² 42 U.S.C. § 12182 (b)(2)(A)(ii) (2000).

⁷³ *Johnson*, 116 F.3d at 1059.

⁷⁴ *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996).

⁷⁵ *Martin*, 994 F. Supp. at 1249.

⁷⁶ *Id.* at 1249.

⁷⁷ *Id.* at 1249-50.

of the use of carts.⁷⁸ The appendix, however, offers a provision allowing revisions and/or additions of rules for certain competitions governed by the PGA Tour. One of those revisions designates that “players shall walk at all times during a stipulated round unless permitted to ride by the PGA Rules Committee,” a regulatory branch of the defendant’s operation.⁷⁹

The defendant claimed that the purpose of the substantive rule is to inject fatigue into the game of golf, further testing the skill of the Tour’s professional golfers.⁸⁰ Although it did not reject this claim as irrational, the court deemed the fatigue factor to be insignificant under normal circumstances.⁸¹ One of the plaintiff’s experts stated that the calories expended during eighteen holes of golf were nutritionally less than a Big Mac and that those calories, expended over five hours, could be replaced easily during that time while golfing.⁸² Even the testimony of the defendant’s prize witness, former U.S. Open champion and television golf analyst, Ken Venturi, about the fatigue factor during particularly hot and humid weather conditions was deemed insignificant.⁸³ The court held that Venturi’s fatigue was caused by the weather conditions, not by walking.⁸⁴ As a result, all golfers even those using a cart, would have experienced fatigue during those extreme weather conditions.⁸⁵

Martin countered with the testimony of Eric Johnson, a fellow Nike Tour golfer, who stated that walking did not create a problem for him.⁸⁶ To Johnson, the act of walking did not add any pressures or other negatives to his overall golf game. In fact, the court stated a belief that most golfers would prefer to walk as opposed to using

78 *Id.* at 1249.

79 *Martin*, 994 F. Supp. at 1249. (quoting PGA pamphlet, “Conditions of Competitions and Local Rules” ¶ 6).

80 *Martin*, 994 F. Supp. at 1250.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Martin*, 994 F. Supp. at 1250.

86 *Id.* at 1251.

a cart.⁸⁷ If walking were so oppressive, why would a majority prefer to walk?

The type of testimony elicited from the plaintiff's witnesses elucidated Martin's claim that the use of a cart did not give him any competitive advantage. The court accepted the testimony of another of the plaintiff's experts who stated that so-called fatigue due to low intensity exercise such as walking is a psychological, not physical, phenomenon.⁸⁸ The level of psychological stress from the low-impact fatigue experienced by golfers who walk is not nearly as high as the stress experienced daily by Martin due to living with his disability.⁸⁹ Even with the aid of a cart, Martin still must walk nearly one-quarter of a golf course, because of the various obstacles on the course, subjecting himself to further injury.⁹⁰ As a result of the testimony of the plaintiff and his experts, the court determined that Martin experienced no competitive advantage from the use of a cart.⁹¹ The court concluded, "As plaintiff's [individual circumstances] easily endures greater fatigue [purpose of Rule] than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour to accommodate him with a cart. . . The walking rule may be modified without fundamentally altering the PGA's game. . . ."⁹² Because the plaintiff satisfied his burden of proving that the ADA applied to the defendant's public accommodation, that his requested modification was reasonable, and that the requested modification did not fundamentally alter the nature of the defendant's public accommodation, the court held that the PGA discriminated against Martin and remedied the situation with an injunction allowing Martin the right to use a cart on the defendant's tours.⁹³

87 *Id.*

88 *Id.*

89 *Id.* at 1252.

90 *Martin*, 994 F. Supp. at 1252.

91 *Id.*

92 *Id.*

93 *Id.*

2. Court of Appeals Opinion

a. PGA Tour Is Not Exempt from Application of the ADA

The PGA appealed the district court's decision to the Ninth Circuit Court of Appeals, and the case was decided nearly two years later in March 2000. The court applied a de novo standard of review, but in the process, it accepted many of the facts from the District Court's opinion as well as from the trial record.⁹⁴ With reference to the application of the ADA to the PGA, the court stated simply, "There is nothing ambiguous about this provision [of the ADA];⁹⁵ golf courses are public accommodations."⁹⁶ The court once again held that the PGA's zone of application argument, compartmentalizing the application of the ADA to certain publicly-accessible areas, was inappropriate. The PGA's claim that the restricted area, or the competition area, is not a place of exercise or recreation within the meaning of the statute, was also invalid, because even if the court accepted that argument, the restricted area could be classified as a stadium or other place of exhibition or entertainment within the statute,⁹⁷ making it a public accommodation.⁹⁸ The court reiterated the district court's argument from *Independent Living*, which held that a facility does not lose its status as a public accommodation merely because entry to that facility is limited.⁹⁹

The final reason cited by the court for applying the ADA to the PGA Tour was the rejection of the defendant's claim that the

⁹⁴ *Martin*, 204 F.3d at 997.

⁹⁵ 42 U.S.C. § 12181(7)(L) (2000) (listing golf courses as examples of public accommodations).

⁹⁶ *Martin*, 204 F.3d at 997.

⁹⁷ 42 U.S.C. § 12181(7)(C) (2000) (listing stadiums and other places of recreation as public accommodations).

⁹⁸ *Martin*, 204 F.3d at 997.

⁹⁹ *Martin*, 204 F.3d at 997-8. See also *Independent Living*, 982 F. Supp. 698, 759 (D. Or. 1997); *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1998) (holding that Title III applies not only to patients at a hospital but also to staff of hospital).

selectivity of the tour precluded it from being a public accommodation.¹⁰⁰ The PGA argued that because the tournaments are restricted to the nation's best golfers and access to the public is denied, the Tour is not a public accommodation.¹⁰¹ The court swiftly rejected this theory. Competition is stiff at Harvard, Yale, Northwestern, and the other top schools in the country, but this kind of selectivity does not preclude those universities from being subject to Title III.¹⁰² The same type of competitiveness and selectivity occurs on the Tour, and the results should be no different as applied to the defendant.¹⁰³ The court's analogy of a race exemplified its rationale.¹⁰⁴ If a track meet was classified as a public accommodation at the outset, should it shed its status as a public accommodation after narrowing down the field, heat after heat, to the final race with the ten best competitors. The court felt that answer was no for the hypothetical track meet just as the answer was no for the defendant, and it held that the ADA applied to the PGA Tour.¹⁰⁵

b. The Use of a Golf Cart Is a Reasonable Modification

The court next addressed the issue of whether Martin's suggested modification was reasonable. This area was one in which the court deferred to the findings of the district court. Because the district court held that the use of a golf cart was reasonable in the sense that such use would help resolve the issue of Martin's access to golf competitions, the higher court adopted such a position.¹⁰⁶ The court of appeals continued by once again deferring to the district court's findings that the use of carts is reasonable based on the fact that other competitions sponsored by

100 *Martin*, 204 F.3d at 998.

101 *Id.* at 998.

102 *Id.* at 998.

103 *Id.* at 999.

104 *Id.* at 999.

105 *Martin*, 204 F.3d at 999.

106 *Id.* at 999.

the defendant such as the events on the Senior Tour¹⁰⁷ permit the use of carts, and that “it is not a difficult practical matter to permit them [carts].”¹⁰⁸ The court again relied on the district court’s finding that the use of a cart was also necessary for Martin based upon the fact that Martin could walk the course neither on his own nor with any artificial aids or prosthetic devices.¹⁰⁹ Because the district court articulated the position that Martin’s use of a cart was wholly reasonable, the court of appeals held that the issue of reasonableness was no longer in serious contention at the appellate level.¹¹⁰

c. The Use of a Golf Cart Does Not Fundamentally Alter The Nature of the PGA Tour

The court of appeals correctly identified the issue of whether or not permitting Martin to use a cart would fundamentally alter the nature of the public accommodation to be the most important issue on appeal.¹¹¹ The court returned to the district court’s finding that the *Rules of Golf*,¹¹² governing the generalized game of golf and used by the defendant as a basis for regulating its tours, does not explicitly require players to walk.¹¹³ The Senior Tour and the first two stages of qualifying school for the PGA Tour do not require golfers to walk.¹¹⁴ The defendant’s counterargument was correct when claiming that the PGA does not offer the generalized game of golf, but instead offers a highly-specialized and particularized

107 The Senior Tour, also sponsored by the defendant, is a series of tournaments, similar to the PGA and Nike Tours, for golfers over the age of 50.

108 *Martin*, 204 F.3d at 999.

109 *Id.* at 999. *See also Martin*, 994 F. Supp. at 1249-50 (detailing the artificial aids and prosthetic devices plaintiff attempted to use prior to seeking use of carts).

110 *Martin*, 204 F. 3d at 999.

111 *Id.* at 999.

112 *See* USGA web site, *2000 Rules of Golf and Decisions on the Rules of Golf*, <http://www.usga.org/rules/rule_2000/index.html> (visited October 25, 2000) (web site containing online version of the USGA’s *Rules of Golf*).

113 *Martin*, 204 F.3d at 999.

114 *Id.*

brand of competition.¹¹⁵ As a result, the defendant argues that tour events are governed not only by the more generalized Rules of Golf but also by the “Conditions of Competition” appendix allowed by the Rules which permitted the PGA to modify the Rules for particular Tour events.¹¹⁶ One of those modifications is a rule stipulating that all players in Tour events must walk, unless permitted the use of a cart by the Tour’s Rules Committee.¹¹⁷ On those events in which the Rules Committee has allowed such a waiver of the walking rule, however, the Committee provided a blanket waiver, meaning that all competitors were allowed to use carts, not just specific individuals.¹¹⁸

Just as it did at trial, the defendant claimed that an individualized fact-specific analysis of the issue focusing only on Martin’s use of a cart was erroneous. The PGA utilized several arguments in support of its position. First, as mentioned previously, the defendant felt that its rule was substantive and that any individualized analysis of a substantive rule was wholly illegitimate.¹¹⁹ The defendant conceded that some athletic rules such as dress codes or uniform requirements could be modified for the disabled, but it argued that competitive rules could never be modified.¹²⁰ The PGA advanced a theory that the determinative factor was whether or not the rule was substantive.¹²¹ The PGA distinguished substantive rules, ones that affect the play of the game, from rules that are simply procedural.¹²² If the rule was substantive, as are competitive rules, it could never be subject to exceptions accommodating disabilities.¹²³ The PGA believed that substantive rules, like substantive rights in the legal arena, were essential to the nature of competition. Any modification of an essential and substantive rule would undoubtedly be a fundamental

115 *Id.*

116 *Id.*

117 *Id.* at 999-1000.

118 *Martin*, 204 F.3d at 1000.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Martin*, 204 F.3d at 1000.

alteration of the nature of its program, which would go beyond the ADA's compliance requirement. As a result, the PGA felt that substantive rules were not required to be modified by the ADA, and it drew the line in the sand at substantive rules. Because the PGA felt that the walking rule was a substantive rule, it believed that any amendment to the walking requirement would fundamentally alter the nature of the tour.¹²⁴

The court rejected the PGA's argument that substantive rules automatically cause a fundamental alteration. This court stated that although the defendant's argument had some merit, the defendant apparently had not carefully read the statute.¹²⁵ The ADA requires modification unless it would *fundamentally* alter that nature of the program.¹²⁶ The court felt that the PGA ignored the word, *fundamentally*.¹²⁷ The court stated that the PGA essentially claimed that permitting a player to use a cart automatically altered competition, and that the PGA arbitrarily classified this alteration, and quite possibly every alteration to its interpretation of the game of golf, as being fundamental.¹²⁸ Such an analysis defied the ADA which provided an exception only for modifications that caused a *fundamental* alteration, not just an ordinary alteration to a public accommodation.¹²⁹ The court refused to allow the defendant to make the assumption that all modifications of competitive or substantive rules automatically resulted in fundamental alterations. The court did not expressly deny the fact that modifications of those substantive rules would alter the nature of the Tour, but it did reject the logical leap to assume that all modifications were *fundamental* alterations.¹³⁰

After rejecting that argument, the court adopted the rule followed by the district court and analyzed whether or not Martin's individual use of a cart fundamentally altered the nature of the

124 *Id.* at 1001.

125 *Id.*

126 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

127 *Martin*, 204 F.3d at 1000-1.

128 *Id.* at 1001.

129 *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

130 *Martin*, 204 F. 3d at 1001.

PGA Tour.¹³¹ The court relied heavily on the district court's opinion for this analysis. At trial, the defendant argued that the purpose of the walking rule was to inject a fatigue factor into the shot-making process, creating a more challenging game for competitors.¹³² The district court found that the fatigue factor was primarily a psychological fatigue, rather than a physical fatigue, and placed much less emphasis on fatigue than did the defendant.¹³³

The court of appeals, following the lead of the district court, then evaluated whether Martin's use of a cart would give him a competitive advantage, which in turn, would demonstrate whether the defendant's purpose was actually significant and whether the plaintiff's use of a cart would fundamentally alter the nature of the Tour.¹³⁴ The district court gave credence to the PGA's stated purpose, the fatigue factor, and the court of appeals held that such a decision was not clearly erroneous.¹³⁵ The court of appeals, however, found the PGA's rationale for the walking rule to be erroneous and insignificant, following the district court's finding that Martin received no competitive advantage from using a cart.¹³⁶ The court cited the facts that Martin must still walk more than one-quarter of the course with a cart, and that Martin endures significant pain and stress while walking, getting in the cart, and getting out from the cart.¹³⁷ The stress that the plaintiff endures while golfing, even with a cart, is easily greater than the stress and fatigue endured by an able-bodied golfer on the golf course without the aid of a cart.¹³⁸ As a result, the court held that Martin did not benefit from a competitive advantage, thus, eliminating the defendant's rationale for its "substantive" walking rule.¹³⁹ The

131 *See Martin*, 994 F. Supp. at 1249. *See also Johnson*, 116 F.3d at 1059; *Crowder*, 81 F.3d at 1486.

132 *Martin*, 204 F.3d at 1000. *See Martin*, 994 F. Supp. at 1250.

133 *Id.*

134 *Martin*, 204 F.3d at 1000-1.

135 *Id.* at 1000.

136 *Id.*

137 *Martin*, 204 F.3d at 1000. *See Martin*, 994 F. Supp. at 1251-2.

138 *Id.*

139 *Martin*, 204 F.3d at 1000.

court added that because the plaintiff would not gain an advantage in shot-making, leaving the central competition of golf unaffected, Martin's use of a cart would not fundamentally alter the nature of the PGA Tour.¹⁴⁰ The only effect that Martin's use of a cart had would be that he could have access to competitions to which he would otherwise have been denied access without a cart--the precise purpose of the ADA, according to the court.¹⁴¹

Finally, the court rejected the defendant's slippery slope arguments. The PGA claimed that by permitting such individualized, highly fact-specific analyses, such as the one in which the district court engaged, would open the door to a flood of unintended applications.¹⁴² For instance, the defendant claimed that permitting Martin's use of a golf cart would lead to future decisions requiring disabled runners or swimmers to be given a head start in a race or requiring disabled basketball players to be allowed to shoot three-point baskets at a distance closer to the basket than non-disabled players, thereby making the shot easier for the disabled athlete.¹⁴³ In the defendant's suggested scenarios, the disabled athletes would be given a competitive advantage, but in Martin's case, as the court had decided earlier, the plaintiff would receive no competitive advantage.¹⁴⁴ The court of appeals soundly dismissed the defendant's slippery slope claim, granting that those hypothetical situations cited by the defendant would be fundamental alterations, unlike the Martin's use of a golf cart on the PGA Tour.¹⁴⁵

140 *Id.*

141 *Id.* See also 42 U.S.C. § 12101(a)-(b) (2000) (Congressional findings and purposes for ADA likely to be the basis for court's statement that opening the doors of accessibility is the precise purpose of ADA).

142 *Martin*, 204 F.3d at 1001.

143 *Id.*

144 *Id.*

145 *Id.*

B. Olinger v. United States Golf Association, 205 F.3d 1001 (7th Cir. 2000)

1. District Court Opinion

The plaintiff in this case, like Martin in the other subject opinion, suffers from a disability which renders him unable to play an entire eighteen-hole golf course without the use of a golf cart.¹⁴⁶ Olinger, the plaintiff, suffers from bilateral avascular necrosis, a disorder which has manifested itself primarily in his hips and significantly impaired his ability to walk even short distances.¹⁴⁷ Olinger's condition had caused him to take medication, to control pain and other symptoms, which has significant side effects such as reduced lung capacity, making breathing more difficult--especially when active, dulling of his sensory perception, and fatigue.¹⁴⁸ Olinger has even been classified as legally disabled by the Social Security Administration, although the legal classification by the SSA has no bearing on the ADA.¹⁴⁹

Olinger filed a lawsuit in district court, seeking the use of a golf cart in the qualifying rounds and beyond, should he qualify, of the United States Open golf tournament (hereafter "the Open") operated by the defendant, the USGA.¹⁵⁰ The Open is the one of the world's premier golf tournaments and is one of thirteen tournaments operated by the defendant.¹⁵¹ The Open limits the number of competitors to 156, limiting the field only to world's elite golf professionals.¹⁵² The USGA requires that entrants carry either a certain handicap index if an amateur or professional status in order to participate in a local qualifying round, the initial stage of qualifying for the Open.¹⁵³ As a professional golfer, the plaintiff

146 *Olinger*, 55 F. Supp.2d at 929.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Olinger*, 55 F. Supp.2d at 928.

152 *Id.*

153 *Id.*

has access to the local qualifying rounds.¹⁵⁴ The local qualifying round consists of eighteen holes of golf on a single day, followed by the next qualifying round, the sectional qualifying round of thirty-six holes of golf. The top golfers at sectionals secure the remaining spots at the Open not already taken by professional golfers from the PGA Tour.¹⁵⁵

a. The USGA Is Not Exempt from Application of the ADA

Olinger sought a court order from the district court requiring the defendant to allow him to use a cart in the local qualifying round of the 1999 Open.¹⁵⁶ The defendant offered several arguments as to why the ADA was not applicable to either the USGA or to the Open. The defendant first claimed that the Open is a not public event, and thus not a public accommodation under Title III of the ADA.¹⁵⁷ The court determined that it need not decide whether the Open was a public event because the Open was not a public accommodation with the meaning of the ADA.¹⁵⁸ The ADA prohibits discrimination “by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁵⁹ The court stated that Congress intentionally chose to insert the word, *place*, into the definition, and as a result the statute must be read to mean that only places can be considered public accommodations.¹⁶⁰ The court held that neither the Open, a golf

154 *Id.* (noting also that plaintiff was one of more than 7000 competitors accepted to compete in local qualifying rounds).

155 *Id.*

156 *Olinger*, 55 F. Supp.2d at 929. (The same court, the Northern District of Indiana, previously granted him a temporary restraining order, allowing him to use a cart in the 1998 qualifying round.)

157 *Id.* at 930.

158 *Id.*

159 42 U.S.C. § 12182(a) (2000).

160 *Olinger*, 55 F. Supp.2d at 930-1. *See also* *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1273 (7th Cir. 1993) (holding that Congress could have avoided the use of place in the definition of public accommodation in ADA just like it did in Title II of the Civil Rights Act of 1964, but it intentionally chose to insert the word).

tournament, nor the USGA, a golf association, was a public accommodation because neither are places as specified by Title III.¹⁶¹

The court stated that if the plaintiff were to succeed in its claim, the ADA would need to apply to the USGA because it owns, leases or operates a place of public accommodation.¹⁶² The district court held that the USGA did, however, operate a public accommodation, over the defendant's objection.¹⁶³ Although the ADA does not define *operate*, the court stated that the ADA's language is extensive and applies to entities which operate a public accommodation "even if the operation is only for a short time."¹⁶⁴ During the local and sectional qualifying rounds each year, as well as during the Open, the USGA operates 102 golf courses, supervising play and other functions.¹⁶⁵ These golf courses, although some are private clubs, were considered public accommodations.¹⁶⁶ The court determined that the USGA exercised substantial control over the golf courses during qualifying rounds and during the Open; as a result, the USGA operated a public accommodation and was subject to Title III.¹⁶⁷

The defendant advanced another argument challenging the court's finding that the ADA applied neither to the association nor to the tournament, claiming that the area inside the ropes of a golf course--the competitive area, as separate from the public viewing area--is not a place of public accommodation because it is not accessible to the public.¹⁶⁸ The court rejected this claim based

161 *Olinger*, 55 F. Supp.2d at 931. *See also Welsh*, 993 F.2d at 1270-1 (rejecting the claim that membership organizations such as the Boy Scouts are public accommodations within the statute).

162 *Olinger*, 55 F. Supp.2d at 931. *See* 42 U.S.C. § 12182(a) (2000).

163 *Olinger*, 55 F. Supp.2d at 931.

164 *Olinger*, 55 F. Supp.2d at 931 (quoting 28 C.F.R. pt. 36, app. B at 591 (1998)).

165 *Olinger*, 55 F. Supp.2d at 931.

166 42 U.S.C. § 12181(7)(L) (2000) (listing golf course as an explicit example of a public accommodation).

167 *Olinger*, 55 F. Supp.2d at 931-2. *See also Martin*, 994 F. Supp. at 1246 (rejecting the PGA's claim that it is exempt from the ADA and can set its own rules).

168 *Olinger*, 55 F. Supp.2d at 932.

upon the same reasons cited by the district court in *Martin*.¹⁶⁹ The court cited both the fact that many facilities classified as public accommodations are restricted only to certain invitees¹⁷⁰ and the ruling in *Martin* rejecting the claim that private facilities or mixed use facilities can classify certain portions of that facility as private enclaves not subject to the rules governing public accommodations.¹⁷¹ This court analogized the USGA's operation of public accommodations to the National Collegiate Athletic Association's (NCAA) exercising control over public accommodations, basketball facilities.¹⁷² In a series of cases,¹⁷³ the respective district courts found that the NCAA exercised substantial control over the athletic facilities as places of exercise and recreation, as well as places of exhibition and entertainment.¹⁷⁴ Just as the NCAA rejected the "inside the ropes" argument whether the athletes were seen as performers or athletes, this district court rejected the defendant's claim that the area inside the ropes was not subject to Title III.¹⁷⁵

b. The Use of a Golf Cart Is a Reasonable Modification

The next issue determined by the district court was whether the plaintiff's requested modification was reasonable. Under the court's specified framework, "the plaintiff bears the burden of proving that the requested modification is reasonable in the general sense."¹⁷⁶ In this case, Olinger's requested modification of the

169 *Id.*

170 *See Independent Living*, 982 F. Supp. at 759.

171 *Martin*, 984 F. Supp. at 1326-7. *See also* 28 C.F.R. pt. 36, app. B at 597 (1998).

172 *Olinger*, 55 F. Supp.2d at 932.

173 *See generally Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp.2d 460 (D. N.J. 1998); *Tatum v. National Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Mo. 1998).

174 *Olinger*, 55 F. Supp.2d at 932.

175 *Id.*

176 *Id.* at 934. *See also Johnson*, 116 F.3d at 1059; *Martin*, 994 F. Supp. at 1249 (holding that plaintiff must prove disability, request of modification and reasonableness).

walking to rule to allow the use of a golf cart is reasonable in the general sense.¹⁷⁷ The court stated that the USGA did not state a claim challenging the reasonableness of the plaintiff's requested modification, and because the modification is reasonable in the general sense, the plaintiff satisfied his burden.¹⁷⁸

c. The Use of a Golf Cart Fundamentally Alters the Nature of the U.S. Open

Under the court's framework, once the plaintiff satisfies his burden, the burden shifts to the defendant to prove that the requested modification would fundamentally alter the nature of the public accommodation.¹⁷⁹ Unlike the plaintiff's burden which focuses on the reasonableness in general, the defendant must prove that a fundamental alteration of the nature of the public accommodation exists as a result of the plaintiff's requested modification in light of the specific circumstances related only to the plaintiff and his requested modification.¹⁸⁰ The court stated that the proper inquiry was "not whether the requested modification would amount to a fundamental alteration of the game of golf (plainly it would not), but rather whether the requested modification would constitute 'a fundamental alteration in the nature of a program,' . . . and the 'program' here at issue is the U.S. Open."¹⁸¹ In other words, the determination was whether Olinger's use of a cart in the Open would fundamentally alter the nature of the Open.

The court determined that the plaintiff's use of a golf cart in the Open would fundamentally alter the nature of the Open and based its reasoning upon two arguments given by the defendant.¹⁸² First, the court accepted the defendant's testimony that the use of a golf

177 *Olinger*, 55 F. Supp.2d at 934.

178 *Id.*

179 *Id.* See *Johnson*, 116 F.3d at 1059.

180 *Id.* at 932. See *Johnson*, 116 F.3d at 1059-60.

181 *Id.* at 934.

182 *Olinger*, 55 F. Supp.2d at 938.

cart could give the plaintiff a competitive advantage over other golfers at the Open.¹⁸³ The USGA claimed that the purpose of the walking rule in the Open was due to the fact that the Open was intended to serve as a test of stamina in addition to a test of shot-making ability on the golf course.¹⁸⁴ The court relied on the testimony of Venturi who claimed that the use of carts could affect the lie, or the position, of the ball.¹⁸⁵ Venturi testified that the cart could alter the condition of the grass on which the ball lies.¹⁸⁶ In that case, a golfer who plays after a cart has come through the area might be at a disadvantage.¹⁸⁷ Additionally, Venturi who won the 1964 Open in unseasonably and oppressively hot and humid conditions, testified that a golfer who rides in a cart has a competitive advantage for not having to exert the energy of walking, especially in the conditions such as the 1964 Open.¹⁸⁸

The court agreed that the plaintiff made a valid point criticizing the defendant's testimony about a competitive advantage.¹⁸⁹ First, the defendant's testimony, about the competitive advantage for a golfer who uses a cart over one who does not, failed to consider the fact that Olinger is not an able-bodied golfer.¹⁹⁰ The defendant's studies did not contemplate the issue of whether an able-bodied golfer, who walks free of the pain suffered by the plaintiff, would actually be disadvantaged personally by the use of a cart by the plaintiff, for whom the act of walking causes fatigue.¹⁹¹ However, the court still accepted the defendant's view, holding that "a strong possibility exists that on any particular day, such a competitive advantage might exist and that it might be substantial."¹⁹² The court explicitly stated that it did not find "that a golfer who rides in a cart invariably has a competitive advantage

183 *Id.* at 935-6.

184 *Id.* at 934.

185 *Id.* at 934-5.

186 *Id.* at 935.

187 *Olinger*, 55 F. Supp.2d at 935.

188 *Id.* at 935.

189 *Id.*

190 *Id.* at 936.

191 *Id.*

192 *Olinger*, 55 F. Supp.2d at 936.

over a similar golfer who walks.”¹⁹³ However, it found only that a competitive advantage might possibly exist, and that finding was sufficient to rule that the use of a cart fundamentally alters the nature of the Open.¹⁹⁴

The second basis on which the court held for the defendant was that the potential impact of carts in the Open would fundamentally alter the nature of the Open. This court stated that any court evaluating the impact of a requested accommodation must consider the potential impact on the nature of the activity or program of the public accommodation.¹⁹⁵ According to this court, the most alarming impact of a decision to allow the use of a cart was that the decision would require that a competitor be given a potential competitive advantage in a highly competitive activity such as the Open.¹⁹⁶ This court did not want to require the USGA to be forced to allow a golfer a competitive advantage in the Open, an event which has traditionally been highly competitive and decided by one stroke or less.¹⁹⁷

Another impact of such a decision addressed by the court was to consider who would be responsible for making the determination of whether to allow the use of a cart.¹⁹⁸ The USGA raised the question regarding what body would make the decision on whether to allow the use of a cart.¹⁹⁹ Although the plaintiff's need to use a cart was genuine, the court noted the fact that some golfers whose need was not nearly as genuine might request the use of a cart.²⁰⁰ The court was reluctant to impose the hardship of the added responsibility and cost of developing a system to determine whether or not future golfers need a cart or merely want to ride in a cart.²⁰¹

193 *Id.*

194 *Id.*

195 *Id.* at 937.

196 *Id.* at 937.

197 *Olinger*, 55 F. Supp.2d at 936-7.

198 *Id.* at 936.

199 *Id.*

200 *Id.* at 937.

201 *Id.*

Finally, the court discussed the idea of the alternative of allowing all competitors the opportunity to ride in a cart if they desired.²⁰² The district court rejected that alternative because that option would also fundamentally alter the nature of the Open by removing the test of stamina from the competition.²⁰³ Additionally, such a decision would strip the USGA of discretion in governing its own tournaments with respect to this matter, something that the court did not wish to do.²⁰⁴ The court noted that athletic competitions should be treated differently than most ADA cases involving a traditional workplace.²⁰⁵ It held that the point of an athletic competition was to determine who can perform an assigned task better than all other competitors, in contrast to the traditional employment situations in which the goal is to put all qualified individuals on equal footing.²⁰⁶ The court stated that competitions such as the Open are not about equal footing.²⁰⁷ It asserted that the Open tests the stamina and skill of an individual to strike a golf ball with certain accuracy under conditions with more stress than normal situations.²⁰⁸ According to the court and the USGA, the use of a cart would remove some of the elements of the test of stamina, whether one individual or all individuals are given the opportunity to use a cart.²⁰⁹ In that sense, the court held that the use of a cart or other modifications in athletic competitions would fundamentally alter the nature of the activity of the public accommodation, namely the Open.²¹⁰

202 *Olinger*, 55 F. Supp.2d at 937.

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Olinger*, 55 F. Supp.2d at 937.

208 *Id.* at 937-8.

209 *Id.* at 938.

210 *Id.*

2. Court of Appeals Opinion: The Use of a Golf Cart Fundamentally Alters the Nature of the U.S. Open

Although mentioning that the defendant raised some legitimate objections to the district court's decision as to the issue of the applicability of the ADA to the USGA and the Open, the court of appeals stated that it hesitated to make a decision as to that factor because the case could be more easily decided on the issue of whether the use of a golf cart fundamentally alters the nature of the Open.²¹¹ Before making its determination of the fundamental alteration issue, the court of appeals briefly mentioned the plaintiff's major contentions on appeal.²¹² These contentions were that the defendant failed to present any proof as to how the specific and individualized circumstances of the plaintiff's use of a cart in the Open would fundamentally alter the event and that the defendant failed to offer any proof that the plaintiff's use of a cart in the Open would impose any additional burdens on the defendant.²¹³ These arguments were ignored throughout the opinion after being mentioned by the court at that point.

The court delved into the fundamental alteration issue by considering the origin of the issue in the Rehabilitation Act,²¹⁴ the predecessor to the ADA, by revisiting a case²¹⁵ in which the Supreme Court interpreted the statute. The Rehabilitation Act bears much resemblance to the ADA,²¹⁶ including language similar to the reasonable modification and fundamental alteration requirements. In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (hereafter "*Davis*"), the Court held that to lower

211 *Olinger*, 205 F.3d at 1005.

212 *Id.*

213 *Id.*

214 29 U.S.C. § 701 et seq. (2000).

215 *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

216 *See* *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 845 n.6 (7th Cir. 1999) (noting "We have held previously that the standards applicable to one act are applicable to the other. Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other.").

or make substantial modifications of standards to accommodate a disabled individual would be unreasonable and fundamentally alter the nature of a program.²¹⁷ The *Olinger* court found *Davis* to be enlightening, stating that in light of *Davis*, many courts, including the one in *Olinger*, have held that “the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination.”²¹⁸ In addition, the *Olinger* court claimed that most courts have held that an accommodation is unreasonable if it imposes an undue financial and administrative burden on the public accommodation.²¹⁹ In sum, a modification would fundamentally alter the nature of a public accommodation if the modification either (1) required the public accommodation to lower its standards; (2) required the public accommodation to change its basic nature, character, or purpose as long as the purpose is not pretextual; or (3) imposed a financial and administrative burden on the public accommodation.

The court of appeals deferred to the district court’s findings that the purpose of the walking rule was to test the golfers’ stamina in conjunction with the golfing competition and that the nature of the Open would be fundamentally altered if the walking rule were modified to allow the use of carts.²²⁰ This court accepted the district court’s findings, stating that those findings were amply supported by the record.²²¹ In addition, the court offered two additional reasons for holding that the use of a cart would fundamentally alter the nature the Open.²²² The first reason was that the tradition of walking in the Open was essential to competitive golf, and as a result, the elimination of the walking requirement would fundamentally alter this essential concept, in the process, fundamentally altering the nature of the Open.²²³ The court cited the testimony of Venturi and even of one of the

217 *Olinger*, 205 F.3d at 1005 (quoting *Davis*, 442 U.S. at 410).

218 *Olinger*, 205 F.3d at 1005.

219 *Id.* at 1005-6.

220 *Id.* at 1006.

221 *Id.*

222 *Id.*

223 *Olinger*, 205 F.3d at 1006.

plaintiff's own witnesses as claiming that physical endurance and stamina are critical elements of the tournament.²²⁴ Venturi's testimony was extremely persuasive to the court of appeals. Venturi testified that the conditions of the 1964 Open left him on the verge of collapse, and that all players endured the conditions on an equal footing.²²⁵ In essence, he stated that "if any competitor would have been riding in a cart, there would have been a 'tremendous advantage to the other player.'"²²⁶ The court also cited Venturi's emphasis on "the importance and tradition of walking in the championship-level tournament golf competition."²²⁷

The court's second reason for holding that the use of a cart fundamentally alters the nature of the Open was that a decision to allow the use of carts would impose an additional burden on the defendant.²²⁸ It repeated the district court's finding that the defendant would need to develop a system, at its own expense, to determine whether a golfer desiring to use a cart truly needs the use of a cart or merely wants to ride in a cart to compete.²²⁹ The court of appeals agreed that such a system would be an unnecessary and undue burden, both administratively and financially, on the defendant.²³⁰ Such a finding was enough to render it a fundamental alteration, in light of *Davis*.²³¹ As a result of these two reasons in addition to the district court's findings, the court of appeals held that the USGA did not need to allow Olinger the right to use a cart because the use of a cart would fundamentally alter the nature of the Open.²³²

224 *Id.* at 1006-7.

225 *Id.* at 1006.

226 *Id.*

227 *Id.* at 1007.

228 *Olinger*, 205 F.3d at 1007.

229 *Id.* See also *Olinger*, 55 F. Supp.2d at 936-7.

230 *Olinger*, 205 F.3d at 1007.

231 *Id.* at 1005, 1007. (quoting *Davis*, 442 U.S. at 410).

232 *Olinger*, 205 F.3d at 1007.

III. ANALYSIS

Because *Martin* and *Olinger* were decided on consecutive days in different circuits of the Court of Appeals, the result was a split in the circuits. Since March 7, 2000, the day of the *Olinger* decision, no Court of Appeals has decided a case which, to use the language at issue in this case, fundamentally alters the gridlock caused by the two seemingly polar decisions. Neither the Seventh nor the Ninth Circuit has reversed its decision in light of the other circuit's opinion. As a result, *Martin* reflects the state of the law in the Ninth Circuit, and *Olinger* represents the law in the Seventh Circuit. Until recently, nothing has been done to alter this status. On September 26, 2000, however, the Supreme Court finally weighed into the controversy. On that date, the Court granted the PGA's writ of certiorari to the United States Court of Appeals for the Ninth Circuit and agreed to hear the case.²³³ By agreeing to hear the *Martin* appeal, the Court will likely attempt to resolve both the narrow issue of whether *Martin* can continue to use a cart on the PGA Tour and the broader issue of whether the use of a cart should be allowed in professional golf, addressing the split between the Seventh and Ninth Circuits caused by the *Olinger* and *Martin* decisions, respectively.²³⁴

Should the Court address the split between the circuits in its appeal, the Court must decide which decision, *Martin* or *Olinger*, best reflects the state of the law. This appeal will be yet another instance in which the Court must interpret and apply the ADA. The Court should decide that both the language of the ADA and the case law interpreting it suggests that the use of a golf cart in either a professional golf tournament or a tour comprised of a series of tournaments is a reasonable modification under the ADA

233 *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000), *cert. granted*, 2000 U.S. LEXIS 4865, 147 L. Ed. 2d 1052, 69 U.S.L.W. 3223 (U.S. Sept. 26, 2000) (No. 00-24).

234 The date for a final resolution for *Martin* (and indirectly for *Olinger* should the Court address the split between circuits as noted above) is unknown. The PGA's briefs will be filed November 13, 2000, and *Martin*'s brief must be filed by December 13. Any reply briefs are due December 29. Any final disposition will likely occur late in the winter or early spring 2001.

which does not fundamentally alter the nature of the competitive golf tournament. As a result, the Court should find that the Ninth Circuit's *Martin* decision most accurately reflects the state of the law on this issue and that the Seventh Circuit's opinion in *Olinger* was decided incorrectly.

In making its decision, the Court must consider the same issues addressed in the ADA analysis of both the *Martin* and *Olinger* courts. Both courts focused on three main issues in their opinions: (1) Whether the respective golf entity (PGA or USGA) is a public accommodation, triggering application of the ADA, (2) whether the respective plaintiff's requested modification, the use of a golf cart, is reasonable, and (3) whether the use of a golf cart fundamentally alters the nature of the program at issue in the public accommodation (the PGA Tour or the Open, respectively). On appeal, the Court need not consider either the first or second issue but must focus its attention only on the issue of whether the use of a cart fundamentally alters the PGA Tour. Even in *Olinger*, which held that the use of a cart fundamentally altered the nature of the Open, the Seventh Circuit addressed only the third issue, assuming *arguendo* that the first two issues were resolved in favor of the plaintiff.²³⁵

In resolving the issue of whether the use of a golf cart fundamentally alters the nature of the PGA Tour, the Court should find the Ninth Circuit's analysis in the *Martin* opinion to be more persuasive because *Martin* more accurately interprets the ADA and reflects the current state of the law. One of the speculative reasons that the Seventh Circuit likely rejected *Olinger*'s claim was due to the fact that the Seventh Circuit is more conservative than the more judicially-activist Ninth Circuit which decided *Martin*. Neither the state of Indiana nor its representatives on the court would generally be prone to such activism by the court. As a result, the district court in Indiana and the Seventh Circuit would be more likely to accept the USGA's argument based on tradition. An argument based on tradition, not on the alteration of long-standing rules, is the benchmark of judicial conservatism. Such a decision would be expected by the two courts deciding *Olinger*'s

²³⁵ *Olinger*, 205 F.3d at 1005.

case. In addition, another speculative reason for the decision in *Olinger* might be due to the differences between the two organizations, the PGA and the USGA. The argument could be made that because the golfers on the PGA Tour are all professionals, those golfers are all at such a tremendously high skill level that a variable such as the introduction of a golf cart would not affect the competition in any fundamental way. Following that logic, because the Open, for instance, invites both amateurs and professionals to compete for the United States golf championship, the skill levels of all participants might not be as uniform as on the PGA, meaning that the introduction of a cart might affect the competitiveness of the tournament. Such a difference was not noted by either deciding court in *Olinger* and is only speculative.

In a less speculative analysis of the *Martin* and *Olinger* opinions, several factors illustrate the fallacy of the *Olinger* decision. These five factors are illustrative of the erroneous nature of the opinion by the *Olinger* court and demonstrate the precise reasons why the Supreme Court must affirm the Ninth Circuit's decision in *Martin* and overrule the Seventh Circuit's decision in *Olinger*. The *Olinger* court erroneously relied on four irrelevant or irrational factors in arriving at its decision: (1) Certain irrelevant age and eligibility rules promulgated by state high school regulatory associations discussed in several Court of Appeals opinions, (2) the irrelevant undue burden or undue hardship exemption, (3) the irrelevant competitive advantage estimation, and (4) the irrational use of tradition. In addition, the *Olinger* court failed to follow the framework for ADA analysis utilized in the precedent of its own Seventh Circuit opinions and in decisions by the Fifth and Ninth Circuits which mandated the weighing of evidence focusing on the specifics of the plaintiff's circumstances. The *Olinger* court's misapplication and/or lack of consideration of these five factors illustrates the inaccuracy of the *Olinger* decision and mandates that the Supreme Court affirm the *Martin* decision and overrule *Olinger*.

A. Olinger's Reliance on High School Age Limit Cases Was Erroneous

In the *Olinger* decision, the USGA referred to several opinions from the Sixth²³⁶ and Eighth Circuits²³⁷ which examined age and eligibility rules for high school athletes promulgated by several state high school athletic commissions. The *Olinger* court cited these high school cases, stating that courts have held that the ADA does not mandate that an entity change its basic nature, character, or purpose provided that the stated purpose is rational and not a pretext for discrimination.²³⁸ The court in *Olinger* used this point to claim that the ADA did not require the USGA to waive the no cart rule because the rule's purpose, to inject fatigue into the competition, was rational and not a pretext for discrimination.²³⁹ The court inferred that any alteration to the USGA's rational rule would change the basic nature, character, or purpose of the no cart rule, and as a result, that revision of the rule would be a fundamental alteration, the type not required by the ADA.²⁴⁰

A brief look at the high school cases cited by the USGA will demonstrate that the USGA's reliance on these cases was misplaced. In these cases, the Sixth and Eighth Circuits examined "interscholastic age eligibility rules imposed by athletic associations of student-athletes and potential student-athletes [which] limit[ed] athletic competition to those under 19 years of age."²⁴¹ The courts in these cases determined whether to allow modification of age limitations for disabled students under the ADA. In *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40

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

237 See *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).

238 *Olinger*, 205 F.3d at 1005.

239 *Id.* at 1005-6.

240 *Id.* at 1006.

241 Diane Heckman, *Athletic Associations and Disabled Student-Athletes in the 1990's*, 143 WEST'S EDUC. L. REP. 1, 23 (2000).

F.3d 926 (8th Cir. 1994) (hereafter “*Pottgen*”), the Eighth Circuit examined the issue of whether to waive the age limit for a nineteen-year-old student-athlete with a learning disability.²⁴² The court upheld the age limit stating the rule was a rational one which “helps reduce the competitive advantage flowing to teams using older athletes; protects younger athletes. . . discourages student athletes from delaying their education. . . and prevents . . . red-shirting to gain a competitive advantage. These purposes are of immense importance.”²⁴³ The court added that waiving the rule was a fundamental alteration of interscholastic athletics and that the student’s request was not a reasonable modification of the rule because no reasonable alternative, other than waiving the rule, was possible to remedy the situation.²⁴⁴ In *Sandison v. Michigan High Sch. Athletic Ass’n*, 64 F.3d 1026 (6th Cir. 1995) (hereafter “*Sandison*”) from the Sixth Circuit, the court denied waiving a similar age limit for two nineteen-year-old athletes with learning disabilities.²⁴⁵ The *Sandison* court upheld the age limit for some of the same reasons as the *Pottgen* court, claiming that the rule protected younger athletes and was rational. The court held that waiving the rule would be a fundamental alteration to high school athletics.²⁴⁶

These cases are distinguishable from the situation in *Olinger*. Obviously, *Olinger* is not an eligibility case, unlike the student athletes whose eligibility to participate in interscholastic athletics was denied. *Olinger* was eligible to play in qualifying rounds for the Open based on his ability to hit a golf ball, not on his ability to walk eighteen holes, unlike the student athletes whose access to participate in interscholastic athletics was totally denied because of their age.²⁴⁷ Eligibility has no part to play in these cases, and any claim advanced by the USGA based on that rationale has not a legal leg on which stand.

242 *Id.* at 29.

243 *Pottgen*, 40 F.3d at 929.

244 *Id.* at 929.

245 Heckman, *supra* note 241, at 27.

246 *Sandison*, 64 F.3d at 1035.

247 Paul M. Anderson, *Spoiling a Good Walk: Does the ADA Change The Rules of Sport?*, 1 VA. J. SPORTS & L. 44, 87 (1999).

In addition, several more compelling differences exist. The *Martin* court distinguished the high school age limit cases from Martin's situation, finding that the age limit rules were necessary to protect younger students both in terms of safety and competition.²⁴⁸ The age limit rules were necessary to limit competition, but the *Martin* court cited the earlier district court's finding that Martin would gain no competitive advantage from the use of a cart.²⁴⁹ As will be discussed later, Olinger would gain no competitive advantage from a cart, meaning that the rule would not be necessary to protect competition and thus, distinguishable from those in the high school cases.

Finally, *Olinger* is distinguishable based on the fact that Olinger's modification was deemed to be reasonable, but the waiver of the rule in *Pottgen* was deemed unreasonable. The court in *Pottgen* stated, "Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodation exists."²⁵⁰ On the other hand, the *Olinger* court affirmed the district court's finding that Olinger's request to use a cart was a reasonable modification.²⁵¹ The *Pottgen* court had a simple reason to deny the plaintiff's request--the fact that the modification was not reasonable. That reason was more than enough to justify the *Pottgen* court's decision not to waive the rule. This difference is a big distinguishing factor from *Olinger*. The fact that the modification was deemed unreasonable might well have been the decisive factor for the *Pottgen* court. To rely on a case with such a sizable difference was a significant error on the part of the *Olinger* court.

248 *Martin*, 204 F. 3d at 1001-2.

249 *Id.* at 1002 (citing *Martin*, 994 F. Supp. at 1252).

250 *Pottgen*, 40 F.3d at 929.

251 *Olinger*, 205 F.3d at 1005.

B. Olinger's Reliance on an Irrelevant Undue Burden Exemption Was Erroneous

The court in *Olinger* again cited *Sandison* to advance the notion that a requested accommodation causes a fundamental alteration if it results in an undue burden or hardship to the public accommodation. *Olinger* cited this proposition, the undue burden exemption, stating that courts interpreting the ADA have held that the imposition of a financial and administrative burden on an entity is a sufficient reason to deny the requested modification.²⁵² The *Sandison* court held that requiring high school coaches to make nearly-impossible determinations about the competitive and hazardous effects of allowing overage athletes would impose an undue burden on both the schools and coaches.²⁵³ Similarly, the *Olinger* court held that the administrative and financial burden of evaluating the validity of cart requests, due to the need to develop a system to determine whether the applicant truly requires the use of a cart, would impose an undue hardship on the USGA.²⁵⁴

Just because the court in *Olinger* claimed that an undue burden existed and was an automatic reason to deny the plaintiff's request does not mean that this claim was valid. *Olinger* failed to define either *undue hardship* or *undue burden*. One reason for this lies in the fact that the Title III of the ADA does not provide an undue burden exemption for public accommodations. Two possible sources for the undue burden exemption are Title I and the Rehabilitation Act. A recent case involving the examination of a Title III case by a district court in the Tenth Circuit stated that the undue burden exemption originated in Title I of the ADA (employment discrimination) and has been incorporated into Title III analysis.²⁵⁵ In that case, the court quoted from Title I which defined discrimination to include "not making reasonable accommodations to the known physical or mental limitations of

²⁵² *Id.* at 1005-6.

²⁵³ *Sandison*, 64 F.3d at 1035. See also *McPherson v. Michigan High Sch. Athletic Ass'n.*, 119 F.3d 453, 462-3 (6th Cir.1997).

²⁵⁴ *Olinger*, 205 F.3d at 1007.

²⁵⁵ *Dahlberg v. Avis Rent-A-Car Sys.*, 92 F. Supp.2d 1091, 1105 (D. Colo. 2000).

an otherwise qualified individual. . . unless [the defendant] can demonstrate that the accommodation would impose undue hardship on. . . such . . . entity.”²⁵⁶ That court then used that Title I language in its Title III analysis. Another source of the undue burden exemption is the Rehabilitation Act. In another high school eligibility case, the Seventh Circuit compared the applicability of some parts of the Rehabilitation Act to the ADA, stating that a provision of one of the acts could be substituted for the applicable portion of the other.²⁵⁷

Assuming *arguendo* that the undue burden exemption is consistent with Title III analysis, the court in *Olinger* erred because the USGA would not actually experience any undue hardship which would fundamentally alter the nature of the Open as a result of Olinger’s requested modification. The ADA’s definition of *undue hardship* in Title I includes four factors to determine whether an entity would experience an undue hardship. Even if Title III analysis in fact permits the undue hardship exemption, an exploration of the Title I factors demonstrates that the USGA would not experience an undue hardship as a result of the plaintiff’s requested modification. The definition of undue hardship follows:

(A) The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered[:] In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this Act;

²⁵⁶ *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A) (2000)).

²⁵⁷ See *Washington*, 181 F.3d at 845 n.6 (7th Cir. 1999) (stating “We have held previously that the standards applicable to one act are applicable to the other. Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other.”).

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.²⁵⁸

The first factor is the nature and cost of the requested accommodation. Olinger's request to use a cart was reasonable and financially insignificant to the USGA. On a larger scale, the USGA might need to pay a few extra administrators in the future to read the requests of applicants and determine whether those requests were genuine. Even if this activity involved some deal of work for the organization and necessitated the addition of physicians to the staff, as alleged by the USGA, such an added financial cost would not be burdensome when considering the other three factors which relate to the USGA's size and financial situation. The second and third factors inquire about the overall resources of the entity, in this case, the USGA and invariably, the PGA Tour as well. The USGA has more than 250 employees on staff throughout the country.²⁵⁹ The USGA claims to be the responsible party for the administration of all golf-related functions in the United States, inferring that it is a large,

258 42 U.S.C. § 12111(10) (2000).

259 USGA Website, *Annual Report*, (visited October 25, 2000) <http://www.usga.org/about/99_annual/index.html>.

widespread, and all-encompassing organization.²⁶⁰ Similarly, the PGA is a vast, multi-million dollar golf empire, evidenced by the PGA's ability to pay out millions of dollars per year in awards for successful golfers and its prestigious network television contract. In fact, the PGA claims to be "the largest working sports organization in the world, comprised of more than 26,000 dedicated men and women promoting the game of golf to everyone, everywhere."²⁶¹ The final factor examines the composition, structure, and functions of operations at the USGA. The USGA states that it "has been expanded beyond its basic responsibilities for making and administering the Rules of Golf, . . . [and] conducting 13 national championships. . . It now includes major initiatives in the provision of affordable access, including [access] for handicapped persons."²⁶² If the USGA does all of these activities, it surely can handle a few additional administrative decisions.

Based on the four factors as stated by Title I of the ADA for determining whether an entity would endure any undue hardship, the USGA (and arguably, the PGA) would not experience any undue burden by modifying the no cart rule. One commentator wrote:

The cost of a golf cart is a minimal imposition on [the organization's] resources. In addition, the procedural burden of reviewing claims from disabled individuals would be less than significant, considering the small number of individuals who have developed abilities commensurate with successful competition in professional golf. Therefore, the individualized assessment of a reasonable accommodation will create neither

²⁶⁰ *Id.*

²⁶¹ PGA Website, *What is the Role of the PGA of America?*, (visited October 25, 2000) <http://www.pga.com/FAQ/pga_role.html>.

²⁶² USGA Website, *Annual Report*, (visited October 25, 2000) <http://www.usga.org/about/99_annual/index.html>.

undue financial hardships nor undue administrative burdens.²⁶³

Compared to the overall financial resources of the USGA, Olinger's request was insignificant. Such a request does not constitute an undue burden on a vast association. Assuming *arguendo* that Title III implicitly allows an undue hardship exemption, that exemption must be consistent with other parts of the Title III analysis. Title III requires a *fundamental* alteration, not an *inconvenient* alteration, to the nature of the public accommodation, in order for the public accommodation to be able to deny a reasonable modification. The USGA's alleged undue hardship illustrates the opposite of what a fundamental alteration is. The USGA's claim essentially was that Olinger's request would be inconvenient and time-consuming. Such an endeavor is not burdensome to the point of fundamentally altering the nature of the Open or any of the USGA's many purported activities. The fact that the PGA has even greater resources, compared to the USGA, compounds the fact that a golfer's requested modification of the no cart rule would not create an undue hardship which fundamentally alters the nature of a public accommodation. As a result, the Supreme Court must overrule *Olinger* and hold that Martin's request neither causes an undue hardship nor is a fundamental alteration.

C. Olinger's Finding of a Competitive Advantage Was Erroneous

Another factor cited by the court in *Olinger* as the basis for determining that the use of a cart fundamentally alters the nature of the Open was the USGA's claim that a cart would give Olinger a competitive advantage over other golfers. The *Olinger* court affirmed the district court's finding that the use of a cart created a

263 Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans with Disabilities Act*, 18 LAW & INEQ. J. 131, 174-5 (2000).

competitive advantage.²⁶⁴ *Olinger* accepted the USGA's claim that the walking rule injected stamina and fatigue into the competition, meaning that any attempt to waive the rule would remove those allegedly necessary elements from the competition.²⁶⁵ The court stated that heat and humidity can affect the fatigue factor which is a central part of the competition.²⁶⁶ Additionally, the court restated the district court's finding that the point of the competition is to determine which golfer can best accomplish the task of hitting a golf ball under the same conditions, a great amount mental and physical stress.²⁶⁷ According to the court, any change to the uniform playing conditions, such as the modification caused by the introduction of a golf cart, might allow for a competitive advantage for the cart user, and the consequential competitive advantage would fundamentally alter the nature of the Open.²⁶⁸

The *Olinger* court's theory about a competitive advantage for *Olinger* resulting from his use of a cart is erroneous. Fatigue is not a major factor in a golf tournament. Golf is a low impact activity, not a high impact sport such as basketball or football in which athletes experience fatigue due to the fast-paced and physically-exhaustive activity. Golfers are allowed to walk slowly between holes, and their caddies carry their golf clubs. Neither speed nor strength is required to be a successful golfer.²⁶⁹ With neither speed nor strength as a factor, the fatigue factor alleged by the USGA to be a central part of competition, must be a result of the weather. All golfers must endure the same elements; thus, the fact that a golfer uses a cart does not make him less susceptible to heat and

264 *Olinger*, 205 F.3d at 1006.

265 *Id.* (citing *Olinger*, 55 F. Supp.2d at 935-6).

266 *Olinger*, 205 F.3d at 1006.

267 *Id.*

268 *Id.* See also Barry A. White, Lee N. Abrams, Guy G. Ward, and Walter Driver, Jr., *Brief of the United States Golf Association as Amicus Curiae in Support of Appellant*, 1 VA. J. SPORTS & L. 110, 119 VA. J. SPORTS & L. (1999) (stating that a professional golf tournament or national championship tests a golfer's skill, stamina, endurance and perseverance under sometimes unfavorable conditions).

269 See also Brian D. Shannon, *Brief of the Klippel-Trenaunay Syndrome Support Group, as Amicus Curiae in Support of Appellee*, 1 VA. J. SPORTS & L. 93, 105 (1999) (stating that speed is not a factor in golf).

humidity. If all golfers, those with and without a cart, are subject to the same weather conditions, then, the use of a cart does not provide a competitive advantage with respect to the fatigue factor.

Even with the use of a cart, the central part of the golfing competition, shot making, is unaffected.²⁷⁰ Because Olinger and Martin each have a debilitating disability which significantly impairs their respective ability to walk the entire length of a golf course, the *Martin* opinion will be beneficial in identifying the fallacies of the *Olinger* decision. In *Martin*, the court held that the central part of the competition, the shot making aspect, was unaffected by Martin's use of a cart.²⁷¹ The game measures the ability to put a ball into a hole, not the ability to walk from one hole to another.²⁷² Why should Olinger's use of a cart cause a different result than Martin's use?

Assuming *arguendo* that part of the competition in a golf tournament is related to fatigue and that golfers who use a cart are less susceptible to the effects of fatigue, the court in *Olinger* erroneously stated that Olinger would experience less fatigue during the course of the competition due to his use of a cart. The fatigue, whether psychological, physiological, or physical, experienced by Olinger and Martin, even while using a cart, greatly exceeds the stress and fatigue experienced by an able-bodied golfer. The district court opinion in *Martin* stated that the fatigue and stress endured by Martin in dealing with his disability was much greater than any fatigue or stress experienced by a golfer during an unseasonably hot and humid day.²⁷³ Due to his disability and the medication used to treat it, Olinger undoubtedly experiences a similar level of stress and fatigue to Martin. In addition, both Martin and Olinger still must walk more than

270 *Id.* (stating that the heart of the competition is shot-making).

271 *Martin*, 204 F.3d at 1000. See also USGA web site, *2000 Rules of Golf and Decisions on the Rules of Golf*, (visited October 25, 2000) <http://www.usga.org/rules/rule_2000/index.html> (citing the first rule of golf, as promulgated by the USGA stating, "The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.").

272 Shannon, *supra* note 269, at 105.

273 *Martin*, 994 F. Supp. at 1252.

twenty-five percent of the course. For Martin, each step increases the risk of significant injury, and for Olinger, each step brings more intense pain. The fatigue-related conditions, some added sweat and stress--conditions arguably endured by Martin and Olinger also--do not remotely compare to the daily stress experienced by the two plaintiffs. Even if fatigue is a factor, to say that Olinger or Martin experience less fatigue while riding a cart is a gross and inaccurate overstatement. In sum, the Supreme Court must overrule *Olinger*, finding that the use of a cart in a golf tournament does not create a competitive advantage for the cart's user and apply that rule to the *Martin* appeal.

D. Olinger's Reliance on the Irrational Tradition Factor Was Erroneous

In addition to the eligibility cases, the undue burden exemption and the competitive advantage analysis, the *Olinger* court erroneously accepted the USGA's claim that the tradition and custom of walking in golf was an appropriate reason to hold that any modification of that rule would fundamentally alter the nature of the U.S. Open. The *Olinger* opinion specifically cited the testimony of one of the defendant's witnesses which emphasized the importance of the walking tradition in professional golf.²⁷⁴ The *Olinger* court stated that the testimony emphasized "the importance and tradition of walking in championship-level tournament golf competition."²⁷⁵ This court placed nearly as much weight on tradition as it did for the undue burden exemption and for the competitive advantage analysis in rationalizing its decision.

Simply put, however, tradition is an irrational reason for holding that the use of a cart fundamentally alters the Open. The district court in *Martin* rejected the PGA's tradition-based argument.²⁷⁶ One commentator noted that rules promulgated and enforced for

²⁷⁴ *Olinger*, 205 F.3d at 1007.

²⁷⁵ *Id.*

²⁷⁶ *Martin*, 994 F. Supp. at 1250 n.11 (stating that mere tradition is not a cognizable purpose).

legitimate reasons, such as the safety and competitive issues in the high school cases, will be enforceable, but “what is not allowed [are] nonessential rules or traditions which bar a disabled individual from participating in golf if he . . . meets the other criteria as established by the organization.”²⁷⁷ Tradition is an unacceptable basis for upholding a rule. In the golf context, tradition is a weak rationale for the walking rule used by the USGA and PGA in order to cloak the lack of more rational reasons for denying the use of a cart. Unfortunately, the *Olinger* court was also blinded by the argument’s cloak of inadequacy and irrationality.

Another problem with the *Olinger* court’s finding of tradition as a basis for denying the plaintiff’s use of a cart is that the tradition argument has no bounds. What is the bright line for determining what traditions are essential to golf and what traditions are not? When is tradition just another word for laziness or an inability to change? Who determines whether the alleged tradition is relevant to the nature of the public accommodation?

More often than not, those individuals who hide behind tradition are involved in using that tradition to exclude others from becoming part of that particular tradition. Many private golf clubs have engaged and still engage in the “tradition” of excluding minorities from gaining membership. Obviously, this type of tradition is forbidden by law, namely the Civil Rights Act. The use of tradition to exclude is not just irrational; it is illegal. A brief in support of the plaintiff in *Martin* stated, “Relying on tradition as a means of upholding a discriminatory practice rings hollow. Rules and policies based on long-standing tradition have certainly not negated laws prohibiting discrimination based on race or gender and cannot do so with respect to the ADA.”²⁷⁸ In the same vein, the argument that disabled individuals will be similarly left on the outside looking in should their key to access, the use of a golf cart, be denied is not far-fetched.

Golf is a long and storied sport with much tradition; that cannot be denied. What can and must be denied, however, is the use of

277 Anderson, *supra* note 247, at 88.

278 Shannon, *supra* note 269, at 108.

tradition to mask the desire to make changes which improve the game. The use of a golf cart to provide a level playing field for disabled athletes does not fundamentally alter the nature of a golf tournament as stated in the above sections, and the claim that tradition is in opposition to such a change is an irrational argument. Golf has seen much change throughout its history, and “tradition has not kept the game of golf from evolving in other aspects [such as advances in clubs and balls].”²⁷⁹ The use of a cart is just another in the long line of advances to the game of golf.²⁸⁰ Just like the game evolved with respect to golf balls and clubs, golf must evolve and allow the use of carts when necessary and not hide behind the shadows of tradition. The Supreme Court must see through the frailties of the tradition-based argument and deny its application in the *Martin* appeal.

E. Olinger’s Failure to Follow the Individual Circumstances Analysis Precedent Was Clearly Erroneous

Although the court in *Olinger* erroneously relied on the four irrelevant or irrational factors stated above--all of which demonstrate that *Olinger* was an incorrect decision which must be overruled--the most appalling mistake was that the Seventh Circuit ignored precedent in deciding *Olinger* on appeal. The precedent to which the references was made is the line of cases in the Fifth,²⁸¹ Seventh,²⁸² and Ninth²⁸³ Circuits which mandate that the court must focus on the specifics of the plaintiff’s situation and conduct a highly fact-specific analysis of the plaintiff’s individualized circumstances with reference to the requested accommodation and any possible fundamental alteration at issue.²⁸⁴ The *Martin* court

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *Johnson*, 116 F.3d at 1059.

²⁸² See *Washington*, 181 F.3d at 852.

²⁸³ See *Crowder*, 81 F.3d at 1486; *Martin*, 204 F.3d at 1001.

²⁸⁴ See also *Dahlberg*, 92 F. Supp.2d at 1105 (a case from the District of Colorado in the Tenth Circuit which recently adopted this type of individualized analysis).

synthesized the rule, quoting a Fifth Circuit case from which it borrowed the rationale. The court in *Martin* stated, “The issue here is not whether the use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so. The evidence must ‘focus on the specifics of the [plaintiff’s] circumstances and not on the general nature of the accommodation.’”²⁸⁵

A highly fact-specific inquiry of the individualized circumstances of the plaintiff went largely ignored in both the district court and appellate opinions of *Olinger*. The district court’s inquiry claimed to have focused on the specific effect of the requested modification on the nature of the Open, as opposed to the general, the game of golf.²⁸⁶ However, the rest of the opinion was not tailored to follow this course of inquiry. The district court noted a few passing references to the fact that Olinger was not like an able-bodied golfer, but that was the extent of the discussion of the plaintiff’s individualized circumstances.²⁸⁷ To follow the framework advanced by *Martin* and its predecessors, all of which were decided well before *Olinger*, the *Olinger* court should have focused on the specifics of Olinger’s situation and explained fully how Olinger’s use of the cart, considering all relevant information about his background, would fundamentally alter The Open. Unfortunately, the district court opinion reflects no evidence of such an inquiry.

Because the USGA refused to consider the requested modification in light of the plaintiff’s unique and individualized scenario, it “violated the proscription against discrimination by failing to make a reasonable modification to its policies and procedures.”²⁸⁸ The USGA cannot offer a “fundamental alteration defense . . . without first looking into the circumstances surrounding the requested modification, and [the USGA’s argument] therefore must fail for lack of foundation.”²⁸⁹ In

²⁸⁵ *Martin*, 204 F.3d at 1001 (quoting portions from *Johnson*, 116 F.3d at 1059).

²⁸⁶ *Olinger*, 55 F. Supp.2d at 934.

²⁸⁷ *Id.* at 935.

²⁸⁸ Hentges, *supra* note 263, at 174.

²⁸⁹ *Id.*

essence, the USGA's fundamental alteration defense was invalid because the organization failed to follow the prescribed framework for analysis by not considering how Olinger's use of a golf cart, and his use alone, would fundamentally alter the nature of The Open. By not conducting this individualized, fact-specific analysis, the defendant USGA did not carry its burden and should not be entitled to the fundamental alteration defense. After all, why should the USGA be allowed the privilege of a defense which essentially forecloses Olinger's access to The Open, punishing the plaintiff for the defendant's failure to follow the rules set out by precedent? In spite of the fact that the USGA failed to carry its burden, the district court nonetheless accepted the USGA's fundamental alteration defense.

On appeal, the Seventh Circuit erroneously upheld the USGA's defense that the plaintiff's requested modification would fundamentally alter the nature of the Open.²⁹⁰ The Seventh Circuit gave only lip service to the precedent of several circuits, including its own decision in *Washington v. IHSAA*.²⁹¹ In *Washington*, the Seventh Circuit examined yet another high school eligibility case, this time, with respect to the application of an eight-semester eligibility limit to a student-athlete with a learning disability. In this case, the Seventh Circuit rejected the defendant's assertion of the undue burden exemption, stating, "The few case-by-case analyses that the IHSAA would need to conduct hardly can be described as an excessive burden."²⁹² In addition to rejecting the validity of the undue burden exemption--yet another reason that the Seventh Circuit should have rejected the exemption in *Olinger*--the Seventh Circuit highlighted the need to conduct a highly fact-specific analysis of the plaintiff's individual circumstances.²⁹³

The Seventh Circuit panel which decided *Olinger* ignored this precedent. The court merely gave lip service to the precedent by noting, in passing, Olinger's claim that the USGA did not offer any evidence that allowing him to use a cart would impose any

290 *Olinger*, 205 F. 3d at 1007.

291 *Washington*, 181 F.3d at 852.

292 *Id.*

293 *Id.*

undue hardship.²⁹⁴ As explained above, the district court did not demonstrate that the USGA had in fact offered such evidence, but the Seventh Circuit either turned a blind eye to the absence of an individualized analysis of the circumstances or just ignored it altogether. Whether the Seventh Circuit erred as a result of a glaring omission or because of a conscious decision to ignore the required consideration of the plaintiff's individualized circumstances, the *Olinger* court failed to follow the principles of *stare decisis* by not providing any rational reason for not following the rule of law in the Seventh, Fifth and Ninth Circuits. By doing so, the *Olinger* court very likely abused its discretion making this erroneous decision.

Had the Seventh Circuit followed the principles of *stare decisis* and conducted a proper inquiry into the plaintiff's predicament, a good chance exists that the Supreme Court would not need to consider the PGA's appeal of *Martin*. Likely, the Supreme Court took the case because of the split between the Seventh and the Ninth Circuits, in other words, the contradictory nature of *Martin* and *Olinger*. If the *Olinger* court had followed both its circuit's established precedent or the precedent of the Fifth and Ninth Circuits, the case would have been decided differently. The *Olinger* court should have either (1) remanded the case to the district court to consider fully the plaintiff's use of the golf cart and how it affected The Open or (2) made that determination on its own. By focusing on the specifics of *Olinger*'s use of a cart in The Open, which neither *Olinger* court, in actuality, did, the Seventh Circuit would have held similarly to the Ninth Circuit in *Martin* and discounted the weight of the irrelevant factors stated above such as eligibility, the undue burden exemption, the alleged competitive advantage gained by using a cart, and the irrational cloak of tradition.

294 *Olinger*, 205 F. 3d at 1005.

IV. IMPACT

The impact of the Supreme Court appeal of *Martin* will be felt in any of several ways. The Supreme Court will likely address the case in one of the following methods: (1) Decide only the narrow issue of whether Martin can use a cart on the PGA Tour, (2) resolve the split between the circuits and determine which case, either *Martin* or *Olinger*, is appropriate rule of law, or (3) address the broader issue of whether the ADA applies to professional sports. Based on the current composition of the Court and its recent history, the Court will likely decide only what is necessary to decide. As a result, the Court probably will not determine the applicability of the ADA to professional sports and decide the narrower issue of whether or not the use of a golf cart fundamentally alters the nature of a golfing competition.

A. A Narrow Decision Will Impact Only Martin and Professional Golf

If the Court addresses only the narrower issues related to Martin, and possibly Olinger, the impact will be noticeable, but not as rippling as the impact of a decision on the applicability of the ADA to all professional sports. On the more narrow issue, the Court will decide whether the use of a cart fundamentally alters golf competitions. The impact of this decision will be both long term and short term. In the short term, obviously, the Court will determine whether Martin will be able to continue using a cart on the PGA Tour. Should the Court address the split between the circuits, it will determine whether golfers can use a cart in the U.S. Open, both in qualifying and tournament rounds. The short term impact will be felt by the PGA and Martin. As the year draws to a close, Martin's eligibility status becomes a factor. Whether he will qualify for a spot on the PGA Tour is questionable, but he will likely qualify to play in one of the PGA's competitive series. In

that sense, the Court will determine whether Martin will be allowed to use a cart on the tour next season.

Looking at the long-term effects, the PGA Tour will feel the impact of the decision in more ways than the seemingly obvious ones. Although the PGA seems to have ignored this fact, Martin's presence improves the tour's value. The fact that a golfer of Martin's caliber is allowed to compete on the PGA Tour only helps foster competition on the tour, making it better for all competitors. A victory over all the best golfers in the world is much more valuable to a competitive golfer than a victory over just some of the best golfers. Both the competitive spirit and nature are weakened in a watered-down tour.

In addition, the Court's decision will have an impact on future generations of Casey Martin-type figures in professional golf. The idea that another disabled child, like Martin, with dreams of becoming a professional golfer can look to Martin as a role model. The application of the ADA to professional golf will help to make sure that the dreams of those talented children who had the misfortune of being born with a disability will not be crushed due to either so-called tradition or blatant societal discrimination. Because golf is a low-impact sport in which speed and strength do not play a prominent role, golf is probably one of the only sports where a simple modification such as the use of a cart can provide equal access. In all likelihood, the Court will limit its decision to professional golf because of the ease of allowing such a reasonable modification in that particular sport. A decision in favor of Martin will give disabled golfers to follow in Martin's footsteps. A decision favoring the PGA will send a message to those children saying that equality of opportunity, manifested in access to professional golf tournaments, is not a guaranteed right for golfers who happen to be disabled.

B. A Broad Decision Will Impact Many Areas of Professional Sports

If the Court, however, does delve into the issue of whether the ADA applies to professional sports, the impact will be much more

pronounced. Since the enactment of the ADA, battles have waged over the application of the act in particular areas. The professional sports arena is just another battleground in a long line of skirmishes fought by the ADA's opponents and proponents. The ardent advocates on both sides of the fence have advanced arguments filled with hyperbole. Proponents of the application of the ADA to professional sports have claimed that the Supreme Court's affirmation of *Martin* will highlight the important constitutional rights of the disabled, putting the *Martin* decision on par with *Marbury v. Madison*, *Roe v. Wade*, and *Brown v. Board of Education*.²⁹⁵ Opponents claim that Congress never intended to apply the ADA to sports²⁹⁶ or the slippery slope argument that the ADA will permit alterations such as major competitive advantages to disabled athletes such a head starts in swimming or track or more points for a given shot in basketball than would be given to able-bodied athletes that would change the landscape of professional sports so much that it would be rendered unrecognizable.

In reality, as usual, the truth is somewhere in the middle. The application of the ADA to athletics is probably not an expansion of the intended scope of the Act. The ADA neither explicitly forbids its application to sports nor does it implicitly warn against such an application. The legislators who enacted the ADA sought merely to provide remedial legislation opening the doors of opportunity to those millions of disabled Americans who have faced societal discrimination because of their disability.²⁹⁷ The ADA can open the door to disabled athletes in the same way it opened the door to disabled individuals in other fields such as access to employment, housing, health care, public facilities, and many other areas. In this sense, the impact of a broad decision by the Court would be felt throughout professional sports. The ADA limits the scope of modifications to those that are reasonable

295 Christopher M. Parent, *Martin v. PGA Tour: A Misapplication of the Americans with Disabilities Act*, 26 J. Legis. 123 (2000) (quoting Terence Moore, *Ruling Allowing Martin to Use Cart Disregards the Essence of Golf*, ATLANTA J. & CONST., Feb. 13, 1998, at 3E).

296 Kensky, *supra* note 27, at 187; White, *supra* note 268, at 119.

297 42 U.S.C. § 12101(b)(4) (2000).

which do not fundamentally alter the nature of the sport.²⁹⁸ With that inherent mechanism in the ADA to limit modifications, the advocates of the chaotic slippery slope theory need not fear the prospect of motorized wheelchairs in professional baseball games. In a decision favoring Martin, the impact would be that disabled athletes in other professional sports get the same type of opportunity to fulfill their dreams just as Martin did. On the other hand, a decision for the PGA, would signal doom for those hopes and dreams of competing in professional sports.

V. CONCLUSION

For ten years, the ADA has improved the lives of Americans with disabilities, providing them with access to places to which they had been denied and protecting them from invidious discrimination. In spite of criticism about its scope and language, the ADA has helped to remedy discrimination against disabled individuals just as the Civil Rights Act has aimed to remedy racial discrimination. The ADA was not intended to be applied selectively to some disabled individuals and not at all to others. Just because Casey Martin happens to be a skilled professional golfer does not make his condition any less debilitating nor should he receive less protection than any other American who must live with a disability. Martin did not choose to be born with a disability. Similarly, those who oppose application of the ADA to Martin, simply because he is a professional athlete, must realize that the ADA does not choose to whom it will apply. The ADA applies universally, protecting all disabled individuals in the United States from discrimination. The remedial power granted to the ADA by Congress mandates that a golf association such as the PGA or the USGA must follow the law of the land and revise its walking rule to incorporate the use of a golf cart for a disabled individual such as Casey Martin or Ford Olinger because the use of a cart is a reasonable accommodation which does not fundamentally alter the nature of a professional golf tournament.

298 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

As a child, Martin dreamed of a chance to compete with the world's elite golfers. Thanks to the ADA, he continues, at the moment, to receive his opportunity. At this point, however, Martin's ability to use a cart is in jeopardy while the Supreme Court prepares to hear arguments for the Martin appeal. The Court should interpret the ADA in the light of what the legislation was purported to do--provide access and protect the disabled from discrimination. In making its decision, the Court must remember why this remedial legislation is so important, embodied in a statement by Martin who said, "Without the ADA, I never would have been able to pursue my dream of playing golf professionally."²⁹⁹ The Court must consider the effects of the ADA over the last ten years. Should the advances of the ADA go for naught? Ten years from now, will the lasting image of the ADA be a young golfer given the opportunity to compete in the sport he loves and to fulfill his dream or will it be a victory for "The Good Old Boys" club, denying the dreams of the disabled of future generations in the name of tradition and discrimination? The fate of the future of Casey Martin, the present and future of disabled individuals, and the scope of the ADA rests in the hands of the Supreme Court.

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²⁹⁹ United States Department of Justice, *Faces of the ADA* (visited Sept. 21, 2000) <<http://www.usdoj.gov/crt/ada/fmartin.htm>>.

