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The Casey Martin and Ford Olinger Cases: The Supreme Court Takes a Swing at ADA Uncertainty

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Case Note

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INTRODUCTION

The Americans with Disabilities Act (ADA)[1] was thrust into the spotlight in 1998, when two disabled golfers brought separate actions for permission to use golf carts in professional tournaments.[2] Casey Martin, a golfer whose disability prevents him from walking an entire round of golf, brought suit against the

1. 42 U.S.C. §§ 12101-12213 (1994).

2. *See* Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998), *aff'd,* 204 F.3d 994 (9th Cir. 2000), *cert. granted,* 69 U.S.L.W. 3023 (U.S. Sep. 26, 2000) (No. 00-24); Olinger v. U.S. Golf Ass'n, 55 F. Supp.2d 926 (N.D. Ind. 1999), *aff'd,* 205 F.3d 1001 (7th Cir. 2000), *petition for cert. filed,* (U.S. Sep. 20, 2000) (No. 00-434).

Professional Golf Association Tour ("PGA Tour" or "Tour") for an exception to that entity's "no-cart" rule.[3] Ford Olinger, also a professional golfer with a comparable disability, sued the United States Golf Association (USGA), arguing that he should be allowed to use a cart in U.S. Open competition.[4] Both Martin and Olinger have asserted similar arguments with different results. Martin has won his suit,[5] while Olinger has not.[6] The conflicting judicial interpretations of the ADA's Title III provisions[7] has led to vast public attention, due in part to the importance that sports play in our society.[8] While the *Martin* and *Olinger* cases involve almost identical issues, it is *Martin* that has received almost all the media attention.[9] The majority of this coverage has focused on society's conflicting views of the case. On one hand, there are those who look at Martin as a courageous hero fighting for what he deserves. Martin has been called a "role model. . .[who has]. . .empower[ed] people with disabilities."[10] One writer concludes that he should be "on posters, not in court papers."[11] The *Martin* controversy even received a political response, when Senators Bob Dole and Tom Harkin spoke on behalf of Casey.[12]

The emotional response on the other side of the argument is just as strong. Many opposed to the "no-cart" policy waiver have relied on a "slippery slope" argument, concluding that this accommodation will "open a Pandora's box with far-reaching ef-

3. *Martin*, 994 F. Supp. 1242, 1244 (D. Or. 1998) [hereinafter *Martin II*].

4. *See Olinger*, 55 F. Supp.2d 926, 928 (N.D. Ind. 1999) [hereinafter *Olinger I*].

5. *See Martin*, 204 F.3d 994 (9th Cir. 2000) [hereinafter *Martin III*].

6. *See Olinger*, 205 F.3d 1001 (7th Cir. 2000) [hereinafter *Olinger II*].

7. 42 U.S.C. §§ 12181-12189 (1994) [hereinafter Title III].

8. *See* Laura F. Rothstein, *Don't Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act,* 19 REV. LITIG. 399, 411 (2000) (referring to the *Martin* case as the most highly publicized case on the issue of whether a particular program is subject to Title III of the ADA).

9. *See* Thomas Heath, *Martin Gives Emotional Testimony in Courtroom; Golfer Recounts Pain From Leg Disorder,* WASH. POST, Feb. 5, 1998, at C1; Harry Blauvelt, *Judge Says Golfer Martin Can Ride Cart,* USA TODAY, Feb. 12, 1998, at 1C.

10. Harry Blauvelt, *Martin Now Ready to Compete PGA's Finchen Wonders if Others Will Request Carts,* USA TODAY, Feb. 12, 1998, at 6C.

11. *A Good Walk Spoiled; The PGA Doesn't Get It,* GREENSBORO NEWS & RECORD, Feb. 1, 1998, at F2.

12. *See* Thomas Bonk, *Casey Case: Tour Has Cartload of Trouble,* L.A. TIMES, Jan. 30, 1998, at C11.

fects,"[13] resulting in "tremendous changes in American sports."[14] As columnist Tom D'Agostino has noticed, a common emotional response is "[w]hy shouldn't the PGA be able to make its own set of rules that apply to everyone equally? Who is some non-golfing judge in Oregon to say that walking isn't an essential part of the game?"[15] Others have even gone so far as to attack Martin's skills on the links.[16]

Probably the strongest sentiment against the allowance of carts has come from the colleagues of Martin and Olinger. Former U.S. Open Champion Ken Venturi testified against Olinger's cause, explaining the importance of walking the course.[17] Golf greats Arnold Palmer and Jack Nicklaus testified to the same effect against Martin.[18] Even Tiger Woods, Martin's college teammate at Stanford, stated his opposition to the use of carts in tournaments, fearing an unfair advantage over other players.[19]

The societal interest in these cases, where professional sports meets the law, has only increased in recent months. This revived concern has been fueled by the Supreme Court's decision to grant certiorari[20] to review the Ninth Circuit's holding in *Martin* that upheld his right to use a cart.[21] The problem with popular media attention is that, for the most part, it is based on pure emotional responses rather than the statutory and legal issues raised by the controversy. These legal aspects, which will decide the ultimate fate of the controversy, have been given

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13. Joe Gordon, *Golf Notes: Authority an Issue* - Martin *Case Weakens PGA,* BOSTON HERALD, Feb. 8, 1998, at B29.

14. Tom D'Agostino, *Casey Martin Golf Cart Case About Fairness; ADA Not Con Artist's Tool,* THE ARIZ. REPUBLIC, March 9, 1998, at B5.

15. *Id.*

16. *See* Jerry Potter, *Martin's Accomplishments Will Always Have Asterisk,* USA TODAY, Feb. 12, 1998, at 6C (commenting that "[w]hatever he accomplishes as a player he'll always have an asterisk by his name"). *Id.*

17. *See Olinger I*, 55 F. Supp.2d at 934.

18. *See* Bruce Balestier, *Simpson Team Makes Par Getting Cart Into PGA Tour,* N.Y.L.J., May 8, 2000, at col. 4.

19. *See* Joel Stein, *A Walk, Spoiled,* PEOPLE, Jan. 26, 1998, at 77.

20. 69 U.S.L.W. 3023 (U.S. Sep. 26, 2000) (No. 00-24).

21. *See, e.g.,* Jeffrey A. Rosenthal, *Should High Court Review Case of Disabled Golfer?*, N.Y.L.J., Aug. 7, 2000, at col. 4; Marianne Means, *Keep ADA Within Reason,* TIMES UNION (Albany), Oct. 4, 2000, at A15; *No Carts for Pro Golfers,* SARASOTA HERALD-TRIBUNE, October 5, 2000, at A14.

considerable attention by legal scholars.[22] Emotional aspects aside, the *Martin* and *Olinger* cases cannot be examined or understood without a detailed analysis of the statutory issues involved: 1) whether a golf course used for a professional tournament is a "place of public accommodation" within the meaning of the ADA[23] and 2) whether the use of a golf cart in this type of professional competition would "fundamentally alter" the nature of the tournaments.[24]

This article attempts to analyze the issues raised by the facts in *Martin* and *Olinger* in light of this statutory framework. Part I analyzes the two cases separately, including their facts, the arguments of all parties, and the courts' reasoning. Part II explores the Americans with Disabilities Act, including a look at the Rehabilitation Act. The Rehabilitation Act, an earlier counterpart and model to the ADA, provides useful insight into ADA issues. Part III analyzes other federal district and circuit court cases interpreting Title III of the ADA in the context of competitive sports. These decisions provide insight into how judges have interpreted the statute, thus providing guidance in analyzing how the Supreme Court may interpret the statute. Part IV explores Supreme Court decisions that are analogous to the situation at hand. Indeed, the court has analyzed what constitutes a "place of public accommodation" and a "fundamental alteration" in contexts outside the ADA,[25] but has never analyzed these provisions in an ADA Title III case. Part V then analyzes the questions of law in *Martin* and *Olinger* in light of

22. Many scholarly articles were published in response to the District Court and Circuit Court opinions in *Martin* and *Olinger*. *See, e.g.*, Christopher M. Parent, Martin v. PGA Tour*: A Misapplication of the Americans with Disabilities Act,* 26 J. LEGIS. 123 (2000); 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 (2000); Sean Baker, *The Casey Martin Case: Its Possible Effects on Professional Sports,* 34 TULSA L.J. 745 (1999); Kenneth E. Neikirk, *Fore! The Americans with Disabilities Act Tees Off at Professional Sports in* Martin v. PGA Tour Inc.*, But Will It Make the Cut?,* 36 HOUS. L. REV. 1867 (1999); Patty Maitland, *Riding A Cart on Golf's "Unfairways":* Martin v. PGA Tour, 29 GOLDEN GATE U. L. REV. 627 (1999); Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings,* 77 OR. L. REV. 1337 (1998); Bryon L. Koepke, *The Americans with Disabilities Act and Professional Golf-Breaking Par,* 38 WASHBURN L.J. 699 (1999).

23. 42 U.S.C. § 12182(a) (1994).

24. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

25. *See infra* Part IV.

past case law, which provides several different lines of reasoning. The analysis ends with the prediction that the Supreme Court will affirm the present holding in *Martin*. Finally, Part VI concludes with the argument that affirming the *Martin* holding is the proper result, in terms of the law and social policy.

PART I - *Martin & Olinger*, Conflicting Viewpoints

A. *The Martin Case*

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a disease that curtails blood circulation in his right leg.[26] Martin's condition, classified as a congenital deformity, has caused his leg to become severely atrophied and weakened.[27] Not only is walking painful, but the mere act places him at significant health risks.[28] Martin's treating physician testified that it is medically necessary for his patient to be permitted to use a cart while playing golf.[29] Thus, Martin is physically unable to walk the golf course, as required by the rules set up by the defendant, PGA Tour.[30]

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26. *See* Casey Martin v PGA Tour, Inc., 984 F. Supp. 1320, 1322 (D. Or. 1998). [hereinafter *Martin I*].

27. *Martin II*, 994 F. Supp. at 1243.

28. *See id.* (The risks associated with walking include risk of tibia fracture, due to the increasing loss of bone stock and the weakening of this bone over Martin's lifetime. In addition, medical testimony introduced by Martin indicates that walking places Martin at a risk of hemorrhaging, as well as an increased chance of developing blood clots). *See id.*

29. *See id.* at 1244. Dr. Jones summarized Martin's condition as follows:

> a rare congenital vascular malformation . . . which has led to, number one, chronic pain secondary to vascular engorgement and progressive loss of bone stock, pain so severe that he has at least considered to explore the use of time contingent narcotics; number two, a documented sleep disorder . . . which leads . . . to an exhaustion syndrome; number three, the need to wear two compression stockings at all times; number four, it has resulted in marked muscular atrophy and weakness in his right calf; number five, it has affected his knee through multiple intra-articular bleeds, causing abnormalities which are painful; and number six, and most important from the orthopedic aspect, it has resulted in a weakened tibia which is at risk for fracture and potential limb loss and/or serious post-fracture complications.

Id.

30. *See Martin I*, 984 F. Supp. at 1322 (discussing the PGA's "no cart" rule, requiring the players to walk in the PGA Tour and the Nike Tour). *See also* Koepke, *supra* note 22, at 699.

The controversy at hand began when Martin was qualifying for the PGA Tour (referred to as the "qualifying school tournament") and requested that the Tour accommodate his disability by granting him a waiver of the "no cart" rule.[31] Martin then filed suit, pursuant to the ADA, seeking to enjoin the defendant's "no cart" rule during this qualifying tournament, and on the PGA and Nike Tours.[32] Martin's basic assertion was that by failing to provide him with a cart, the PGA Tour failed to make its tournaments accessible to individuals with disabilities in violation of the ADA.[33] The United States District Court for the District of Oregon granted Martin a preliminary injunction, thereby directing the defendant to allow the golfer to use a cart during the qualifying tournament.[34] Thereafter, Martin scored well enough to qualify for the Nike Tour, which is run by the PGA Tour, thus forcing his ADA-based suit to continue.[35] The court subsequently extended the injunction by stipulation of both parties to include the first two tournaments on the Nike Tour.[36]

The defendant then moved for summary judgment, arguing that the ADA does not apply to it or its tournaments.[37] The PGA Tour asserted that it was exempt because it is a private non-profit establishment, and in the alternative that the tournament competitions are not "places of public accommodation" within the meaning of the ADA.[38] The court denied the motion, holding that the PGA Tour is not a private entity that is exempt from ADA coverage and that it does in fact operate a "place of public accommodation."[39]

In deciding that the PGA Tour is not a private organization, United States Magistrate Judge Coffin analyzed a set of factors, including genuine selectivity, membership control, history of organization, use of facilities by nonmembers, club purpose, whether the club advertises for its members, and whether

31. *See* Parent, *supra* note 22, at 133.
32. *See Martin I*, 984 F. Supp. at 1322.
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See Martin I*, 984 F. Supp. at 1322.
38. *See id.* at 1322-23.
39. *See id.* at 1327.

the club is nonprofit.[40] Judge Coffin's conclusion focused almost entirely on the fact that although the Tour is nonprofit, "its fundamental purpose is to enhance profits for its members."[41] The court relied on a Fifth Circuit decision that interpreted the private membership exception to the Civil Rights Act, and held that a credit union is not a private organization because they "exist for purely mercantile purposes and although they may be organized on a nonprofit basis, members join credit unions in search of profits on their investments."[42] Judge Coffin's analysis concluded that the PGA Tour, like a credit union, is nonprofit, however, its fundamental purpose is to enhance profits for its members.[43] Therefore, it cannot receive exempt status.[44]

The second argument raised by the defendant, that golf courses being used for pro tournaments are not "places of public accommodation," was also rejected.[45] The Tour made the compelling argument that the only parts of the course open to the public are those actually accessed by the public at large, and therefore the playing area is not a "place of public accommodation" because the public is not allowed in this area.[46] Unfortunately for the PGA, Judge Coffin did not find the contention compelling or persuasive. First, he noted that a golf course is specifically listed within the examples of the term "public accommodation" in the ADA.[47] Next, Judge Coffin strictly adhered to this statutory listing, refusing to entertain the assertion that places of public accommodation can have zones of ADA applicability and non-applicability.[48] The court reiterated this holding with the statement that no organization can "relegate the ADA to hop-scotch areas."[49]

Finally, Judge Coffin explained his holding with a hypothetical situation of ADA applicability, wherein a professional

40. *See id.* at 1325. The factors used by the court were set forth in *United States v. Lansdowne Swim Club,* 713 F. Supp. 785 (E.D. Pa. 1989), *affirmed,* 894 F.2d 83 (3d Cir. 1990).

41. *Martin I,* 984 F. Supp. at 1325.

42. Quijano v. University Fed. Credit Union, 617 F.2d 129, 133 (5th Cir. 1980).

43. *See Martin I,* 984 F. Supp. at 1323.

44. *See id.* at 1323.

45. *See id.* at 1326.

46. *See id.*

47. *See id.* (referring to 42 U.S.C. § 12181(7)(L) (1994)).

48. *See Martin I,* 984 F. Supp. at 1326.

49. *Id.*

golfer hires a disabled caddy. "Once the caddy steps within the boundaries of the playing area of the golf course. . .does he step outside the boundaries of the ADA simply because the public at large cannot join him there?"[50] Judge Coffin's broad interpretation of the ADA provisions seemed to hint at how he would eventually decide the *Martin* case, in favor of the plaintiff.[51]

After holding that the Tour is not exempt from ADA coverage, the only real issue at trial was whether accommodating Martin's disability with the use of the cart would work a "fundamental alteration" of the nature of its business or programs, which, as will be shown below, is not required by the Americans with Disabilities Act.[52] Arguing that cart use would result in a "fundamental alteration," the PGA Tour's plan was to show the importance of walking in PGA tour competitions.

The court noted at the outset of its analysis that "the burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation."[53] The court made clear that the ultimate issue in the case was whether allowing Casey Martin, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.[54] This became a huge factor in Judge Coffin's decision, as can be seen with the comment "[a]s plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart."[55]

The court came to this conclusion despite the Tour's attempts to show that required walking puts a fatigue factor into golf that is crucial in a tournament. The defendant offered the testimony of professional golfers swearing to the advantage one golfer would have over others if he were not required to walk the course.[56] Nevertheless, Judge Coffin's specific inquiry test found that walking a course cannot compare with the fatigue and pain Martin feels by playing a round of golf. "To perceive

50. *Id.* at 1327.
51. *See Martin II*, 994 F. Supp. at 1242.
52. *See infra* Part II.
53. *Martin II*, 994 F. Supp. at 1249.
54. *See id.*
55. *Id.* at 1252.
56. *See id.* at 1250.

that the cart puts him - with his condition - at a competitive advantage is a gross distortion of reality."[57] The court relied heavily on medical testimony stating that the fatigue factor injected into golf by walking the course could be deemed insignificant.[58] In the end, the court continued with its individual inquiry and assessed the requested modification in light of the specifics of his disability. The opinion concludes, "[t]he requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability."[59]

Not surprisingly, the PGA Tour appealed the permanent injunction issued by the district court. The Ninth Circuit affirmed, thus upholding Martin's right to use a cart within PGA Tour competition.[60] On the issue of whether Title III of the ADA's "public accommodation" requirement applied to the PGA Tour, the Tour renewed its argument that the competition area is not a public accommodation because the public has no right to enter it.[61] Much like the district court, the Ninth Circuit denied this argument and held that "[t]he fact that entry to a part of a place of public accommodation may be limited does not deprive the facility of its character as a public accommodation."[62]

The Ninth Circuit went further than the district court did in analyzing a golf course as a "place of public accommodation." The court addressed the Tour's argument that the competition itself is not public because it is restricted to the nation's best golfers. The court attacked this argument, pronouncing, "the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation."[63] Noting that any member of the public that pays an entrance fee and obtains two letters of recommendation can try out for the qualifying school, the court found it obvious that the course is a place of public accommodation.[64]

The court devoted more attention to the second issue on appeal, whether the accommodation of permitting Martin to use a

57. *Id.* at 1252.
58. *See Martin II*, 994 F. Supp. at 1250.
59. *Id.* at 1253.
60. *See Martin III*, 204 F.3d 994.
61. *See id.* at 997.
62. *Id.*
63. *Id.* at 998.
64. *See id.* at 999.

golf cart fundamentally alters the PGA Tour and Nike Tour Competitions. The analysis began with the acceptance of the district court's findings of fact, including the determination that while the purpose of the "no cart" rule is to inject a fatigue factor into the game, this fatigue can be deemed insignificant.[65]

The PGA Tour again reiterated the argument used in the court below, that since the "no cart" rule is substantive, it cannot be modified to accommodate a disability.[66] The Ninth Circuit, like the district court, denied this argument. The court stressed a specific inquiry into the issue of fundamental alteration, as Judge Coffin had below, and framed the issue as "whether the use of a cart by Martin"[67] would fundamentally alter the competition, not "whether the use of carts generally"[68] would do so. The court accepted the district court's fact determinations, and thus declared that Martin's use of a golf cart would not fundamentally alter the nature of PGA Tour competition.[69]

In making its decision, the Ninth Circuit addressed an argument that had not been raised in the district court opinion. The Tour presented a "slippery slope" argument, claiming that permitting cart use would open the door to future changes in sports, like head starts for runners and swimmers, which had been rejected.[70] The court showed its confidence that the specific, fact based inquiry that must be applied in these cases will result in no such changes, as they would be fundamental alterations.[71] Once again, this shows the reliance on a fact based, individualized test when determining whether a modification will result in a fundamental alteration.

After the controversial holding of the Ninth Circuit was handed down, the PGA Tour filed a petition for a writ of certio-

65. *See Martin III*, 204 F.3d at 1000 (court found there was ample evidence to support these findings of fact, and therefore they are not clearly erroneous).

66. *See id.* at 1000.

67. *Id.* at 1001.

68. *Id.* (court went on to state that "the evidence must focus on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation"). *Id.*

69. *See id.* at 1002.

70. *See Martin III*, 204 F.3d at 1001.

71. *See id.*

rari, which was granted on September 26, 2000.[72] The possible dispositions of the Supreme Court decision in *Martin* are engaging, not only because the case will result in new Supreme Court precedent, but also due to the conflicting ADA interpretations of the Seventh Circuit in *Olinger*.[73]

B. *The Olinger Case*

Like Martin, Ford Olinger suffers from a condition that undoubtedly classifies him as a disabled individual within the meaning of the ADA, bilateral avascular necrosis.[74] This condition "makes it nearly impossible for him to walk an 18-hole golf course."[75] Olinger applied to play in the 1998 U.S. Open and requested the use of a golf cart, a request that the USGA quickly denied.[76] Olinger then brought suit under the ADA, just 4 days before the qualifying tournament was scheduled to begin in Indiana.[77] Due to these circumstances, the U.S. District Court for the Northern District of Indiana granted Olinger a temporary restraining order, thereby allowing him to participate in the qualifying round.[78] Consequently, Olinger rode a cart, but failed to qualify for the U.S. Open.[79]

When the *Olinger* action came to trial, the district court was forced to grapple with the same issues present in *Martin*; whether a golf course operated by the USGA for tournament purposes is a "place of public accommodation," and whether the

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72. 69 U.S.L.W. 3023 (U.S. Sept. 26, 2000) (No. 00-24).

73. *See Olinger II*, 205 F.3d 1001.

74. *See Olinger I*, 55 F. Supp.2d 926. Like Casey Martin, this disability significantly impairs his ability to walk.

75. *See id.* at 929.

76. *See Olinger II*, 205 F.3d at 1004.

77. *See id.*

78. *See Olinger I*, 55 F. Supp. 2d at 929 (court concluded that a temporary restraining order was appropriate, recognizing the circumstances that 1) exclusion from the local qualifying would have meant that Olinger could not participate in the 1998 championship even if he prevailed on his ADA claim before the championship began; 2) this order would only apply to the local qualifying because it would expire before sectional qualifying; 3) in light of an agreement between the USGA and Casey Martin, Mr. Olinger would not be the only golfer to ride in local qualifying). *See id.* The agreement to which the court is referring is that the USGA voluntarily agreed to abide by the ruling in the Casey Martin case. Thus, when Martin was successful in his action, he was also allowed to ride in the 1998 U.S. Open. *See Olinger II*, 205 F.3d at 1004.

79. *See Olinger I*, 55 F. Supp.2d at 929.

use of a cart in these tournaments would represent a "fundamental alteration" of the nature of the USGA program.[80] The court ultimately held that the course operated by the USGA was a "place of public accommodation" within the ADA, but it contradicted the *Martin* decision by ruling that the modification of USGA rules to allow golf cart use would "fundamentally alter" the nature of the competition.[81]

On the issue of "public accommodation," the USGA raised arguments very similar to those raised by the PGA in *Martin*, specifically that only the part of the course open to the public, those "outside the ropes," are within the authority of the ADA.[82] The court rejected this argument, in part relying on *Martin*, for the declaration that neither the ADA, nor the Department of Justice regulations implementing it, provides for "a private enclave in a public accommodation."[83] The court also rested its holding on a series of Title III cases involving the NCAA and its determination of eligibility requirements for college athletes.[84] None of the courts that decided these cases found Title III limited to areas outside the roped off, competitive field, court or pool.[85] This factor, combined with the court's determination that "nothing supports a finding that . . . barrier ropes limit Title III"[86] led the court to conclude that the ADA does in fact apply to areas of competition and the areas "outside the ropes."[87]

The "fundamental alteration" issue is where the court's analysis sharply divides with that in *Martin*. First, the court distinguished *Olinger* from *Martin* because its ruling "no doubt appears to conflict with that well publicized holding."[88] Next, the court recognized that the use of a golf cart is a reasonable

80. *See id.*
81. *See id.*
82. *Id.* at 932.
83. *See Olinger I,* 55 F. Supp.2d at 932 (citing *Martin*, 984 F. Supp. at 1326).
84. *See id.*
85. *See id.*
86. *Id.*
87. *Id.*
88. *Olinger I,* 55 F. Supp.2d. at 933 n.4. The court first declared that *Martin* has no precedential impact on this court, and stated differences in the cases. These include: 1) this case focuses on a single event, not a series of multi-level weekly tournaments as in *Martin*; 2) the parties in *Martin* presented different evidence, so the records differ. *See id.*

modification in "the general sense,"[89] because the golf cart "has become so ubiquitous in the sport"[90] that any challenge to that assertion would be "doomed."[91] The court declared that once this element of "general reasonableness"[92] is established, the burden shifts to the defendant to prove that the modification would "fundamentally alter" the nature of the public accommodation.[93]

The opinion went on to declare that proof of a fundamental alteration must "focus on the specific circumstances" rather than reasonableness in general.[94] The court concentrated entirely on the specific *program* in issue, but in no way analyzed the specific situation of the *plaintiff*. This is almost the opposite approach taken by both the Ninth Circuit and the district court in *Martin*.[95] Those opinions focused almost entirely on the specific situation of the disabled plaintiff, and the effect granting *him* the requested modification would have on the program.[96] This court never considered the effect that allowing Olinger the modification would have on the program, but chose to look at the modification in terms of how it would affect this specific program (the USGA) in future applications.

The analysis began with the court's acceptance of medical testimony that the use of a golf cart can provide one golfer with a competitive advantage over another player who walks.[97] This acceptance of some type of fatigue factor injected in the game by

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89. *Id.* at 934.
90. *Id.*
91. *Id.*
92. *Id.*
93. *See Olinger I*, 55 F. Supp.2d at 934
94. *Id.* The court declared that the:

> proper inquiry, then, is not whether the requested accommodation would amount to a fundamental alteration in the game of golf (plainly, it would not), but rather whether the requested accommodation would constitute 'a fundamental alteration in the nature of a program. . . and the 'program' here at issue is the U.S. Open.

Id.

95. *See infra* Part I.A (discussing the approach taken by the courts in *Martin*).
96. *See id.*
97. *See Olinger I*, 55 F. Supp.2d at 935 (the court recognized that this advantage may not apply to Olinger because he is not a "similar" golfer to others on the course). Still though, the fact that the court accepts a fatigue factor injected into the game by walking is a distinguishing factor between this case and *Martin*. *See id.* at 926.

walking is a major one, because the courts in *Martin* deemed this factor insignificant.[98] The court acknowledged that the fatigue Olinger endures after a round with a cart may in fact be more than "a healthy Tiger Woods,"[99] but the court in no way used this fact in its determination of the fundamental alteration issue.[100] Instead, the *Olinger* court focused specifically on the administrative burdens and problems that allowing the modification to the "no-cart" rule would have on the USGA. The court hypothetically asked what would happen if a disabled person applies to play with a cart next year: "how will that applicant be compared to Ford Olinger? Will next year's applicant . . . have a competitive advantage over Mr. Olinger if allowed to ride? Will Mr. Olinger have a competitive advantage . . . if both are allowed to ride?"[101]

The court concluded that the requested modification was not reasonable, because the administrative burden of requiring "that someone be given the discretion to allow one competitor a potential advantage denied to others would fundamentally alter the nature of the competition."[102] Since the only possible way to eliminate this problem would be to allow all players the option of carts, thereby changing the entire scope of the game, the court determined this a "fundamental alteration."[103]

On appeal, the Seventh Circuit affirmed the district court, thereby creating a circuit split on the scope of Title III.[104] The circuit court decided the appeal on narrow grounds, simply sidestepping the "place of public accommodation" issue, and holding that the use of a cart would "fundamentally alter the nature of the competition."[105]

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98. *See* Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998), *aff'd,* 204 F.3d 994 (9th Cir. 2000).

99. *Olinger I*, 55 F. Supp.2d at 937.

100. It is important to note that in *Martin* the district court held that because Casey endures more fatigue just by playing with a cart than other golfers who walk the course, the modification was reasonable. *See Martin I*, 994 F.Supp. 1252. The district court in *Olinger* was not persuaded by this idea, instead focusing on the administrative problems the modification would cause the USGA. *See Olinger I*, 55 F. Supp.2d at 937.

101. *Olinger I*, 55 F. Supp.2d at 937.

102. *Id.*

103. *See id.*

104. *See Olinger II*, 205 F.3d at 1007.

105. *Id.* at 1005. The court declared that:

Olinger's main contention on appeal was essentially that the USGA failed to present proof, "responsive . . . [to his] . . . personal circumstances,"[106] that in fact allowing a cart would be a fundamental alteration.[107] According to Olinger, the testimony below did not support the conclusion, because it "did not bear on Mr. Olinger at all."[108] The appellate court affirmed the decision below without addressing this contention, basically adopting the lower court's holding because the findings of fact, that stamina is involved in golf, are "amply supported by the evidence."[109] Since stamina and walking are considered important for purposes of competition and "tradition,"[110] the reasoning concluded, taking these factors out of the competition would be a fundamental alteration.[111]

The court also adopted the concept of an "administrative burden" present in evaluating requests for waivers of the "no-cart" rule.[112] The court agreed with the district court that it should be "unnecessary" for the USGA to "develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but not need, to ride a cart to compete."[113] The opinion ended with a hint of deference to the USGA in making decisions about the rules of golf, assuming that "the decision on whether the rules of the game should be adjusted . . . is best left to those who hold the future of golf in trust."[114]

> [e]ven assuming that the competitive part of the golf course on which the U.S. Open is played is a place of public accommodation covered by the ADA, Mr. Olinger cannot prevail because we believe his use of a cart during the tournament would fundamentally alter the nature of the competition.

Id.

106. *Id.*

107. *Id.*

108. *Id.* If relying on the Ninth Circuit's reasoning in *Martin*, one can argue that Olinger has a very strong contention. *See infra* Part I.A.

109. *Olinger II*, 205 F.3d at 1006 (the court made this assessment due to testimony of Ken Venturi and Dennis Hepler, players who testified to the importance of stamina in golf, and Dr. Holland, who testified to the same effect). *See id.*

110. *Id.* at 1007.

111. *See id.*

112. *Id.*

113. *Id.*

114. *Olinger II*, 205 F.3d at 1007.

PART II - The Americans with Disabilities Act

The ADA was enacted in 1990 to address the discrimination that disabled Americans encounter in a variety of life situations. The congressional purpose was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[115] At the time of the ADA's creation, Congress noted that "some 43,000,000 Americans have one or more physical or mental disabilities" which had resulted in significant discrimination.[116] Under the ADA, discrimination is described as the "failure to make reasonable modifications . . . when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."[117] An entity subject to the statute can avoid liability only if it can show that the modification requested "would fundamentally alter" that entity, its programs, or purposes.[118]

The ADA is a comprehensive statute covering many types of "disabilities" including the mentally disabled, recovering drug addicts, alcoholics, and people stricken by HIV.[119] The statute is divided into four titles, each covering different types of entities. Title I of the ADA applies directly to employers who discriminate based on disability.[120] The section prevents covered entities from discriminating in the areas of job application procedures, the hiring, advancement, or discharge of employees,

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115. 42 U.S.C. § 12101(b) (1994). This section declares:

> It is the purpose of this chapter—(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.

Id.

116. 42 U.S.C. § 12101(a) (1994).

117. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

118. *Id.*

119. *See* Tanya R. Sharpe, *Casey's Case: Taking a Slice Out of the PGA Tour's No-Cart Policy,* 26 FLA. ST. U. L. REV. 783, 787 (1999).

120. *See* 42 U.S.C. § 12112 (1994).

employee compensation, job training, and other terms and conditions of employment.[121] In order to succeed on a claim under Title I, a plaintiff must establish that he or she was a qualified individual with a disability and that the employer excluded the plaintiff because of the disability or that the employer failed to create a reasonable accommodation for the plaintiff's disability.[122]

Title II is aimed at public entities, making it a violation of the statute for them to discriminate against or exclude qualified, disabled individuals from participating in or receiving the benefits of their services, programs, or activities.[123] The ADA describes a "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."[124] An example of an entity covered under this title would be public transportation.[125] Title IV provides for telecommunications accessibility requirements applicable to disabled persons.[126] This section applies to the Federal Communications Commission, requiring them to offer services to hearing and speech-impaired individuals.[127]

Title III is the relevant provision under analysis in the *Martin* and *Olinger* cases. This provision prohibits discrimination based on disability in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[128] The title also declares that "discrimination includes failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford "such . . . accommodations . . . unless the entity can demonstrate that making such modifications would fundamentally alter the nature of [the] . . . accommodations" being offered.[129] Title III gives an illustrative list of entities which "are considered public accommodations for

121. *See* Parent, *supra* note 22, at 130.
122. *See* 42 U.S.C. § 12112 (1994).
123. *See* 42 U.S.C. § 12132 (1994).
124. 42 U.S.C. § 12131 (1994).
125. *See* 42 U.S.C. § 12184 (1994) (speaking directly to public transportation).
126. *See* 42 U.S.C. § 12102 (1994).
127. *See* Parent, *supra* note 22, at 131.
128. 42 U.S.C. § 12182(a) (1994).
129. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

the purposes of this subchapter," within which a golf course is specifically listed.[130]

The Rehabilitation Act of 1973[131] is an earlier statute aimed at discrimination that served as a model for the ADA.[132] Therefore, in any attempt to interpret the scope and intended meaning of the ADA, this Act can prove to be informative. The statute sought to protect the disabled who were employed by either the federal government or employers receiving federal assistance.[133]

The "reasonable accommodation" requirement in the ADA was first announced in the Rehabilitation Act in terms of employer duties.[134] Although the statute was a substantial step in attacking disability discrimination, it had inherent weaknesses. First, what constitutes a "reasonable accommodation" was never defined within the Rehabilitation Act, leaving employers subject to the Act with no guidelines with which to work.[135] Also, the Act offered no protection for the disabled in many areas, including private employment, public accommodations, transportation, and state and local activities and services.[136] These weaknesses led to the birth of the ADA, which expressly speaks to the shortcomings of the Rehabilitation Act. Due to the relationship of these statutes, decisions interpreting the Rehabilitation Act provide "useful guidance," as the Seventh Circuit noted in *Olinger*.[137]

PART III - Title III in Competitive Sports

A review of the Title III cases shows that the ADA's application to competitive sports has been limited. In fact, there is no relevant Supreme Court precedent speaking directly to the

130. 42 U.S.C. § 12181(7) (1994).
131. 29 U.S.C. §§ 701-797b (1994).
132. *See* Parent, *supra* note 22, at 124.
133. *See* Neikirk, *supra* note 22, at 1875.
134. *See* Parent, *supra* note 22, at 125.
135. *See id.*
136. *See id.* at 126.
137. *Olinger II*, 205 F.3d at 1006 n.6 (citing Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) for the proposition that "[b]ecause the ADA is patterned in large measure on the Rehabilitation Act, decisions interpreting the Rehabilitation Act and its implementing regulations provide useful guidance as to 'the meaning of the same terms in the new law.'"). *Id.*

ADA issues involved in Martin and *Olinger*. However, several federal circuit courts of appeal and district courts have interpreted Title III in the context of athletics. While none of these decisions dealt with professional sports, many of the cases involved issues analogous to those present in *Martin* and *Olinger*.

The Sixth Circuit decision in *Sandison v. Michigan High School Athletic Association*[138] is one such case. The controversy involved two high school students with learning disabilities which caused them to fall two grades behind other students of the same age.[139] As a result, both were nineteen years old at the beginning of their senior year.[140] The students, who were both athletes, were prevented from competing after age nineteen due to a Michigan High School Athletic Association (MHSAA) regulation that prohibited participation by any student of that age.[141] The students brought suit under the ADA and the Rehabilitation Act seeking an injunction allowing them to compete, which the district court granted.[142] The Sixth Circuit, however, reversed and held that waiving the age requirement rule would fundamentally alter the sports program.[143] The court focused on the purposes of the age restriction, to prevent injury to other players and to prevent unfair competitive advantage that older players may have.[144] Reasoning that the waiver would have a serious effect on the competition, the court held a waiver would result in a fundamental alteration, thus not a reasonable accommodation.[145] In addition, the court found that the "daunting task"[146] of conducting an individualized evaluation of each older student's abilities to determine if there is an unfair advantage was not a reasonable accommodation.[147]

In *McPherson v. Michigan High School Athletic Association*,[148] a similar MHSAA rule came under attack. The rule in

138. 64 F.3d 1026 (6th Cir. 1995).
139. *See id.* at 1028.
140. *See id.*
141. *See id.*
142. *See id.*
143. *See Sandison*, 64 F.3d at 1037.
144. *See id.* at 1035.
145. *See id.*
146. *Id.* at 1037.
147. *See id.* at 1037.
148. 119 F.3d 453 (6th Cir. 1997).

issue limited student participation in school sports to athletes who had not yet completed eight semesters of high school.[149] A learning-disabled student athlete, who had completed eight semesters, challenged the rule under the ADA and Rehabilitation Act.[150] Following *Sandison*, the Sixth Circuit held that waiving the rule would work a fundamental alteration in the program because the age restriction "is a necessary requirement."[151] The *McPherson* decision seems to go farther than *Sandison* in holding that forcing the MHSAA to make "near impossible determinations"[152] about a student's physical and athletic maturity would "impose an immense financial and administrative burden."[153]

Finally, the Eighth Circuit was faced with a challenge to a high school sports age limitation in *Pottgen v. Missouri State High School Activities Association*.[154] Pottgen had repeated two grades in elementary school due to learning disabilities, thereby causing him to turn nineteen before his senior year.[155] The regulation, like that in *Sandison*, prohibited him from playing due to his age.[156] Pottgen filed suit under the ADA and Rehabilitation Act after his request for a waiver was denied.[157] The Eighth Circuit denied his claim, focusing on the determination that the rule was essential to the sports program, and that the MSHAA would face an "undue financial and administrative burden"[158] if required to conduct an individualized inquiry into each student waiver request.[159]

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149. *See id.* at 455.

150. *See id.*

151. *Id.* at 461.

152. *Id.* at 462.

153. *McPherson*, 119 F.3d at 462.

154. 40 F.3d 926 (8th Cir. 1994).

155. *See id.* at 928.

156. *See id.*

157. *See id.* at 927.

158. *Id.* at 931 (quoting School Bd. Of Nassau County v. Arline, 480 U.S. 273 (1987)).

159. *See Pottgen*, 40 F.3d at 929-31. The court focused on the value of the rule, such as reducing the advantage afforded to older student-athletes, protecting younger student-athletes from injury, discouraging students from delaying their education to become more athletically mature, and to prevent coaches from taking advantage of the relaxation of age requirements by repeated red-shirting. *See id.* at 929-30.

In his dissent, Chief Judge Arnold attacked the absence of a specific inquiry into the circumstances of the plaintiff in *Pottgen*.[160] He argued that "courts are obligated by statute to look at plaintiffs as individuals" when interpreting claims under the ADA.[161] Furthermore, he felt that if this type of individual inquiry were conducted in *Pottgen*, it would be clear that the age requirement "is not essential."[162] Since the rule could be modified in this instance "without doing violence to its essential purposes," Chief Judge Arnold argued that the rule could not properly be characterized as "essential to the nature of the program."[163]

The district court cases that have interpreted Title III in the context of competitive sports provide another means of analysis. One such opinion is *Elitt v. U.S.A. Hockey,*[164] where a youth hockey player suffering from attention deficit disorder was denied his request to play in a younger league with his father on his ice.[165] The defendant denied the request due to concerns over safety risks and the disruptive atmosphere it would create for other players.[166] The plaintiff brought suit under Title III, and the court denied his request, thereby providing a line of analysis not accepted in either *Martin* or *Olinger*.[167] The court held that the plaintiff was not actually denied entrance to a place of public accommodation, because he was allowed in the hockey rink.[168] The court made a distinction between being denied access to the league and being denied entrance to the rink

160. *See id.* at 931 (Arnold, C.J., dissenting).

161. *Id.*

162. *Pottgen,* 40 F.3d at 931. Chief Judge Arnold noted that Pottgen would have been eligible to play if the "requirement had been modified by only thirty-five days." *Id.* at 932. Because he was "that close" to compliance, Arnold argued that none of the purposes of the rule would be violated. *See id.* There was no contention that Pottgen had "deliberately repeated the first and third grades to make himself eligible to play baseball another year at age nineteen." *Id.* Also, "any competitive advantage resulting from plaintiff's age is de minimis." *Id.* Furthermore, he accepted the district court finding that Pottgen "does not appear to constitute a threat to the safety of others." *Id.*

163. *Pottgen*, 40 F.3d at 933.

164. 922 F. Supp. 217 (E.D. Mo. 1996).

165. *See id.* at 218.

166. *See* Parent, *supra* note 22, at 138. *See also Elitt*, 922 F. Supp. 217.

167. *See Elitt*, 922 F. Supp. at 225.

168. *See id.* at 223.

itself.[169] The court held the membership organization, the league, was not a "public accommodation" within the ADA.[170]

The holding in *Brown v. Tenet ParaAmerica*[171] relied on and followed the analysis used in *Elitt*. The court held that Title III did not apply to the organizers of a bicycle race because they were an "association or organizing group."[172] Therefore, "the defendants are closer in identity to a youth hockey . . . league, which have not been found to be a public accommodation. Mr. Brown [did] not allege that he was denied access to a physical place. He allege[d] that he was denied a chance to participate."[173]

Ganden v. NCAA[174] involved an ADA challenge to the NCAA's minimum academic eligibility requirements for student–athletes.[175] Ganden, a learning-disabled swimmer, challenged these requirements when he was declared ineligible, arguing that the NCAA had failed to make reasonable modifications to accommodate his learning disability.[176] In denying his claim, the district court focused on the underlying purposes of the requirements to determine if a modification of these rules was reasonable.[177] The court determined that the underlying purpose was "insuring the integrity of . . .[a student's] GPA and independently insuring that the student has covered the minimum subject matter required for college."[178] The court then conducted a specific inquiry into Ganden's situation and determined that lowering the GPA requirement would be a fundamental alteration within the meaning of the ADA.[179]

Though there is a common theme of giving deference to rules with a valid purpose present in these cases, a problem persists. To what extent do these cases actually provide insight into how the Supreme Court will decide *Martin*? The strength

169. *See id.*
170. *See id.*
171. 959 F. Supp. 496 (N.D. Ill. 1997).
172. *Id.* at 499.
173. *Id.*
174. No. 96-C6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 19, 1996).
175. *See id.* at *13.
176. *See id.* at *13-14.
177. *See id.* at *48.
178. *Id.* at *46.
179. *See Ganden*, 1996 U.S. Dist. LEXIS, at *48.

of these cases in assisting a prediction is questionable at best. There is a need to examine Supreme Court decisions for guidance. In addition, due to the lack of direct Title III precedent, an analysis into analogous situations is appropriate.

PART IV - Analogous U.S. Supreme Court Precedent

A. *Places of Public Accommodation*

The Supreme Court has given a broad reading to "places of public accommodation" in contexts outside the ADA. For example, the Court has interpreted the phrase in decisions interpreting the Civil Rights Act.[180] For example, in *Heart of Atlanta Motel v. U.S.*,[181] the Court interpreted a "place of public accommodation" very broadly, and a similar reading was conducted in *Daniel v. Paul*.[182] In *Daniel*, the Court held that an establishment with a snack bar is a "place of public accommodation" within the Civil Rights Act since it is "principally engaged in selling food for consumption on the premises."[183] While both of these decisions were more involved with the establishment's relationship to interstate commerce, both recognized a broad construction of the term "place of public accommodation."[184]

It is interesting to note that the ADA as enacted is broader than the Civil Rights Act, due to the words, "by any person who owns, leases (or leases to), or operates a place of public accommodation."[185] This breadth, combined with the Court's broad reading of a "place of public accommodation" under that Act, supports the argument that the Court will consider the ADA applicable to the golf course in *Martin*.

B. *Fundamental Alterations*

The concept of "fundamental alterations" originated in the Supreme Court case of *Southeastern Community College v. Davis*[186] where the Court discussed the reasonableness of an ac-

180. *See* Hentges, *supra* note 22, at 165 (describing the Court's broad reading of "places of public accommodation" in past decisions).

181. 379 U.S. 241 (1964).

182. 395 U.S. 298 (1969).

183. *Id.*

184. *See* Hentges, *supra* note 22, at 165.

185. 42 U.S.C. § 12182(a) (1994). *See also* Hentges, *supra* note 22, at 165.

186. 442 U.S. 397 (1979).

commodation under the Rehabilitation Act. *Davis* declared an accommodation is not reasonable if it either imposes "undue financial and administrative burdens"[187] or requires a "fundamental alteration in the nature of [the] program."[188] Thereafter, the "fundamental alteration" phrase was included in the ADA when enacted. For this reason, case analysis of the reasonable accommodation requirement in the Rehabilitation Act "is easily transferable to the Title III [ADA] reasonable modifications context."[189]

An often-cited employment claim under the Rehabilitation Act is *School Board of Nassau County v. Arline.*[190] The Court held that a court should make an "individualized inquiry" into the facts to determine if a proposed modification is reasonable.[191] "Such an inquiry is essential" if the Rehabilitation Act is to "achieve its goal of protecting handicapped individuals from deprivations."[192] The Court also cited *Davis* for the two-part test of whether an accommodation is reasonable, either an undue financial and administrative burden or a fundamental alteration in the nature of the program.[193]

PART V – Analysis

The case law interpreting Title III in the context of sports provides limited and somewhat conflicting guidance. The analysis in *Sandison*, *McPherson*, and *Pottgen* seem to echo the reasoning used by the district court and Seventh Circuit in *Olinger*. Each of the opinions focused on the individual circumstances of the public accommodation in the determining the reasonableness of the requested modification. Also, none of the courts conducted an inquiry into the specific circumstances of the plaintiff in issue, as the courts deciding *Martin* so zealously stressed. *Sandison, McPherson, Pottgen* and *Olinger* all seem to give deference to an organizational rule if its purpose is to ensure a

187. *Id.* at 412.
188. *Id.* at 410.
189. Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997).
190. 480 U.S. 273 (1987).
191. *Id.* at 287.
192. *Id.*
193. *See id.* at 287 n.17.

"level playing field." This is directly at odds with the holding in *Martin*, where the inquiry focused on whether allowing a *specific* plaintiff the requested accommodation would work a fundamental alteration.[194]

Judge Arnold's dissenting argument[195] mirrors the line of analysis used in *Martin*. The Ninth Circuit focused on the fact that allowing Casey Martin to use a cart would not fundamentally alter the nature of the program or alter the level playing field. Likewise, Chief Judge Arnold focused on the reasons why allowing Pottgen to play past age nineteen would not alter the fairness on the playing field.

The *Elitt* and *Brown* opinions provide a line of reasoning that makes a distinction between a spectator and a player. This type of analysis was argued in *Martin* and *Olinger*, in that only the part of the course open to the spectators can properly be called a "place of public accommodation."[196] The reasoning in *Elitt* and *Brown* has inherent weaknesses because it would make it almost impossible for a disabled athlete to obtain injunctive relief under the ADA.[197] Furthermore, if the court in either *Martin* or *Olinger* would have used this line of reasoning, both cases could have been dismissed on narrow grounds because both the PGA and the USGA are "associations or organizing groups" comparable to a youth hockey league.

Finally, the *Ganden* opinion seems to follow a line of reasoning present in the *Olinger* case: that an organizational rule with a valid purpose should be upheld, because any alteration would be "fundamental" and not required by the ADA. This test was also controlling in *Sandison, McPherson* and *Pottgen.* These cases all focused heavily on the nature of the public accommodation, not the handicapped individual requesting a

194. *See Martin III*, 204 F.3d at 1001.

195. *See Pottgen*, 40 F.3d at 931 (Arnold, C.J., dissenting).

196. *See supra* Part I. In both *Martin* and *Olinger*, this argument was not accepted.

197. *See* Baker, *supra* note 22, at 760. Baker argues that the view in *Ellit* raises a potential problem for a plaintiff suing a sports league for the right to participate as a disabled athlete. For example, Baker uses the hypothetical case of a football player suing the NFL for failure to make reasonable accommodations. Under the reasoning in *Elitt*, the plaintiff would not have the right to sue, because the plaintiff is not prevented from entering an NFL stadium as a spectator. *See id.* at 759.

modification. Based on this line of cases, it would seem that the reasoning used in *Martin*, that an inquiry must determine what effect allowing one specific plaintiff the requested modification would have, is the minority position. Even with the common theme of these cases, the weight to be afforded these decisions is most likely not controlling. There is a need to analyze the limited Supreme Court precedent that is available.

In terms of the definition of a "public accommodation" under the ADA, it is clear that the Court has read the phrase broadly in other contexts.[198] In addition, the fact that the ADA specifically lists "golf course" as a covered entity[199] may sway the Court. If the Court uses a textualist method of analysis, as the district court did in *Martin*,[200] it will most likely hold that the course used for a golf tournament is covered. In addition, due to the stated purposes of the ADA, mainly to combat discrimination, the Court will most likely agree with the district court in *Martin* that no organization can "relegate the ADA to hop-scotch areas,"[201] thereby claiming only parts of the facility are subject to the ADA.

This issue will have to be addressed because the PGA's main contention has been that only the portion of the course open to spectators is subject to the ADA, while the competition area "inside the ropes" is not.[202] The past Supreme Court reading of "places of public accommodation," combined with the purpose of the ADA to combat discrimination in all walks of life,[203] will most likely cause the Court to reject this argument and hold that a course used for a PGA tournament is a "place of public accommodation" subject to the ADA.

Assuming the Court declares a golf course used for a PGA Tour competition a "place of public accommodation," the Court will likely then apply the two-part test of reasonableness of an accommodation, as expressed in *Arline*.[204] This Arline analysis

198. *See supra* Part IV.

199. 42 U.S.C. § 12181(7)(L) (1994).

200. *See supra* Part IA. The district court specifically noted that "golf course" is listed as a "place of public accommodation" subject to the ADA. *See also Martin I*, 984 F. Supp. at 1326.

201. *Martin I*, 984 F. Supp. at 1326.

202. *See supra* Part IA.

203. *See supra* Part II.

204. *See Arline*, 480 U.S. at 287 n.17.

cuts toward a Supreme Court decision affirming *Martin.* The Court stressed the propriety of a plaintiff specific inquiry to determine reasonableness, as was pushed in both *Martin* opinions.[205] This argument is more persuasive when the *Arline* test is applied to the facts in *Martin.*

Applying this test: 1) Martin's proposed accommodation does not involve an undue financial or administrative burden, when based on a specific inquiry. When each case is looked at on specific facts, a determination can be made as to whether a player is disabled to the point that he will not be at a competitive advantage by use of a cart. If the Court looks at the circumstances in the abstract, as the *Olinger* courts did, it may find an undue administrative burden. 2) Based on a *specific inquiry*, Martin's golf cart use does not work a fundamental alteration in the nature of the tournaments. This conclusion is based on one element: the acceptance of the district court's findings that there is no "fatigue factor" injected into the game of golf. If the Supreme Court accepts this, and conducts a specific inquiry, they will affirm the case and hold that the modification is reasonable.

On the other hand, if the Court does not accept the findings of fact, and accepts the argument that walking imposes fatigue on a player, it may reverse. Thus, the entire "fundamental alteration" issue will boil down to the standard of review the Supreme Court will apply to the *Martin* decision below.

The Supreme Court will apply the "clearly erroneous" standard of review to the findings of fact made by the District Court for the District of Oregon.[206] A finding of fact is "clearly erroneous" when, although there is evidence to support it, the reviewing court is left with "the definite and firm conviction" that a mistake has been committed, on the entire evidence.[207] Furthermore, a reviewing court cannot reverse findings of fact simply because it would have decided the case differently.[208] This

205. *See supra* Part IA.

206. *See* Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993); Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985); McAllister v. United States, 348 U.S. 19, 20-21 (1954).

207. *Anderson*, 470 U.S. at 573.

208. *See id.* The Anderson opinion also states that a reviewing court oversteps the bounds of its duty if it decides factual issues de novo. *See id.*

standard is "significantly deferential"[209] to the factual findings of the district court. In light of this deference, the Supreme Court will affirm the finding that there is no significant element of fatigue injected into golf by walking.

The severity of Martin's condition causes him more fatigue than any healthy golfer who walks 18 holes. The *Olinger* courts, due to the non-specific inquiry used, ignored this concept, which can properly be applied to Ford Olinger as well. Since the Court will most likely engage in a specific inquiry into Martin's personal conditions, they will affirm this aspect of the case, based on the record. There is enough medical testimony as to Martin's condition, as well as about the lack of fatigue in golf, to compel the court to affirm. This evidence will not leave the members of the Court, or at least a majority, with a "firm and definite conviction" that a mistake has been made.[210] Thus, the Court will find no fundamental alteration in the PGA Tour tournaments by allowing Martin his requested modification.

PART VI – Conclusion

The cases of disabled golfers Casey Martin and Ford Olinger have done more than create uproar in the sports world. More importantly, they have raised important issues as to how far entities must go in modifying their programs to accommodate disabled individuals. There is no doubt that the disabled should be given every reasonable opportunity to enjoy the facilities, privileges and services that others enjoy. The question is where should the line be drawn between reasonable and unreasonable modifications. Will a Supreme Court decision affirming the Ninth Circuit's holding in *Martin* change the face of sports as we know it? Will the rules of sports become unimportant, having to bend every time someone with a disability wants to play? Most likely the ADA's fundamental alteration defense will prevent this from ever happening. Both Martin and Olinger have severe conditions, and they both play a sport where fatigue plays a small factor, at best. It would be a stretch of the

209. *Concrete Pipe*, 508 U.S. at 623. It is also important to note that the Supreme Court does not have to answer whether or not the Ninth Circuit's findings in Martin were clearly erroneous, but rather the focus is on the findings of fact in the district court. *See McAllister*, 348 U.S. at 20-21.

210. *Anderson*, 470 U.S. at 573.

imagination to believe that the ADA would allow an individual in a wheelchair to play a sport like professional football.

The more important consideration is the effect Martin's successful claim could have on future Title III litigation. First, if the Court upholds the Ninth Circuit's holding, the definition of a "place of public accommodation" will be substantially broadened. This may result in a number of questionable suits, requiring the courts to draw limitations. Moreover, the "fundamental alteration" concept will be seriously modified, in light of the view used in decisions such as *Sandison, McPherson,* and *Pottgen.* The concept used in those cases, that a rule with a valid purpose should be given deference, will be directly at odds with new Supreme Court precedent requiring an individualized inquiry into specific circumstances.

While affirming *Martin* may cause new problems and issues for the courts, the fact that Casey Martin has a valid claim cannot be denied. The circumstances in this case warrant a modification in the PGA Tour's rules due to Casey's specific condition. A case with such unique circumstances warrants a change in the minds of organizations such as the PGA Tour. No longer will they have the ability to keep out whomever they want due to tradition or whatever else they deem important.

ADDENDUM

Following the completion of this article, but prior to final publication, the Supreme Court handed down a decision in the *Martin* case.[211] The Court affirmed the Ninth Circuit, and held that "petitioner's golf tours and their qualifying rounds fit comfortably within the coverage of Title III, and Martin within its protection."[212] In deciding that Martin's cart use would not fundamentally alter the Tour's programs, the Court concluded that "Title III of the ADA, by its plain terms, prohibits petitioner from denying Martin equal access to its tours on the basis of his disability."[213]

211. *See* PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001).
212. *Id.* 1890.
213. *Id.*