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## Let's be Reasonable Here: Why the ADA Will Not Ruin Professional Sports

*Michael Waterstone\**

*"As a society, we are so much better off with people like Casey Martin, who show us that heart is just as important as talent, who only want an opportunity to compete against the best in their profession."*<sup>1</sup>

*"We may not have a Tour at all. It may disappear."*<sup>2</sup>

### I. INTRODUCTION

Many people are scared that the world of professional sports is facing a drastic, unwelcome change. Soon, basketball players are going to be wearing spring-loaded shoes. Every participant in a championship race is going to have her own individual starting line. Quarterbacks are going to have on-the-field sign language interpreters. Umpires are going to have guide dogs. Finally, some professional golfers are going to be able to ride carts around golf courses, while the rest of the competitors walk.

The Americans with Disabilities Act ("ADA") is either the culprit or the savior, depending on one's point of view. Two recent federal cases have addressed the ADA's application to professional sports. Casey Martin, a professional golfer whose disability prevents him from walking a full round of golf, sued the Professional Golf Association ("PGA") Tour for the right to use a golf cart in PGA competition. Ford Olinger, also a professional golfer with a disability, sued

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1. Jim Abbott, *It's Easy to Accommodate*, GOLF WORLD, Feb. 20, 1998, at 92.

2. W. Kent Davis, *Why is the PGA Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L.J. 1, 42 (1998) (quoting Arnold Palmer).

the United States Golf Association (“USGA”), claiming he should be allowed to use a golf cart in U.S. Open competition. As things stand, Casey Martin has won his suit,<sup>3</sup> whereas Ford Olinger has not.<sup>4</sup>

Notwithstanding their different results, both of these cases held that the ADA applies to professional sports. Together, these two cases started outlining an approach by which this can happen. Applying the ADA to professional sports will be a difficult process, because professional sports contain unique qualities that will make for challenging cases. Although the *Martin* and *Olinger* decisions began the process, the approaches they use are insufficient to decide ADA cases involving professional sports in a fair and consistent manner. The *Olinger* case in particular comes dangerously close to establishing an overly deferential method of ADA review.

This article will propose an analysis that a court can use when a professional athlete (or would-be athlete) requests a rule modification from her league or association. In doing so it will use the statutory framework of the ADA, precedents involving other industries, critical commentary, and the *Martin* and *Olinger* opinions themselves to outline an analytical approach that strikes a balance between the need to deal with professional sports’ uniqueness and the desirability of treating sports the same as other industries. This approach will distinguish those rules that cannot be modified without fundamental change from those that can and discuss how a court should determine if an athlete’s proposed change should in fact be made. This article will further argue that as a matter of policy rigorous review of these rule modification proposals is desirable. Many businesses and industries involve intense competition, and professional sports should not be separated from these areas in any blanket fashion. Even accepting that the essence of professional sports involves preserving competition that is as “equal” as possible, prop-

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3. The Supreme Court recently accepted certiorari in Martin’s case. See *PGA Tour, Inc. v. Martin*, \_\_ U.S. \_\_, 121 S. Ct. 30 (2000). The Court will hear the case in the 2000–2001 term. Casey Martin won below in the Ninth Circuit Court of Appeals. See *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000). When the district court decision, *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998), is referred to it will be clearly stated.

4. *Olinger v. United States Golf Ass’n*, 205 F.3d 1001 (7th Cir. 2000). When the district court decision, *Olinger v. United States Golf Ass’n*, 55 F. Supp. 2d 926 (N.D. Ind. 1999), is referred to it will be clearly stated. At the time of publication, Ford Olinger had a petition for certiorari pending. See *Olinger v. United States Golf Ass’n*, 205 F.3d 1001 (7th Cir.), *petition for cert. filed*, 68 U.S.L.W. 1551 (U.S. Sept. 30, 2000) (No. 00-434).

erly applying the ADA will protect that value.

This article is divided into seven parts. Part II provides a brief background and overview of the ADA, and also discusses the basic purposes and organization of the ADA. Part III presents the ADA's "reasonable accommodations" statutory framework, explaining why the Title I "undue burden" and Title III "fundamental alterations" analyses are central to ADA cases involving professional sports. Part IV focuses on the *Martin* and *Olinger* decisions, discussing the manner in which they were decided and how they differ from one another. Part IV also demonstrates why neither of these cases provides an adequate form of analysis for addressing future cases involving disability discrimination in professional sports. Part V offers a proposed method of analysis that will work in both the Title I and Title III contexts to properly address disability discrimination in professional sports. This proposed approach will strike the proper balance between recognizing and protecting what makes professional sports unique and ensuring that professional athletics do not receive an overly deferential ADA review. Part VI addresses the policy and normative issues in the discussion of the application of disability law to professional sports. Finally, Part VII concludes that the ADA can and should be applied to professional sports.

## II. ADA BASICS

### *A. The Purposes and Organization of the ADA*

Congress enacted the ADA in 1990. It was intended to provide a clear national mandate for the elimination of discrimination against individuals with disabilities, to establish a clear standard for eliminating this discrimination, and to ensure that the federal government played a central role in enforcing these standards.<sup>5</sup> In doing so the ADA invoked the full sweep of congressional authority, including Congress's power to enforce the Fourteenth Amendment and to regulate commerce. This was done to address the major areas of discrimination faced every day by people with disabilities.<sup>6</sup> President Bush described the ADA as "the world's first comprehensive declara-

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5. See 42 U.S.C. § 12101(b) (1994).

6. See *id.*

tion of equality for people with disabilities.”<sup>7</sup> In many ways the ADA has functioned well to meet its far-reaching goals, and in many respects it is “the most significant civil rights legislation since the Civil Rights Act of 1964.”<sup>8</sup> In the ten years since its passage, individuals with disabilities have utilized the ADA to secure rights in employment,<sup>9</sup> education,<sup>10</sup> transportation,<sup>11</sup> medical care,<sup>12</sup> and other areas.

The ADA is divided into five sections. This article will only discuss those that could likely affect professional sports: The Introductory Section, Title I, and Title III. The Introductory Section gives congressional findings and purposes, and establishes several definitions used throughout the entire act.<sup>13</sup> The findings make it clear that Congress viewed individuals with disabilities as an isolated and segregated group that has been subject to various forms of discrimination, both intentional and unintentional.<sup>14</sup> In enacting the ADA, Congress set the nation’s goals regarding individuals with disabilities as assuring equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.<sup>15</sup> Most significantly, the Introductory Section defines “disability” for the entire

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7. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413–14 (1991) (quoting President George Bush during the ADA signing ceremony).

8. Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471 (1991).

9. *See* Zamudio v. Patla, 956 F. Supp. 803 (N.D. Ill. 1997).

10. *See* Baird *ex rel.* Baird v. Rose, 192 F.3d 462 (4th Cir. 1999).

11. *See* Coalition of Montanans Concerned with Disabilities v. Gallatin Airport Auth., 957 F. Supp. 1166 (D. Mont. 1997).

12. *See* Howe v. Hull, 874 F. Supp. 779 (N.D. Ohio 1994).

13. *See* 42 U.S.C. §§ 12101–12102 (1994).

14. One of the most interesting and often-quoted sentences of the ADA section reflects this concern with unintentional discrimination:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and *resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.*

42 U.S.C. § 12101(a)(7) (emphasis added). The Supreme Court has indicated that it is important to protect against discrimination based on thoughtlessness and ignorance, stating in *School Board v. Arline*, 480 U.S. 273, 284 (1987), that “society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” Although this was a Rehabilitation Act case, the general principles still apply. *See* 42 U.S.C. § 12201(a); *see also infra* Part II.D.

15. *See* 42 U.S.C. § 12101(a)(8).

statute as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”<sup>16</sup>

### *B. Title I*

The next section of the ADA is Title I,<sup>17</sup> which governs employment discrimination. The general rule against discrimination set forth in Title I is that “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, or privileges of employment.”<sup>18</sup> The Equal Employment Opportunity Commission (“EEOC”) is responsible for issuing regulations to carry out Title I.<sup>19</sup>

Title I of the ADA is quite aggressive in its approach, extending significant legal protections for the handicapped into the private sec-

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16. 42 U.S.C. § 12102(2). This definition was largely taken from section 504 of the Rehabilitation Act. All of the major terms in the definition of “disability” in the ADA are defined in the Equal Employment Opportunity Commission (“EEOC”) regulations. “Physical or mental impairment” is defined as

- (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;
- [or] (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 36.104(1) (1999). “[M]ajor life activities” are defined as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 28 C.F.R. § 36.104(2). The regulations detail that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: “(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2). However, as the Supreme Court has recently noted, these regulations are not binding. *See Sutton v. United Airlines, Inc.*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 2139, 2145 (1999).

17. *See* 42 U.S.C. §§ 12111–12117 (1994).

18. 42 U.S.C. § 12112(a) (1994).

19. *See id.* § 12116. The promulgations of the EEOC range from interpretative guides to federal regulations which are accorded the full weight of any administrative agency. *See* 29 C.F.R. § 1630 (regulations to implement the equal employment provisions of the ADA); *see also* United States Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities* (last modified Feb. 1, 2000) <<http://www.eeoc.gov/docs/psych.html>>.

tor. Whereas traditional civil rights legislation, such as the Civil Rights Act of 1964, prohibits any consideration of personal characteristics such as race or national origin, the ADA takes a more proactive approach. It requires an employer to consider whether a reasonable accommodation could remove a particular barrier to employment.<sup>20</sup> An employer will violate the ADA if she does not take the additional steps of evaluating what possible accommodations would allow the applicant to perform the job, or of considering how the job can be performed in an alternative fashion.<sup>21</sup>

### C. Title III

Title III of the ADA covers “Public Accommodations and Services Operated by Private Entities.”<sup>22</sup> The general prohibition against discrimination contained in Title III is that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>23</sup> Activities that are specifically prohibited are a denial of participation or giving disabled participants an unequal or separate benefit.<sup>24</sup>

Discrimination is broadly defined so as to include a failure to make reasonable modifications in policies, practices, or procedures.<sup>25</sup> However, if the owner of a place of public accommodation can show that a modification or accommodation will “fundamentally alter” the nature of her good or service, then she is not required to modify or accommodate.<sup>26</sup>

“Public accommodation” is not specifically defined in the ADA; rather, examples of public accommodations are given.<sup>27</sup> Private clubs

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20. See 29 C.F.R. app. § 1630 (1999).

21. See Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 204 (1993).

22. 42 U.S.C. § 12181–12189 (1994).

23. See *id.* § 12182(a).

24. See *id.* § 12182(b)(1)(A)(i)–(iii).

25. See *id.* § 12182(b)(2)(A)(i)–(iv).

26. *Id.*

27. See 42 U.S.C. § 12181(7). These examples include “a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment,” also “a park, zoo,

and religious organizations are statutorily exempted from the provisions of Title III.<sup>28</sup> The Attorney General is responsible under Title III for issuing regulations that can further the implementation of the ADA.<sup>29</sup>

The majority of the body of law that has developed under the ADA has developed within Title I. The courts, however, have borrowed the decisional principles behind Title I case law in deciding cases under different titles. For example, in *McPherson v. Michigan High School Athletic Ass'n*,<sup>30</sup> a case involving Title II, the Sixth Circuit applied the principles developed under Title I case-law.<sup>31</sup> Likewise, in *Johnson v. Gambrinus Company/Spoetzl Brewery*,<sup>32</sup> the Fifth Circuit was guided by the more fully developed Title I case law in determining the burden of proof for a reasonable modification under Title III.<sup>33</sup>

#### *D. Relationship with Rehabilitation Act*

The ADA was not drawn on a blank canvas. Section 504 of the Rehabilitation Act,<sup>34</sup> enacted in 1979, prohibits federal agencies and employers that receive federal funds from discriminating against applicants or employees with disabilities. The Rehabilitation Act protects “otherwise qualified individual[s] with a disability.”<sup>35</sup> Under

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amusement park, or other place of recreation,” or “a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.” *Id.*

28. *See id.* § 12187 (“The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 . . . or to religious organizations or entities controlled by religious organizations, including places of worship.”).

29. *See* 42 U.S.C. § 12187(b). The resulting regulations are found in the Code of Federal Regulations. *See* 28 C.F.R. §§ 36.101–36.108.

30. 119 F.3d 453 (6th Cir. 1997).

31. *See id.* at 460 (“Not surprisingly, most of the law that has been made in ADA cases has arisen in the context of employment discrimination claims, but we have no doubt that the decisional principles of these cases may be applied to this case.”).

32. 116 F.3d 1052 (5th Cir. 1997).

33. *See id.* at 1058.

The central issue for us to address in this case is the allocation of the burdens of proof in a ‘reasonable modifications case’ under Title III. Because no Fifth Circuit case sets forth these burdens in the context of Title III, we will look to the more fully developed case law under Title I of the ADA, which prohibits disability discrimination in employment.

*Id.*

34. *See* 29 U.S.C. §§ 701–797(b) (1994).

35. *Id.* § 794.

the Rehabilitation Act a “qualified handicapped person” is defined by the relevant regulations as “[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and . . . [w]ith respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.”<sup>36</sup> The Supreme Court has held that an otherwise qualified handicapped individual “is one who is able to meet all of a program’s requirements in spite of his handicap.”<sup>37</sup>

Many key components of the ADA are taken directly from section 504 of the Rehabilitation Act and Rehabilitation Act cases. A key rationale used to support the ADA was that it essentially extended an existing federal statute into the private sector.<sup>38</sup> Perhaps most significantly, the ADA definition of disability comes directly from the definition of an “individual with a handicap” under the Rehabilitation Act.<sup>39</sup> As a result, both Rehabilitation Act and ADA cases use the same analysis in determining if a plaintiff is disabled.<sup>40</sup> Additionally, the ADA provides that, except as otherwise stated, nothing in the Act shall be construed to apply a lesser standard than those applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by federal agencies pursuant to that title.<sup>41</sup> As a result of the legislature’s intent for the Rehabilitation Act to serve as an important guiding role in the ADA, courts have often applied Rehabilitation Act concepts and precedent in ADA cases.<sup>42</sup>

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36. 28 C.F.R. § 41.32 (1990).

37. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

38. *See Jones*, *supra* note 8, at 475.

39. 29 U.S.C. § 706(8)(B) (stating that an individual with a handicap is “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment”).

40. *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994) (“Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term ‘disability’ as used in the ADA.”) (quoting 29 C.F.R. app. § 1630.2(g) (1999)).

41. *See* 42 U.S.C. § 12201(a) (1994).

42. In *Pottgen v. Missouri St. High School Activities Ass’n*, 40 F.3d 926 (8th Cir. 1994), the Plaintiff raised both § 504 and Title II ADA claims. After proceeding first through the § 504 analysis, the court noted “Congress intended Title II to be consistent with section 504 of the Rehabilitation Act. This desire for consistency is evident from the ADA statutory scheme itself. Enforcement remedies, procedures and rights under Title II are the same as under section 504.” *Id.* at 930; *see also Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) (“[B]ecause the standards under both acts are largely the same, cases construing one statute are

*E. No Explicit Mention of Professional Sports*

The ADA contains no specific exemption for professional sports. During the floor debate on the ADA, no such exemption was even discussed. The only mention of professional sports during these debates concerned the ADA's possible effects on the drug test policies of the National Football League, the National Hockey League, the National Basketball Association, and Major League Baseball.<sup>43</sup> In fact, apart from private clubs and religious entities, no particular industry is granted any type of special exemption from the ADA.

III. THE TITLE I "UNDUE BURDEN" AND THE TITLE III  
"FUNDAMENTAL ALTERATIONS" REASONABLE ACCOMMODATIONS  
ANALYSES

*A. Two Necessary Precursors to the Reasonable Accommodations  
Analyses*

A professional athlete (or would-be professional athlete) requesting a rule modification from her professional league or association<sup>44</sup> needs to prove two things before a court will consider her request for a reasonable accommodation. First, the athlete needs to prove that she is disabled within the meaning of the ADA. Second, she needs to prove that her professional league or association is covered by the ADA. These threshold issues will be briefly discussed in turn.

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instructive in construing the other."); *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997) (performing a similar Title II analysis and noting that "it is well-established that the two statutes are quite similar in purpose and in scope."); *Burns v. Columbus*, 91 F.3d. 836, 842 (6th Cir. 1996) ("[B]y statute, the Americans with Disabilities Act standards apply in Rehabilitation Act cases alleging employment discrimination."); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996) ("[T]he analysis of claims under the Americans with Disabilities Act roughly parallels those brought under the Rehabilitation Act of 1973.").

43. See H. R. Rep. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303. The drafters of the ADA agreed that these policies were in compliance with the requirements of the ADA.

44. As used herein, "league" and "association" refer to the governing and rule making body of the particular sport; e.g., Major League Baseball ("MLB"), the National Football League ("NFL"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL").

### 1. *Disability*

The first thing an athlete-plaintiff will need to prove is that she is disabled within the meaning of the ADA. To achieve this, the athlete is really no different from any other ADA plaintiff. Although athletes might be subject to more sprains, strains, and broken bones than the general population, the regulations and case law are clear that these are not ADA disabilities.<sup>45</sup> Additionally, three recent Supreme Court decisions make it more difficult than it has been in the past for any plaintiff to establish an ADA disability.<sup>46</sup>

### 2. *League or association covered under Title I or Title III*

Before reaching the reasonable accommodations analysis, the second thing an athlete-plaintiff needs to prove is that her league or association is covered by the ADA. Otherwise, the athlete has no one to sue. There are two ways to successfully argue that a league or association is covered under the ADA. The first is to show that the league or association is an “employer,” and is therefore covered by Title I. Although it is not yet clear whether a league or association would be an ADA-covered employer, it is quite possible that they could be.<sup>47</sup> Although the ADA defines both employer and em-

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45. See *Sanders v. Arnenson Prod.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (holding that temporary injury with minimal residual side effects cannot be the basis for sustainable ADA claim).

46. *Sutton v. United Airlines, Inc.*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 2139 (1999), and *Albertson's, Inc. v. Kirkinburg*, 119 S. Ct. 2162 (1999), both decided recently by the Supreme Court, hold that corrective and mitigating measures should be considered in determining whether an individual is substantially limited in a major life activity. Thus, impairments which can be corrected with artificial aides (eyeglasses, medications) or physiological adaptations, may not be disabling within the meaning of section 12102(2). These cases, combined with *Murphy v. United Postal Service, Inc.*, \_\_\_ U.S. \_\_\_, 119 S. Ct. 2133 (1999), cast doubt on whether a plaintiff will be able to show that the life activity that their disability substantially limits is “working.” In *Sutton*, the Court noted that, while it was “[a]ssuming without deciding” that working could be the major life activity at issue,

[t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs.

\_\_\_ U.S. \_\_\_, 119 S. Ct. at 2151. This has the potential to be especially harmful to professional athletes seeking to use “working” as their major life activity; their jobs are a blend of highly specialized skills, and they do not have a wide variety of jobs to choose from.

47. 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 (1999) (discussing the possibility of the PGA being covered by Title I of the ADA).

ployee,<sup>48</sup> the definitions do not offer much guidance. Consequently, courts have turned to the common law test.<sup>49</sup> This has the potential for an expansive interpretation: in the civil rights context, courts have been willing to define the employment relationship more broadly than the common law definition would suggest.<sup>50</sup> Title I is even more attractive to a potential plaintiff than Title III, because it provides for jury trials<sup>51</sup> and punitive damages.<sup>52</sup>

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48. The statutory definition of an employer is “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.” 42 U.S.C. § 12111(5)(A). “Employee” is simply defined as “an individual employed by an employer.” *Id.* § 12111(4). The regulations promulgated by the EEOC offer no direct guidance, stating that “in general, the terms employer . . . and employee [have] the same meaning that [they are] given under Title VII.” 29 C.F.R. app. § 1630.2(e)–(f).

49. As Title VII and other federal statutes define “employer” and “employee” in terms that are as cryptic as the ADA, courts have generally used one of three modes of analysis to determine if an employment relationship exists. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (setting forth the common law test); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (using the “economic realities” test); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989) (using the “combination” test). Despite minor differences between the three analyses, in all of them the employer’s right to control is determinative. Every professional league and association has some measure of control over its athletes. Although they do not sign the individual athlete’s paychecks, the NBA, NFL, NHL, and MLB all have the ultimate say in determining the rules of competition. The same holds true for the PGA and the USGA. The commissioners of all the major team sports have broad powers to act in the best interests of their sports. Although in professional boxing the promoters perhaps look more like employers than the governing bodies, whenever the WBA, WBC, or IBF sanctions an event, their rules and regulations govern. *See* *Tyson v. WBA*, 1991 WL 41571 (S.D.N.Y. 1991). Although some may argue that any particular league or association is not an “employer” for Title I purposes, it is a fair prediction that courts may soon find that at least some of them are “employers.” A federal district court in Georgia has found that the PGA is an employer for the purposes of the Civil Rights Act of 1964. *See* *Naismith v. PGA*, 85 F.R.D. 552 (N.D. Ga. 1979) (holding that a female golfer required to tee-off from the men’s tees at sectional PGA tournaments showcasing the talents of golfers seeking employment as golf club professionals, was employed by the PGA). The *Naismith* court reasoned that the PGA controlled Naismith’s access to employment as a golf professional. This reasoning could be extended to the NFL, NBA, NHL, MLB, or professional boxing, all of whom control access to their sports.

50. In the civil rights context, significant weight is given to the controlling access and rules factor. *See* *Spirt v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983) (interpreting the term “employer” under Title VII, the court stated: “It is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an ‘employer’ of an aggrieved individual as that term has generally been defined at common law”); *see also* *Barone v. Hackett*, 602 F. Supp. 481, 483 (D.R.I. 1984) (“Title VII liability is not limited to the entity which issues pay checks to the employee.”).

51. *See* 42 U.S.C. § 1981a(a)(2) (1994).

An athlete-plaintiff might also attempt to show that her league is covered under Title III. To do this, she would need to demonstrate that the defendant league or association is an “owner or operator” of a place of public accommodation. The *Martin* court considered whether the PGA was covered under Title III of the ADA, and held that it was.<sup>53</sup> In *Olinger*, the Seventh Circuit declined to directly answer the question of whether the USGA was an owner or operator of a place of public accommodation.<sup>54</sup> At least one nonprofessional sports association has been found to be the owner and operator of a place of public accommodation.<sup>55</sup> Although it is not completely clear that courts will always view a professional sports league or association

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52. *See id.*

53. *Martin*, 204 F.3d at 994. The PGA argued that the competitor’s area was not a public accommodation because the public had no right to enter it. *See id.* at 997. The Ninth Circuit, citing *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 759 (D. Or. 1997) (holding that the executive seats in the Rose Garden Arena were subject to the ADA, even though they were not open to the general public), rejected this “zone” theory. The court also cited a line of cases involving disabled student-athletes, and viewed the underlying premise of these cases as being that “Title III applies to the playing field, not just the stands.” *Martin*, 204 F.3d at 998. The court reasoned that the fact that the users of a facility are highly selected does not mean that the facility cannot be a public accommodation. The court analogized to the case of highly elite private universities, which, although highly competitive to gain entry into, are still places of public accommodation to the students that are admitted to them. The court concluded that an intense winnowing process does not change the nature of the facility. At the district court level, the PGA also argued that they were a private club, and therefore not subject to the ADA. The court rejected this proposition, noting that the private club exemption is to be narrowly construed. *See Martin*, 994 F. Supp. at 1323 (citing *Nesmith v. YMCA*, 397 F.2d 96, 101 (4th Cir. 1968)). The district court evaluated the PGA along the seven factor test outlined in *United States v. Landsdowne Swim Club*, 713 F. Supp. 785 (E.D. Pa. 1989), and held that the PGA was not a private club. The district court in *Martin* characterized the PGA tour as

an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers. As with all professional sports organizations, the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors. The Tour, in short, is a commercial enterprise.

*Martin*, 984 F. Supp. at 1323. Almost without qualification, the same could be said of a professional boxing association. With the exception of generating the tournament prize money awarded to the competitors, this analysis and definition could easily be applied to the NBA, MLB, NHL, or NFL.

54. *See Olinger*, 205 F.3d at 1005. The *Olinger* court preferred to decide the case on the more “narrow” fundamental alterations ground. *Id.*

55. *See Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Ariz. 1992) (holding that Little League Baseball falls within the ambit of Title III because they own, lease (or leased to), or operate a place of public accommodation).

as an owner or operator of a place of public accommodation,<sup>56</sup> at a minimum the *Martin* case established that courts can and will hold that they are so covered under Title III.

As indicated, the question of whether either Title I or Title III coverage exists is somewhat unsettled. This question is also an extremely important one: if the athlete-plaintiff cannot establish that the league or association is covered under Title I or Title III, there is no proper defendant, and the lawsuit will be dismissed. A complete and thorough discussion of this topic would require another article. However, this article proceeds from the assumption that the athlete-plaintiff would be able to demonstrate that the league or association is covered under either Title I or Title III.<sup>57</sup>

*B. Should the Accommodation Be Made? Undue Burden and Fundamental Alteration*

Once a court finds that a plaintiff is disabled, and the defendant is covered under Title I or Title III, the court must determine

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56. Certainly there are cases and arguments that suggest that a court would not. In *Sandison v. Michigan High School Athletic Ass'n*, 64 F.3d 1026, 1036 (6th Cir. 1995), the Sixth Circuit overruled the district court's ruling that Title III covered the Michigan High School Athletic Association ("MHSAA"). Likewise, in *McPherson*, the Sixth Circuit again noted that "it is quite clear that the MHSAA is not a private entity operating a place of public accommodation." *McPherson*, 119 F.3d at 463. However, both of these cases rested on the misconception that MHSAA was not a *private* entity when in fact it was public. Under the ADA, public accommodations are operated by private entities, not public entities. See *Sandison*, 64 F.3d at 1036. Therefore, these cases are easily distinguished from that of a professional sports organization which is a private entity. In *Stoutenborough v. NFL, Inc.*, 59 F.3d 580 (6th Cir. 1995), an association of individuals with hearing impairments alleged that the NFL's blackout rule (prohibiting live local broadcasts of home football games that are not sold out) violated their rights under the ADA. The court held that "[i]t is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers which fall within the scope of Title III." *Id.* at 583. The court concluded that the NFL was disqualified from Title III. The *Martin* decision has been criticized for holding that the PGA is subject to Title III of the ADA. Critics have contended that the *Martin* court erred in holding that the PGA was not exempt from the ADA as a private club or establishment, and erred in not accepting the PGA's "zone of applicability" argument. See 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, 175-87 (1998).

57. If this is not the case, then a court will never get to the reasonable accommodations analysis. For example, if in the *Martin* case the Supreme Court decides that the PGA is not covered under Title III as an operator of a public accommodation, then the Court will never reach the issue of whether use of a golf cart is a reasonable accommodation and would fundamentally change the PGA Tour. Some commentators would urge the Court to take this route. See Kensky, *supra* note 56, at 175-87.

whether the requested accommodation can and should be made. This question is at the heart of what this article will attempt to discuss. Under Title I, this is primarily accomplished with the “undue burden” analysis. Under Title III, a court will use the “fundamental alterations” analysis. This section will discuss the statutory frameworks and applicable case law for each of these analyses.

### *1. The Title I Analysis—Undue Burden*

Title I of the ADA provides that no covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual.<sup>58</sup> Accordingly, the relevant concepts are “discriminate,” “qualified individual,” “disability,” and “because of the disability.”

An employer discriminates against an applicant or employee when she refuses to make a reasonable accommodation to a known limitation.<sup>59</sup> As discussed above, “disability” is defined under the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”<sup>60</sup> Generally, the “because of the disability” phrase has *not* been interpreted to require intentional discrimination,<sup>61</sup> and a professional athlete would not need to prove that the league is excluding her because it does not want disabled athletes participating.

A “qualified individual with a disability” is defined under Title I as “an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employ-

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58. See 42 U.S.C. § 12112(a) (1994).

59. *Id.* § 12112(b)(5)(A).

60. *Id.* § 12102(2).

61. For example, racial discrimination under the Equal Protection Clause generally requires proof of discriminatory purpose. See *Washington v. Davis*, 426 U.S. 229 (1976). However, disability jurisprudence has followed a different path. In *Alexander v. Choate*, 469 U.S. 287 (1984), the Supreme Court rejected the contention that section 504 of the Rehabilitation Act only reached purposeful discrimination against the handicapped. This principle has been applied to the ADA. See *Washington v. Indiana High Sch. Athletic Ass’n*, 181 F.3d 840, 846–47 (7th Cir. 1999). However, it is interesting to note, that there is contradictory case law in the amateur athletic context. Some courts have used the “because of disability” language to allow “neutral” rules which have a disparate impact on the disabled to defeat ADA challenges. See *Sandison* 64 F.3d at 1036 (holding that a high school athletic association’s rule that declared 19 year-old students ineligible to compete was “neutral” rule; therefore student who had been held back in school due to a learning disability, and was thus 19 in his senior year, was not being discriminated against because of his disability, but rather because of his age).

ment position that such individual holds or desires.”<sup>62</sup> The plaintiff bears the burden of showing that with the reasonable accommodation, she can perform the essential functions of the job. “Essential functions” are the fundamental job duties of a position that an individual with a disability is actually required to perform.<sup>63</sup> In determining what job functions are essential, a court is required by the ADA to consider the employer’s judgment but not defer to it completely. Written job descriptions are probative evidence.<sup>64</sup> A job function may also be essential if there are a limited number of employees among whom performance of this job can be distributed.<sup>65</sup> An individual who is completely disabled, and who cannot perform the essential functions of a job even with a reasonable accommodation, is not “qualified,” and receives no ADA protection.<sup>66</sup>

At this stage of the analysis, the plaintiff necessarily must present her individualized situation, and show what she can and cannot do. Disabled individuals must be individually assessed for each job for which they apply.<sup>67</sup> This is consistent with the ADA regulations:

[T]he determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. . . . [A]n accommodation must be tailored to match the needs of the disabled individual with the needs of the job’s essential functions. . . . This case-by-case approach is essential. . . . [N]either the ADA nor this part can supply the ‘correct’ answer in advance for each employment decision.<sup>68</sup>

The plaintiff also carries the burden of showing that her requested accommodation is reasonable. In *Riel v. Electronic Data Systems Corporation*,<sup>69</sup> this burden was interpreted as a showing that the

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62. 42 U.S.C. § 12111(8).

63. 29 C.F.R. § 1630.2(n)(2)(i) (1999).

64. *See* 42 U.S.C. § 12111(8).

65. *See* 29 C.F.R. § 1630.2(n)(2)(ii); *see also* *Holbrook v. Alpharetta*, 112 F.3d 1522, 1526 (11th Cir. 1997).

66. *See* *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1108 (9th Cir. 2000) (“A totally disabled person who cannot ‘perform the essential functions of the employment position’ with or without reasonable accommodations thus cannot be a ‘qualified individual’ entitled to sue under Title I of the Act.” (citing *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996))).

67. *See* 28 C.F.R. § 35.104; *see also* *Bombrys v. Toledo*, 849 F. Supp. 1210, 1216 (N.D. Ohio 1993).

68. 29 C.F.R. app. § 1630.

69. 99 F.3d 678, 683 (5th Cir. 1996).

requested accommodation is “a method of accommodation that is reasonable in the run of cases.”<sup>70</sup> The facts in *Riel* provide a good demonstration of how this works. The employee’s disability prohibited her from reaching certain milestone deadlines, but she was still able to reach final deadlines. She requested that her employer transfer her to another division in the company that did not use milestone deadlines. She demonstrated that this accommodation was reasonable as a general matter by presenting evidence that the employer often shifted employees back and forth between the two divisions.<sup>71</sup> The employer can challenge the reasonableness of the accommodation only by evidence showing that the accommodation generally would not be reasonable.<sup>72</sup>

The ADA does not specifically define “reasonable accommodation.” Rather, it gives examples. Within the statute, the ADA provides:

‘[R]easonable accommodation’ may include: (A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>73</sup>

The EEOC has further defined reasonable accommodation as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities,”<sup>74</sup> and divides accommodations into three categories.<sup>75</sup>

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70. *Id.* at 683 (citations omitted).

71. *See id.*

72. *See id.*

73. 42 U.S.C. § 12111(9) (1994).

74. 29 C.F.R. app. § 1630.

75. These categories are:

(1) accommodations . . . required to ensure equal opportunity in the application process; (2) [those that] enable the employer’s employees with disabilities to perform the essential functions of the position held or desired; and (3) those that enable the employer’s employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

*Id.*

Once a plaintiff has shown that she is a “qualified individual,” and that the requested accommodation is “reasonable,” the employer must make the accommodation unless it can be shown that the accommodation would impose an undue hardship.<sup>76</sup> Undue hardship is an affirmative defense, and courts have held that the burden is on the employer to prove it.<sup>77</sup> The ADA defines undue hardship as “an action requiring significant difficulty or expense,”<sup>78</sup> and continues:

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 chapter; (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 . . . 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.<sup>79</sup>

The federal regulations promulgated by the EEOC under this Title add a fifth factor to be considered: “[T]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.”<sup>80</sup>

Therefore, the undue hardship defense does not just concern financial factors. It is also the employer’s way to argue that the requested accommodation will unacceptably modify their business. For example, in *Southeastern Community College v. Davis*,<sup>81</sup> the Supreme Court held that a college did not have to make significant curricular

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76. 42 U.S.C. § 12112(b)(5)(A) (Discrimination includes “not making reasonable accommodations . . . unless [the defendant] can demonstrate that the accommodation would impose an undue hardship.”).

77. *See Riel*, 99 F.3d at 683.

78. 42 U.S.C § 12111(10)(A).

79. *Id.* § 12111(10)(b).

80. 29 C.F.R. § 1630.2(p)(2)(v) (1999).

81. 442 U.S. 397 (1979).

changes to accommodate a deaf nursing student applicant.<sup>82</sup> Fundamental alterations, such as eliminating clinical classes and having constant, close interaction with a nursing instructor were more than “reasonable” modifications required under the law.<sup>83</sup> Although the specific holding in *Southeastern* fits more neatly into a Title II or Title III “fundamental alteration” analysis, under Title I these types of concerns must take place within the “undue burden” framework.<sup>84</sup> If the defendant cannot meet its burden of showing that the accommodation unduly burdens their business, it must make the requested accommodation.<sup>85</sup>

### 2. *The Title III Analysis—Fundamental Alteration*

The Title III general prohibition against discrimination is that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>86</sup> Discrimination is broadly de-

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82. *See id.* at 410.

83. *Id.* Although *Southeastern* was a Rehabilitation Act case, courts have applied the general principle to ADA cases. *See Olinger*, 205 F.3d 1001, 1005 (“In light of *Davis*, courts have repeatedly 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.”); *see also* *Washington v. Indiana High Sch. Athletic Ass’n.*, 181 F.3d 840, 847 (7th Cir. 1999); *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999); *Bombrys v. Toledo*, 849 F. Supp. 1210, 1216 (N.D. Ohio 1993).

84. *See Earl v. Mervyn’s, Inc.*, 207 F.3d 1361 (11th Cir. 2000); *see also Bombrys*, 849 F. Supp. at 1216.

85. Besides proving an undue burden, the employer can also avoid making an accommodation by pleading and proving the “safety defense.” If an employer can demonstrate that a requested accommodation will cause a direct threat to others in the workplace, then the requested accommodation is not reasonable. “Direct threat” is defined in the ADA as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3) (1994). The “direct threat” inquiry must be done according to an individualized analysis. The EEOC regulations add harm to the individual as well as to others. They continue to explain that the determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: “(1)[t]he duration of the risk; (2)[t]he nature and severity of the potential harm; (3)[t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.” 29 C.F.R. § 1630.2(r).

86. 42 U.S.C. § 12182(a).

fined and includes a failure to make reasonable modifications in policies, practices, or procedures.<sup>87</sup> Although Title III reads, “discriminated against on the basis of disability,” and Title I reads, “because of disability,” Title III has been interpreted similarly to Title I in this regard. In other words, no showing of impermissible intent has been required.<sup>88</sup>

What exactly constitutes discrimination under Title III? The most applicable statutory provision states that discrimination is a “failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services . . . or accommodations.”<sup>89</sup> If the owner or operator of a place of public accommodation can show that a modification or accommodation will “fundamentally alter” the nature of her good or service, then she is not required to modify or accommodate.<sup>90</sup>

In applying this definition, courts have adopted an approach that is virtually identical to that used in analysis of Title I actions. This approach was most thoroughly explained in a Title III context in *Johnson v. Gambrinus Company/Spoetzel Brewery*.<sup>91</sup> As with Title I, the plaintiff has the burden of proving that a modification was requested, and that the requested accommodation was reasonable.<sup>92</sup> “The plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is reasonable in the run of cases.”<sup>93</sup> While the defendant may introduce evidence indicating that the plaintiff’s requested accommodation is not reasonable in the run of cases, the plaintiff bears the ultimate burden of proof on the issue.<sup>94</sup>

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87. *See id.* § 12182(b)(2)(A)(i)–(iv).

88. Rather, discrimination can be proven by showing that the defendant failed to accommodate. *See* 42 U.S.C.A. § 12182(b)(2)(A)(II); *see also* *Washington v. Indiana High Sch. Athletic Ass’n*, 181 F.3d 840, 848 (7th Cir. 1999).

89. *Id.* § 12182(b)(2)(A)(ii).

90. *Id.*

91. 116 F.3d 1052 (5th Cir. 1997). The *Johnson* court explained that it was borrowed the Title I approach from *Riel*. *See supra* notes 69–72 and accompanying text.

92. *See Johnson*, 116 F.3d at 1059.

93. *Id.*

94. *See id.*

If the plaintiff meets this burden, the defendant must make the requested modification unless the defendant pleads, and meets her burden of proving, that the requested modification would “fundamentally alter” the nature of the public accommodation.<sup>95</sup> This is similar to the “undue burden” affirmative defense that an employer uses in Title I. “While Title I provides an undue hardship defense and Title III provides a fundamental alteration defense, fundamental alteration is merely a particular type of undue hardship.”<sup>96</sup>

Similarly to the Title I undue burden defense, an owner or operator of a public accommodation who wants to demonstrate that a requested accommodation would be a fundamental alteration will need to use proof focusing on specific circumstances.<sup>97</sup> Courts have almost uniformly found that the ADA requires a fact-specific, case-by-case determination of whether a particular accommodation is reasonable.<sup>98</sup> This means that a defendant must offer, and a court will evaluate, the purposes of the rule or regulation at issue and determine the ramifications of an exception in light of the plaintiff’s individualized circumstances. If the defendant cannot meet the burden of showing a fundamental alteration, the accommodation must be made.<sup>99</sup>

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95. *See id.*

96. *Id.* *See also* *Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp.2d 1091, 1105 (D. Colo. 2000) (“Thus, there appears to be little, if any, substantive difference between the ‘reasonable accommodation’ which title I requires and the ‘reasonable modification’ which title III mandates.”); Sharpe, *supra* note 47, at 799 (“The closest thing to Title I’s undue hardship defense is the previously discussed fundamental alteration defense.”).

97. *See Johnson*, 116 F.3d at 1058.

98. *See Staron v. McDonalds, Corp.*, 51 F.3d 353 (2d Cir. 1995); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1995) (“[T]he determination of what constitutes a reasonable modification is highly fact-specific, requiring case-by-case inquiry.”).

99. Similarly to Title I, the owner or operator of the public accommodation can also use the “safety defense.” The standards and analysis for this claim are functionally similar to the “direct threat” defense available to an employer under Title I. Under Title III, “direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures.” 28 C.F.R. § 36.208(b) (1999). Under both Titles, the analysis must be individualized. *See* 29 C.F.R. § 1630.2(r) (Title I); 28 C.F.R. § 36.208(c) (Title III). *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992), is a good example of this. Little League Baseball had a policy that wheelchairs were not allowed on the field, as they posed a direct threat of a collision with players. A first-base coach who wanted to coach from the first-base box brought a Title III ADA suit. The court held that the defendant’s rationale of the danger of direct harm cannot be based on generalizations or stereotypes about the effects of a particular disability; rather, it must be based on an individualized assessment. The court held that because Little League Baseball had not conducted such an individualized inquiry, it had violated the ADA.

When applying the ADA to amateur athletics, some courts have held that an individualized analysis into the necessity of a given rule may not be appropriate. Put another way, a given rule may be essential, even though given a particular plaintiff's individualized situation, their participation would not violate the rule's purpose. In *Sandison v. Michigan High School Athletic Ass'n*,<sup>100</sup> a learning-disabled student who had been held back in school, and thus was over eighteen in his senior season, sued his athletic association under Title III of the ADA. The association offered, and the court accepted, that the purpose of the association's rule (that no one could play high school athletics after age nineteen) was to safeguard against injury and to protect against competitive advantage.<sup>101</sup> However, these particular plaintiffs demonstrated that neither of these concerns would be implicated in their specific case.<sup>102</sup> The court held it would be unreasonable to force an athletic association to do a case-by-case inquiry and determination.<sup>103</sup>

Likewise, in *McPherson*,<sup>104</sup> the Sixth Circuit found that making a determination on a case-by-case basis as to whether or not to waive an eight semester high school athletic eligibility rule would require too much of an administrative and financial burden.<sup>105</sup> Therefore, the court would not entertain McPherson's argument that as applied to him, one individual waiver was not unreasonable and would not fundamentally change the nature of the entity.<sup>106</sup> In *Pottgen v. Missouri State High School Activities Ass'n*,<sup>107</sup> the Eighth Circuit similarly held that the defendant did not have to prove that given the individualized circumstances of this particular plaintiff, that an exception to a rule would fundamentally alter the nature of the public accommoda-

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100. 64 F.3d 1026 (6th Cir. 1995).

101. *See id.* at 1029.

102. *See id.* at 1035 (explaining they were not more physically mature than their classmates, they were "average" athletes, and because their chosen sport was track, there was no danger of injury).

103. *See id.* ("It is plainly an undue burden to require high school coaches and hired physicians to determine whether these factors render a student's age an unfair competitive advantage . . . . It is unreasonable to call upon coaches and physicians to make these near-impossible determinations.").

104. 119 F.3d 453 (6th Cir. 1997).

105. *See id.* at 461.

106. *See id.* at 463.

107. 40 F.3d 926 (8th Cir. 1994).

tion.<sup>108</sup> Judge Arnold dissented, reasoning that the ADA required an individualized analysis in every case.<sup>109</sup>

*Washington v. Indiana High School Athletic Ass'n*<sup>110</sup> is a recent case involving amateur athletics that highlights this issue. Like *McPherson*, *Washington* involved a student with a learning disability who was requesting a waiver of an eight-semester eligibility rule. The Seventh Circuit had to choose whether a waiver of the rule in *this particular case* was so at odds with the purposes behind the rule that it would be a fundamental or unreasonable change, or whether a waiver was not required if the rule itself was generally an essential or necessary eligibility requirement. The *Washington* court chose the former analysis, siding with Judge Arnold's *Pottgen* dissent.<sup>111</sup>

In sum, assuming that the athlete-plaintiff can demonstrate disability, and the court views the league or association as an employer or owner/operator of a public accommodation, the court will then decide whether the requested accommodation is reasonable. Although the Title I and Title III tests for this have different names, they are quite similar, and both focus on the extent to which the proposed modification will affect the entity at issue.

#### IV. THE *MARTIN* AND *OLINGER* DECISIONS

The *Martin* and *Olinger* decisions are the only two cases to date that apply the ADA to professional sports. Both were Title III cases. This section will attempt to highlight the different factual findings and legal conclusions that led to these divergent holdings and demonstrate why neither decision completely works as a model for future cases of this type.

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108. *See id.* at 930.

109. Chief Judge Arnold criticized the majority for applying the MHSAA rule as essential, without determining whether it was so in Pottgen's individual case:

[T]he age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule. But instead of looking at the rule's operation in the individual case of Ed Pottgen, both the Activities Association and this Court simply recite the rule's general justifications . . . and mechanically apply it across the board. But if a rule can be modified without doing violence to its essential purposes . . . I do not believe that it can be "essential" to the nature of the program or activity to refuse to modify the rule.

*Id.* at 932-33 (Arnold, J., dissenting).

110. 181 F.3d 840 (7th Cir. 1999).

111. *See id.* at 850.

*A. Martin v. PGA Tour, Inc.**1. Background*

Casey Martin, a star amateur golfer at Stanford, attempted to join golf's professional ranks in 1997. Martin went to PGA qualifying school, where the top finishers qualify for the PGA Tour, and the next-best finishers qualify for the Nike Tour.<sup>112</sup> Qualifying school is conducted in three stages, and players are eliminated in each stage. In the first two stages, players are allowed to use carts.<sup>113</sup> Martin played well enough to advance to the third round of the 1997 qualifying school. In the third stage of qualifying school (as well as the actual PGA and Nike Tour events), the players are required to walk the course.<sup>114</sup> Martin has Klippel-Trenaunay-Weber Syndrome, a painful congenital vascular malformation that affects his right leg. This condition prevents him from being able to walk a full golf course.<sup>115</sup> He requested permission from the PGA to use a golf cart. The PGA refused Martin's request.

*2. The district court*

Martin sued the PGA under the ADA in the United States District Court in Oregon. He initially received a preliminary injunction that allowed him to use a golf cart in the third round of qualifying

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112. *See Martin*, 204 F.3d at 996.

113. *See id.*

114. *See id.*

115. The district court in *Martin* described Casey Martin's condition as follows:

The right leg appears to be about half the size of the plaintiff's left leg. When plaintiff removes his double set of support stockings and stands upright, the leg immediately discolors and swells in size because the circulatory condition with which he is afflicted prevents the blood from flowing through his veins back to the heart. Instead, gravity, combined with "incompetent" valves which fail to close properly, pulls the blood back down his leg. The leg becomes engorged in blood because the arteries pump blood to his leg but the veins fail to circulate blood back to the heart. To relieve this situation, plaintiff must lie down and elevate his leg.

A double set of support or compression stockings provides plaintiff with enough venous pressure to allow him to remain upright for periods of time. As he has gotten older (he is now 25 years of age), his leg has steadily worsened because of his disability. Whereas he used to be able to walk a golf course (albeit with difficulty), he can no longer do so. As noted, he is at substantial risk of serious physical harm by the mere act of walking.

*Martin*, 994 F. Supp. at 1243-44.

school.<sup>116</sup> Martin then played well enough to secure a spot on the Nike Tour. The district court granted Martin a partial summary judgment, holding that the PGA was covered under Title III of the ADA as the operator of a place of public accommodation.<sup>117</sup> After a six-day bench trial, the district court held that modifying the walking rule for Casey Martin did not fundamentally alter the nature of the PGA's golf tournaments.

The district court started its analysis by noting that Martin met his initial burden of demonstrating that his requested accommodation was reasonable in the general sense.<sup>118</sup> The burden was then placed on the PGA to demonstrate the requested accommodation was not reasonable. The district court rejected the PGA's contention that any modification of a substantive rule of competition would fundamentally alter the nature of the PGA Tour, noting: "[T]he ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. . . . [T]he disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life."<sup>119</sup> In examining the purpose of the PGA's walking rule, the district court accepted the PGA's contention that its purpose was to inject the element of fatigue into the skill of shot making. However, the court found that fatigue caused by walking a golf course in normal circumstances could not be considered significant.<sup>120</sup>

The district court then went on to state that its duty was not to determine if a cart would give a normal golfer an advantage by rendering him less fatigued, but rather whether it would give Casey Martin an advantage. In weighing Casey Martin's individualized circumstances against the purpose of the rule, the court reasoned: "The fatigue plaintiff endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the

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116. *See Martin*, 204 F.3d at 996.

117. *See generally Martin*, 984 F. Supp. 1242 (D. Or. 1998).

118. *See id.* at 1248.

119. *Id.* at 1246.

120. *See id.* at 1250. The court relied on testimony from Dr. Gary Klug, who testified that approximately 500 calories are expended walking a golf course, which nutritionally was less than a Big Mac. The court also viewed as telling that even when PGA golfers do have the option of riding carts, they choose to walk.

able-bodied by the requirement that they walk from shot to shot.”<sup>121</sup> The district court concluded that Casey Martin received no competitive advantage from riding a cart, and therefore accommodating him in this fashion would not fundamentally alter the nature of the PGA tour events.

### *3. The Ninth Circuit*

The PGA appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit, in an opinion by Judge William Canby, affirmed.<sup>122</sup> As an initial matter, the court accepted the district court’s conclusion that the PGA is subject to Title III of the ADA as an operator of a place of public accommodation.<sup>123</sup> The court then turned to the question of whether allowing Casey Martin to use a golf cart would fundamentally alter the PGA and Nike Tour competitions. The court agreed with the district court’s factual findings that (1) the purpose of the walking rule was to inject an element of fatigue into the shot-making process; (2) the fatigue factor injected into golf by walking the course cannot be deemed significant under normal circumstances; and (3) even with a cart, Martin easily endured greater fatigue than his able-bodied, walking competitors.<sup>124</sup> Accepting these findings paved the way for the court’s next step of affirming the district court’s holding that permitting Casey Martin to use a golf cart in the PGA and Nike tournaments would not fundamentally alter the nature of those competitions. The court reasoned that the central competition in shot making would be unaffected by Martin’s accommodation.<sup>125</sup>

Already having made its holding, the court went on, arguably in dicta, to address the PGA’s other arguments. First, the PGA argued that while some rules, such as dress codes or uniform requirements, may be subject to exception to accommodate the disabled, a substantive rule of competition cannot. According to the PGA, once a rule is determined to affect the competition, the rule cannot be modified. As such, Martin’s case should have ended as soon as the district court

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121. *Id.* at 1251.

122. *See generally Martin*, 204 F.3d 994 (9th Cir. 2000).

123. *See id.* at 999.

124. *See id.* at 1000.

125. *See id.*

concluded that the purpose of the PGA's walking-only rule was to inject fatigue into the competition.<sup>126</sup>

In evaluating this argument, the court started with the language of section 12182(b)(A)(ii) of the ADA, which states that accommodations must be made unless they "fundamentally alter" the nature of the public accommodation. The Ninth Circuit reasoned that the PGA's position reads "fundamentally" out of the statute,<sup>127</sup> and would make all alterations of the competition fundamental. The court determined that the statute mandates an inquiry into whether a particular exception to a rule would fundamentally alter the nature of the good or service. "We cannot tell whether a golf cart for Martin fundamentally alters the competition without first investigating whether walking is fundamental to the competition."<sup>128</sup>

The court reasoned that the determination of whether a particular rule is "fundamental" to the competition is an intensely fact-based inquiry. This provided the basis for a rejection of the PGA's position that allowing Martin to use a golf cart would open the door for giving disabled swimmers a head start, or moving the 3-point line in for growth-impaired basketball players. The court reasoned: "We have little doubt that fact-based inquiries into the effects of such accommodation would result in rulings that those accommodations fundamentally altered the competitions."<sup>129</sup>

The PGA also contended that it was improper for a court to consider whether Martin's condition was such that riding would not give him unfair advantage over competitors who walked. The PGA argued it would be far too burdensome for the PGA to determine whether disabled individuals using carts would have an advantage over non-disabled walking competitors. The PGA relied on the *Sandison* line of amateur-athletics cases that held it was an undue burden for an athletic association to do an individualized analysis to determine whether a given plaintiff would receive a competitive advantage if an eligibility rule were waived for him.<sup>130</sup> The court first distin-

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126. *See id.*

127. *See id.* at 1000-01 ("The difficulty with this position is that it reads the word 'fundamentally' out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that the accommodation would 'fundamentally alter the nature' of its competition.").

128. *Id.* at 1001.

129. *Id.*

130. *See* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir.

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guished these cases by noting that the rules at issue in all of them were determined to be fundamental to the competition. In contrast, the walking rule was not fundamental, because the district court found that the fatigue factor introduced by walking was not significant.

The court went on to note that an individualized determination might even be appropriate if a court found that a particular rule was fundamental to the sport. It noted Judge Arnold's dissent in *Pottgen* that the inquiry must focus on the individual exception and that, in light of the plaintiff's individual characteristics as found by the district court, "the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule."<sup>131</sup> The court concluded that the proper determination for the PGA to make was whether providing Casey Martin with a golf cart gave him an unfair advantage over other golfers. The Ninth Circuit clearly believed it did not.

*4. The Supreme Court*

After the Ninth Circuit decision, the PGA applied for certiorari to the United States Supreme Court. The Supreme Court accepted certiorari, and will consider the case in the 2000-2001 term.

*B. Olinger v. United States Golf Ass'n**1. Background*

Ford Olinger first became a professional golfer in 1988 when he received his certification from the PGA. Olinger suffers from bilateral avascular necrosis, which significantly impairs his ability to walk. Olinger had surgery on his left hip in 1997 and has delayed similar surgery on his right hip due to pain. By 1998, Olinger's condition was severe enough that it was nearly impossible for him to walk an eighteen-hole golf course. In 1998, Olinger wanted to compete in the local qualifying round for the U.S. Open, one of thirteen national championships the USGA conducts each year. Olinger's status as a professional golfer meant that he was eligible to compete in the

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1997); *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).

131. *Pottgen*, 40 F.3d at 932 (Arnold, J., dissenting).

local qualifying round for the U.S. Open, which is an eighteen-hole round held at ninety sites across the nation. From that round, 750 out of 6881 competitors advance to the sectional qualifying, which consists of thirty-six holes in a single day and is conducted in twelve sites across the nation.<sup>132</sup>

In 1998, Olinger received a temporary restraining order that enabled him to use a cart and compete in the local qualifying round of the U.S. Open. He did not play well enough to advance to the second round. Olinger wanted to compete again in the local qualifying round for the 1999 U.S. Open. The USGA denied Olinger's request to use a golf cart, and Olinger sued the USGA in the United States District Court in the Northern District of Indiana.<sup>133</sup>

## 2. *The district court*

As an initial matter, the district court held that the USGA was covered under Title III of the ADA. The district court then turned to the question of whether allowing Olinger to ride a cart would fundamentally alter the U.S. Open. First, the district court found that Olinger had met his burden of proving his requested accommodation was reasonable in a general sense. The district court then evaluated the purpose behind the walking rule. The district court accepted the USGA's contention that the purpose of the walking rule was to serve as a test of stamina. Unlike the court in *Martin*, the *Olinger* court found that the use of a cart can provide a competitive advantage over a golfer who walks.<sup>134</sup> The district court agreed that the complete question was not whether a cart would give able-bodied golfers an advantage over other able-bodied golfers, for Olinger was indisputably not an able-bodied golfer.<sup>135</sup> However, the district court never addressed the issue of whether a cart would give Olinger an advantage over able-bodied golfers, although it suggested it would not: "Ford Olinger must ride a golf cart to play, and even

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132. See *Olinger*, 205 F.3d at 1001-03.

133. See *Olinger v. United States Golf Ass'n*, 55 F. Supp. 2d 926, 933 (N.D. Ind. 1999).

134. In reaching this conclusion, the court credited the testimony of Dr. James Rippe, an expert in the physiology of walking. See *id.* at 933.

135. *Id.* at 935. ("The court agrees with Mr. Olinger that a comparison between average able-bodied golfers is not the issue before the court: Mr. Olinger is not an average, able-bodied golfer.")

with a cart he is likely to be more fatigued at the day's end than a healthy Tiger Woods or a healthy David Duvall."<sup>136</sup>

Rather, the district court held that it could not force the USGA to make that particular determination without fundamentally altering the nature of the U.S. Open. If Olinger were allowed to ride, the USGA would have to determine if the next applicant for a golf cart had an advantage over Ford Olinger. The district court reasoned that in addition to making an individualized decision based on Olinger's case, it had to evaluate the requested accommodation's impact on the U.S. Open. It noted that the U.S. Open has never used rules or discretionary decisions for the purpose of giving one competitor a systematic advantage over another. To put the USGA in a position where it had to do so would be to fundamentally alter the nature of the U.S. Open competition.<sup>137</sup>

### 3. *The Seventh Circuit*

Olinger appealed the decision of the district court to the Seventh Circuit Court of Appeals. The Seventh Circuit, in an opinion by Judge Evans, affirmed.<sup>138</sup> The court began its opinion with an extensive explanation of the U.S. Open.<sup>139</sup> The court continued this discussion with a list of past winners of the U.S. Open, including ten golfers and the years they won the U.S. Open.<sup>140</sup> Apparently to demonstrate the importance of tradition in the U.S. Open, and the extent to which golf professionals treat the U.S. Open with respect,

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136. *Id.* at 937.

137. *See id.*

138. *See Olinger*, 205 F.3d at 1001.

139. *See id.* at 1002. The court noted that the U.S. Open had been conducted yearly since 1895, with the exception of the war years 1917–1918 and 1942–1945. The court continued by explaining that this year the U.S. Open will be played at the “historic” Pebble Beach course in California, and “[the U.S. Open’s] venues are true meccas of tournament golf, places like Winged Foot (Mamaroneck, New York); Medinah (Medinah, Illinois); Shinnecock Hills (Southampton, New York); Merion (Ardmore, Pennsylvania); and Congressional (Bethesda, Maryland).” *Id.* at 1002 n.1.

140. “Past winners of the U.S. Open include legends in the game: Bobby Jones (1923, 1926, 1929, and 1930); Gene Sarazen (1922, 1932); Byron Nelson (1939); Ben Hogan (1948, 1950, 1951, and 1953); Arnold Palmer (1960); Jack Nicklaus (1962, 1967, 1972, and 1980); Gary Player (1965); Hale Irwin (1974, 1979, and 1990); Tom Watson (1982); and Lee Trevino (1968, 1971).” *Id.* at 1002. The court continued, in a footnote, to add the names of eight more golfers. *Id.* at 1002 n.2 The court also recounted in detail the story of Willie Anderson, a Scotsman who immigrated to the United States just before the turn of the century and was the first four-time U.S. Open winner. *Id.* at 1002 n.3.

the court recounted the story of Payne Stewart's father, who "always insisted' he use the formal 'William Payne Stewart' on his U.S. Open application because, quoting Payne, 'Dad always said this is the United States Open, your national championship, you write down your full name.'"<sup>141</sup>

The court addressed the argument that the USGA would be covered under Title III of the ADA, but declined to decide the issue, stating:

[W]e can resolve this appeal, as did the district court, on a more narrow ground. Even 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.<sup>142</sup>

The court stated that Olinger's contentions on appeal were: (1) the USGA did not present any proof (responsive to his personalized circumstances) that in fact allowing him to use a golf cart would fundamentally alter the nature of the event; and (2) the district court's conclusion that allowing him to ride a cart would impose impossible administrative burdens was unsupported by the record. The court noted the district court's factual finding that removing the walking rule from competition would "remove stamina (at least, a particular type of stamina) from the set of qualities designed to be tested in this competition."<sup>143</sup> The court held that these findings were amply supported by the record. In addressing the facts in the record that supported this finding, the court referenced professional golfer Ken Venturi's testimony (a professional golfer, and Olinger's witness), Dennis Hepler's testimony, and Dr. Holland's testimony.<sup>144</sup> The written opinion indicates that the court was especially taken with Ken Venturi's testimony. After discussing Venturi's impressive career in golf, the court spent a paragraph recounting the story of

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141. *Id.* The court continued to inform the reader, in a footnote, that "Stewart won the U.S. Open in 1991 . . . and again last year in a memorable finish at Pinehurst in North Carolina. He will not, of course, defend his championship this June as he died, tragically, in a mysterious plane crash last fall in South Dakota." *Id.* at n.1.

142. *Id.* at 1005.

143. *Id.* at 1006 (quoting *Olinger*, 55 F. Supp. 2d at 937).

144. "Dr. Theodore Holland . . . testified that physical endurance and stamina are important criteria in determining the national golf champion. As he put it, 'there is a lot more to getting . . . around those 72 holes than just hitting the shots.'" *Olinger*, 205 F.3d at 1006.

Venturi's performance in the 1964 U.S. Open, where battling dehydration, and on the verge of collapse, Venturi managed to win the Open. The court spent the next paragraph citing Venturi's testimony about the "amazing" story of Ben Hogan, who in 1949 was injured when his car collided with a Greyhound bus, yet returned the next year to walk and win the U.S. Open. Venturi opined that even if he would have had the option, Hogan would not have thought about using a cart.<sup>145</sup> The court stated it was using Venturi's testimony for one reason: "[I]t emphasizes the importance and tradition of walking in championship-level tournament golf competition."<sup>146</sup>

Next, the court addressed the district court's second rationale for ruling in favor of the USGA, that the administrative burdens of evaluating requests to waive the walking rule and permit the use of a golf cart were to great. Without any analysis, the court agreed with the district court that evaluating these individual requests was unnecessary.

In the final paragraph of its opinion, the court conceded that it was not specifically addressing whether the USGA should give seriously disabled, but otherwise well-qualified, golfers a chance to compete. The court concluded that:

[T]he decision on whether the rules of the game should be adjusted to accommodate him is best left to those who hold the future of golf in trust. Because the law does not force the USGA to make the accommodation Olinger seeks, the judgment of the district court is affirmed.<sup>147</sup>

### *C. Similarities and Differences between the Martin and Olinger Decisions*

#### *I. Similarities*

Although the *Martin* and *Olinger* decisions reached contrary results, and could arguably have different effects on future plaintiffs,<sup>148</sup>

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145. *See id.*

146. *Id.* at 1007.

147. *Id.*

148. In assessing the current state of the law with regard to professional golf's walking rule and the ADA, it is important to remember that Ford Olinger's and Casey Martin's lawsuits were against different defendants. About all that can be said is that a federal district court sitting in the Ninth Circuit would be bound by the *Martin* decision in a case against the PGA,

commentators should not hastily proclaim a circuit split. The cases share more similarities than differences. Once the two cases dispensed with the public accommodation issue<sup>149</sup> they both moved to a discussion of fundamental alteration. Initially, both cases approached the issue with similar legal analyses. Both courts agreed that the use of a golf cart was “reasonable in the general sense” and that under the *Johnson* analysis<sup>150</sup> the burden shifted to the defendant to prove that the use of a golf cart would fundamentally alter the nature of the championship competition. Both courts evaluated the purpose behind the walking rule and accepted professional golf’s contention that the purpose of the walking rule was to inject an element of fatigue into the competition.

The next question that both courts faced was whether the walking rule truly injected a significant fatigue factor into the central competition of shot making. Again, at this point neither court was looking at Casey Martin’s or Ford Olinger’s individualized circumstances. Both courts framed the question similarly. Would walking give a significant advantage to a “normal” competitor? Put another way, does riding a cart really make a difference? The courts considered evidence from different sources in considering this question.

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and a federal district court sitting in the Seventh Circuit would be bound by the *Olinger* decision in a case against the USGA. Besides those binding effects, both opinions would be considered no more than persuasive authority. The USGA has indicated that they will allow Casey Martin to ride a cart in the U.S. Open, but they stand by their position that no other golfers will be allowed to ride. Obviously, much depends on how the Supreme Court decides to resolve the issue in *Martin*.

149. The two cases took a different view of whether Title III covers professional golf associations. The defendants in both the *Martin* and *Olinger* cases argued that under a “zone” theory, the actual field of competition is not covered under Title III. The *Martin* court squarely holds that the PGA is an operator of a place of public accommodation, noting that the relevant precedent holds that Title III applies to the playing field, not just the stands. The court criticizes the premise of the PGA’s zone argument that there is nothing public about the competition itself. The PGA argued that the fact that its tournaments are restricted to the nation’s best golfers means that the courses on which they play during tournaments cannot be places of public accommodations. The court responded that the fact that the users of a facility are highly selected does not mean that the facility cannot be a public accommodation. *See Martin*, 204 F.3d at 998. The court analogized to the nation’s elite universities. Although competition to attend these universities is quite intense, and those that do not “make the cut” are excluded from the schools, the members that do get admitted and get to use the facilities are still members of the public using the universities as places of public accommodation. In contrast, the *Olinger* court declined to answer the question of whether the actual field of competition, “their actual fields of strife—where Packers battle Bears and Cubs play Cardinals,” would be covered by Title III as public accommodations. *Olinger* 205 F.3d at 1005.

150. *Johnson v. Gambrinus Co./Spotz Brewery*, 116 F.3d 1052 (5th Cir. 1997).

The district court in *Martin* noted the testimony of Dr. Gary Klug, a professor in physiology at the University of Oregon. Dr. Klug, an expert on the physiological basis for fatigue, calculated that approximately five hundred calories are expended in walking a golf course (five miles in five hours).<sup>151</sup> Dr. Klug also testified that it was likely that Ken Venturi's fatigue in his storied 1964 U.S. Open victory was induced by heat exhaustion and fluid loss, not walking. Many spectators at the 1964 U.S. Open had to be treated for exhaustion as well and they were not walking. According to Dr. Klug, fatigue at lower intensity exercise is primarily a psychological phenomenon; stress and motivation are the key ingredients. The district court further noted that the evidence at trial indicated that even when they had the choice, most PGA Tour golfers appeared to prefer walking as a way of dealing with the psychological factors of fatigue, even when they had the choice of using a cart. The court doubted that they would do so if they would receive an advantage from riding.<sup>152</sup> The Ninth Circuit accepted all of the district court's findings as not clearly erroneous.

The district court in *Olinger* excluded Dr. Klug's testimony for want of sufficient showing of reliability of underlying scientific principles.<sup>153</sup> The court noted the testimony of Dr. James Rippe, an expert in the physiology of walking, who testified that an average twenty-five to thirty-five year-old golfer who rides a cart for an average round of golf on an average summer day had a significant and unfair advantage over an average able-bodied twenty-five to thirty-five year-old golfer who is walking.<sup>154</sup> *Olinger* criticized Dr. Rippe's study on multiple grounds, but the court did not find any of them persuasive. The court believed that Dr. Rippe's report provided a strong basis to believe that between two roughly similar golfers, the golfer who rides is likely to have some advantage over the golfer who walks when it comes to fatigue.<sup>155</sup> The Seventh Circuit Court of Appeals accepted these findings as not clearly erroneous.

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151. *See Martin*, 994 F. Supp. at 1250.

152. *See id.* at 1251.

153. *See Olinger*, 55 F. Supp. 2d at 932.

154. *Id.* at 935. "The person who walks the course under those conditions performs the same amount of physiologic work as if he had run 11-minute miles for 2.5 hours, and studies indicate that such exertion causes cognitive and psychomotor tasks to deteriorate at rates between 10 and 50 percent." *Id.*

155. *See id.* at 936.

## 2. Differences

At this point the courts diverged and made different *factual* findings. The *Martin* court wrote: “[T]he fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances.”<sup>156</sup> The district court in *Olinger* phrased its finding slightly differently, writing: “[T]he court finds not that a golfer who rides invariably has a competitive advantage over a very similar golfer who walks; the court finds only that a strong possibility exists that on any particular day, such a competitive advantage might exist, and that it might be substantial.”<sup>157</sup>

These divergent factual findings are the key difference between the two cases and set the stage for different *legal* analyses from that point on. The *Martin* court, finding that the fatigue factor introduced by walking was not significant, proceeded to do an individualized analysis as to whether waiving the walking rule would give Casey Martin an advantage. The *Martin* court concluded it would not. The PGA argued that it was improper for the district court to consider whether Martin’s condition was such that riding would not give him an unfair advantage over golfers who walked.<sup>158</sup> The PGA argued that this would be far too burdensome, if not impossible.<sup>159</sup> The court rejected this proposition, noting that nothing in the record established that an individualized determination would impose an intolerable burden on the PGA.<sup>160</sup> Indeed, the *Martin* court recognized that the district court had little difficulty making the factual determination that providing Martin with a golf cart did not give him an unfair advantage over his competitors.<sup>161</sup>

In contrast, the *Olinger* court, finding that the fatigue factor introduced by walking was significant, did not do an individualized analysis as to whether waiving the rule would give Ford Olinger an advantage. Rather, the court held that to modify the rule at all would fundamentally alter the nature of the USGA. Unlike the *Martin* court, the *Olinger* court was hostile to the idea of an individualized analysis. The district court accepted the testimony of Dr. James

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156. See *Martin*, 204 F.3d at 1000 (quoting the district court, 994 F. Supp. at 1250).

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

158. See *Martin*, 204 F.3d at 1000.

159. See *id.* at 1001.

160. See *id.*

161. See *id.*

Rippe that such an analysis could not be provided because the variety of potential disabilities and the individual impact of each disability was too great.<sup>162</sup> The court agreed with the USGA that it did not need to develop “a system and fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete.”<sup>163</sup> Rather, the court was content with expert testimony that if some competitors rode carts, there would be tremendous advantage to those players.

Aside from their different factual findings, and different legal analyses in light of these findings, there is one additional difference between the two cases. This final difference concerns the two courts’ tone when discussing professional golf. The *Martin* decision is relatively straightforward in its legal analysis. Regardless of its outcome, the attitude of the court seems to be that golf is no different from any other industry. The fact that the PGA is so illustrious and competitive is stated when appropriate for the analysis and not dwelt on.

In contrast, the Seventh Circuit’s decision in *Olinger* at times reads more like a USGA promotional brochure than a federal circuit court opinion. It seems important to the court to make two points concerning the USGA: (1) its practices and traditions are an important part of its appeal; and (2) competition is so fierce, that any little element can make a difference in the end score. However, irrespective of the propriety of these points, the court goes overboard in making them. No less than twenty-two professional golfers are mentioned, by name, in the opinion. Furthermore, counting conservatively, a reader of the opinion is exposed to at least nine completely irrelevant tidbits and stories from golf’s history, which take up almost half of the opinion’s text. These include the fact that Payne Stewart’s father always insisted he use his formal name on his U.S. Open application; the fact that Willie Anderson—a four-time U.S. Open winner—was a Scotsman who immigrated to the United States just before the turn of the century; and the fact that in his testimony golfer Ken Venturi felt compelled to discuss which putts he felt he should have made in the 1964 U.S. Open.

Obviously different commentators have different views on what style opinions should be written in, and it is presumptuous to suggest that colorful opinions are always wrong. Yet a careful read of the

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162. See *Olinger*, 55 F. Supp. 2d. at 937.

163. *Olinger*, 205 F.3d at 1006 (quoting the district court, 55 F. Supp. 2d. at 937).

*Olinger* opinion makes one wonder: was the court being truthful when it wrote that the “focus of our opinion has been on one question: Must the USGA allow Ford Olinger to compete while riding in a golf cart;”<sup>164</sup> or was the focus really on the majesty of professional golf?<sup>165</sup> There is nothing wrong with a judge or court having admiration for golf, or its players. Yet Ford Olinger, reading this opinion, must have felt like Curt Flood challenging Major League Baseball in *Flood v. Kuhn*,<sup>166</sup> and wondered if he stood any chance on his factual or legal arguments in the face of a court enamored with the traditions and majesty of his sport. Olinger’s comments after receiving the opinion are understandable: “Casey had three judges who attacked the legal issues, whereas I got golfers for judges.”<sup>167</sup>

*D. Why Martin and Olinger Will Not Work as Models for Future Cases*

The *Martin* and *Olinger* opinions started the process of applying the ADA to professional sports and admirably grappled with some difficult questions. In particular, both cases are to be applauded for rejecting the idea that professional sports are categorically exempt from the ADA. As previously discussed, this position has no support in the text of the ADA, or in its legislative history. This was an important first step and provides a basis from which this interaction between the ADA and professional sports can move forward.

However, neither case provides a coherent model by which courts can decide future professional sports rule-modification ADA cases. There are two reasons for this. First, neither court asks the questions necessary to make the *factual* determination as to whether a rule is fundamental to a sport. Second, taken together and individually, the two cases do not present a definitive *legal* analysis as to whether and when the defendant must present proof of the plaintiff’s individualized circumstances in proving a fundamental alteration.

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164. *Id.* at 1007.

165. The adjectives used to describe the USGA and the U.S. Open throughout the opinion are “venerable,” “greatest,” “most democratic,” “premier,” and “historic.” The adjectives used to describe USGA golfers and courses are “meccas,” “legends,” “storied,” and “amazing.” *Id.* at 1001–07.

166. 407 U.S. 258 (1972). In 1972, Curt Flood, a major league baseball player, challenged Major League Baseball’s longstanding exemption from federal antitrust laws. He lost. In one famous paragraph, Justice Blackmun listed 89 celebrated baseball players by name.

167. *Golf Cart Rulings: The Battle Isn’t Over Yet*, SPORTS ILLUSTRATED, Mar. 20, 2000, at 40 (quoting Ford Olinger).

*1. Problems with factual analysis*

Both the *Martin* and *Olinger* cases first attempt to determine whether the walking rule is fundamental to professional golf. Both courts accept the idea that equal competition is a fundamental value to all sports, including golf. As such, both courts reason that if the walking rule influences scoring in golf, then the rule is fundamental to the game. To determine whether the walking rule influences score, both courts attempted to make the factual determination of whether the fatigue introduced by walking affected a “normal” golfer’s score.

This factual determination was crucial to both courts’ decisions. To be sure, both opinions admirably grappled with an extremely difficult factual question. However, in making this particular factual accommodation, both courts could have improved on their analysis. It would have been helpful to focus more on the particular physical trait that the rule tests for and to evaluate how specialized that skill is. Also, the courts should have considered how athletes prepare for competition—do they practice this particular trait or skill? In particular, the *Olinger* definition of competitive advantage<sup>168</sup> is somewhat ambiguous—it is hard to imagine what factors could not influence score on any given day.

On a more serious issue, both courts missed the mark in relying solely on the idea of competitive disadvantage to determine what rules are fundamental to a given sport. Certainly both courts were correct that ensuring all athletes receive no competitive advantage is fundamental to a sport. Yet this is not all that is fundamental to sports. In addition to the competitive advantage problem, some rules are so embedded in the game that even if modification would present no competitive advantage problem, they should not be changed. Tradition is not irrelevant. If certain “core” rules are modified, the game will become something different. These rules might not have any better explanation than “the game has always been played this way.”<sup>169</sup> Neither the *Martin* nor *Olinger* opinions treat these as suffi-

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168. “The court finds not that a golfer who rides invariably has a competitive advantage over a very similar golfer who walks; the court finds only that a strong possibility exists that on any particular day, such a competitive advantage might exist, and that it might be substantial.” *Olinger*, 55 F. Supp. 2d at 936.

169. Realistically, why else are the bases 90 feet apart in baseball, or the baskets 10 feet high in basketball. Why else are there three outs in a baseball inning or a first down every 10 yards in football?

ciently distinct questions. The *Olinger* court especially seems to confuse tradition with competitive advantage. The court clearly uses Ken Venturi's testimony to evaluate the likelihood of competitive advantage. While this testimony might well be probative as to the idea of walking as a "core" rule similar to the bases being ninety feet apart in baseball, Venturi's story about Ben Hogan has little relevance to the competitive advantage inquiry. The questions of what rules make a sport what it is and what rules are incapable of being modified without giving someone a competitive advantage are objectively difficult to answer. However, they are not the same question, and should not be treated as such.

Also distinct from the idea of competitive advantage, both the USGA and PGA argued that it was too administratively difficult to modify rules for individual competitors and that such a waiver would in and of itself constitute fundamental change. The *Martin* court rejected this argument, but the *Olinger* court accepted it. In their holdings, however, neither court offered meaningful guidance on how to evaluate this argument in future cases. In particular, the *Olinger* court confuses the proof of administrative difficulty with the proof of competitive advantage. The court held that it would be a fundamental change to force the USGA to administrate on a case-by-case basis who would receive a waiver from the walking rule because the USGA has never granted a systematic "advantage" to one competitor over another. Although this presents an argument about competitive advantage, it does not answer the question of administrative difficulty. Even if case-by-case waivers would be distasteful to the USGA, they are not necessarily unduly burdensome.

## 2. *Problems with legal analysis*

A second problem with using the *Olinger* and *Martin* opinions as a comprehensive model for future cases deals with their *legal* analyses. Both cases are unclear as to whether a defendant is always required to give proof that modifying the rule for a particular plaintiff will fundamentally change the entity, or whether the defendant does not have to present individualized proof if the rule itself is fundamental to the sport. Can a rule that is "essential" or "necessary" be modified if, given the plaintiff's individualized circumstances, that plaintiff's accommodation does not disturb what makes the rule fundamental or significant?

The *Martin* case in particular is ambiguous on this point. Given the path the *Martin* court took, it is not clear whether the court would have forced the defendant to present individualized proof if the court had found that walking a course had more of an impact on competition. Would the court have engaged in an individualized analysis and determined whether the cart gave Casey Martin an advantage over other golfers? Or would the court have done what the *Olinger* court did and reason that if a rule significantly affects the central competition, then that rule can never be modified? Although the *Martin* court went to great lengths to point out the necessity of an individualized analysis of Casey Martin's situation, the determination that the fatigue walking generates was not significant came *before* the individualized analysis.<sup>170</sup>

*a. Always individualized analysis.* The court's language in *Martin* suggests that it would have engaged in some type of individualized analysis even if it had found the walking rule to be more significant. The court approvingly cited Judge Arnold's dissent in *Pottgen*, noting: "[W]e do not share the antagonism to individual determinations reflected in these cases [*Pottgen*, *Sandison*, and *McPherson*]." <sup>171</sup> The thrust of Judge Arnold's view is that a rule cannot be "fundamental" if modifying it in the individual case does no violence to its purpose. If Casey Martin or Ford Olinger will *always* be more tired after riding a course than the rest of the competitors will be after riding, then modifying the rule clearly gives them no advantage. Also, if the entire holding was based on the walking rule not injecting any significant element into the competition, one has to wonder why the court felt compelled to determine whether Casey Martin would receive an unfair advantage if the rule was waived. Indeed, almost by definition, no one would.

As discussed previously, the view that there must always be an individualized analysis, a view that *Martin* hints at, has support in the case law.<sup>172</sup> This approach also has an intuitive appeal. Winners and losers are determined in all sports on the basis of performance.

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170. "We cannot tell whether a golf cart for Martin fundamentally alters the competition without first investigating whether walking is fundamental to the competition." *Martin*, 204 F.3d at 1001.

171. *Id.* at 1002.

172. See *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 852 (7th Cir. 1999); see also *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 932-33 (8th Cir. 1994) (Aronld, J., dissenting).

The competition is fairest when none of the athletes possess an advantage that the other athletes do not. As the district court in *Olinger* stated, “[T]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor.”<sup>173</sup> It follows that if a competitor is not getting an advantage from a certain accommodation, and it is just putting her on equal footing with other competitors, then the competition is not being made unfair by granting her the modification. Even if one accepts that the walking rule injects fatigue into the game of golf, and accepts that fatigue influences score, if Casey Martin or Ford Olinger will *always* be more fatigued after a round of “riding” golf than a healthy Tiger Woods or David Duvall will be after a round of “walking” golf, then certainly they are gaining no unfair advantage. The modification can be made without damaging the competitive aspect of the game.

This is not a workable principle, nor one that is required under the ADA. If a court were to always require individualized proof that waiving a particular rule, which admittedly affected competition, would give that athlete a competitive advantage, any sport could be fundamentally altered by the ADA. As discussed above, the only *factual* analysis that both courts engaged in (prior to the decision to do or not do an individualized analysis) was a competition-based inquiry. However, there is more that is fundamental to a sport besides the premise that all athletes start from as equal a place as possible. Sprinters should always start from the same place, even if a disabled sprinter can show that given her disability, to remain equal with other competitors she must be given a head start. The baskets in the NBA should be kept at ten feet, even if a growth-impaired player wants to move them down to nine feet for all games that he plays in and can demonstrate that he makes baskets on this modified hoop with less precision than other players.

Although these are extreme examples, they demonstrate the point. There are elements to professional sports, as in every employment or public accommodation situation that cannot be modified without creating fundamental change, in spite of any compelling set of individualized circumstances. The *Southeastern* case teaches this

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

principle.<sup>174</sup> It is not a desirable nor reasonable application of the ADA to require that the baskets be changed for all players. Although the aforementioned basketball player would garner no advantage from nine-foot baskets, the height of the baskets cannot be altered without fundamentally changing the game. Whether a particular player garners an advantage cannot be the only inquiry. These rules affect competition, yet the player gains no competitive advantage from the rule being waived. There must be some category of rules that cannot be modified, regardless of any individualized circumstances. The *Martin* decision recognizes this, stating that accommodations such as the examples above would not have to be made, because “fact-based inquiries into the effects of such accommodations would result in rulings that those accommodations fundamentally altered the competitions.”<sup>175</sup> However, *Martin* fails to supply a set of questions by which to make this determination and does not clearly establish whether an individualized analysis is appropriate given the answer of the fact-based inquiry.

*b. Never individualized analysis.* The other approach, specifically endorsed by *Olinger* and not inconsistent with the holding in *Martin*, would be to never do an individualized analysis if the rule at issue adds any significant element to the competitive nature of the game. A strict application of this rule is also undesirable and is inconsistent with ADA purposes and case law. In essence, such a rule would be a blanket policy (“all rules that *really* affect competition are not modifiable”), and the ADA case law is clear such blanket policies are frowned upon.<sup>176</sup> Sports have many rules, and there will be some that do affect competition, perhaps even in a “significant manner,” but should nonetheless be modifiable.

A non-hypothetical example is instructive. Major League Baseball rules require that a pitcher be completely motionless prior to delivery once his foot is on the pitching rubber.<sup>177</sup> However, a pitcher needs to spin the ball in his hand to get the proper grip on the ball for the particular pitch to be thrown. To follow the rule, pitchers hide the

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174. See *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979).

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

176. See *Bombrys v. Toledo*, 849 F. Supp. 1210, 1219–20 (N.D. Ohio 1993) (“The Americans with Disabilities Act makes it clear that blanket exclusions are to be given the utmost scrutiny, and are, as a general rule, to be discouraged.”).

177. See MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES Rule 8.01 (2000) (“Legal Pitching Delivery”).

ball in their glove while they are getting their grip with their other hand, and then put their foot on the rubber and come to the required stop.

Jim Abbott, a one-armed pitcher, could not hide the ball in his glove hand while he was spinning the ball. The only way he could adjust his grip without tipping off the batter as to what pitch he was throwing was to adjust the ball with his pitching hand, with his hand behind his back, after he had already put his foot on the rubber. However, to do so would violate the “motionless” rule. To modify the rule would in some sense give Abbott an advantage over other pitchers and batters. He could disguise his pitches in a way that other pitchers could not. Yet Major League Baseball officials granted Jim Abbott an exception from this particular rule.

To be sure, the “motionless” rule does influence competition. It maintains equality among all pitchers and forces them to do the same thing. Exempting Jim Abbott from the rule could be said to give him an advantage; for without the modification, he would have gotten clobbered. However, Major League Baseball, without being threatened with any potential ADA litigation, made the determination that given Jim Abbott’s individualized circumstances, modifying the rule would not give him any significant advantage. Rather, the exception merely allowed him to compete. Quite simply, Major League Baseball made a common sense decision, which no one could reasonably claim ruined or altered the game. As Jim Abbott himself said, “I wasn’t given an advantage. I was merely being allowed to do something that everyone else was able to do naturally.”<sup>178</sup>

The point of this example is to illustrate that an approach which states any rule that affects competition cannot be modified given any set of individualized circumstances would preclude a potential plaintiff from using the ADA to force a Jim Abbott-type result if her sport would not do so on its own. Sports are a rule-dominated world, and not all of these rules that affect competition are incapable of being modified without fundamentally altering the sport. The example of Jim Abbott is a positive one—Major League Baseball adequately policed itself and accommodated Jim Abbott. However, there was no guarantee that it would have done so. Given the importance of tradition in sports, and the fact that almost any rule could be considered to affect competition at some level, an athlete might well need the

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178. *Sports Extra Chatter*, TAMPA TRIB., Mar. 27, 1998, at 6 (quoting Jim Abbott).

ADA to force her sport to do the common sense thing and perform an individualized analysis of whether an athlete really gathers an unfair advantage to a minor rule change.

In sum, problems with the *Martin* and *Olinger* courts' legal and factual analyses preclude them from being comprehensive models for cases of this type. It is unacceptable to always have an individualized analysis; however, it is just as undesirable to never have one. Clearly, a new approach is needed.

#### V. A PROPOSED APPROACH

There are commentators who dismiss Casey Martin's and Ford Olinger's struggles with professional golf as isolated incidents.<sup>179</sup> This is an unrealistic view. JaRo Jones, a former golf teaching pro with polio, recently filed a lawsuit against the USGA, based on a denial of his request to use a cart during the Senior Open qualifying rounds.<sup>180</sup> Future cases will not be limited to golf. Every sport has rules, and it is not hard to imagine cases where an athlete can effectively compete in the sport but cannot abide by a particular rule.<sup>181</sup> In formulating an approach to dealing with these situations, uniformity of process should be important. The ADA has been criticized, in some instances quite legitimately, for inconsistent application.<sup>182</sup> Cases involving professional sports are likely to be high-profile, and as the body of ADA case law continues to evolve, decisions like *Martin* and *Olinger* will serve as precedent for the ADA's application to other competitive situations.<sup>183</sup> No one's interests will be served by a scattered body of case-law, especially if it applies the ADA in different ways depending on the popularity of the sport or of a particular athlete.

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179. See Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings*, 77 OR. L. REV. 1337, 1377 (1998) ("In reality, it may turn out that professional golf is one of the few sports where an accommodation of one of the major rules of play might not fundamentally alter the nature of the game.")

180. See Jim Vertuno, *Yahoo Sports Headlines* (visited May 1, 2000) <[http://dailynews.yahoo.com/h/ap/20000501/sp/glf\\_disabled\\_golfer\\_lawsuit-1.html](http://dailynews.yahoo.com/h/ap/20000501/sp/glf_disabled_golfer_lawsuit-1.html)>.

181. The possibility for future Martin-like or Olinger-like suits is increased by the fact that these suits are not limited to Title III public accommodations. As discussed in Part II, it is possible that professional athletic ADA suits will proceed under Title I of the ADA.

182. Consider the comments of JaRo Jones: "I have nothing against Casey, but I don't understand how they can deny me the use of a golf cart when they turned around and said he could use one." Vertuno, *supra* note 180.

183. See Long, *supra* note 179, at 1377-79.

As demonstrated above, there are two major problems with the *Martin* and *Olinger* cases. The first is that they use an incomplete set of questions to determine the *factual* issue of how important a rule is to the sport. The second is that neither case presents a coherent vision of the *legal* analysis a court should use in addressing the relationship between the ADA, professional sports, and disabled players (specifically, when and whether a court should require an individualized analysis in determining whether a rule modification will fundamentally alter the competition). These problems are interrelated. The approach this article proposes will remedy both of these problems and provide a workable legal and factual framework that courts can use in future ADA professional sports cases. This approach is intended to separate rules which are essential and cannot be modified from those that can, and to determine whether and when a particular requested accommodation should in fact be made.

#### A. *Outlining the Approach*

The proposed approach contains three steps. At the first step the plaintiff-athlete has the burden to demonstrate that the requested accommodation is reasonable in a general sense. If the plaintiff is able to meet this burden then, under step two of the proposed analysis, the burden shifts to the defendant to prove that the asked-for change would fundamentally alter the game. At this point, before the defendant has to offer proof that a modification for *this particular* plaintiff would fundamentally alter the sport, the defendant must be allowed to show that the rule is so important that *any* deviation from it would generate fundamental change. If so, the rule cannot be changed, and the analysis is over. This is an extremely difficult factual inquiry, and this article will propose a question set that goes far beyond the analysis in either the *Martin* or *Olinger* cases for reaching an answer to that inquiry. Finally, under step three of the proposed analysis, if the defendant cannot demonstrate that the rule is so important to the sport that it can never be changed, then the defendant must prove that modifying the rule for *this particular* plaintiff would cause fundamental change. At this point, the court must undertake an individualized analysis of this plaintiff's circumstances. If the defendant cannot demonstrate, with specificity, that making this individualized exception would cause fundamental change, then the accommodation must be made. The approach will first be discussed in

the context of a Title III lawsuit. Afterward, the article will demonstrate that the approach will also fit a Title I case.

*B. Step 1: Reasonable in the General Sense*

This first step of the proposed approach is in accord with the methodology applied in both the *Martin* and *Olinger* cases. Under both *Johnson* and *Riel*, the plaintiff has the burden of demonstrating that the requested accommodation is reasonable in a general sense. As defined in *Johnson*,<sup>184</sup> this means “reasonable in the run of cases.” This is not a heavy burden. It is an initial screen that can curb outlandish proposed rule changes. In *Martin*, the court noted that because many golfers use golf carts, the reasonableness of using golf carts in the game of golf as a general matter cannot be contested.<sup>185</sup>

Of course, it is possible to increase the level of specificity at this stage of the analysis and make it more of a rigorous inquiry. For example, assume that a Major League Baseball player requests that he be exempted from the rule that requires batters to use wood bats.<sup>186</sup> As an accommodation, this player wants to use an aluminum bat. Under the more relaxed analysis, this requested accommodation would survive this stage, because many professional baseball players, at levels other than the major leagues, use aluminum bats. However, at a higher level of specificity, one could argue that Major League Baseball players never use aluminum bats, and therefore the requested accommodation is not reasonable in the general sense.

The more relaxed inquiry is more appropriate for this initial stage of the analysis because after step one the burden shifts and the analysis becomes more complex. Steps two and three of the proposed method of analysis are the more appropriate places to resolve the more difficult, less glaring issues. This approach is in accord with the way courts have interpreted the *Johnson* burden for other industries.<sup>187</sup>

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184. *Johnson*, 116 F.3d at 353.

185. *See Martin*, 204 F.3d at 999.

186. *See* MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES Rule 1.10(a) (2000).

187. *See Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (referring to this initial burden as “not a heavy one,” and stating “[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits”); *see also Guckenberger v. Boston University*, 974 F. Supp. 106, 146–47 (D. Mass. 1997) (finding that the plaintiffs had met this initial burden by showing that course substitutions were reasonable in the general sense).

*C. Step 2: Can the Rule Ever Be Waived?*

If the plaintiff is able to meet her burden in step one by demonstrating that the proposed accommodation is reasonable, the case continues to step two of the proposed analysis. Step two separates rules that can never be waived without causing fundamental change from those that can. At this stage, the burden is placed on the defendant to demonstrate that the rule can never be changed without fundamentally altering the game. The defendant does not need to show that waiving the rule for this particular plaintiff would cause fundamental change, but simply that changing the rule itself will fundamentally alter the game. Allowing the defendant to make her case before an individualized analysis takes place is an acknowledgment that there are some rules that cannot be modified without fundamentally changing the sport regardless of the individualized circumstances of any plaintiff.

The question the courts will address then is: "Can this rule ever be waived?" There should be only three broad ways to answer "no" to this question. The first is if the rule change would change the game into something it is not. The second is if the rule change will *always* produce a competitive advantage or disadvantage. The third is if the rule change is impossible to administer. These are three difficult questions to address, and finding an answer to them requires a comprehensive, intensive factual inquiry. This is an inquiry that the *Martin* and *Olinger* cases do not give.

This article proposes that a court should ask seven questions to determine whether a requested rule change falls into one of the three broad categories above. These questions both improve the competitive advantage inquiry initiated in *Martin* and *Olinger* and direct the analysis to additional relevant points. These questions all contribute to determining the true competitive effects of a rule change, the extent to which the rule transforms the game, and what the administrative burdens accompanying a waiver.

The proposed questions are as follows. (1) Does the rule involve a skill that an athlete in the particular sport trains to do? (2) Is this particular skill unique to an athlete in the sport, or is it a task that the general population can perform? (3) What is the link between success in the skill the rule tests for and success in the sport? (4) Would the rule modification place other athletes at a competitive disadvantage? (5) Why does the league have this rule? (6) Would the rule modification change the way the game is played for all participants? (7) What

is the realistic administrative and financial burden on the association in determining whether or not to waive this rule on a case-by-case basis? Individually none of these questions are determinative, but together they should isolate those rules that are so important to a particular game that they can never be changed. The answers to these questions interrelate and overlap.

*1. Question one: Does the rule involve a skill that an athlete in the particular sport trains to do?*

The first question is quite probative of the importance of a particular rule. Professional athletes are extremely competitive and look for every advantage they can get. If a certain skill will give them an edge over other competitors, it is reasonable to expect them to train at that skill and strive to get better at it. In contrast, if a skill is somewhat incidental to the game, they will not focus nearly as much effort on perfecting that skill.

This question must be answered with the appropriate level of specificity. For example, the National Basketball Association has a rule that a player shooting a free throw only has ten seconds to shoot the ball after it is given to him.<sup>188</sup> However, consider the case of a basketball player who has a mental disability, such as an obsessive-compulsive disorder. This player needs to go through an elaborate ritual before shooting each free throw, and it takes twelve seconds. He requests an exemption from the ten-second rule. Although there could be a correlation between increased time and increased free throw percentage, it is unlikely that most professional basketball players specifically train at making a free throw in ten seconds, as opposed to twelve or fifteen. This suggests that the rule is not so important as to be non-modifiable. Similarly, consider Jim Abbott's case. Although the rule involved a central function of the sport (pitching), most pitchers do not seek to develop any particular skill in staying motionless before delivery. In contrast, consider an example that kept coming up in the aftermath of the *Martin* case: a disabled baseball player who is in a wheelchair, and cannot run to first base. Players do practice running to first base, and they train to get better at it.

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188. See NATIONAL BASKETBALL ASSOCIATION, OFFICIAL NATIONAL BASKETBALL ASSOCIATION RULES Rule 9 (2000) (setting out the time limit for free throws).

2. *Question two: Is this particular skill unique to an athlete in the sport, or is it a task that the general population can perform?*

This second question focuses on how specialized the skill at issue really is. The more specialized the skill, the more reasonable it is to believe that modifying the rule could lead to a competitive advantage. For example, most of the general population can hear a starting gun. This suggests that putting a flashing light in front of a deaf person to represent the start of a race will not give her a competitive advantage. In contrast, most people in the general population cannot hit a major league fastball, run the forty-yard dash in the time of a NFL receiver, or hit a golf ball nearly as far as a professional golfer. Any modification that helps a disabled individual accomplish one of these tasks would likely give her a significant competitive advantage.

3. *Question three: What is the link between success in the skill the rule tests for and success in the sport?*

Question three focuses specifically on competitive advantage. Considering Jim Abbott's case, not many professional pitchers have made careers based on any particular skill in being motionless. Sports have many rules, and not all of them involve a case where one athlete's gain is another athlete's loss. The competitive advantage inquiry is another way a court can hone in on what exact effects a rule has on a sport.<sup>189</sup>

4. *Question four: Would the rule modification place other athletes at a competitive disadvantage?*

Question four is another way to evaluate competitive advantage. This is a way to recognize that sports can be different from other industries, because one competitor's advantage can be another's disadvantage.<sup>190</sup> But this will not always be the case; sports have many rules, and not all of them involve a zero-sum gain. For example, Major League Baseball rules only allow one manager or coach to visit the pitching mound, to talk with a pitcher, in the middle of an in-

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189. It is important to remember that the driving force behind this question is to determine whether the rule could ever be modified without causing fundamental alteration, given the most wild of imaginable circumstances.

190. See *e.g.*, Long, *supra* note 179.

ning.<sup>191</sup> However, allowing a sign language interpreter, as well as a coach or manager, to come to the mound for a deaf pitcher would not hurt anyone's chances of hitting the ball.

It is important to note that questions three and four should not screen out many rules at this stage of the analysis. The individualized inquiry is better suited to determine if a competitive advantage or competitive disadvantage exists.

*5. Question five: Why does the league have this rule?*

Question five will allow a league to argue that in addition to any competitive effects a rule has, the rule is a bedrock tenet of the game. It is quite possible the answer to this question will be: "[B]ecause the game has always been played like this," or "because this rule makes our game what it is." For example, why else are the bases in baseball ninety feet apart?<sup>192</sup> Why else are baskets in basketball ten feet high?<sup>193</sup> Every sport has "rules of the road," and the fact that they have no impressive explanation should not degrade their importance. A court should listen to these arguments. Ultimately, however, the court must make an independent judgment as to whether this rule is so much a part of the game that it cannot be changed without transforming the game into something else.

Another example is instructive. The National Basketball Association's Rules specifically mention the use of profanity as being grounds for a technical foul.<sup>194</sup> A technical foul leads to a free throw shot for the opposing team and thus can directly affect the score of the game. Imagine a basketball player with Turret's syndrome, a mental condition that can cause those with it to uncontrollably shout obscenities. Such a player would be assessed many technical fouls, which could preclude him from being able to play. This player requests that he be exempted from this rule. This rule is not primarily intended to keep a competitive balance, but rather to keep a measure of civility and decorum in games. While perhaps a desirable goal, it is unlikely this could be cast as a bedrock tenant of the game of basketball.

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191. See MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES Rule 8.06 (2000).

192. *Id.* at Rule 1.04 ("The Playing Field").

193. See NATIONAL BASKETBALL ASSOCIATION, OFFICIAL NATIONAL BASKETBALL ASSOCIATION RULES Rule 1 (2000) ("Court Dimensions").

194. *Id.* at Rule 12 ("Fouls and Penalties, VII: Conduct (d)(4)").

6. *Question six: Would the rule modification change the way the game is played for all participants?*

Question six is a crucial tool to help courts decide which rules cannot be modified without changing the nature of the game too drastically. Furthermore, it is essentially a specialized way to evaluate a league's *Southeastern* arguments in a manner that is adapted to professional sports. If a rule only has to be modified for one particular participant, and will not change the way that everyone plays the game, the modification's disruptive effects may be lessened.

For instance, consider the example given by the PGA in *Martin* of a height-impaired basketball player who wants to move the three-point line closer to the basket for all games he plays in. This involves changing the line for everyone; not just that player. Even if the league could paint two separate three-point lines (one for the disabled participant, and one for everyone else), the rule change would still affect everyone because the defense would need to actively adjust to that one player's specialized circumstance. As such, it starts to look like a major change. In contrast, Major League Baseball only had to alter the motionless rule for Jim Abbott, not for every pitcher. Likewise, the NBA would only need to accommodate the mentally disabled basketball player who needs more free-throw time, not everyone else in the league.

7. *Question seven: What is the realistic administrative and financial burden on the association in determining whether or not to waive this rule on a case-by-case basis?*

With regard to the seventh question, it is not so much that *Olinger* court did not ask this question, but that they did not answer it. The *Olinger* holding, that rule modification on a case-by-case basis would be administratively difficult and unnecessary, is woefully unsupported in the opinion. The ADA is clear on how this argument must be evaluated. The most on-point provisions in the ADA deal with the "undue burden" Title I defense. Factors to be considered in evaluating administrative burdens must include "the nature and cost of the accommodation . . . the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation . . . the effect on expenses and resources . . . the overall financial resources of the covered entity with respect to the number of its

employees.”<sup>195</sup> Careful review is needed here; blanket policies (“it is too difficult for us to evaluate the plaintiff’s evaluation on a case-by-case basis”) are inherently suspect under the ADA.<sup>196</sup> Given that all professional sports are extremely profitable, it is not likely that financial burdens will often work as a justification for not making accommodations.

Although individually none of these questions are determinative, taken together they should isolate those rules that are so important to the game that they can never be changed. Furthermore, using these seven questions will keep this particular set of rules limited in a systematic way that the *Martin* nor *Olinger* decisions do not. If a challenged rule either (1) is so entwined in the central competition that it could never be modified without giving a competitive advantage; (2) would change the game into something it is not; or (3) would be administratively impossible for a league to modify on a case-by-case basis, then that rule cannot be changed given any set of individualized circumstances. It is the defendant’s burden throughout to prove that a rule belongs in this category.

#### *D. Step 3: The Individualized Analysis*

Having performed the above analysis, a court is in an appropriate position to evaluate the argument that, as applied to a particular plaintiff, a rule modification would cause fundamental change. This analysis will focus on whether a particular athlete gets an advantage from a rule modification. Although still difficult to answer, this third question is less hypothetical than the case of the “normal” athlete. For example, consider the case of the mentally disabled basketball player who needs more time at the free throw line. Does the additional time give him an advantage, or does it merely allow him to shoot free throws like everyone else? Are his twelve seconds equal to another player’s ten seconds? While this may be a tough question to answer, other questions will not be as difficult. Consider Jim Abbott’s case. There is likely little evidence that allowing Jim Abbott to modify his delivery gave him a competitive advantage over the batters he was facing. Allowing one basketball player with Turret’s syn-

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195. 42 U.S.C. § 12111(10)(B) (1994).

196. See *Bombrys v. Toledo*, 849 F. Supp. 1210, 1219–20 (N.D. Ohio 1993) (“The Americans with Disabilities Act makes it clear that blanket exclusions are to be given the utmost scrutiny, and are, as a general rule, to be discouraged.”).

drome to curse at an official would not compromise basketball's civility.

Again, this approach is clear (in a way that the *Martin* and *Olinger* decisions are not) about when a defendant has to offer proof about the plaintiff's individualized circumstances. If the rule is so important that it can never be changed without fundamentally changing the sport, no individualized analysis is necessary. However, under the approach proposed here, a rule must get past an intense and consistent set of factual questions to reach this category.

#### *E. Application of this Approach to Title I*

The approach proposed in this article can be extended beyond Title III and into the Title I context. The Title I "undue burden" defense incorporates the Title III "fundamental alteration" test. "While Title I provides an undue hardship defense and Title III provides a fundamental alteration defense, fundamental alteration is merely a particular type of undue hardship."<sup>197</sup> There is little substantive difference between the two inquiries.<sup>198</sup> Once the plaintiff discharges her initial burden under *Johnson*,<sup>199</sup> the burden remains on the defendant league to prove that the requested accommodation would be unduly burdensome. Essentially, what is "unduly burdensome" will be the same as what is "fundamentally altering."<sup>200</sup> As in a Title III case, the defendant in a Title I situation should have an opportunity to use the questions proposed here and prove that the rule at question can never be modified without being unduly burdensome. If the defendant cannot make that showing, she must demonstrate that waiving the rule for this particular plaintiff will be unduly burdensome.

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197. *Johnson*, 116 F.3d at 1059. See also Sharpe, *supra* note 47, at 799 ("The closest thing to Title I's undue hardship defense is the . . . fundamental alteration defense.")

198. See *Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091 (D. Colo. 2000).

199. Under Title I, this will include the additional burden of proving that the plaintiff, with the requested accommodation, can still perform the essential functions of the position, as determined by the court. 42 U.S.C. § 12111(8) (1994).

200. This includes rules that cannot be modified without causing competitive advantage, too germane to the way the game is played, or too administratively difficult to waive on a case-by-case basis.

*F. Criticisms of this Approach*

It is likely that criticism of this approach will focus on two areas. First, critics may argue that not having an individualized analysis in every case violates the ADA regulations and case law. Second, from the other side, it may be argued that this approach will allow too many cases to proceed to the individualized analysis inquiry; courts will too often be called upon to make near impossible determinations. Each of these criticisms will be addressed in turn.

*1. The need for individualized analysis in every case*

As discussed above, there is a line of cases, culminating with *Washington*, that stand for the proposition that a court cannot consider the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes.<sup>201</sup> To take the example in *Washington*: if the purpose behind an eight-semester rule is to prohibit red-shirting,<sup>202</sup> and it is obvious that the individual requesting a waiver from the rule is not red-shirting, then there should be no problem making an exception. A court should not consider the importance of the red-shirting rule to the game or program in a vacuum. As *Washington* discussed, this line of reasoning is supported by the ADA regulations,<sup>203</sup> which stress the importance of the individualized analysis, the *Arline* case,<sup>204</sup> and some commentators' views.<sup>205</sup>

201. See *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 851 (7th Cir. 1999).

202. Redshirting is the practice of deliberately holding children back in school so they will be bigger and more developed than their classmates, and thus have an advantage in athletics.

203. See 28 C.F.R. app. A § 35 (1999) ("Preamble to Regulation on Nondiscrimination on Basis of Disability in State and Local Government Services").

204. 480 U.S. 273, 287 (1987).

205. See Colleen M. Evale, Sandison v. Michigan High School Athletic Ass'n: *The Sixth Circuit Sets up Age Restrictions as Insurmountable Hurdles for Learning-Disabled High School Student-Athletes*, 5 SPORTS L.J. 109, 134 (1998); Mark R. Freitas, *Applying the Rehabilitation Act and the Americans with Disabilities Act to Student-Athletes*, 5 SPORTS L.J. 139, 162 (1998); Adam Milani, *Can I Play? The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817 (1998); Katie M. Burroughs, *Learning Disabled Student Athletes: A Sporting Chance Under the ADA?*, 14 J. CONTEMP. HEALTH L. & POL'Y. 57 (1997); John T. Wolohan, *Are Age Restrictions a Necessary Requirement for Participation in Interscholastic Athletic Programs?*, 66 U. MO. KAN. CITY L. REV. 345 (1997).

This article, and the method of analysis it proposes, does not intend to denigrate the importance of the individualized analysis. However, as discussed above, we must realize that it is an impossibility in every case. None of the aforementioned commentators address this reality, nor has the case law yet demanded that it be considered. The fact that the baskets are ten feet in basketball is so central to the game that it can never be changed. This is true even if a disabled participant, given his individualized circumstances, gains no advantage from lowering the baskets. Once we agree that there is some level of rules that can never be changed, regardless of any particularly compelling set of individualized circumstances, we must develop a method of analysis to separate changeable rules from unchangeable rules. That is the analysis that this article provides.

Moreover, in practice, this approach will not be inconsistent with the approach used in *Washington* and *Pottgen*. Under this approach, the age rule at issue in *Washington* would eventually proceed to the individualized analysis stage. Courts would just not reach that stage until the defendant has a chance to show that age rules are “essential” to the sport as a general matter. Although age rules can affect competition, a defendant would not be able to show that they are incapable of being modified without influencing competition. Moreover, they would not change the way the game is played for everyone.

## 2. *Hostility to individualized determinations*

Some may also argue that the proposed approach will allow too many cases to proceed to the individualized analysis inquiry. This line of criticism is evident in the *Olinger* decision. The *Olinger* opinion’s blanket hostility to this individualized analysis is misguided. An individualized determination will be difficult, but it will not always be impossible. Since the burden is still on the league, they must at least conclusively prove that such a determination will be impossible in this specific instance. Courts are called upon to make difficult factual findings all the time, in all areas of law. Quite simply, that is their job. As always, this determination will have to be based on the totality of the record, including expert testimony. There are rules of evidence that place external limits on evidence that is too speculative to be admitted.<sup>206</sup>

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206. See FED. R. EVID. 702 (“Testimony By Experts”); see also *Daubert v. Merrell Dow*

*G. The Test Applied—The Walking Rule in Professional Golf*

The approach advocated here would provide a superior result in both Casey Martin's and Ford Olinger's cases. It would allow for a more comprehensive judging of the importance of the walking rule to golf as a general matter and would clarify when it is appropriate to address whether waiving the walking rule gives either of the two golfers a competitive advantage. At this point, this is more than an academic exercise; the Supreme Court will soon be deciding this issue.

It is likely that both Martin and Olinger can demonstrate that using a golf cart during a competition meets the *Johnson* test and is a reasonable accommodation when looked at in the general run of cases. Therefore, the analysis of this particular situation would likely proceed to step two of the proposed approach, and the PGA or USGA would have to prove that the walking rule can never be modified without fundamentally changing the sport. To address this issue, a court should ask the seven questions listed above in an effort to determine whether waiving the walking rule would change golf into something it is not, whether it would invariably alter the competitive balance, or whether waiving the rule is administratively impossible.

Do professional golfers train at walking? Although more golfers are starting to incorporate physical fitness routines into their regimen, most do not independently practice walking. They certainly do not practice walking to the extent that a NBA player practices making baskets, or moving his feet on defense. They certainly do not practice walking to the extent that a major league baseball player practices hitting the ball. And they certainly do not practice walking to the extent that golfers practice putting or driving. Walking a golf course is not unique to golf. Rather, it is a skill that the majority of the population can and does perform. The answer to question one, then, suggests that riding a golf cart might not give a golfer a significant advantage over her competitors.

What is the link between success in walking and success in golf? Does walking in golf directly influence score? In one sense the answer is no, because players get no strokes off their game for being good walkers. But it is more complicated than that. Does skill at

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Pharmaceuticals Inc., 509 U.S. 579 (1993) (giving the standard for testing admissibility of scientific evidence).

walking without getting fatigued lead to an increased score? Here, as the *Martin* decision pointed out, it is certainly probative that even when players are permitted to ride carts, they generally choose to walk. However, one cannot ignore that golfing can be tiring, and riding a cart would lead to less fatigue. In the end, we must remember that this question focuses on whether less fatigue from riding a cart would invariably and always lead to an improved score. The answer to the next question, whether riding a cart would place other athletes at a competitive disadvantage, must also be answered with the requisite level of generality. Although these are both difficult questions, perhaps the most difficult, the USGA or PGA likely cannot demonstrate that riding a cart will invariably lead to a better score. Although possible, it is not certain, and when we proceed to the individualized analysis, we will be in a better position to evaluate the specific effects of a waiver of the walking rule in this case.

Why do the PGA and USGA have the walking rule? There are two answers to this question. One is to inject an element of fatigue into the competition.<sup>207</sup> The second is tradition. Neither is unimportant. As for fatigue, if we can imagine any possible situation where a golfer could ride a cart and still be fatigued, we should at least proceed to the individualized analysis stage. A court should also listen to the PGA's and USGA's argument that they have a large voice in defining what is fundamental to their sport, and walking has always been a part of golf. In both *Martin* and *Olinger*, the PGA and USGA attempted to argue that walking made golf what it was, akin to the bases being ninety feet apart in baseball.

Ultimately however, it is the court that must decide the answer to this question. This is no doubt odious to some. In a sense, were this approach to be applied, the governing body of a sport would no longer be in exclusive control of that sport. However, the PGA or USGA can no more make an element that discriminates against those with disability a fundamental part of their sport than it can exclude minorities. The *Olinger* opinion closes with the statement: "[T]he decision on whether the rules of the game should be adjusted to accommodate [Olinger] is best left to those who hold the future of golf in trust."<sup>208</sup> With all due respect, this is wrong. The ADA is explicit that a court must make an independent evaluation of what

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207. See *Martin*, 994 F. Supp. at 1250.

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

rules are essential. The USGA's and PGA's explanation and arguments are evidence, but the court is the ultimate fact-finder on the issue. Congress decided as much when it passed the ADA without an exception for professional sports. At the end of the day, both the *Olinger* and *Martin* courts made the correct judgment that golfing is ultimately a game of shot making, and not walking.

Independent of competitive advantage, would a modification of the walking rule change the way the game is played for all participants? Clearly it would not. Whether Casey Martin rides a cart or not does not have a direct effect on the fact that David Duvall or Tiger Woods are walking the course. Waiving the walking rule does not directly impact any other players in how they play their own game. Finally, what about the realistic administrative and financial burden of waiving the walking rule on a case-by-case basis? As discussed above, the *Olinger* opinion did not meet the ADA standard in answering this question. Although perhaps difficult, professional golf cannot demonstrate that it is impossible to deal with these cases as they come. Certainly, it is not unduly financially burdensome.<sup>209</sup>

When all these factors are considered, it becomes evident that the walking rule is not incapable of being modified without transforming golf into something it is not, invariably causing competitive advantage or disadvantage, or being unduly administratively burdensome. As such, the rule is capable of being modified without causing "fundamental" change to golf. The next question, then, is should the rule in fact be changed for Casey Martin or Ford Olinger? It is at this point, and only at this point, that a court should proceed to the individualized analysis stage.

Does walking a course give Ford Olinger or Casey Martin an advantage? Their respective medical evidence proves that it would not. Even the *Olinger* court essentially acknowledged as much.<sup>210</sup> On this ground, then, the requested accommodation should be made. At the end of the day, *Martin* got the outcome correct and *Olinger* did not.

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209. See Rick Horrow, *Golf Business Soaring: The PGA Is Enjoying Business Growth*, Fox Sports Biz Website, (visited Nov. 2, 2000) <<http://www.foxsports.com/business/views/z000405horrow1.sml>> (discussing how PGA has been experiencing unprecedented business success, as evidenced by the fact that purses have risen from \$69 million five years ago, to about \$150 million this year).

210. "Ford Olinger must ride a golf cart to play, and even with a cart he is likely to be more fatigued at the day's end than a healthy Tiger Woods or a healthy David Duvall." *Olinger*, 55 F. Supp. 2d at 937.

The Supreme Court should realize this, and decide the case accordingly.

In sum, the intent of this proposed analysis is to strike a balance between the unique importance of equal competition in professional athletics and the importance of applying the ADA in a consistent manner that does not “ruin” professional sports. There are other ADA checks against fundamental change, both before and after the “fundamental alterations” or “undue burden” analyses. First, from the outset, not every person with a mental or physical impairment can bring an ADA suit; rather, they must be “disabled” within the meaning of the ADA definition. After *Albertson’s, Inc. v. Kirkinburg* and *Sutton v. United Airlines*,<sup>211</sup> fewer individuals will qualify to bring ADA suits. Second, before the “fundamental alteration” and “undue burden” analyses, under both Title I and Title III, a professional athlete needs to prove that her requested accommodation is reasonable in the general sense, which means in the general run of cases.<sup>212</sup> All of this notwithstanding, the heart of professional sports’ and every other industry’s protection against fundamental change is the fundamental alterations and undue burden analysis contained in the ADA.

## VI. POLICY CONSIDERATIONS

The method of analysis proposed here is based on the belief that professional sports should not be exempted from the ADA in any blanket fashion. On a statutory level, this is not a particularly controversial stance. The ADA must be applied equally to professional sports because Congress, when writing the ADA, did not say that it should not.

History teaches us, however, that the lack of a textual exemption is not necessarily determinative. In *Federal Baseball Club v. National League*,<sup>213</sup> the Supreme Court created a judicial exception for Major League Baseball to federal antitrust law. That exception was upheld in *Flood v. Kuhn*.<sup>214</sup> In a manner which is eerily reminiscent of *Olinger*, the *Flood* decision was long on baseball history (the opinion

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211. For details on the *Albertson’s* and *Sutton* decisions, see *supra* note 46.

212. *Johnson v. Gambrius Co./Spoetezel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997).

213. 259 U.S. 200 (1921).

214. 407 U.S. 258 (1972).

cited the names of no less than eighty-nine famous baseball players), yet was criticized for engaging in some creative legal maneuvers to maintain baseball's antitrust protection.<sup>215</sup> Although the baseball antitrust exemption has been characterized as an anomaly, and is likely one that judges and legal scholars are not anxious to recreate, it does stand as an example of the judiciary protecting a professional sport without a statutory directive to do so. In short, both a judicially created exception for professional sports, or an amendment to the ADA exempting professional sports, are possibilities that should be rejected.

The unique role of competition in professional sports offers one rationale to justify special anti-discrimination treatment in this arena. Indeed, as the district court in *Olinger* offered, and the Seventh Circuit cited:

Athletic competition presents ADA concerns different from those presented by the workplace. In the workplace, the pertinent inquiry is whether a particular otherwise qualified individual can perform the job if a reasonable accommodation is made to allow for the person's disability. The point of an athletic competition, in contrast, is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor.<sup>216</sup>

Some commentators, concerned that any modification of tightly-monitored competition will ruin professional sports, opine that "[t]he [ADA] . . . has pushed sports . . . to the mouth of a very dark cave,"<sup>217</sup> and the ADA "has fostered a spirit of entitlement that is suspicious of any standards that may exclude any person claiming disability."<sup>218</sup>

To say that the element of competition in professional sports mandates a special exemption both puts professional sports on too high of a pedestal and denigrates the importance of competition in other workplace and public accommodations situations. Is competi-

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215. See PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 137 (2d ed. 1998) (noting that *Flood* rejected every premise upon which *Federal Baseball* was written, but still managed to uphold the exception).

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

217. John Garrity, *Taking One for the Team Battered by the Martin Case, Tim Finchem Nonetheless Deserves Respect*, *SPORTS ILLUSTRATED*, Feb. 23, 1998, at 63.

218. J. Freedley Hunsicker, *The Accommodation of Writing Disorders in Law School: A Lawyer's View* 27 *J.L. & EDUC.* 621, 622 (1998).

tion really more important in professional sports than it is in getting a job in a prestigious law firm and performing that job in an acceptable fashion? Is the competition in professional sports different in any meaningful qualitative sense from securing a place in a top medical school and performing well enough to graduate? To cast any of these situations as anything less than a zero sum gain, where one person's advantage is another's disadvantage, is misguided.

To be sure, there exists the danger that some court, somewhere, will get carried away and make a ruling that arguably disrupts the competitive balance of the sport. This danger exists, however, in all ADA cases and increases in industries where competition is keenest. Yet fear of a mistake is not a legitimate reason to close off an industry. That is why there are appellate courts. This chance of mistake is preferable to the alternative: a world where the disabled can be discriminated against in professional sports and not have an opportunity to vindicate their rights.

Given their exclusivity and preeminent place in our society, strong ADA protection is particularly needed in the case of professional sports. Professional sports are virtual monopolies. An athlete who is being discriminated against on the basis of his disability will often not have any other viable career options. They do not have the option of going to a different, non-discriminating firm within the same industry who will make the accommodation. They will not be able to make the initial discriminator "pay" for his irrational behavior by giving their value to a different employer.

Professional sports are especially dangerous hosts of discrimination. Unfortunately, this is borne out by their history. Baseball did not integrate until Jackie Robinson broke the color barrier for the Brooklyn Dodgers in 1947. The PGA had a provision in its charter requiring its members to be of the Caucasian race until 1961.<sup>219</sup> As late as 1973, eighteen United States Congressmen sent a letter to the PGA complaining that a "form of subtle discrimination taints the image of the tournament and brings no credit to the world of professional golf."<sup>220</sup> No black man was invited to The Masters until 1975.<sup>221</sup> Indeed, many of the same arguments used to combat racial

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219. See Davis, *supra* note 2, at 28.

220. *Id.* at 29 (quoting AL BARKOW, GOLF'S GOLDEN GRIND: THE HISTORY OF THE TOUR 216 (1974)).

221. See *id.*

integration in professional sports (it will ruin the sport, players do not agree with the changes) are present in the current disability debate.

Athletes are widely regarded as both role models and even heroes. As such, professional sports are an especially appropriate vehicle to carry out the ADA's goals of combating perceptions of disabled individuals as second-class citizens. Whether he intends to be or even wants to be, a disabled athlete competing at a sport's highest level can serve as an example to disabled children nationwide.<sup>222</sup> In addition, accommodating disabled individuals in professional sports sets an example for lower-level sports organizations, from intercollegiate athletics all the way down to youth recreation leagues. Likewise, exempting professional sports from the ADA would send the harmful message that disabled individuals cannot be competitive and productive at the highest levels of individual endeavor.

The ADA is the disabled community's equivalent of the Civil Rights Act of 1964. It is their civil rights statute, and they have no other federal protection. In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>223</sup> the Supreme Court found that disabled individuals were not part of a protected class; thus they were not entitled to heightened scrutiny when the government or a state actor regulated based on disability.<sup>224</sup> Instead, the Equal Protection Clause only requires the rationality test.<sup>225</sup> Constitutional protection is therefore not a viable option for a disabled plaintiff.

## VII. CONCLUSION

In *Martin* and *Olinger*, the ADA announced its arrival at professional sport's doorstep. Some, fearing that professional sports will be fundamentally and forever changed, would shut the door. Doing so is not morally right, nor is it lawful. There is nothing germane to the professional sporting world that gives it favored status in the eyes of the ADA. Congress realized as much when it passed the ADA without an exemption for professional sports. A reasoned, consistent form of the "fundamental alterations" and "undue burden" analyses

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222. Throughout their ordeals, both Casey Martin and Ford Olinger have maintained that they are not, nor do they want to be, crusaders. They just want to play golf.

223. 473 U.S. 432 (1985).

224. *See id.* at 437.

225. *See id.*

will assure that the ADA's promise—that only accommodations that are reasonable and do not fundamentally change an entity—can be a reality.

*Martin* and *Olinger* started the process, but they do not provide the coherent analytical framework necessary for deciding future ADA cases involving professional athletics. Both fall short on their factual analyses and muddy the waters as to the placement and propriety of an individualized analysis. In contrast, the set of factual questions this article provides will allow a reviewing court to determine whether a rule is capable of being modified without fundamentally altering the sport—a factual review that the *Martin* and *Olinger* cases does not give. The reviewing court should only proceed to the individualized analysis if the league cannot prove that the rule is incapable of being modified without giving competitive advantage or disturbing the essence of the game in some other manner.

Although professional sports do not deserve preferential treatment under the ADA, it is undeniable that professional sports, at times, involve special circumstances that will make ADA cases difficult to decide. Giving the league an opportunity to prove prior to the individualized analysis that the rule is incapable of being modified is a tool to “accommodate” professional sports’ uniqueness. The individualized analysis should be the last question, not the first. Although it is impossible to look into the future and predict every challenge that will come, this article gives a method of analysis that does justice to these special circumstances in a manner that is consistent with the way the ADA is applied to other employers and owner/operators of public accommodations.