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WHEELING THROUGH ROUGH TERRAIN
- THE LEGAL ROADBLOCKS OF DISABLED ACCESS IN SPORTS ARENAS

MARK A. CONRAD*

Imagine the trip to your seat at a sports arena or stadium. Although you have arrived at the gate, the sojourn is far from over. The car is parked, the tickets are ready and you have just entered. What is left is to negotiate through the ramps, escalators and stairs. The distance can be measured in hundreds of feet, if the seats are found in the lower-numbered sections, and hundreds of yards, if your seats are in the higher sections. In any event, more than a few steps of walking are involved.

The trip to your seat involves walking up three steep ramps to get to the “loge” level. Upon reaching the loge level you find the entrance to your seat section. Upon entering, you see a flight of twenty descending steps. You gingerly walk down, arrive at the correct row and look for your seat. Upon calculating that your seat is the eighth seat inside, you tiptoe gingerly through seven seated patrons (since you arrived just three minutes before the beginning of the match). After journeying the equivalent of a quarter mile from the parking lot to your seat, you fall into your seat and relax. That is until nature calls, and you need to take a trip to the bathroom — and backtracking through the seven bodies, and up the twenty steps and about 200 feet in the hallway until you reach the location. Later in the game, your accompanying son or daughter must have that pizza or hot dog. With nary a vender to be found, you again ascend, turn right into the corridor, wait in line for five minutes to get the goodies, and descend to the seat once more.

Now that the walking is over, it is time for setting your eyes on the game at hand. A close contest against the most hated rival, you enjoy the excitement and the adrenaline is flowing. Every few minutes, a heart-stopping moment approaches. Whether it is a home run, interception,
goal or basket, you and many around you have the natural inclination to
stand up during these moments. Whether it is the heat of emotion, the
need to get a better view of the activities, or just participating in the
"wave," the process of standing comes naturally.

But suppose that there is a problem. A major problem. You cannot
get out of your seat. Nor can you walk those steps. Nor ascend and de-
scent down the ramp. In fact, you cannot even get into the stadium or
arena. Due to accident or disease, your legs are immobile or badly weak-
ened. As a result, you are wheelchair bound.

In most stadiums or arenas, you cannot easily get up the ramp to get
to your section, to then climb down the stairs to get into your row. If you
are a sports fan who happens to be disabled, often your best bet is to stay
home and watch the match on television as you literally cannot get past
the stadium or arena entrance without some degree of facility.

It is no secret that going to sporting events has been a pastime for
those who have the ability to walk on their own two feet. Unfortunately,
people with difficulty walking or standing have not been able to frequent
baseball, football, basketball, hockey, or just about any organized event
in a standard sports stadium or arena.

The modern-day sports stadium or arena began after the First World
War. Larger than its predecessors with the capacity to seat tens of
thousands of fans, it had several levels, narrow stairs, and tight seating.
The same can be said for indoor arenas, which also gained prominence in
the 1920s and 1930s when refrigerated ice surfaces originated and more
winter events could be staged. Many fans took advantage of these larger
facilities. But not the disabled.

Of course, the disabled were relegated to the margins of our society
in more direct ways. Lack of employment, transportation and the like.
But if so many analogize sports with society, this analogy proves espe-
cially apt in our hypothetical. The marginalized disabled cannot enjoy
the tribal rituals of a sports event.

The more recent improvements like elevators and escalators do not
necessarily solve the problem. The disabled patron still has to find his or
her way to the particular seat. And as our hypothetical noted, even if the
patron is seated, what happens if the fans in front of him or her stand up
for a goal, or a basket, or a home run, and the disabled person cannot do
so? What if the disabled person misses every goal, every home run, and
most baskets? What is the point of going through an obstacle course to
get to the seat in the first place? As this article will discuss, this point is
far from irrelevant, in fact it is crucially important.
Fortunately, a change has occurred in American society over the last quarter century. Albeit slowly, attitudes towards the disabled have changed, and attempts to bring the disabled into the whole of society have taken greater meaning and importance. In the legal sphere, the passage of the Americans with Disabilities Act (hereinafter "ADA") in 1991\(^1\) was a clear statutory step toward the emancipation of the disabled. Among its many protections, the ADA prohibits discrimination against the disabled in all places of public accommodation.\(^2\) This includes sporting facilities and places of exercise or recreation. Title III of the Act mandates that these protections apply to all places of public accommodation, including sports stadiums and arenas.

So far, so good. Many would agree that it is high time that the disabled partake in amusements that the able-bodied have taken for granted. But what is the most appropriate way to permit such access? How many seats must be reserved and where are they to be placed? How much extra cost must the owner(s) absorb in designing a facility in such a manner? As will be discussed, the courts are just beginning to address these questions.

Let us return to our hypothetical. An owner of a basketball and hockey franchise in a given city wishes to build a new arena. He or she commissions architects to design a state-of-the-art sports palace, with all the accouterments available for the patron, whether he or she is a high-rolling corporate chieftain or a loyal fan of more modest means. The place will be stacked with luxury boxes, club seating, and more standard seating. Sure, it is expensive, but the owner is confident that the new edifice will bring in all kinds of fans to watch his teams. The local politicians back the idea, as the new palace, located in a previously impoverished or desolate area of the community, may create new jobs and revitalize the area. Getting a few votes from these sports fan constituents will not hurt either.

At the time of construction, the owner, the commissioned architects, and engineers wish to include the disabled in their facility. Aware of the ADA, they fashion a facility that not only complies with the law and accompanying regulations, but also serves the needs of a potential group of fans heretofore shut out. Out of the 20,000 seats, the owner and the architects debate how many should be accessible. Twenty percent? Ten percent? A few hundred? They also consider where and how the seats are to be distributed. The owner consults with his or her attorneys for

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2. Id. at § 12182(a).
guidance. But there is no conclusive answer. Like so many complex statutes, much of the detail is left to administrative agencies to define and regulate. If the agencies fail to promulgate effective and definable rules, headaches will surely arise. And the ADA has given its share of headaches to employers, architects, and landlords in the few short years after its enactment.3

This scenario is based on fact. The recent litigation involving the construction of the newly opened MCI Arena in downtown Washington, D.C., forced two federal Courts to address many of the concerns outlined. It also pitted the owner of the facility, his two teams, and the architectural firm against a disabled rights organization and the Justice Department. Other courts have also rendered decisions in this matter. These rulings may have a major effect on the design of every stadium and arena in the planning or construction stages for years to come.

First announced in 1994, the MCI Center was to accommodate 20,000 persons for basketball, hockey, concerts, and other entertainment events.4 $150 million of private money was pledged for this project.5 The government of the District of Columbia endorsed the project for economic and political reasons.6 One study reported that as a downtown arena it would produce $152 million of commerce annually for the District of Columbia economy.7

Designed to replace the almost quarter-century old arena housing the Washington Wizards (formerly the Bullets) of the NBA and the Capitals of the NHL, the MCI Center is said to be one of the best facilities of its kind, an ne-plus ultra state-of-the-art palace filled with all sorts of amenities for the fans.8 In a review just before its opening, the WASHINGTON POST recounted the difficulties of its construction and the grittiness of Abe Pollin’s (the owner of the arena and the NBA and NHL teams which will be housed in the MCI Center) desire for this new arena. Calling its construction a “huge challenge . . . a four-year struggle, slowed for a half year by contaminated soil, a paralyzing snowstorm

5. Id.
6. Id.
7. Id.
and asbestos,” one writer noted that it “by and large succeeds in its de-
sign” to “cultivate fist pumping excitement.” And Abe Pollin, the owner
of MCI Center and the Wizards and the Capitals said that he “had much
to be thankful for — most of all to the good lord for letting me see this
day.”

The MCI Center is but one of a number of arenas and stadiums
planned and constructed in this decade. Since 1992, new arenas have
opened in Boston, Buffalo, Philadelphia, St. Louis and Chicago. New
baseball and football stadiums have been completed, or are under con-
struction in Cleveland, Miami, Washington, D.C., and Atlanta. Planned
facilities in Milwaukee, Detroit, San Francisco, and Broward County
(FL) are in various stages of development. The ruling by the U.S. Court
of Appeals for the D.C. Circuit in Paralyzed Veterans of America v. D.C.
Arena, L.P., attempted to clarify the standards for the construction of
disabled seating, setting a precedent for these future locales. But the
legal and procedural history left a bad taste in everyone’s mouth, from
the plaintiff disabled advocates to the defendant owners and architects.
And courts in other jurisdictions have been skeptical about the reason-
ing behind the Court’s conclusions.

This essay will describe the history of the case, the applicable ADA
regulations and their interpretations by both the District Court and the
D.C. Circuit, resulting in one of the most important and underpublicized
cases in this field in recent years. Analogous cases with conflicting rul-
ings from other circuits will also be discussed.

**The ADA and its Sightline Regulations**

The ADA was enacted in 1990 to address what Congress found to be
a “serious and pervasive social problem... discrimination against individ-
uals with disabilities” in public accommodations, employment, trans-
portation, and other areas of public life. The goal of this statute is “to
provide a clear and comprehensive national mandate for the elimination

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9. Thomas Heath & David Montgomery, *Once More, the Ball Is in Pollin's Court*, WASH.
   POST, Nov. 30, 1997, at A01; Frank Ahrens, *The Lights go Up - And Down, and Up - On the
11. 117 F.3d 579 (D.C. Cir. 1997) (In the lower court, the case was entitled *Paralyzed
    1997).
of discrimination against persons with disabilities." Title III of the Act bans discrimination against persons with disabilities by owners or operators of public accommodations, which include sports stadiums and arenas. The language is quite broad and general: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations." The Act imposes greater requirements of access for facilities designed and completed for "first occupancy" after January 26, 1990. Title III of the Act requires that the design must be "readily accessible to and usable by individuals with disabilities." There is a strong presumption that this goal must be achieved. The only exception is where meeting this requirement is "structurally impracticable" which was defined by the regulation to mean "those rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility features." This exception is not applicable in the case of a new sports arena.

The statute did not precisely define what is meant by "readily accessible and usable for individuals with disabilities." Instead it directed an entity called the United States Architectural and Transportation Barriers Compliance Board (hereinafter "Board") to issue specific guidelines implementing the ADA. This Board, made up of thirteen individuals appointed by the President, and representatives of twelve governmental departments or agencies, issued recommendations to the Department of Justice (hereinafter "DOJ") for consideration and adoption. The recommendations, called the ADA Accessibility Guidelines (hereinafter "ADAAG") included a number of different implementation recommendations.

In the construction of a sports facility, two of these guidelines come into play. The first, ADAAG section 4.1.3(19) is relatively straightforward. It requires arenas which seat more than 500 persons, to have six disabled access seats plus one for every hundred total seats in excess of

14. Id. at (b)(1).
15. Id. at § 12182(a).
16. Id. at § 12183(a)(1).
17. Id.
18. Id.; See also C.F.R. § 36.401(c).
the first five hundred. Called the "one percent plus one" requirement, it has become familiar to architects and builders and is one that has not been controversial. However, section 4.33.3, which deals with the placement of wheelchair locations has not been as simple or understandable. It provides: "Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public." It also provides that "at least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location."

The language came from earlier regulations for federally-financed facilities. The term "lines of sight comparable" was not defined and its scope is the key point in this litigation. In a nutshell, the issue is whether this standard requires wheelchair seats to afford sightlines over standing spectators.

In February 1991, one month after the Board issued section 4.33.3, the DOJ sought to adopt the Board's guidelines as the accessibility standard. After a period of notice and comment, the standards were adopted. The DOJ's "final" version of section 4.33.3 was identical to the Board's earlier version.

During the comment period, a number of commentators recommended that the "lines of sight" standard should mean a "clear view" over standing spectators. Thus, if the non-disabled patrons in front of the disabled patrons were to stand, the disabled patron, unable to stand, could still see the action. When the Board first crafted its standard, it considered this matter. In fact it solicited comments on "whether full lines of sight over standing spectators... should be required." When the DOJ accepted the standard, it "omitted reference to the standing spectator problem: it simply recommended, 'lines of sight comparable to those available to the rest of public,'" and deferred the issues of standing spectators. This resulted in an inconsistency between the Board's rec-

23. Id. at § 4.1.3(19).
24. Id. at § 4.33.3 (1996) (emphasis added).
25. Id. (emphasis added).
27. Paralyzed Veterans, 117 F.3d at 581.
28. Id.
29. Id.
31. Id.
32. Paralyzed Veterans, 117 F.3d at 581.
ommendations and the DOJ's final regulation. Although both regulations are worded exactly the same, this standing spectators issue took on an important role.

Although the Board wished to address the issue of standing spectators in a future report, the DOJ initially expressed no point of view. Fortuitously, an interpretation against the notion of mandatory sightlines over standing spectators appeared. In 1992, the Justice Department rejected the standing spectator interpretation. During a conference of Major League Baseball stadium operators, the department’s chief of the Public Access section stated that “there is no requirement of line of sight over standing spectators.”

But the following year, the DOJ’s interpretation began to change. By the middle of 1993, it began an investigation into the accessibility of stadium facilities for the 1996 Summer Olympics, and first embraced the “standing spectator” (hereafter known as enhanced sightlines) concept. The result of the investigation was an agreement to make Olympic Stadium (now Turner Field) “the most accessible stadium in the world,” in part because ‘virtually all wheelchair seats would have a comparable ‘line of sight,’ so that wheelchair users can still see the playing surface even when spectators in front of them stand up during the event.’

By the end of 1994, the DOJ “formally” adopted the enhanced sightlines standard, but in a backhanded way. It published, without any notice or comment, a supplement to a Technical Assistance Manual (hereinafter “TAM”) explicitly stating that wheelchair locations must have lines of sight over standing spectators. These technical manuals, required under Title III of the ADA, are meant to assist architects in the building of the arenas; they are not supposed to be a substitute for a notice in the Federal Register. No explanation for this addition, or for the ultimate change of heart by the DOJ was made.

By the time Pollin announced plans for the MCI Center, other cities had progressed in constructing new facilities, such as the Fleet Center in Boston (housing the basketball Celtics and hockey Bruins) and the Marine Midland Arena in Buffalo (housing the Sabres hockey team). And the DOJ made the standard its own. Just one month later, the
Defendants began work on the MCI Center — located just five blocks from the Justice Department.

It must be noted that Pollin and Ellerbe Becket intended to have disabled seating at the MCI arena. The arena is designed to have two main “bowls” of seating, comprising a lower and upper level. Similar to other such facilities, the seating bowls are designed to be reconfigured for different types of events. The MCI Center has four such configurations: for basketball, hockey, and two types of stages for concert events. The capacity was set at 17,989 for basketball (of which 189 would be wheelchair spaces), 17,240 for hockey (182 wheelchair spaces), 18,648 for the larger staging (213 wheelchair spaces), and 16,249 for the smaller stage events (165 wheelchair spaces). The actual numbers conform to the one percent plus one standard required in section 4.1.33(19). These wheelchair spaces were found in both the upper and lower bowls. But not all of those seats had enhanced sightlines over standing spectators. In fact, only seventy-one of the seats for basketball and the larger staging, and forty-one seats for hockey had enhanced sightlines. Also, a great number of these seats were found in the end zones of the arena. Also, as the blueprints demonstrate, the seating was more evenly distributed in the upper bowl than in the lower, with those seats more concentrated in the center and sides. Some, but not all of the seats had lines of sight over standing spectators.

The Department never formally contacted Pollin or Ellerbe Becket as construction began on October 18, 1995. The following year, however, the Paralyzed Veterans of America (hereinafter “PVA”), a public interest group representing disabled individuals, including veterans, who have served in the armed forces, brought an action under the ADA claiming violations of section 4.33.3.42

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38. See for example Exhibits to Defendants’ Plan Pursuant to the Court’s Order of December 20, 1996, No. 96-1354 (D.D.C. Jan. 6, 1997).
40. Id. The MCI Center also includes 109 suites, which are privately sold. Each of the suites is designed with a wheelchair space in the second row of seating.
41. See Exhibits to Defendants’ Plan Pursuant to the Court’s Order of December 20, 1996, No. 96-1354 (D.D.C. Jan. 6, 1997) & Plaintiff’s Response to Defendant’s Proposed Compliance Plan, No. 96-1354 (Jan. 21, 1997). These plans can be ordered from the Clerk of U.S. District Court, Washington, D.C., Attn: Copy Desk, (202) 273-0520. The final plans referred to were completed on May 16, 1997.
42. Paralyzed Veterans, 117 F.3d at 582.
The Plaintiffs, who also brought suit against the owners of the Fleet Center in Boston, the Marine Midland Arena in Buffalo, and the Core-States Center in Philadelphia, argued that the ADA mandates that all disabled seating must have enhanced sightlines over standing spectators. Basically, the PVA sought to modify the seating plan of the MCI Center, not only to make all seats in such a manner, but to distribute the seating more evenly.44

The Defendants claimed that because of the sightline requirement's inconclusive history, a "nebulous record, comprised mostly of informal documents, press releases, announcements and correspondence" resulted. Therefore, they pointed out that there was no authoritative determination, either in the statute, or in the attorney general's regulations, or in the advisory proposals, that this would be the case. Even though a proposed draft in 1996 by the Access Board "suggested" that the Board may be ready to interpret "comparable" as requiring enhanced sightlines, it did not take an official position.46 Throughout this time, the arena was designed with the assumption that "enhanced sightlines" were not required to any degree. Not unmindful of the problem caused by non-disabled patrons standing, the Defendants proposed to withhold from sale those seats in front of the wheelchair patrons and to impose an "education and enforcement" policy which would discourage patrons seated in front of wheelchair patrons from standing up during play. Signs would be posted reminding patrons not to stand.47

THE DISTRICT COURT DECISION

The case was argued in the District Court for the District of Columbia. Ellerbe Becket was dismissed from the case at that time,48 leaving the MCI Center and Pollin's Limited Partnership as the remaining Defendants. On a summary judgment motion brought by the Defendants in October, 1996, the Court, in a bench opinion, granted deference to the DOJ's recent 1994 TAM interpretation of section 4.33.3 requiring enhanced sightlines, but did so reluctantly. Judge Thomas Hogan specifically criticized the government for not giving any expertise regarding its interpretation.49 He made this ruling despite the "good faith" of the Defendants in proceeding with its design and construction of the MCI

44. Paralyzed Veterans, 950 F. Supp. at 404.
45. Id. at 399.
46. Id.
47. Id.
49. Id. at 399.
Center believing that the ADA had not required that the wheelchair seating location must provide an enhanced sightline. With this issue resolved, it was up to the Court to determine whether the MCI Center complied with the ADA standards.

The second and more extensive ruling occurred two months later. Throughout this opinion, the lower Court was troubled with the administrative history of this case and stated some pointed criticism of the DOJ. "The Justice Department has not established a clear record of exactly what its interpretation requires. With the exception of a single, general diagram in a 1996 'Accessible Stadiums' release [regarding the Atlanta Olympic stadium], the Department has not defined or documented the technical specifications for compliance." It added, "[t]o further complicate matters, the Department of Justice has not insisted on full compliance" with the proposed line of sight standard, as demonstrated by the fact that the DOJ came to a settlement in a dispute concerning the Atlanta Olympic facilities which offered limited numbers of enhanced sightline seating.

Turning to the merits of the ruling, the Court concluded that the Defendants violated section 4.33.3 but in looking at the standards in a flexible manner, the Court did not conclude that every seat had to provide enhanced sightlines. All that was required, said the Court, was a "substantial percentage of seats" providing these sightlines. In looking at the designs, the numbers were not substantial, but could be modified with "moderate changes to achieve compliance."

In looking at the designs of the arena, the Court concluded that the numerical requirements of section 4.1.3 were met and that the seating was "sufficiently integrated" to meet the ADA's requirements. As for the sightlines, the Court noted that seventy-one spaces for basketball, seventy for hockey, seventy-one for the larger stage, and forty-one spaces for the smaller stage met the requirement. In all, less than forty percent of the wheelchair spaces provided unobstructed sightlines. The question was what to do about the other seats. The Court looked to the

50. Id. at 389.
51. Id.
52. Id. at 399.
54. Id. at 399.
55. Id. at 401.
56. Id.
57. Id.
59. Id.
two proposals advocated for the Defendants: the "no-stand" and "no-
sell" concepts.60

In rejecting both as unworkable, the Court made the following prac-
tical observations. The "no-stand" policy (euphemistically referred to as
the "educational and enforcement policy") would prevent persons from
standing up in front of wheelchair patrons to clear the line of sight.61
According to the Court, the solution was an "operational" rather than a
"design" solution,62 thereby violative of the ADA's requirement that the
design and construction must provide the access.63 Also, the disabled
would be singled out for attention and possibly worse. The Court noted
that the defendants stated that they would not eject patrons for violating
the policy.64

One can imagine the following scenario: the Washington Capitals are
playing against the New York Rangers. A wheelchair patron, rooting for
the Rangers, asks the fans in front of him or her to stop standing because
it disrupts the line of sight. It does not take a rocket scientist to figure
out the probable result.

As to the "no-sell" policy, the Court considered that idea in a more
favorable light, since it was not merely an operational measure. The fact
that no one would sit in front of the wheelchair patron would ensure an
enhanced sightline and would prevent potential ugliness from result-
ing.65 Also, this was the solution approved by the Justice Department
for one of the venues of the 1996 Atlanta Olympics.66 Therefore, it con-
cluded that the "no-sell" policy could bring the non-enhanced line of
sight seats into compliance.67 Most of those seats were found in the up-
per bowl of the arena. With such a solution, seventy-two upper level
spaces would be brought into compliance, the Defendants would achieve
enhanced sightlines in seventy-nine percent of the basketball spaces, sev-
enty-seven percent of the larger stage spaces, eighty-two percent of the
hockey spaces, and sixty-two percent of the smaller stage spaces.68

However, the Court ruled that even with this proposal, proper access
in the lower sections of the MCI Center would not be adequate.69 The

60. Id.
61. Id.
62. Id.
64. Id. at 403, n.21.
65. Id. at 403.
66. Id.
67. Id.
68. Paralyzed Veterans, 950 F. Supp. at 403, n.23.
69. Id. at 404-5.
reason was the inadequate dispersal of the seats in the lower level of the arena.\textsuperscript{70} Unlike the top level, which had adequate dispersal (as seating is distributed equally throughout the bowl) and only needed to have enhanced sightlines, the lower level had almost no spaces in the center sections. The only enhanced sections were in the corners. As the Court remarked "the spaces in the lower and club levels are ghettoized in the end zone arenas."\textsuperscript{71} The Court concluded that the MCI Center, as designed, was not "readily accessible to and usable by" wheelchair users as required by the ADA.\textsuperscript{72} The Court required the Defendants to submit proposed changes in design within thirty days of the decision.\textsuperscript{73}

Acceding to the Court's wishes, the Defendants submitted a revised plan that increased the percentage of general seating wheelchair spaces that have enhanced sightlines. For the upper deck seats, the MCI Center would implement a "no-sale" policy to withhold from sale seats in a prior row.\textsuperscript{74} For the lower bowl, the plan increased the number of front row wheelchair spaces in the center area, but would not add any more enhanced seating.\textsuperscript{75} The lower court rejected the revised seating plan. In a two-page order, Judge Hogan ruled that the seating arrangement still "does not comply with the ADA" because there were not enough enhanced view seats in the center Court area of the lower level.\textsuperscript{76} More significantly, the Court concluded that the design did not provide seating that was "sufficiently dispersed throughout the center court locations of the Lower Bowl."\textsuperscript{77} The Court did conclude that the rest of the arena's seating tiers did comply with the ADA.\textsuperscript{78} The Court ordered that a new plan be submitted within fifteen days.

The Defendants sought reconsideration of the first plan, or in the alternative, a second compliance plan was offered, where a "roll-forward" mechanism would be utilized to provide enhanced wheelchair spaces in the center court area back from the playing surface.\textsuperscript{79} This

\textsuperscript{70} Id.
\textsuperscript{71} Id. at 404.
\textsuperscript{72} Id. at 405
\textsuperscript{73} Paralyzed Veterans, 950 F.Supp. at 405-6.
\textsuperscript{74} Defendants' Plan Pursuant to the Court's Order of December 20, 1996, No. 96-1354, at 3.
\textsuperscript{75} Id. at 3-4.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Memorandum In Support Of Motion For Partial Reconsideration Or, In The Alternative, For Acceptance For First Amended Plan, Civ. 96-1354 (D.D.C. filed Feb. 28, 1997) (The Defendants claimed that the enhanced line of sight standard was improperly applied and the
plan was also denied by the lower court and ultimately the defendants and plaintiffs appealed.  

THE APPELLATE RULING

On July 1, 1997, the D.C. Circuit Court of Appeals unanimously affirmed the lower Court decision.  Of central importance was the “doctrinal” issue of whether the regulations can be enforced in the manner required by the lower court and by extension, the appellees.

The opinion by Judge Silberman, writing for the panel (also composed of Chief Judge Edwards and Judge Sentelle), had to consider what was meant by “lines of sight” and the level of deference to be given to the DOJ’s interpretation. The panel noted that the term “comparable lines of sight” is by no means obvious.  “[T]here is no indication” the Court said “that the words were intended to address sightlines over standing spectators,” but “neither is there any evidence to the contrary.” Since the words do not have an accepted meaning, the panel reasoned that the ambivalence lends credence to the notion that the interpretation of the phrase by the DOJ should be entitled to deference.

The issue of deference goes to the heart of administrative law, and the next portion of the panel’s decision presents a textbook discussion of this area of law. It is a bedrock maxim that an agency’s determination of administrative regulations is afforded deference by the courts, unless they are “plainly erroneous or inconsistent” with the regulation. The Court addressed the arguments of several academics who have called into question this standard. Although the D.C. Circuit panel rejected a new approach to administrative regulation, it noted that there was “an outer limit to that deference imposed by the Administrative Procedure Act [“APA”].” “It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’” However, the Court emphasized that section 4.33.3

Plaintiffs cross-appealed because the injunction did not require all wheelchair locations to have enhanced views).

80. Paralyzed Veterans, 117 F. 3d at 582.
81. Id.
82. Id. at 583.
83. Id.
84. Id.
85. Paralyzed Veterans, 117 F.3d at 584.
87. Paralyzed Veterans, 117 F. 3d at 584.
88. Id.
is not that type of regulation. Though section 4.33.3 was drafted by the Access Board, not the DOJ, the fact that it was adopted by the Justice Department thus made it the Department's responsibility. More significantly, since Congress required the publication of a technical manual that would "further refine or interpret" the regulation's obligations, the fact that the manual was issued "contemplate[s] a continuing administration of the regulation." Therefore, it reasoned that the manual must be given deference.

The Court discussed the Appellants' most compelling argument: that this interpretation of the regulation constituted a "fundamental modification of its previous interpretation." It is a foundation of administrative law that once the agency gives its interpretation to a regulation, it can only modify that regulation through a process of notice and comment rulemaking under the APA. But the question remained whether the change in the interpretation of the phrase "lines of sight comparable" was such a modification requiring the formal procedures. The panel concluded — barely — that it did not.

In one sense, the Court rejected the government's argument that even if the initial interpretation is forwarded by the government, it can decide to change the interpretation of an ambiguous interpretation as long as the "regulation reasonably will bear" the newer meaning. That Court rejected this broad claim. The APA makes it clear that notice and comment is obligatory before formulating regulations and amendments. However, in this case, the central point was whether section 4.33.3 was "amended" or fundamentally modified by the enhanced sightlines interpretation.

"[A]ppellants almost but do not quite establish that the Department significantly changed its interpretation of the regulation when it issued the 1994 technical manual," the opinion stated. It concluded "that the Department never authoritatively adopted a position contrary to its manual interpretation" before any modification or change occurred. Since it never released an "official" interpretation of the lines of sight

89. Id. at 585.
90. Id.
91. Id.
93. Paralyzed Veterans, 117 F.3d at 586.
94. Id.
95. 5 U.S.C. § 551(5).
96. Paralyzed Veterans, 117 F.3d at 587.
97. Id.
issue, the Court deemed that no prior determination was made.\textsuperscript{98} The prior inconsistent statements about the scope of the regulations were not treated as definitive, despite any confusion that these activities might have caused the owners of the MCI Arena.

Still, appellants argued that prior statements made by the deputy chief of the Public Access Section of the Civil Rights Division of the DOJ made to baseball stadium operators that denied an enhanced sightline were prior official determinations. "A speech of a mid-level official of an agency... is not the sort of ‘fair and considered judgment’ that can be thought of as an authoritative departmental position."\textsuperscript{99} The opinion added that it is not equivalent to the TAM issued beforehand. As a result, the enhanced sightlines standard was deemed to be the first time that the department had made a judgment on the issue.\textsuperscript{100} And since the manual interpretation was not sufficiently distinct or "additive" to the regulation, there was no notice and comment requirement necessary.\textsuperscript{101}

On cross-appeal, the appellees claimed that the lower court erred in not requiring all wheelchair seating to comply with the enhanced sightlines requirement.\textsuperscript{102} The D.C. Circuit upheld the lower court’s "substantiality" standard of eighty percent as sufficient.\textsuperscript{103} Rejecting the argument that the lower court erroneously refused to accept an amicus brief from the DOJ, in which the government argued that "substantial compliance" should only apply to limited circumstances where full compliance is "impractical," the appellate panel ruled that the lower court had no obligation to accept this brief, especially due to the government's prior lack of interest in the case.\textsuperscript{104}

The D.C. Circuit had the final word, since a certiorari petition to the United States Supreme Court was ultimately denied.\textsuperscript{105} As the first appellate decision to interpret the scope of section 4.33.3, the case was a victory for the disabled, though a controversial one. Both the District Court and the D.C. Circuit were clearly upset at the government's action or lack thereof, despite the deference given by those Courts to the DOJ. Because of the questionable procedural history, the precedential value

\textsuperscript{98.} Id.
\textsuperscript{99.} Id.
\textsuperscript{100.} Id.
\textsuperscript{101.} Paralyzed Veterans, 117 F.3d at 588.
\textsuperscript{102.} Id.
\textsuperscript{103.} Id. at 589.
\textsuperscript{104.} Id.
of the case may not carry to other circuits. If other courts are equally or more upset, and opine that such deference should not apply here, is there a chance for a contrary interpretation?

**Other Arena Access Cases**

In late 1996, after eight months of unsuccessful negotiations, the DOJ filed suit in Minneapolis against Ellerbe Becket under the ADA, alleging that the firm engaged in a pattern of violation in its construction plans for sports arenas.\(^{106}\) The suit asked the Court to bar the firm from designing any new stadiums and to assess a civil penalty not in excess of $50,000.\(^{107}\) The lawsuit cited Boston’s Fleet Center, the CoreStates Center in Philadelphia, the Rose Garden in Portland, Gund Arena in Cleveland, Marine Midland Arena in Buffalo, and the MCI Center as examples of this “pattern” by Ellerbe Beckett.\(^{108}\) The complaint alleged that “patrons confined to wheelchairs have no place to sit that guarantees a line of sight to the playing surface.”\(^{109}\)

Ellerbe Becket sought dismissal, claiming that architects are excluded from liability under Title III of the ADA as a matter of law, and in addition claiming non-meritorious defenses such as lack of standing.\(^{110}\) After rejecting the standing issue, the Court addressed the other claims, including the DOJ’s interpretation of section 4.33.3. Relying on the D.C. Circuit’s opinion in *Paralyzed Veterans*, the Ellerbe Becket court denied the motion, concluding that the enhanced sightlines standard was entitled to deference.\(^{111}\) In effect, the latter court gave collateral estoppel effect to the D.C. Circuit ruling, despite, as will be discussed, decisions to the contrary. It also affirmed the *Paralyzed Veterans* district court’s holding that “substantial compliance with [the] standard” does not mean one hundred percent enhanced lines of sight.\(^{112}\)

As to other arguments, the Court in *Ellerbe Becket* concluded that section 303(a) of the ADA applies to architects, since it concerns “owners, operators, lessors or lessees of public accommodations,”\(^{113}\) and not

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111. *Id.* at 1266.
112. *Id.* at 1269.
113. *Id.* at 1267.
designers of "commercial facilities." In rejecting this argument, the Court noted that Congress "clearly intended" that commercial facilities be subject to the accessibility standards for new construction.

More recently, Ellerbe Becket and the DOJ entered into a consent order whereby the firm agreed to design future arenas (those after the date of the consent order) with the enhanced sightlines standard so that "all or substantially all of the wheelchair seating locations in the facility provide lines of sight comparable to those for members of the general public." For projects already completed, the government agreed not to commence any enforcement actions.

Two recent opinions by federal courts in differing circuits have called the Paralyzed Veterans rationale into serious question, setting a stage for a battle over the scope and effect of the enhanced sightlines requirement. A district court in New Jersey issued a contrary opinion in Caruso v. Blockbuster-Sony Music Entertainment Center. While there are some distinguishing features between the facts in this case and those in Paralyzed Veterans, the skepticism of the government's interpretation by the judge is telling and worth analyzing.

Caruso involved the construction of a music and entertainment facility in Camden, New Jersey, which accommodates up to 25,000 people. Plaintiffs, a disabled patron and a disabled rights group, sued shortly after the facility opened in May 1995, claiming, among other grounds, violations of the enhanced sightlines standard. This court looked at the confused history of section 4.33.3 in a more skeptical manner than both of the Paralyzed Veterans' Courts (which had their own doubts about the viability of the enhanced sightlines standard).

First, the Caruso court noted important factual differences between the cases. In Paralyzed Veterans, the Defendants had notice of the 1994

114. Id.
116. Consent order, United States v. Ellerbe Becket, Civil Action No. 4-96-995 (D.C. D. Minn, Apr. 27, 1998). See also Mark Conrad, "Disabled-Seat Pact May Unify Standard for New Stadiums," N.Y.L.J., May 8, 1998, at 5. This order, announced on April 27, 1998, as this article was going to press may have a significant effect on future stadium and arena designs. Although it only applies to Ellerbe Becket, other firms may use this as an industry-wide standard, but it is too early to know for sure. Id.
117. The order also includes detailed measurements for the average heights of standing spectators and the average height of a person in a wheelchair to be used in calculating sight lines for the disabled. Ellerbe Becket, No. 4-96-995.
119. Id. at 212, n.4.
120. Id. at 210.
TAM supplemental interpretation before planning began, where as in Caruso, no such notice occurred because the facility began its planning and construction earlier. Also, in Paralyzed Veterans, the MCI Center was in the design stage, rendering accommodations much less costly than for the Sony Theater, which had already been built.

If the court had stopped there, the effect of Caruso would be minimal as the inference would be that any "new" facility in planning or design stages would be distinguished from the Caruso facts. In other words, it would be a backhanded endorsement of the Paralyzed Veterans rulings. But the Caruso court did not stop at this safe harbor. It continued its line of reasoning, viewing the TAM determination as akin to a "legislative rule" which required a formal notice and comment stage rather than an "interpretative rule," which did not. In disagreeing with the District Court's rationale in Paralyzed Veterans, the Caruso court found that the TAM provision was "an improperly promulgated substantive rule that conflicts with existing regulations and deserves little deference."

The court also found that "the notice and comment requirements of the APA cannot be evaded by merely interpreting an existing regulation to cover subject matter consciously omitted from its scope." And in disregarding the enhanced sightlines interpretation of section 4.33.3, as "irrational" given the lack of legislative history and defectively promulgated revision of an existing rule, the court concluded that "it was clear from the public record that the concept of comparable lines of sight had not been interpreted to include enhanced sightlines," an interpretation consistent since 1984.

The Rose Garden Case

The most recent case in the saga of disabled access to arenas addresses the issues of lines of sight, and novel "second generation issues" applied to disabled patrons. Independent Living Resources v. Oregon Arena Corporation, is the most exhaustive and detailed ruling rendered since MCI and may set the stage for appellate reviews as well as future litigation in the field. It exhaustively analyzed the ADA in its application of the legal standards and scope of administrative review.

121. Id. at 215, n.10.
122. Id.
124. Id.
125. Id.
126. Id. at 217 (emphasis added).
A Portland, Oregon attorney brought an action against the Oregon Arena Corporation, the builder and owner of the Rose Garden, alleging violations of the ADA. The principal tenants of the arena are the National Basketball Association's Portland Trail Blazers and a minor league hockey team. The plaintiff claimed that the arena was engaged in a pattern of discrimination due to the location of the wheelchair spaces and the lack of adequate sightlines to see the events. Each party sought summary judgment.

The motion gave the Court room to determine a number of issues about enhanced sightlines and other disabled access issues. First, the Court ruled that the placement of the 191 wheelchair seats did not provide for adequate disbursal, because the seats were concentrated in the upper level of the arena. It noted that subtracting the "excess" spaces in the upper level, the arena violated the "one percent plus one" standard of the ADA rules. It also concluded, much like the lower court in Paralyzed Veterans, that the wheelchair spaces were improperly "clustered" into the corners of the end zones, lacking uniform distribution. Calling this "scheme [a] far cry from exact or even rough proportionality" the court noted that eighty-two percent of the Rose Garden's wheelchair spaces are clustered in those locations.

The court saved the greatest amount of discussion for the scope of the sightlines. The plaintiffs argued that the arena was required to provide patrons with a line of sight over standing spectators, under section 4.33.3, citing both Paralyzed Veterans and the DOJ's interpretation (the DOJ was an amicus party in this case). But the court divided this question into three distinct issues: (1) whether DOJ could require that wheelchair users be provided with a line of sight over standing spectators; (2) whether such a requirement actually does exist and whether it is binding upon this defendant; and (3) whether defendant has any equitable defense to the enforcement of such a requirement.

After answering the first question in the affirmative, with little real debate as to the ample legal authority to support such a requirement,

128. Id.
129. Id. at 706.
130. Id.
131. Id. at 708.
133. Id.
134. Id. at 714.
135. Id. at 709.
136. Id. at 732-58.
the Court analyzed the latter two matters. The question of whether the 1994 TAM supplement was a valid "interpretation regulation" was, of course, addressed in both *Paralyzed Veterans* and *Caruso* with different results. The Court looked to both cases for guidance on the matter and its conclusion was striking.\(^{138}\) In following *Caruso*, the court could have relied upon the fact that the date on which construction occurred was before the TAM supplement had been published.\(^{139}\) But the Court did not follow this reasoning, instead it analyzed the administrative law aspects in a manner almost worthy of a heightened scrutiny analysis. Concluding that it is "irrelevant whether defendant was aware of DOJ interpretation prior to the date when construction of the Rose Garden commenced,"\(^{140}\) the Court rejected the idea advocated in *Paralyzed Veterans*, that the 1994 TAM supplement was a valid interpretation regulation.\(^{141}\) The question was "not whether [the DOJ] privately reached a different interpretation of standard 4.33.3 than the one the agency now articulates, but whether it had formally and publicly adopted such a contrary interpretation."\(^{142}\)

Unlike the D.C. Circuit in *Paralyzed Veterans*, the Court in Oregon Arena did not accept the notion that the DOJ’s lack of adoption of guidelines from the Access Board was independent from the commentaries and viewpoints of the Board.\(^{143}\) If the DOJ wished to adopt the enhanced lines of sight standard, then, the court stated, it should have published a separate commentary to satisfy notice and comment requirements.\(^{144}\) The DOJ never responded to public comments regarding individual standards, nor did it explain why it had adopted the ADAAG rule while rejecting its comments, specifically its failure to adopt an enhanced sightlines standard.\(^{145}\) In other words, if the ADAAG rule never authorized enhanced sightlines, it was not within the DOJ’s power to do so. The opinion added that the enhanced lines of sight standard could not be inferred from the general non-discriminatory language of the ADA itself.\(^{146}\)

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\(^{138}\) *Id.* at 734-47.

\(^{139}\) *Id.* at 735.

\(^{140}\) *Id.*

\(^{141}\) *Id.* at 736-37.

\(^{142}\) *Independent Living Resources*, 982 F. Supp. at 737.

\(^{143}\) *Id.* at 742.

\(^{144}\) *Id.* at 743.

\(^{145}\) *Id.* at 741.

\(^{146}\) *Id.* at 743.
In anticipation of a contrary result after a likely appeal, the district court did admit that if a higher court decided that the TAM was a valid interpretative regulation, or that a line of sight requirement may be enforced directly under the ADA, then the Defendants must comply with the enhanced sightlines requirement and no defense, equitable or otherwise, to this standard would be available.\textsuperscript{147}

Additionally, the ruling noted that the Rose Garden’s executive suites are public accommodations under the ADA and must fully comply with the ADA design standards.\textsuperscript{148} The court also concluded that money damages are not awardable and that there was no evidence of a “pattern” of ADA violations at the Rose Garden.\textsuperscript{149}

The Court in \textit{Oregon Arena} covered much administrative law territory and discussed many more disabled access issues than any prior decision on the matter. While excruciatingly detailed, it looked into the interplay of administrative rulemaking and the flaws of the DOJ in adopting the enhanced sightlines standard. Additionally, the Court ventured into an issue that may signal a second generation of cases involving disabled access.

\textbf{THE SELLOUT FACTOR}

Tickets for certain sports teams are often difficult to obtain and, not surprisingly, many sports events result in sellouts. Think of the New York Giants football team (with a decade-plus long waiting list for season tickets) or the Detroit Red Wings ice hockey team (with a 101 percent capacity of fans, meaning that some may return tickets for resale).\textsuperscript{150} Let us say that a team moves to a new arena, with approximately the same number of seats as the old one. And let us suppose that season ticket holders buy up all or nearly all of the seating in the new arena. Assuming that all, or just about all, of these ticketholders are able-bodied, how is it possible to make the arena disabled-accessible? Do the owners sacrifice some ticket holders’ locations to make way for proportional spacing of disabled seats? And what if those wheelchair areas are only available if season-ticket holders do not populate those areas?

\textsuperscript{147} Independent \textit{Living Resources}, 982 F. Supp. at 747.
\textsuperscript{148} Id. at 758.
\textsuperscript{149} Id. at 773.
The thought of creating space for the disabled when the space may not be there opens up a new Pandora's box of issues. For the first time, the Court in Oregon Arena addressed them. Apparently the Court noted that the Defendants had a policy of "infilling the wheelchair locations with portable tiers of conventional seats for use by ambulatory patrons." For Trail Blazers games, at least 133 of the wheelchair (and companion) seats were infilled with 1028 conventional seats! This amounted to about $50,000 in ticket revenue for each game, or about $2 million per season and no doubt is a powerful incentive to infill seats for every game.

Section 4.33.3 permits "readily removable seats to be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users." Since the "vast" majority of tickets for Trail Blazers games were sold on a season-ticket basis, and few were left for individual games, the availability of disabled seating was minimal, prompting the Court to note that "most wheelchair locations in the Rose Garden exist only on paper, having been infilled with conventional seats and sold to ambulatory patrons on a season ticket or longer basis." That figure came to eighty-four percent of the wheelchair seats not located on the very top level of the arena. Noting the "disparate impact" of this policy, the Court opined that the "ticket sale and operational policies furnish defendants with a powerful economic incentive to discourage wheelchair use."

Paralyzed Veterans did not consider this matter and it may not be as much of a factor if the new arena has (1) considerably more seats than the facility it replaces and/or (2) ticket demand is not high enough to sellout matches. But if disabled patrons are adversely affected by long-term ticketholders priorities, there is little question that this issue will appear in future cases. And, much like other "disparate impact" cases

151. Independent Living Resources, 928 F.Supp. at 717.
152. 28. C. F. R. Pt. 36.
154. Id. at 719. (David Snowden, Manager, Disabled Services from New York's Madison Square Garden, a facility built and renovated before the 1993 date, told Edna Williams (Prof. Conrad's research assistant) that the "majority" of the time MSG was able to accommodate all requests for disabled seating at MSG events, but he said that the availability of disabled seating mirrored the availability for the general population. For instance if the New York Knicks face the Chicago Bulls, the general population seating tends to sell out, as does the disabled seating, but they still try to accommodate the disabled as much as possible. Telephone conversation between David Snowden and Edna Williams, Jan. 22, 1998.)
155. Independent Living Resources, 982 F. Supp. at 722
and past Court remedies in the employment discrimination sphere, the results either way could have some ugly effects.

CONCLUSION

The issue of proper access by the disabled to sports venues is in a confused state. To many disabled patrons, the ADA has not yet accomplished its goal for effective access to sports arenas. But, to paraphrase Shakespeare, the fault is not as much in the architects, engineers and owners, as in the government's methods of promulgating a regulation. Although the Court in Paralyzed Veterans upheld an enhanced sightlines standard, it had to jump through some administrative law hoops to do so. The DOJ's failure to convincingly define its regulations because of its failure to institute formal notice and comment standards gives everyone involved in the Paralyzed Veterans, Ellerbe Becket, Caruso, and Oregon Arena cases unneeded headaches. That failure, under a law that in itself will not win any awards for clarity and its tardy involvement, spawned these, and potentially other lawsuits, and resulted in three contradictory rulings by three different federal circuits.¹⁵⁶

The goals of the ADA as exemplified in section 4.33.3 are certainly noble. Disabled patrons have a right to enjoy going to an arena and viewing a sporting event just like other members of society. For too long, they have been pushed to the fringes of society and the time has come to change this phenomenon. When sitting in an area, an enhanced sightline is more than just an abstract concept. It is desirable, even necessary, to give a wheelchair-seated patron a relatively full view of the events.

The recent settlement between Ellerbe Becket and the DOJ may ensure some stability to a standard that should have been adequately delineated in the first place. But if not, because of the prior inconsistent actions of the DOJ, it will take a higher court, possibly the United States Supreme Court, to resolve the confusion regarding the proper standard for sightline views. And then, as the Oregon Arena case demonstrates,

¹⁵⁶. The PVA brought class action suits against the owners of the FleetCenter (Boston), CoreStates Center (Philadelphia), the Marine Midland Arena (Buffalo), and the MCI Center, in May and June of 1996, alleging that the seating designs of these facilities violated the ADA. In the complaints involving the Marine Midland Arena and the MCI Center, the architects, Ellerbe Becket Architects & Engineers, were included. See for example East Paralyzed Veterans Assoc. v. Crossroads Arena, L.L.C., et al., No. 96 CV 0102A(F) (W.D. New York). At this time, the lawsuit against the Marine Midland Arena in Buffalo has been settled. Conversation with Lawrence Hagel, Esq., of the PVA, February 10, 1998. In Boston, suit has been filed but no action has been taken. Id. Also at this time, Abe Pollin has petitioned the United States Supreme Court for a writ of certiorari in relation to the MCI Center lawsuits. Pollin, 118 S.Ct. 1184.
that may be just the first of a myriad of issues in this field of disability access.