A Cart That Accommodates: Using Case Law to Understand the ADA, Sports, and Casey Martin

Paul M. Anderson
Marquette University Law School, paul.anderson@marquette.edu

Follow this and additional works at: http://scholarship.law.marquette.edu/facpub

Part of the Law Commons

Publication Information

Repository Citation
http://scholarship.law.marquette.edu/facpub/547

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
A Cart That Accommodates: Using Case Law to Understand the ADA, Sports, and Casey Martin

Paul M. Anderson*

Introduction ........................................................................................................... 212
I. Brief Overview Of The ADA ........................................................................ 213
II. Application of the ADA to Sports ............................................................... 215
   A. Interscholastic Sports ........................................................................... 215
   B. Intercollegiate Sports .......................................................................... 225
   C. Sports Facilities .................................................................................... 233
III. Casey Martin and Ford Olinger ................................................................. 233
   A. Place of Public Accommodation ........................................................... 233
   B. Reasonable Accommodation ................................................................. 235
IV. PGA Tour, Inc. v. Casey Martin ................................................................. 238
   A. The Decision ......................................................................................... 238
   B. Rules and Clarifications ....................................................................... 242
V. Judicial Interpretation Of The Martin Decision ......................................... 247
   A. Cruz v. Pennsylvania Interscholastic Athletic Association .................... 247
   B. Kuketz v. MDC Fitness Corp. ................................................................. 248
   C. Matthews v. National Collegiate Athletic Association ......................... 251
   D. The Sports World After Martin .............................................................. 253
Conclusion ........................................................................................................... 255

INTRODUCTION

The Americans with Disabilities Act ("ADA" or "the Act") was enacted in 1990 with the express purpose of "providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with

* Associate Director, National Sports Law Institute of Marquette University Law School where he is an Adjunct Assistant Professor of Law. B.A., cum laude, Marquette University, 1991; J.D., Marquette University Law School, 1995. Professor Anderson is the Editor of the Journal of Legal Aspects of Sport published by the Society for the Study of the Legal Aspects of Sport and Physical Activity, and the Supervisor of the Marquette Sports Law Review published by Marquette University Law School.
This elimination of discrimination has touched virtually every corner of American life. Whereas disabled individuals previously might have been ignored or merely omitted from consideration, the ADA’s clear mandate has forced these individuals to the forefront of public consciousness.

Perhaps no area of American life has been more scrutinized by the strictures of the ADA than sports. Growing out of cases under the Rehabilitation Act, disabled athletes have fought their exclusion from sports participation at virtually every level of competition.

No case has garnered more public attention, and more decisive opinions than Casey Martin’s suit against the PGA Tour. During the years it took the case to reach the Supreme Court, individuals in the sports world—from commentators to the athletes themselves—worried that a victory for this disabled athlete would spell the end of elite athletics as we know them today. While the result in the case may have surprised some, the sports world has not seen the shocking results anticipated by some commentators.

In his essay on Casey Martin in the last issue of this publication, Brian Shannon explained the results of the case in detail from the perspective of one closely involved in the litigation. Shannon’s analysis, however, similar to many critiques of the Martin case, leaves the impression that the case exists in a vacuum as if the sports world has not faced critiques under the ADA for some time. This is not an omission; it is merely a focus that is not part of the analysis for many.

In 1999 this author attempted to present a comprehensive analysis of the ADA’s impact on the sports world by looking at the many sports cases that had addressed the issue up until the time of the first decision in Martin by the Oregon district court. Now that the Supreme Court has weighed in on the issue, it is worthwhile to analyze the cases that may have led to its conclusion. This Article attempts to fill in the gap by analyzing what has occurred since 1999.

Beginning with a brief introduction to the ADA, the Article will analyze the

---


3 Brian Shannon, A Drive to Justice: The Supreme Court’s Decision in PGA Tour, Inc. v. Martin, 1 Va. Sports & Ent. L.J. 54 (2001). In fact, Shannon’s dedication to Martin’s case is a perfect outgrowth of his own personal situation—his own daughter has the same Klippel-Trenaunay Syndrome that afflicts Casey Martin. This personal stake does not cloud Shannon’s perspective, however, as he presents a cogent legal analysis of the Supreme Court’s case leading to the logical conclusion that the Court’s decision was correct.

many cases that have dealt with claims by disabled athletes seeking to participate in different levels of sport. This analysis will use these cases to explain the true impact of the ADA and the Martin case on the sports world. An initial study of the cases that came down in the two years before the Supreme Court’s Martin decision will demonstrate that the Supreme Court’s decision merely followed in the footsteps of prior judicial analysis of the impact of the ADA on the sports world. This leads into a look at the actual dispute the Supreme Court resolved in the Martin case—the Ninth and Seventh Circuit’s differing opinions in Olinger and Martin. These cases lead to a discussion of the Supreme Court’s Martin decision with a specific focus on how the decision may actually affect the sports world beyond Casey Martin. As part of this discussion, several cases that have followed the Supreme Court’s reasoning will be analyzed to demonstrate how lower courts have interpreted the decision. Finally, the actual impact of the Martin case on disabled athletes will be assessed.

I. BRIEF OVERVIEW OF THE ADA

Many commentators and courts have discussed the provisions of the ADA in depth—a recitation of these provisions is not necessary here. Moreover, in the sports context, Title II and Title III have been the provisions found applicable. Title I, which applies only to employment situations, has not been the focus and will not be discussed herein.6

Cases involving sports at the interscholastic level and, less frequently, at the intercollegiate level have dealt with claims under Title II. Title II provides that

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.7

Title II only applies to such “public entities” that discriminate against “qualified individual[s] with a disability. . .who, with or without reasonable modifications to rules policies, or practices. . .meet[] the essential eligibility requirements for

5 For further details, see, e.g., Ruth Colker, The Law of Disability Discrimination: Cases and Materials (3d ed. 2000); Anderson, supra note 4, at 46–51.

6 Although Title I has not been the focus of the case law, it does have some impact as “Title I of the ADA requires that organizations employing over 15 individuals comply with the ADA. Thus, the ADA has applied to professional leagues from its enactment and disabled professional athletes such as Tom Dempsey (NFL), Jim Abbott (MLB), and Magic Johnson (NBA) have all played in the major leagues without having sought protection provided them under the ADA.” Anita M. Moorman & Lisa Pike Masteralexis, Writing an Amicus Curiae Brief to the United States Supreme Court, PGA Tour, Inc. v. Martin: The Role of the Disability Sport Community in Interpreting the Americans with Disabilities Act, 11 J. Legal Aspects of Sport 285, 310 (2001).

receipt of the services or participation in programs or activities provided by a public entity.\(^8\)

As Title II has mostly been used in sports cases dealing with student-athletes, these claimants must show that (1) the athletic association or school is a "public entity," (2) the student-athlete is a "qualified individual with a disability," (3) the student-athlete has been excluded from participation in or denied the benefits of the activities of the association or school, and (4) the association or school could make "reasonable accommodations/modifications" that would not fundamentally alter the nature of the activities or benefits of the association.\(^9\)

Potential liability under Title III has been the issue in many other cases at the intercollegiate and professional level. Title III provides that

\[
\text{[n]} \text{o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation}.\]

Title III prohibits many types of discrimination against disabled individuals based on their disabled status. The most common prohibitions involved in the sports cases include denial of participation,\(^11\) screening of individuals with disabilities from enjoyment of the goods and services of the place of public accommodation,\(^12\) and failure to make reasonable accommodations unless such accommodations would fundamentally alter the nature of the goods and services of the place of public accommodation.\(^13\)

II. APPLICATION OF THE ADA TO SPORTS

Since its inception, the ADA has been applied to the sports world in many different ways. In 1999, this author catalogued these cases up until the Ninth Circuit's decision in Martin.\(^14\) After this decision the courts have not been silent. Many have addressed the ADA's impact on the sports world even as the United States Supreme Court listened to arguments in the Martin case. As the district court noted in Martin, "[t]he ADA does not distinguish between sports

---

\(^8\) Id. § 12131(2).
\(^9\) Kasperski, supra note 1, at 182–84.
\(^11\) Id. § 12182(b)(1)(A)(i).
\(^12\) Id. § 12182(b)(2)(A)(i).
\(^13\) Id. § 12182(b)(2)(A)(ii).
\(^14\) Anderson, supra note 4, at 51–75.
organizations or other entities when considering whether its provisions apply.\footnote{Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1246 (D. Or. 1998).} In order to assess this impact and gain a true understanding how the Martin case and the ADA may affect the sports world, a brief analysis of these cases is still important.

In an attempt to synthesize the results of the cases in the most organized manner, they will be discussed under three categories: (1) interscholastic sports, (2) intercollegiate sports, and (3) sports facilities.\footnote{All of the cases discussed in this Section were decided after January 1, 1999. For an overview of the cases before this point, see Anderson, supra note 4, at 51–75.}

A. Interscholastic Sports

Cases at the interscholastic level of sports participation (mainly high school) deal with claims brought by disabled student athletes who argue that they were barred from participating in a particular sport as a direct result of their disability. These cases often involve eight-semester rules, which bar participation in school-sponsored athletics after the eighth semester from the time a student originally enrolled, or age limitations, which bar the participation of students who reach a certain age, usually those who are older than eighteen years of age. In essence, "[d]isabled athletes are denied from participation in athletics by these rules because their disability has forced them to take longer in school to meet academic or other requirements."\footnote{Id. at 52.} As a result, they are in school for more than eight semesters or are too old to participate in school-sponsored athletics.

In such a case, disabled students will often sue the high school organization enforcing the rule that keeps them from participating in athletics. Normally they ask for a waiver from the rules as an accommodation mandated by the ADA. Until 1999, the cases in the interscholastic sports area reached inconsistent results. The United States Courts of Appeal for the Sixth\footnote{McPherson v. Mich. High Sch. Athletic Ass’n, 119 F.3d 453 (6th Cir. 1997); Sandison v. Mich. High Sch. Athletic Ass’n, 64 F.3d 1026 (6th Cir. 1995).} and Eighth\footnote{Potgen v. Mo. State High Sch. Activities Ass’n, 40 F.3d 926 (8th Cir. 1994).} Circuits determined that the ADA does not mandate that interscholastic athletic associations modify age limitation rules because such changes would be unreasonable modifications of essential rules. In reaching contrary results, the Second\footnote{Dennin v. Conn. Interscholastic Athletic Conference, Inc., 94 F.3d 96 (2d Cir. 1996).} and Eleventh\footnote{Johnson v. Fla. High Sch. Activities Ass’n, Inc., 102 F.3d 1172 (11th Cir. 1997).} Circuits made their decisions based on the mootness of the claims themselves and not on the actual merits of the claim brought.

Although the recent cases in this area have not resolved the issue, it is
helpful to analyze them to develop a full picture of the issue at the interscholastic level.\textsuperscript{22}

1. \textit{Bingham v. Oregon School Activities Association}\textsuperscript{23} 

When Adam Bingham was in the sixth grade, a physician diagnosed him as having a learning disability—Attention Deficit Disorder ("ADD"). Bingham began high school in 1994, but he did not play interscholastic sports as a freshman. The next year he participated in sports and his family, teachers, and physician believed that he benefited academically from that participation. Still, due to concerns over his overall academic progress, Bingham was held back a grade to repeat his sophomore year of high school. Moreover, in order to avoid any perceived social stigma associated with repeating a grade, Bingham’s parents decided that he would transfer to another school for the 1996–97 school year. At this new school, Bingham played football and wrestled.

In 1997, Bingham’s family moved and he enrolled at a third school for his junior year. He played football and wrestled at this school as well. At this point he had played sports for six semesters, although he had been enrolled in high school for eight semesters overall. Bingham’s current school was initially unaware of his participation record.

Eventually the school counselor, athletic director, and Bingham’s father met because of an Oregon School Activities Association ("OSAA") rule that limited a student’s athletic eligibility to eight consecutive semesters of high school—regardless of whether the student actually participated in athletics during those semesters.

Another case, \textit{Inskip v. Astoria School District} \textit{L.J.}, 1999 WL 373792 (D. Or. 1999), will not be discussed in depth here as it merely dealt with a motion for a preliminary injunction. In this case, the School District refused to allow the plaintiff to play softball. Due to the plaintiff’s autism, the District felt that she posed a danger to herself and others. Plaintiff sued the District under Title II of the ADA asking for a preliminary injunction stopping the District from barring her participation. As the court explained, and the District agreed, plaintiff is disabled and was excluded from participation solely because of her disability. The District argued that because of the danger she posed to other participants, she was not an “otherwise qualified individual,” and they did not have to accommodate her wish to play sports.

While the court admitted that “[n]otwithstanding a disabled student-athlete’s ability to perform the skills necessary for a particular sport, a significant risk of personal physical injury can disqualify the student from a position if the risk cannot be eliminated,” id. at *2, the District did not make a showing that plaintiff or any other players would face a reasonable probability of substantial injury by plaintiff playing softball. The court also determined that plaintiff would suffer irreparable harm if she was not allowed to play sports. As a result, the court determined that the plaintiff had a likelihood to succeed in proving she was a “qualified individual” and granted her motion for a preliminary injunction, meaning that the District could no longer exclude her from practice or games as a result of her disability. Id. at *2.

\textsuperscript{22} Another case, \textit{Inskip v. Astoria School District} \textit{L.J.}, 1999 WL 373792 (D. Or. 1999), will not be discussed in depth here as it merely dealt with a motion for a preliminary injunction. In this case, the School District refused to allow the plaintiff to play softball. Due to the plaintiff’s autism, the District felt that she posed a danger to herself and others. Plaintiff sued the District under Title II of the ADA asking for a preliminary injunction stopping the District from barring her participation. As the court explained, and the District agreed, plaintiff is disabled and was excluded from participation solely because of her disability. The District argued that because of the danger she posed to other participants, she was not an “otherwise qualified individual,” and they did not have to accommodate her wish to play sports.

\textsuperscript{23} 37 F. Supp. 2d 1189 (D. Or. 1999).
eight semesters. Everyone acknowledged that athletics provided Bingham with motivation to stay in school and encouraged his academic progress. The counselor suggested that Bingham be tested for an Individualized Education Program ("IEP") under the Individuals with Disabilities Education Act ("IDEA").

Even though Bingham qualified for an IEP, and the OSAA had special procedures that allowed for waivers from its rules for students with an IEP, Bingham was not given a waiver from the eight-semester rule. Subsequently, Bingham sued the OSAA under the ADA, claiming that its refusal to give him a waiver of the rule violated the Act.

According to the court, Bingham needed to prove four elements in order to prevail on his ADA claim. Initially, Bingham needed to prove that the ADA applied to the OSAA. As the court explained, the OSAA "acts pursuant to a delegation of authority from the school district boards as well as the State Board of Education," and therefore, it is a public entity covered by Title II of the ADA.

As with other cases dealing with learning disabled student-athletes, the court easily found that plaintiff was a disabled individual as required under the ADA because "in the context of pursuing his education through the high school level ... [he] is substantially limited in the major life activity of learning."

The court combined the last two elements in its analysis of whether Bingham was a qualified individual with a disability and whether waiver of the eight-semester rule constituted a reasonable modification under the ADA to accommodate his disability. The OSAA put forth four justifications for the rule: (1) to ensure safety, (2) to promote competitive fairness, (3) to encourage students to graduate in four years, and (4) to ensure that all students have an equal opportunity to participate in athletics and that no student receives a greater opportunity at the expense of another student.

Before determining whether the eight-semester rule was an essential rule or whether it could be reasonably modified in this case, the court looked at several other OSAA eligibility rules (minimum attendance and grades and age limitation), noting that the OSAA expressly provided for waivers of these rules for learning disabled students, while not allowing for similar waivers from the eight-semester rule. The court could not reconcile these differences. Specifically it noted that a similarly disabled student who is nineteen years of

25 Bingham, 37 F. Supp. 2d at 1194.
26 Id. at 1196.
27 Id.
28 Id. at 1196-97.
age could be given a waiver from the age limitation rule (barring participation in athletics to students over the age of eighteen), even though this student would present the same safety and competitive fairness concerns. Moreover, such a student could displace another student on the team, and thus implicate the specific purpose behind the eight-semester rule. The OSAA had also waived the rule for many other reasons (such as drug abuse problems, broken homes, and emotional disorders), because athletic participation motivated these students to pull themselves out of their problems and eventually graduate. This was exactly the motivation that Bingham received from his athletic participation.

The OSAA pointed to the Sixth Circuit's ruling in *McPherson v. Michigan High School Athletic Association,* arguing that requiring it to consider a student's disabled status in a waiver request would impose an immense burden on it and so would be unreasonable. The court found *McPherson* both distinguishable and unpersuasive.

Initially, the *Bingham* court noted that unlike *McPherson,* the OSAA already considered a student's disabled status in granting waivers of the other eligibility rules, so this burden on the OSAA seemed nebulous. Also, the *McPherson* case relied on a "parade of horribles" argument, claiming that such an individualized assessment of a disabled student would lead to an increase in overall assessments and tax the administrative body, here the OSAA. The *Bingham* court again disagreed with the *McPherson* court and instead noted that the fact "[t]hat there may be few or many qualified individuals with a disability is irrelevant to the reasonableness of a modification."

In the end, the court could not find that the eight-semester rule was an essential rule. Instead it found that "a waiver of the eight-semester rule under the circumstances of [Bingham's] case is a reasonable modification to accommodate his learning disability." Therefore the court ordered the OSAA to refrain from using the eight-semester rule to deny Bingham eligibility to participate in sports in 1998–99 and to rewrite the eight-semester rule to allow waivers for learning disabled students.

---

29 Id. at 1201.
30 Id. at 1202.
31 119 F.3d 453 (6th Cir. 1997).
32 *Bingham,* 37 F. Supp. 2d at 1203
33 Id.
34 Id.
35 Id.
36 Id. at 1202.
37 Id. at 1205–06. This was not the end of the *Bingham* decision, although the subsequent adjudications did not affect the result of the case. In August 1999, the court defined the procedures for
2. Washington v. Indiana High School Athletic Association

Eric Washington was a learning disabled student at Central Catholic High School in Lafayette, Indiana. Despite his long history of academic problems, he was allowed to advance to high school. During Washington’s freshman year in high school (1996–97), a school counselor suggested that he drop out because he was having severe difficulty with his coursework.

In the summer of 1997, Washington was playing in a three-on-three-basketball tournament when Central Catholic coach, Chad Dunwoody, noticed his outstanding ability. Dunwoody, who was also a schoolteacher, convinced Washington to reenroll at Central Catholic. Dunwoody began serving as Washington’s academic counselor and suggested that Washington be tested for learning disabilities even though prior tests failed to indicate any disabilities. Results of new tests indicated that Washington did have a learning disability.

The Indiana High School Athletic Association (“IHSAA”) had a rule limiting athletic eligibility to eight semesters following the student’s commencement of the ninth grade. This rule was implemented to discourage coaches from red-shirting their players and to promote competitive equality and student safety. Washington applied for a waiver of the eight-semester rule under an exception providing that the eight-semester rule can be waived if a student withdraws completely from school due to an injury and receives no academic credit during that time. Washington also relied on a hardship rule allowing the IHSAA to avoid strict construction of its bylaws if such enforcement would promote undue hardship in a particular case. The IHSAA denied Washington’s request for a waiver.

Washington then filed suit against the IHSAA alleging violations of the Rehabilitation Act and Title II of the ADA. The district court granted a preliminary injunction against enforcement of the rule against Washington,

judicial review of decisions under the OSAA’s new eight-semester rule, adopted after the initial case. Bingham v. Or. Sch. Activities Ass’n, 60 F. Supp. 2d 1062 (D. Or. 1999). The case was also appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit determined that the issue was moot because Bingham had completed high school, and therefore it vacated the district court’s injunction. Bingham v. Ediger, 2001 U.S. App. LEXIS 21808 (9th Cir. 2001).

38 181 F.3d 840 (7th Cir. 1999).
39 Id. at 842.
40 Id.
41 Id.
42 Id.
43 Id. at 842–43.
44 Id. at 843.
45 Id.
finding that waiver of the rule "would be a reasonable modification because there would be no conflict with the purposes behind the eight semester rule."\textsuperscript{46}

The IHSAA's primary goal is to enhance education through athletic participation. The court ruled that failing to accommodate Washington would contravene this goal.\textsuperscript{47} The United States Court of Appeals for the Seventh Circuit affirmed this decision and held that the potential harm to the IHSAA would be insignificant if this rule was waived for Washington.\textsuperscript{48}

The court of appeals focused on whether the IHSAA rendered Washington ineligible to play solely because of his disability.\textsuperscript{49} Initially, the IHSAA contended that Washington could not show that the IHSAA had intentionally barred him from participation because of his disability. The Seventh Circuit disagreed that liability under Title II of the ADA must be premised by an intent to discriminate as the IHSAA contested.\textsuperscript{50} Instead the court looked to the \textit{McPherson}\textsuperscript{51} case and focused on whether the IHSAA had failed to provide Washington with a reasonable modification.\textsuperscript{52} The court held that "it is possible to demonstrate discrimination on the basis of disability by a defendant's refusal to make a reasonable accommodation... plaintiffs need not prove that the IHSAA intended to discriminate on the basis of disability."\textsuperscript{53}

The IHSAA also relied on the Sixth Circuit's \textit{McPherson} and \textit{Sandison}\textsuperscript{54} decisions upholding similar eight-semester rules that barred disabled athletes and holding that they did not violate the ADA because the students were really barred by the passage of time and not the nature of the disability.\textsuperscript{55} The Seventh Circuit in \textit{Washington} found that the Sixth Circuit's determinations merely indicated that the application of a neutral rule that makes a disabled student ineligible cannot support a claim of \textit{intentional} discrimination; the Sixth Circuit, however, never indicated that the passage of time was somehow the legal cause of the ineligibility.\textsuperscript{56} In the present case, "[i]n the absence of his disability, the passage of time would not have made him ineligible."\textsuperscript{57}

The Seventh Circuit then analyzed whether Washington was a "qualified

\textsuperscript{46} Id. at 844.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 853–54.
\textsuperscript{49} Id. at 846.
\textsuperscript{50} Id. at 846.
\textsuperscript{52} Washington, 181 F.3d at 847.
\textsuperscript{53} Id. at 848.
\textsuperscript{54} Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995).
\textsuperscript{55} Washington, 181 F.3d at 848–49.
\textsuperscript{56} Id. at 849.
\textsuperscript{57} Id.
individual' covered by Title II and, therefore, whether waiver of the rule would fundamentally alter the purpose of the rule or create an undue financial and administrative burden on the IHSAA. The court noted the Eighth Circuit's decision in *Pottgen*, holding that even if a waiver would be reasonable in a particular case, it would not be required if the rule was generally an essential eligibility requirement. Instead of following this decision, the Seventh Circuit looked to the dissent in *Pottgen* and the *McPherson* case, which found that an individualized analysis of the particular case is necessary to determine whether waiver of the rule would result in an unreasonable fundamental change.

The court then turned to an individualized examination of Washington's claim. The court noted that the eight-semester rule that the Sixth Circuit refused to waive in *McPherson* was different from the rule in the *Washington* case, because it restricted eligibility to eight semesters of enrollment, while the IHSAA rules automatically created ineligibility eight semesters from the first day of enrollment even if the student was not enrolled for the full eight semesters. As the court explained, the IHSAA granted waivers of the rule in the past, and none of the purposes behind the rule would be violated by giving Washington a waiver in this case. In addition, Washington was the first individual to seek a waiver of the rule because of a disability in over a decade; in other words, granting Washington a waiver would create no administrative burden.

In the end, because the granting of a waiver for Washington would frustrate no purpose of the rule itself, it was deemed a reasonable modification of the rule as mandated by the ADA. Therefore, the Seventh Circuit affirmed the district court's decision granting Washington a waiver of the eight-semester rule.

3. *Stearns v. Board of Education for Warren Township High School District #121*

In another case dealing with a challenge to an interscholastic eligibility rule, Rickey Higgins was barred from participating in athletics after two alcohol-related incidents that violated his high school's Athletic Code of Conduct. Soon after, Higgins was diagnosed as an alcoholic. His parents informed the

---

58 *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).
59 *Washington*, 181 F.3d at 850 (citing *Pottgen*, 40 F.3d at 929).
60 *Washington*, 181 F.3d at 850 (citing *Pottgen*, 40 F.3d at 931; *McPherson*, 119 F.3d at 461, 463).
61 *Washington*, 181 F.3d at 852.
62 Id. at 855–54.
63 Id. at *2–3.
65 Id. at *3.
school of this diagnosis and asked for his eligibility to be restored, but the school board would not take this action. Higgins's mother, Elizabeth Stearns, then sued the Board of Education alleging that their actions violated the ADA.

The court allowed for the presumption that Higgins was disabled and otherwise qualified, but still found that the Board's conduct did not violate the ADA. As the court explained, the Board was unaware of his diagnosis as an alcoholic—his alleged disability—when they made the decision that he was ineligible. Therefore, they could not have made the decision as a result of his disability.

The plaintiffs argued that knowledge of an individual's disabled status is not a prerequisite to liability under the ADA or Rehabilitation Act; instead liability can be imposed on defendants merely if the decision was based on the manifestation of some sort of disability. In response, the court pointed to a Seventh Circuit decision in the employment context which stated that there should be no liability when the organization "had no knowledge of the disability, but knew of the disability's effects, far removed from the disability itself and with no obvious link to the disability," and found the plaintiffs' argument unpersuasive.

The plaintiffs also argued that the Board's failure to accommodate Higgins's alcoholism was in violation of the ADA. Pointing to the Washington case, however, the court noted that "[a] waiver of a rule is unreasonable if it is 'so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change.'" Granting Higgins a waiver from the code would create a double standard and would "eviscerate the rule itself." The waiver would fundamentally alter the rule and thwart its stated purposes; thus, it would be an unreasonable accommodation.

In the end, the court noted "[f]ederal courts must be hesitant to interfere in [a school's] operation absent a clear violation of law or the Constitution." The allegations in this case could not meet this standard.

67 Id.
68 Id. at *1.
69 Id. at *5-6.
70 Id. at *6.
71 Id. at *6-7, (quoting Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 933-34 (7th Cir. 1995)).
74 Id. at *11.
4. Long v. Board of Education, District 128

A final case which occurred after the Martin decision chronologically, but fits in this initial analysis of the interscholastic level of sports participation, involved Matthew Long, a student who was denied the opportunity to participate in lacrosse and football because he violated the school’s athletic code of conduct, allegedly due to a disability. Long sued the Board of Education seeking a temporary restraining order ("TRO") that would permit him to participate in athletics. Although the court did not address the facts of the case in any depth, the ruling resembles that in the Stearns case just discussed.

Initially, in assessing Long’s likelihood of success on the merits of the case, the court noted two possible ways that the Board could have violated the ADA. The Board would be in violation of the ADA if it knew of his disability and excluded him from participation or if it failed to provide a reasonable accommodation after determining his disabled status. As to any potential reasonable accommodation, the court, following the Stearns and Washington cases, found that “waiver of the application of the code of conduct to plaintiff would be, in the words of the Stearns court, an ‘unreasonable change,’” because it would alter the fundamental nature of the rule itself.

Even assuming that Long did have some likelihood of success, the court also determined that granting a TRO would send a message to others that an athletic code of conduct may be avoided by simply bringing an ADA challenge against the association instituting the code. The court was uncomfortable in replacing the Board’s authority to set its own rules with whatever a federal court might decide. As a result, Long’s motion for a temporary restraining order was denied.

5. Impact of the Interscholastic Cases

The cases at the interscholastic level all deal with claims against public schools or athletic associations covered under Title II of the ADA. As with the earlier cases, the issue has focused on whether modification of a particular eligibility rule will fundamentally alter the nature of the sports program offered.

76 Id. at 991.
77 See supra Section II.A.3.
78 See supra Section II.A.2.
79 Id.; see supra note 72.
80 Id. at 992.
81 Id. at 992–93.
82 Anderson, supra note 4, at 51–58.
The Bingham\textsuperscript{83} and Washington\textsuperscript{84} courts focused on an individualized analysis of the student-athlete claimants' situations, finding that waiver of the eligibility rules involved was a reasonable modification that would not fundamentally alter the nature of the sports program offered. The Stearns\textsuperscript{85} and Long\textsuperscript{86} courts came to different results because they found that waiver of the rules would result in a fundamental alteration.

It is this individualized analysis of how a potential modification requested by a particular claimant may affect the sports program itself that will be eventually drawn upon in the Martin case. Clearly, as the factual circumstances in each case will differ, the final results of these cases were necessarily different—all that seems uniform is the analysis of the ADA itself.

Moreover, these interscholastic cases are not only directly related to the intercollegiate cases that follow; they also are closely related to the Martin case itself. As one court noted, the consideration of whether an individual has been discriminated against on the basis of his or her disability under Title III is analogous to the consideration of whether an individual was a qualified individual with a disability under Title II.\textsuperscript{87} These cases analyzing rules for eligibility that control participation in sports are therefore very similar to the cases assessing actual participation in sports.

Finally, it is interesting to keep in mind that the United States Court of Appeals for the Seventh Circuit, which decided the Washington case based on an individualized assessment of the particular claimant, was the court that was made a decision causing a circuit split with the Ninth Circuit's decision in Martin—both cases will be discussed in this Article.\textsuperscript{88}

B. Intercollegiate Sports

At the intercollegiate level, the issue is much the same. Students who were held back or took special education courses as a result of their disability in high school often cannot meet the NCAA's initial eligibility requirements to participate in college athletics during their freshman year. Then, "[a]s these student-athletes could not meet NCAA initial eligibility requirements (i.e., they took courses that were necessitated by their disability although not recognized as fulfilling the core requirements of the NCAA), these student-athletes allege that

\begin{itemize}
  \item See supra Section II.A.2.
  \item See supra Section II.A.1.
  \item See supra Section II.A.3.
  \item See supra Section II.A.4.
  \item Bowers v. NCAA, 118 F. Supp. 2d 494, 517 (D.N.J. 2000) [hereinafter Bowers III].
  \item See supra Part III.
\end{itemize}
the NCAA's declaring them ineligible is a violation of the disability laws.  

Until 1999, although three courts determined that the NCAA is amenable to suit under Title III of the ADA, no higher court had determined that the NCAA could be held liable under the ADA. In fact, each case simply dealt with motions brought by the various parties; no final adjudication of the merits of the issue had occurred. Since that time, the NCAA has faced further legal challenges under the ADA, often in litigation that has continued for several years.


In 1996, Toure Butler was granted a preliminary injunction forbidding the NCAA from enforcing its initial eligibility requirements to bar him from participation in college athletics. In making this determination, the court found that Butler had at least some probability of success in proving that the NCAA was an operator of a place of public accommodation for purposes of Title III of the ADA.

Before the matter could go to trial, the NCAA entered into a consent decree under which it agreed to abide by the requirements of the ADA, although steadfastly denying that it was actually amenable to the ADA. Subsequently, Butler and the NCAA agreed that the action should be dismissed (although there has been further litigation involving the payment of attorney's fees). Although the Ninth Circuit recognized the United States Department of Justice's finding that the NCAA violated Title III of the ADA, the precedential value of the initial Butler decision that found the NCAA potentially amenable to the ADA is now certainly lessened.


Anthony Matthews was a learning-disabled student-athlete at Washington State University ("WSU"). To accommodate Matthews's disability, the NCAA

---

89 Anderson, supra note 4, at 59.
92 Id. at *5–6.
96 79 F. Supp. 2d 1199 (E.D. Wash. 1999) [hereinafter Matthews I].
granted him two waivers under its "75/25 Rule," enabling him to compete on WSU's football team during the 1997 season and be red-shirted for the 1998 season. The 75/25 Rule, as established by NCAA Bylaw 14.4.3.1.3, is one of the NCAA's minimum academic requirements. The rule provides that all student-athletes must earn at least 75 percent of the minimum number of credit hours required to maintain full-time student status. The rule further states that student-athletes cannot earn more than 25 percent of the required number of credit hours during the summer session. The purpose of the 75/25 Rule is to keep each student-athlete's workload on par with that of the general student body. Because summer school classes tend to be less demanding than regular academic year classes, the rule forbids student-athletes from making up credits by taking less rigorous summer courses.

Matthews completed seven credits during the fall 1998 semester and nine during both the spring and summer 1999 semesters. These credits comprised only 64% of the required course load for the regular academic year. Consequently, when Matthews applied for a third waiver, the Satisfactory Progress Waiver Committee of the NCAA denied it because his academic performance had not improved despite the two previous waivers. After the NCAA did not respond to his request that it reconsider the decision, Matthews sued the NCAA claiming that its conduct violated Title III of the ADA which prohibits discrimination in places of public accommodation.

Initially, the court issued a TRO against the NCAA, enjoining it from declaring Matthews to be academically ineligible and thus prohibiting him from participating in intercollegiate athletics. In the present case, the court considered Matthews's application for a preliminary injunction.

In analyzing Matthews' ADA claim, the court noted that "[f]ew courts have considered actions by the NCAA in light of the ADA, and those that have generally have not directly addressed the question of whether the ADA applies to the NCAA." The court specifically pointed to Tatum v. NCAA, which held that the ADA applies to the NCAA because the extensive control it exerts over the athletic facilities of its member institutions rendered it an operator of those facilities. The district court found that the Tatum court's reliance upon certain

98 Id.
99 Matthews I, 79 F. Supp. 2d at 1202.
100 Id. at 1204.
102 Matthews I, 79 F. Supp. 2d at 1205 (citing Tatum, 992 F. Supp. at 1120).
facts in making this determination was incorrect.\footnote{Matthews I, 79 F. Supp. 2d at 1205.}

The NCAA argued that because its organization was not an actual physical “place,” it was not a place of public accommodation in the most traditional sense, and thus could not be bound by regulations under Title III.\footnote{Id.} The court pointed to other sports cases where courts ruled that a hockey membership organization,\footnote{Ellitt v. USA Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996).} an organization sponsoring a bicycle race,\footnote{Brown v. 1995 Tenet ParaAmerica Bicycle Challenge, 959 F. Supp. 496, 499 (N.D. Ill. 1997).} and the National Football League\footnote{Stoutenborough v. NFL, 59 F.3d 580, 583 (6th Cir. 1995).} were not places of public accommodation. Consequently, the Matthews court held that the NCAA was not a place of public accommodation for purposes of Title III.\footnote{Matthews I, 79 F. Supp. 2d at 1205-06.}

Still, the NCAA could have been amenable to Title III as an operator of a place of public accommodation. The court made clear that “a facility being a place of public accommodation does not mean that Defendants are operators of that public accommodation merely because events sanctioned by them occur there,”\footnote{Id. at 1205-06.} especially when the NCAA has “no direct control over any of the facilities used by member institutions.”\footnote{Id. at 1206.} As a result, the court determined that the NCAA “simply do[es] not fall within the scope of the ADA.”\footnote{Id.}

In addition, the court reiterated that the NCAA had already granted Matthews two waivers of its academic requirements, and that Matthews nevertheless could not possibly satisfy the 75-25 rule. Requiring the NCAA to perpetually issue waivers for him would undermine the purpose of establishing requirements; the ADA would not mandate such a policy.\footnote{Id. at 1207.}

After this case, both parties filed motions for summary judgment. The court, however, decided to wait until the United States Supreme Court’s resolution of Martin before addressing these motions.\footnote{Matthews v. NCAA, 179 F. Supp. 2d 1209, 1214 (E.D. Wash. 2001) [hereinafter Matthews II].} The later disposition of this case will be discussed further on in this Article.


Plaintiff Quinton Cole, a learning-disabled football player at the University of Memphis, did not meet the NCAA’s initial eligibility requirements when

\begingroup
\footnotesize
\begin{itemize}
\item Matthews I, 79 F. Supp. 2d at 1205.
\item Id.
\item Stoutenborough v. NFL, 59 F.3d 580, 583 (6th Cir. 1995).
\item Matthews I, 79 F. Supp. 2d at 1205.
\item Id. at 1205-06.
\item Id. at 1206.
\item Id.
\item Id. at 1207.
\item Matthews v. NCAA, 179 F. Supp. 2d 1209, 1214 (E.D. Wash. 2001) [hereinafter Matthews II].
\item 120 F. Supp. 2d 1060 (N.D. Ga. 2000).
\end{itemize}
\endgroup
entering college and thus did not qualify for Division I competition. Subsequently he applied for a waiver pursuant to the NCAA Bylaws, but the NCAA’s Waiver Subcommittee determined that it lacked sufficient information to find that his academic record warranted a waiver. Plaintiff appealed this decision, having informed the NCAA that his academic deficiencies were a result of his disabled status. Plaintiff also filed suit against the NCAA, claiming that its policies violated Title III of the ADA and seeking an injunction against the enforcement of these rules.\textsuperscript{115}

The NCAA again denied plaintiff’s appeal for a waiver. The court also denied plaintiff’s request for a temporary restraining order and scheduled a hearing on his motion for injunctive relief. Prior to the hearing, the NCAA contacted Cole and suggested that he resubmit his application for a waiver. He complied and included new information that led the NCAA to declare him to be a partial qualifier.\textsuperscript{116}

Although the court determined that plaintiff’s partial qualifier status rendered his claim moot,\textsuperscript{117} its discussion of the ADA and its impact on the NCAA is still important. While the court would not reach a conclusion concerning the applicability of Title III to Cole, it nevertheless invoked the Eighth Circuit’s ruling in Pottgen, which held that “the ADA does not require an institution to ‘lower or to effect substantial modifications of standards to accommodate a handicapped person.’”\textsuperscript{118} Moreover, the court seriously questioned the reasonableness of accommodations which impose “undue financial and administrative burdens or . . . require a ‘fundamental alteration in the nature of the program.’”\textsuperscript{119}

In analyzing the NCAA’s eligibility requirements, the court reasoned that such requirements are “essential” or “necessary” if they are “reasonably necessary to accomplish the purposes of a particular program.”\textsuperscript{120} The court also explained that because the NCAA’s initial-eligibility requirements are integral and essential rules, “[t]he statute ‘does not require the NCAA to simply abandon its eligibility requirements, but only to make reasonable modifications to them’.”\textsuperscript{121} The court ultimately concluded that “[a]bandoning the NCAA’s
essential eligibility requirements in this case is not a reasonable modification."\(^{122}\)
In addition, the court hesitated to substitute its judgment for that of the NCAA, noting that "the NCAA’s rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference," and expressed its reluctance "to replace the NCAA subcommittee as the decision-maker on private waiver applications."\(^{123}\)


The Bowers case is one of the most complicated and lengthy cases involving a learning-disabled student-athlete’s claim against the NCAA. In Bowers I,\(^{124}\) the court denied the plaintiff’s motion for a preliminary injunction, finding that "a complete abandonment of the ‘core course’ requirement would fundamentally alter the nature of the privilege of participation in the NCAA’s intercollegiate athletic program," and therefore would be an unreasonable modification not warranted under the ADA.\(^{125}\)

The NCAA then filed a motion to dismiss the plaintiff’s amended complaint. In the second case, the court initially found that the NCAA could be amenable to the public accommodation provisions of Title III of the ADA because "Bowers has adequately alleged that the NCAA owns, leases (or leases to), or operates the place of public accommodation and that he was denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of that place of public accommodation."\(^{126}\) According to the court, the issue boiled down to whether the NCAA "manages, controls, or regulates the place or places of public accommodation," in a way that somehow discriminatorily denied Bowers the enjoyment of the public accommodation.\(^{127}\)

The court found that there was more than sufficient evidence that the NCAA is an “operator” of a place of public accommodation in that its eligibility rules and leasing and operating of public accommodations constitute the kind of conduct that falls under the statute.\(^{128}\) Furthermore, it determined that the NCAA’s waiver process and other accommodations might not be enough to be considered reasonable and sufficient under the ADA.\(^{129}\) The court would not judge the merits of Bowers’s claim seeking a modification of the NCAA’s rules tied to his

\(^{122}\) Cole, 120 F. Supp. 2d at 1070.
\(^{123}\) Id. at 1071–72.
\(^{125}\) Id. at 467.
\(^{127}\) Id. at 486.
\(^{128}\) Id. at 486-87.
\(^{129}\) Id. at 476.
particular situation and allowed the case to proceed to trial.130 The case came back to the district court for a third time in November 2000.131 This lengthy opinion covered many different claims, but for purposes of this analysis, only those parts of the case dealing with the merits of Bowers’s ADA Title III claim against the NCAA will be discussed.

The court began its analysis by assessing whether the NCAA is an owner, lessor, or operator of a place of public accommodation. In Bowers II, the court had determined that the NCAA is not a place of public accommodation itself, but it could be considered an operator of such a place of public accommodation.132 The Bowers III court then allowed the NCAA to introduce new evidence showing that such a conclusion would be incorrect. According to the court, the NCAA failed to present any such evidence, and the court held “as a matter of law, that the NCAA is an operator of a place of public accommodation under Title III.”133 The court also pointed to the Ganden,134 Butler,135 Tatum,136 and Matthews137 decisions and noted that only the Matthews court concluded that the NCAA is not an operator for Title III purposes.138 The court specifically disagreed with the Matthews decision and held that, as in Tatum, “the NCAA does more than merely regulate the eligibility of potential college athletes ... the NCAA is effectively determining the rules and regulations of each member’s athletic facilities.”139

The court then turned to an analysis of whether Bowers was discriminated against on the basis of his disability. Connecting the high school and college cases, the court noted that this consideration is analogous to the “otherwise qualified” and “by reason of” a disability analysis under Title II.140 In other words, Bowers needed to demonstrate a causal connection between his disabled status and the NCAA’s alleged discriminatory conduct by either showing that the eligibility criteria were unnecessary and screened out individuals with disabilities, or that the NCAA failed to provide him with the requested reasonable accommodation which would not fundamentally alter the NCAA’s

130 Id.
131 Bowers III, 118 F. Supp. 2d at 494.
132 Bowers II, 9 F. Supp. 2d at 488–89.
133 Bowers III, 118 F. Supp. 2d at 515.
138 Id.
139 Id. at 516–17.
140 Id. at 517.
operation.

Initially, the court determined that the NCAA had not provided sufficient evidence to demonstrate that the core course requirement is essential or that it does not tend to screen out individuals with disabilities.\textsuperscript{141} It was still an open question, however, whether Bowers was discriminated against by the implementation of "unnecessary eligibility criteria that screen out individuals with disabilities."\textsuperscript{142}

The court next moved to an analysis of whether Bowers could meet these requirements if he was given a reasonable accommodation. The NCAA could still argue that such an accommodation is not warranted because it would fundamentally alter the requirement itself. Because the NCAA had not carried its burden of demonstrating that the requirements are essential, the court could not reach a conclusion as to the requirement's fundamental nature, and thus could not hold that Bowers's proposed modification would fundamentally alter the NCAA's eligibility program.\textsuperscript{143}

The NCAA argued that the waiver procedure that Bowers used was a sufficient accommodation to his disabled status. As the court explained, "[w]hether an accommodation is reasonable 'involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question.'"\textsuperscript{144} Moreover, the focus is not on the reasonableness of the modification in some general sense; the focus is on "what is reasonable given the specific facts of Bowers's circumstances."\textsuperscript{145}

The court was not persuaded by Bowers's arguments that the waiver process began too quickly, that he had no knowledge of the process before entering college, and that the members of the Waiver Subcommittee were unqualified.\textsuperscript{146} It did, however, conclude that the waiver process occurred too late to be effective for Bowers because by the time the process began, it was too late for him to receive any scholarship money and participate in athletics during his freshman year.\textsuperscript{147} Therefore the court found that "the waiver review process that the NCAA conducted for Bowers... was not a reasonable accommodation as required under Title III of the ADA."\textsuperscript{148}

\textsuperscript{141} Id. at 518–19.
\textsuperscript{142} Id. at 519.
\textsuperscript{143} Id. at 520.
\textsuperscript{144} Id. at 521 (citing Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995)).
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 521–23.
\textsuperscript{147} Id. at 523–24.
\textsuperscript{148} Id. at 524.
The case returned to court in February 2001 for a fourth time. This case involved the NCAA's motion for reargument because it had changed its rules and so argued that Bowers could not be given injunctive relief as he is not suffering from any continuing and present adverse affects of his initial eligibility status, because under the new rules Bowers is able to receive a fourth year of eligibility. The court held that his claim based on the year he was ineligible was no longer valid. Therefore, Bowers no longer had standing to seek injunctive relief because he has now been placed in the same position (able to participate for four years) as he would have been had he been an initial qualifier. The NCAA's motion was granted.

5. Impact of the Intercollegiate Cases

At the intercollegiate level, courts have addressed claims by disabled individuals arguing that the NCAA's eligibility requirements discriminate against them as a result of their disabled status. Similar to the Martin case, these claims focus on potential liability under Title III of the ADA. The courts have focused on two main issues: (1) whether the NCAA's eligibility requirements are essential such that their modification would fundamentally alter the nature of the NCAA's operations, and (2) whether the NCAA itself is covered by Title III as a place of public accommodation.

As to the first issue, the Matthews and Cole courts determined that the NCAA's rules are essential and that their modification would fundamentally alter the NCAA's requirements, while the Bowers III court did not feel that the NCAA carried its burden of proving that these rules were essential.

As to the second issue, while the Matthews court found that the NCAA itself is not a place of public accommodation covered under Title III, the Bowers III court specifically disagreed with Matthews and found that the NCAA is a place of public accommodation covered by Title III.

Based on these decisions, the issue of whether a sport association like the NCAA is subject to Title III is still unclear. However, these courts, most significantly in Bowers III, also undertook the type of individualized assessment of the student-athlete's claims as was seen in the interscholastic cases. Again, it is this individualized assessment that was eventually important in the Martin case itself.

150 Id. at 614. The case returned to court a fifth time in August 2001. This case involved the New Jersey Law Against Discrimination and not the ADA, so its resolution is not pertinent to this discussion. Bowers v. NCAA, 151 F. Supp. 2d 526 (D.N.J. 2001) [hereinafter Bowers V].
C. Sports Facilities

One of the most fertile areas in sports for litigation involving the ADA has been in the area of sports facilities. Typically these cases focus on access to or use of the facility itself by disabled patrons and not in any way on eligibility or participation issues concerning the athletes themselves.\(^{151}\) Therefore, in the overall analysis of participation by disabled athletes in sports, these cases are only peripherally important and will not be discussed in depth herein.

III. CASEY MARTIN AND FORD OLINGER

From the beginning of the dispute, Casey Martin's plight has been intertwined with that of Ford Olinger. Both are exceptional golfers who have serious disabilities that affect their ability to walk and both sued one of golf's governing bodies claiming that they should be allowed to use a golf cart in competition.\(^{152}\) Although the courts reached different results, the appellate decisions involving these golfers essentially focused on the same two issues. It is the court's disagreement in these cases that lead to the Supreme Court's final resolution of the issue.

A. Place of Public Accommodation

Both cases were brought under Title III of the ADA. As such, the initial consideration for each court was whether the USGA or PGA Tour was a place of public accommodation covered under the statute.

After the district court held that the PGA is subject to the ADA and must provide Casey Martin with the use of a cart as a reasonable accommodation to his disability, the PGA Tour appealed to the United States Court of Appeals for the Ninth Circuit.\(^{153}\) In focusing on the issue of whether the PGA Tour is a place of public accommodation covered by Title III, the Ninth Circuit addressed the Tour's argument that although Title III specifically covers a golf course, the competitor's area behind the ropes during a PGA event is not a place of public accommodation.

Initially, the court pointed to the intercollegiate cases discussed and noted

\(^{151}\) Recent cases in this area include Caruso v. Blockbuster-Sony Music Entm't Centre at the Waterfront, 193 F.3d 730 (3rd Cir. 1999); Lara v. Cinemark USA, Inc., 207 F.3d 783 (5th Cir. 2000), aff'd without opinion, 213 F.3d 639 (5th Cir. 2000); Lonberg v. Sanborn Theaters Inc., 2001 U.S. App. LEXIS 21065 (9th Cir. 2001); Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293 (D.Or. 2001); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357 (S.D. Fla. 2001).

\(^{152}\) For an in-depth discussion of initial decisions involving Olinger and Martin, see Anderson, supra note 4, at 75–86, and Shannon, supra note 3, at 75–80.

\(^{153}\) Martin v. PGA Tour, Inc., 204 F.3d 994 (9th Cir. 2000).
that "the underlying premise of the cases dealing with disabled student athletes is that Title III applies to the playing field, not just the stands." Therefore, the fact that access to some part of a golf course or other playing field may be limited during competition "does not deprive the facility of its character as a public accommodation." The PGA Tour also argued that because its tournaments are restricted to the best golfers, they cannot be considered open to the public, at least during the competitions themselves. As the Ninth Circuit explained, however, "the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation." In fact, any member of the public who pays a $3,000 entry fee and supplies two letters of recommendation can try out for qualifying school—the first step to participation on the PGA Tour. Although eventually only the highest qualified golfers reach the elite level of the PGA Tour, the court found "no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation." Accordingly, the Ninth Circuit concluded that golf courses remain places of public accommodation during PGA Tour tournaments.

The United States Court of Appeals for the Seventh Circuit came to a much different conclusion. Initially, the district court granted Ford Olinger a temporary restraining order, allowing him to use a cart in the qualifying stages for the 1998 U.S. Open as an accommodation of his disabled status. Even with this accommodation, Olinger was unable to qualify for the Open. Thereafter, following a trial, the district court agreed with the USGA and denied Olinger's further use of a cart in competition. Olinger then appealed the decision to the United States Court of Appeals for the Seventh Circuit.

In a decision rendered the day after the Ninth Circuit's decision in Martin, the Seventh Circuit initially addressed the USGA's argument, similar to the PGA

---

155 Martin, 204 F.3d at 997.
156 Id. at 998.
157 Id. at 999.
158 Id.
159 Olinger v. United States Golf Ass'n, Case No. 3:98CV252RM, at 3 (N.D. Ind. May 15 & 18, 1999); Anderson, supra note 4, at 84–86.
161 Olinger v. United States Golf Ass'n, 205 F.3d 1001 (7th Cir.), petition for reh'g & reh'g en bane denied, 2000 U.S. App. LEXIS 14464 (2000).
162 The Ninth Circuit filed its decision on March 6, 2000, while the Seventh Circuit filed its decision on March 7, 2000.
Tour, that the courses used for its competitions are subject to the ADA outside the actual areas of the competition where the general public has access, but not subject to the ADA within the competition areas.\textsuperscript{163} The Seventh Circuit would not resolve this issue as it believed that the case could be resolved on a much narrower issue—the nature of the requested accommodation itself.\textsuperscript{164}

An analysis of the courts' determinations in regard to this issue is now necessary.

\textbf{B. Reasonable Accommodation}

In addressing the reasonableness of Casey Martin's request to use a cart during competition as an accommodation to his disabled status, the Ninth Circuit framed the issue as simply "whether the accommodation... fundamentally alters the PGA and Nike Tour competitions."\textsuperscript{165} The PGA Tour argued that allowing Martin to use a cart would fundamentally alter the nature of its competition, because walking is an essential part of the game of golf at the PGA level and Martin's use of a cart would provide him with a competitive advantage over other golfers. Observing that the official rules of golf do not require players to walk, the court recognized that "walking is not essential to the generalized game of golf."\textsuperscript{166} It also noted that the use of a cart by Martin is reasonable not only because it solves the problem of his access to the competition, but also because carts are already used in various PGA Tour-sponsored competitions already.\textsuperscript{167}

Similar to the interscholastic and intercollegiate cases already discussed, the Ninth Circuit also focused on an individualized analysis of whether Martin's use of a cart would fundamentally alter the nature of the PGA Tour's competition. The district court found that the fatigue factor injected into the game of golf by walking was not significant and that when given the choice most players chose to walk instead of using a cart.\textsuperscript{168} The district court also held that even with a cart, Martin endures greater fatigue than other able-bodied golfers; he gains no competitive advantage from the use of a cart.\textsuperscript{169} The Ninth Circuit agreed with the district court and found that "[a]ll that the cart does is permit Martin access to

\begin{footnotesize}
\textsuperscript{163} Olinger, 205 F.3d at 1004–05.
\textsuperscript{164} Id. at 1005.
\textsuperscript{165} Martin, 204 F.3d at 1000.
\textsuperscript{166} Id. at 999.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 1000 (citing Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1250–51 (D. Or. 1998)). For an interesting study of the actual potential fatigue factor associated with walking during a round of golf, see John M. Kras & Brian T. Larsen, A Comparison of the Health Benefits of Walking and Riding During a Round of Golf, 6 Int'l Sports J. 112 (2002).
\textsuperscript{169} Martin, 204 F.3d at 1000.
\end{footnotesize}
a type of competition in which he otherwise could not engage because of his
disability. That is precisely the purpose of the ADA.”

Following the Sandison, McPherson, and Pottgen cases that determined that
it would be an undue burden for high schools to assess whether an
accommodation to a student athlete’s disability leads to a competitive advantage,
the PGA Tour also argued it would be an undue burden for it to undertake a
similar individualized inquiry to determine whether any disabled individuals
using carts would have an advantage over other competitors. The Ninth Circuit
pointed out that the decisions in these cases were based on each court’s finding
that the eligibility rules involved were essential because they protected
competition at the lower age group and prevented redshirting. The
decisions were premised on concerns about creating undue administrative burdens; this was not the case in the golf context, as the court found the fatigue factor to be insignificant.

The Ninth Circuit also made clear that it did not “share the antagonism to
individual determinations reflected in these cases.” Instead, finding support
from the Seventh Circuit’s decision in Washington, it found that “the inquiry
must focus on the individual exception...in light of the plaintiff’s
individualized characteristics,” and that “[n]othing in the record establishes
that an individualized determination would impose an intolerable burden on
PGA.” Therefore, in analyzing Martin’s individualized situation, use of a cart
was a reasonable accommodation that did not fundamentally alter the nature of
PGA Tour competition.

As stated earlier, the Seventh Circuit found in Olinger that it could resolve
Olinger’s entire claim based on an analysis of the reasonableness of allowing
him to use a cart as an accommodation to his disability. The court also pointed
to Sandison and Pottgen, but it used those cases in support of the rule that “the
ADA does not require entities to change their basic nature, character, or purpose,
in so far as that purpose is rational, rather than a pretext for discrimination.”
The court agreed with the district court’s conclusion that the nature of the
competition would be fundamentally altered “if the walking rule were eliminated
because it would ‘remove stamina...from the set of qualities designed to be

170 Id.
171 Id. at 1001.
172 Id. at 1002.
173 Id.
174 Id. (emphasis in original).
175 Id.
176 Olinger, 205 F.3d at 1005.
tested" in USGA competition.177

The court found the testimony of Ken Venturi very persuasive. Venturi is a retired highly successful golfer and a golf analyst for CBS Sports. Venturi recounted the 1964 U.S. Open that was played in temperatures near 100 degrees with 97 percent humidity. Battling dehydration and against doctors' orders, Venturi completed and won the tournament on the verge of collapse. According to Venturi, if another competitor had been allowed to ride a cart, "there would have been a 'tremendous advantage to the other player.'"178 Venturi also recounted Ben Hogan's win at the 1950 U.S. Open after a severe car accident led doctors to tell him that he would never walk again. Although the Seventh Circuit admitted that Olinger's disability is more dire than Hogan's situation in 1950, to the court it "emphasizes the importance and tradition of walking in championship-level tournament golf competition."179

The Seventh Circuit also agreed with the district court's determination that it would be an administrative burden to ask the USGA to develop a system to evaluate whether requests for waivers were from applicants that were truly disabled and deserving or merely from those wanting to use a cart. The Seventh Circuit agreed with the district court that this would be an unnecessary burden for the USGA to undertake.180

In the end, the Seventh Circuit held that "the decision on whether the rules of the game should be adjusted to accommodate ... [a disabled individual] is best left to those who hold the future of golf in trust."181 The court would not force the USGA to alter its rules to accommodate Ford Olinger.

Many commentators have debated whether the Ninth or the Seventh Circuit's reasoning is correct.182 Fortunately, the United States Supreme Court has provided the ultimate answer with its ruling in the Casey Martin dispute.

177 Id. at 1006.
178 Id.
179 Id. at 1007.
180 Id.
181 Id.
IV. PGA TOUR, INC. v. CASEY MARTIN\textsuperscript{183}

In order to understand how the Supreme Court has clarified the way in which the ADA can and may affect the sports world, a brief description of the case itself is necessary.

A. The Decision

On appeal from the Ninth Circuit, the United States Supreme Court distilled the case down to two major issues: (1) whether the ADA protects access to the PGA Tour’s tournaments by a qualified entrant with a disability, and (2) whether a disabled contestant may be denied the use of a golf cart as a modification because such use would fundamentally alter the nature of the tournament itself.\textsuperscript{184}

In resolving these issues, the Court first addressed whether walking is actually a rule of golf so that the use of a cart is specifically prohibited. The Court looked to the Rules of Golf jointly written by the USGA and the Royal and Ancient Golf Club of Scotland and found that they do not prohibit the use of golf carts. The Court also noted that the “Conditions of Competition and Local Rules” allow for participants to use a cart during qualifying rounds and that the Senior Tour allows contestants to use golf carts. Finally, the “Notices to Competitors” or hardcards for particular events often allow for the use of a cart to speed up play. All in all, there are many times when a participant is allowed to use a golf cart in a PGA Tour event.

Early on, the Court also noted that Casey Martin’s disability, Klippel-Trenaunay-Weber Syndrome, causes him specific problems when walking. According to the Court, “[w]alking not only cause[s] him pain, fatigue, and anxiety, but also create[s] a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required.”\textsuperscript{185} In order to participate in a PGA Tour event, Martin must be able to use a cart. Still, at trial, the PGA Tour insisted that walking during a PGA tournament is a substantive rule of competition, and that waiving this rule for any individual would fundamentally alter the nature of the competition.

Turning to the substantive issues, the Court found that the PGA Tour’s events fit easily within Title III of the ADA. These events occur on “‘golf courses,’ a type of place specifically identified by the Act as a public accommodation,” and at all relevant times the PGA Tour “‘leases’ and ‘operates’
golf courses to conduct its Q-School and tours.\textsuperscript{186} As a result, "Title III of the ADA, by its plain terms, prohibits petitioner from denying Martin access to its tours on the basis of his disability."\textsuperscript{187}

The PGA Tour argued that Title III is merely concerned with discrimination against "clients or customers" seeking to obtain "goods and services" at places of public accommodation, and so while it may protect spectators viewing a PGA event, it does not apply to participants "inside the ropes." The Court found this argument unpersuasive. It pointed out that PGA events offer two potential benefits or services—"that of watching the golf competition and that of competing in it."\textsuperscript{188} Therefore, there are two sets of clients or customers: spectators at the events and actual players in the tournaments. In the end, "[i]t would be inconsistent with the literal text of the statute as well as its expansive purpose to read Title III’s coverage... any less broadly."\textsuperscript{189}

Although the Court found that Title III of the ADA does apply to the PGA Tour, the Tour could still avoid allowing Martin to use a cart if such a modification would fundamentally alter the nature of a PGA Tour tournament. The Court explained that a modification might constitute a fundamental alteration in two ways: (1) "[i]t might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally;"\textsuperscript{190} and (2) "a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and... fundamentally alter the character of the competition."\textsuperscript{191}

In assessing whether the use of a cart would fundamentally alter the nature of PGA Tour tournament golf, the Court noted that the essence of golf is shot-making, and thus the "use of carts is not itself inconsistent with the fundamental character of the game."\textsuperscript{192} As one commentator noted,

\begin{quote}
[g]olf, even PGA-level competition, is not a contest in which speed, mobility, size, or quickness is essential (in contrast to sports like tennis, soccer, basketball, football and running). The lowest score wins in PGA events. There is no bonus reduction of strokes for fast play; no style points for speed or walking form; no requirement to run between shots; and no penalty for moving up the fairway too
\end{quote}

\textsuperscript{186} Id. at 1890 (citations omitted).
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 1892.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 1893. The Court noted that changing the diameter of the hole from three to six inches might be such a modification.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
slowly (although time limits apply once the ball is reached and before it is struck). The game is about skilled shot-making, not walking.\textsuperscript{193}

As already explained, the Rules of Golf do not include a walking rule; the only place it is included is in the particular event hardcards as an optional condition—clearly not an essential attribute of the game itself. Moreover, as the PGA Tour allows carts to be used at Senior Tour events and at certain other PGA and Nike Tour events, “the walking rule is not an indispensable feature of tournament golf either.”\textsuperscript{194}

The PGA Tour argued that the general game of golf is much different than the game it sponsors, what it referred to as—golf at the “highest level”—a game that does not allow for a contestant to use a cart. This is because walking injects a certain fatigue factor into each contestant’s game—if one contestant uses a cart, he will not face this same fatigue and may have a competitive advantage over other competitors. According to the PGA, this type of competition is only meaningful if all competitors are subject to the same rules, and a “waiver of any possibly ‘outcome-affecting’ rule for a contestant would violate this principle and therefore . . . fundamentally alter the nature of the highest level athletic event.”\textsuperscript{195} The Supreme Court did not agree with this argument.

The Court pointed out that there are many circumstances—for example, weather, green conditions, lucky bounces—that can have as much of an effect on the outcome of an event as the potential fatigue an individual contestant will feel as a result of walking the course. In addition, the Court supported the district court’s determination that the fatigue factor from walking during a tournament “cannot be deemed significant.”\textsuperscript{196} Finally, when given the option of using a cart, “the majority of golfers in petitioner’s tournaments have chosen to walk, often to relieve stress or for other strategic reasons.”\textsuperscript{197}

Even assuming that the fatigue factor was significant and potentially “outcome affecting,” the PGA Tour failed “to consider Martin’s personal circumstances in deciding whether to accommodate his disability,” and this “runs counter to the clear language and purpose of the ADA.”\textsuperscript{198} This is the exact individualized inquiry mentioned in the discussion of the many sports cases that have interpreted the ADA’s requirements. In reasserting this focus on the individual and inferentially supporting the analysis in these cases, the Supreme

\textsuperscript{193} Shannon, supra note 3, at 94.
\textsuperscript{194} Martin, 121 S.Ct. at 1895.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 1896.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
Court stated the test for making this determination, "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." 199

Furthermore, answering the PGA's argument that any change in what it called "outcome affecting" rules would cause a fundamental alteration, the Court realized that what the Tour was really arguing was that it was exempt from Title III's reasonable modification requirements. As the Court explained, Title III "carves out no exemption for elite athletics, and given Title III's coverage not only of places of 'exhibition or entertainment' but also of 'golf courses,' its application to petitioner's tournaments cannot be said to be unintended or unexpected." 200

Therefore, in making the individual evaluation of Casey Martin, realizing that in order to participate he must use a cart, the Court held that "allowing Martin to use a golf cart would not fundamentally alter the nature of [the PGA Tour's] tournaments." 201 While the purpose of the walking rule is to inject fatigue, it was undisputed that Martin will endure greater fatigue than an able-bodied contestant even with the use of a cart. The rule "is not compromised in the slightest" by allowing Martin to use a cart and this modification to a "peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament." 202

The Supreme Court was also aware that this decision imposes some administrative burden on operators of places of public accommodation like the PGA Tour. The Court made clear, however, that these burdens "could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities." 203

199 Id.
200 Id. at 1896–97 (citations omitted)
201 Id. at 1897. As one commentator noted, the decision in Martin "is in sharp contrast to the Olinger opinion, which endorses maintaining the sport as it has always been played, a process that might approve the very discrimination by intent or neglect that the ADA is intended to remedy." Alison M. Barnes, The Americans with Disabilities Act and the Aging Athlete After Casey Martin, 12 Marq. Sports L. Rev. 82 (2001).

Another commentator observed that "[g]iven the substantial fatigue and pain caused by Martin's disability, he might have asked to be allowed to play only nine of the requisite eighteen holes, then multiply his score by two. But, that would be a fundamental alteration of the sport—his score would not be based on shot-making over the full course." Shannon, supra note 3, at 92.

202 Martin, 121 S.Ct. at 1897.
203 Id. Concomitant with this decision, the Supreme Court also vacated the Seventh Circuit's decision
B. Rules and Clarifications

The Supreme Court's decision is a perfect outgrowth of the sports cases discussed earlier. Specifically, in five areas the Supreme Court clarified exactly what type of scrutiny is necessary when a disabled individual sues a sports organization under the ADA.

1. Fundamental Alterations

In assessing claims made by disabled student-athletes, the interscholastic and intercollegiate athletic cases came to inconsistent results. Several courts determined that a waiver of eligibility rules would fundamentally alter the nature of the sports program involved, while other courts determined that a waiver was reasonable because the sports organizations' rules were not essential or fundamental.

While discussing this fundamental alteration language, the Supreme Court delineated a test for future cases to follow. A modification might constitute a fundamental alteration in two ways: (1) "[i]t might alter such an essential aspect of the game . . . that it would be unacceptable even if it affected all competitors equally" and (2) "a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and . . . fundamentally alter the character of the competition."

In following this rule, the Court agreed with the Ninth Circuit that allowing Martin to use a cart (1) would not alter an essential aspect of the game of golf—contrary to the Seventh Circuit's decision in Olinger—because the walking rule is not an essential or fundamental rule of golf, and (2) Martin's use of a cart did not give him an advantage over other competitors and as a result it did not fundamentally alter the competition.

It is with this second point that the Seventh Circuit's decision seems most in Olinger and remanded the case to the Seventh Circuit for further proceedings. Olinger v. United States Golf Ass'n, 121 S.Ct. 2212 (2001), on remand, 2001 U.S. App. LEXIS 20379 (7th Cir. Sept. 4, 2001).


206 Martin, 121 S. Ct. at 1893.

207 Id.
nebulous. If the Seventh Circuit would have undertaken the type of individualized assessment necessary under the ADA to determine whether Olinger required a cart, its decision may have been more in line with what the Supreme Court eventually decided.

In answer to the Supreme Court's decision, many individuals feared that the sports world would now open itself to modifications of games cherished by the public to somehow accommodate disabled individuals. As one commentator noted, however, "[t]he ADA limits the scope of modifications to those that are reasonable which do not fundamentally alter the nature of the sport. With that inherent mechanism in the ADA to limit modifications, the advocates of the chaotic slippery slope theory need not fear the prospect of motorized wheelchairs in professional baseball games." Moreover, "[w]hat this argument conveniently ignores is that much of the business of law is about drawing lines. Judges are paid to do so, and they generally do it well."

A recent decision in Florida is illustrative of this point. The case dealt with wheelchair-bound individuals who requested, in part, that a cruise ship change its craps tables as an accommodation to their disabled status. In specifically following the Martin case, the court determined that

[1]owering the rail of a craps table or lowering the entire table would alter the playing surface in a manner that is the equivalent of changing the dimensions of a playing field or the size of the diameter of a golf hole. Similarly, moving one of the croupiers or the stickman from his designated spot on the table to another spot would change the dimensions of where competitors play... Moreover, allowing disabled players to play from a spot on the table that other players cannot play from may provide the disabled players with an advantage not enjoyed by the other players. As Plaintiffs' proposed modifications of the craps tables would fundamentally alter the nature of the game, Plaintiffs are entitled to no relief with respect to the craps tables.

2. Individualized Assessments

It is this type of individual assessment of the disabled claimant that is most outcome-determinative in disability sport cases. Interestingly, although it did not clearly follow this directive in Olinger, the Seventh Circuit undertook exactly

209 Shannon, supra note 3, at 98 (citing Tom D'Agostino, Casey Martin Golf Cart Case About Fairness; ADA not Con Artist's Tool, Ariz. Republic, Mar. 9, 1998, at B5).
this type of individualized assessment in the Washington case. The court analyzed the particularized effect that the eight semester rule had on Washington, and the nature of the proposed modification of the rule—namely, a waiver—and found that the modification of the rule for Washington was entirely reasonable.

The Bowers III court undertook much of the same analysis. In assessing whether Bowers's request for a waiver was a reasonable modification of the NCAA's eligibility rules, the New Jersey district court emphasized "what is reasonable given the specific facts of Bowers's circumstances," and not on the reasonableness of the modification in some general sense. After making this individualized assessment, this court found that the NCAA's proposed accommodation in its waiver process was not a reasonable accommodation as required under the ADA.

In Martin, the Supreme Court made clear that this individualized assessment is required under the ADA by stating, "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." The Court pointed to provisions within Titles II and III that specifically require the elimination of discrimination against "individuals" with disabilities. After making this assessment in Martin's case, the court found that his necessary use of a cart would not alter the nature of PGA Tour competition.

As one commentator noted, "given the requirement of individual assessment, the standard seems to require identifying an accommodation that is believed to have the correct effect. If such a determination can be made, it must be made, not only when it is 'easy.'"  

3 Undue Burden

The PGA Tour and many of the sports organization defendants argued that any sort of process where they are forced to undertake an individualized assessment of potentially qualified, although disabled, individuals who seek to

211 Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir. 1999).
212 Id. at 852–54.
214 Id. at 521.
215 Id. at 524.
216 Martin, 121 S. Ct. at 1896.
217 Id. (citing 42 U.S.C. §§ 12101(b)(1), 12182(b)(2)(A)(ii) (1994)).
218 Barnes, supra note 201, at 83.
participate would be unduly burdensome and not required by the ADA.\footnote{See, e.g., Cole v. NCAA, 120 F. Supp. 2d 1060, 1070 (N.D. Ga. 2000) (noting "accommodations are not reasonable if they impose 'undue financial and administrative burdens'") (quoting Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 931 (8th Cir. 1994) (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987))).}

This assertion of undue burden was also a major part of the Seventh Circuit's decision in Olinger. Pointing to the district court with approval, the Seventh Circuit stated that the USGA would have to "develop a system and a 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;\footnote{Olinger, 205 F.3d at 1007.} this was an administrative burden that the Seventh Circuit did not believe the ADA would impose.\footnote{Id.}

The Supreme Court admitted that the ADA "imposes some administrative burdens on the operators of places of public accommodation;" it made clear, however, that this is acceptable because Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.\footnote{Martin, 121 S. Ct. at 1897-1898.}

In a footnote, the Supreme Court also determined that the PGA Tour's contention about this undue burden was overstated. In the three years since Martin began his suit, no other golfer had sued the PGA, and only two others had sued the USGA.\footnote{Id. at 1898 n.53.} Moreover, as the Court stated, nowhere in the ADA "does Congress limit the reasonable modification requirement only to requests that are easy to evaluate."\footnote{Id.}

The Bingham court seems to share this finding as it noted that the fact "[t]hat there may be few or many qualified individuals with a disability is irrelevant to the reasonableness of a modification."\footnote{Bingham v. Or. Sch. Activities Ass'n, 37 F. Supp. 2d 1189, 1203 (D. Or. 1999).} In the end as one commentator adds "given that entities such as private colleges, medical, nursing, and law schools, and medical, nursing, and legal examining boards, make such individualized inquiries every day in matters that arguably have far more societal impact than does professional golf, the PGA's complaint rings hollow.\footnote{Shannon, supra note 3, at 95-96.}"

\footnote{20} Olinger, 205 F.3d at 1007.
\footnote{21} Id.
\footnote{22} Martin, 121 S. Ct. at 1897–1898.
\footnote{23} Id. at 1898 n.53.
\footnote{24} Id.
\footnote{26} Shannon, supra note 3, at 95–96.}
4. Written Rules

The Supreme Court also noted that the potential undue burden associated with making an individualized assessment of a disabled individual could be abrogated by "strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities."\(^{227}\)

Several commentators have argued that this strict adherence would most easily be upheld if these rules—for instance, golf's walking rule—were written down in some sort of official rulebook for the particular sport. This use of written rules "might be considered a lawyerly emphasis, or overemphasis, inappropriate to sport. On the other hand, the rules are considered in the context of evidence of intention, ongoing practice, and a general perception about what is important about the game."\(^{228}\) In essence,

\[\text{[i]f an eligibility rule (which is written down) is enforced for legitimate reasons (as in the high school cases), modifications of which would fundamentally alter the game, the rule should be allowed. What is not allowed is nonessential rules or traditions which bar a disabled individual from participating in golf if he or she meets the other criteria established by the organization.}\(^{229}\)

5. Athletics and the ADA

Many seem to presume that sports organizations should be exempt from the ADA's requirements, "with the justification that sports are different from other endeavors because of their elite nature, the purpose of which is to identify those who are physically most accomplished."\(^{230}\) As this author stated earlier, however, although "sports organizations, even after the cases discussed herein, are still loath to admit that the ADA does apply in the sports context . . . [t]he ADA deals with organizations that come under its requirements and discriminate against the disabled . . . sports organizations receive no special protection from the strictures of the ADA."\(^{231}\) Other commentators have noted that

\[\text{[f]irst, no such deference is provided to any organization or entity including sport organizations. Second, the ADA does not exempt sport organizations. Had Congress desired to exempt sport organizations it could have, and yet nothing in the ADA, its history, or the amicus brief of ADA sponsors Senators Harkin, Dole,}\]

\(^{227}\text{Martin, 121 S. Ct at 1897.}\)
\(^{228}\text{Barnes, supra note 201, at 81.}\)
\(^{229}\text{Anderson, supra note 4, at 88 (emphasis in original).}\)
\(^{230}\text{Barnes, supra note 201, at 84.}\)
\(^{231}\text{Anderson, supra note 4, at 85, 87.}\)
and Kennedy, supports the existence of an exemption. Exemptions are not foreign to Congress, as it exempted all professional sports leagues and the business of professional baseball from the antitrust laws.\footnote{Moorman & Masteralexis, supra note 6, at 306.}

Although the cases discussed in this Article did not all come to the conclusion that each sports organization was subject to the requirements of the ADA, each court at least attempted to determine if the disabled plaintiff could succeed on such a claim.

In the end, the Supreme Court made it very clear that sports organizations, whether at the lowest or highest level of competition, are not exempt from the requirements of the ADA, as the statute "carves out no exemption for elite athletics,"\footnote{Martin, 121 S. Ct. at 1896.} regardless of the potential burden that a sports organization believes ADA scrutiny might entail.

V. JUDICIAL INTERPRETATION OF THE MARTIN DECISION

After the Martin decision, several courts have been faced with challenges by disabled athletes. In following the rules and clarifications just discussed, the following sampling of cases is illustrative of the exact way in which the Supreme Court's decision has influenced judicial scrutiny of sports organizations.


Similar to plaintiffs in the interscholastic cases discussed earlier, Luis Cruz is a learning disabled student-athlete who sued the Pennsylvania Interscholastic Athletic Association ("PIAA") because it enforced its age limit rule which barred him from participating in sports once he reached the age of nineteen. Cruz claimed that the rule discriminated against him in violation of Title II of the ADA.\footnote{In analyzing this case, one must keep in mind the Bowers III court's explanation that a Title III analysis is very similar to a Title II analysis under the ADA. Bowers III, 118 F. Supp. 2d 494, 517 (D.N.J. 2000).}

After recounting the conflicting decisions in Pottgen, Sandison, McPherson and Washington, the court stated that it was waiting for the Supreme Court's decision in the Martin case before resolving the present case.\footnote{Cruz, 157 F. Supp. 2d at 496–98.} The court immediately noted the Supreme Court's requirement that the focus be on the disabled individual.\footnote{Id. at 498.} It distilled the Supreme Court's Martin decision down to three inquiries: "(1) whether the requested modification is reasonable; (2)
whether it is necessary for the disabled individual; and (3) whether it would fundamentally alter the nature of the competition.\textsuperscript{218}

In dealing with the last two inquiries, the court quickly found that “Cruz would not fundamentally alter the nature of the competition in football and track and that the modification of the age rule is necessary for him to be able to play in interscholastic competition in those two sports.”\textsuperscript{239} It had more difficulty determining whether the rule itself is reasonable.

According to the court, in assessing this reasonableness, it first had to determine whether the rule is essential to the PIAA sports program. As the court explained, “a rule is essential to a program unless it can be shown that the waiver of it would not fundamentally alter the nature of the program.”\textsuperscript{240} After completing the individualized assessment of Cruz’s situation, “it is clear that Luis Cruz playing on the football team and track team would not fundamentally alter the nature of PIAA interscholastic competition.”\textsuperscript{241}

The court also addressed the potential burden that would be placed on the PIAA to administer a waiver rule in connection with the age of the individual seeking a waiver. After finding that the PIAA often grants waivers of its rules and that the statistics showed that there were few occasions where similar age waivers could be considered, the court held that “it does not appear that a waiver process would place an unreasonable burden on the PIAA.”\textsuperscript{242}

\textbf{B. Kuketz v. MDC Fitness Corp.}\textsuperscript{243}

This case involved Stephen Kuketz, a paraplegic bound to a wheelchair since 1991, and a nationally-ranked player in wheelchair racquetball competitions. In 1995 Kuketz sought to play in an “A” Level Tournament but asked that he be permitted two bounces to hit the ball, rather than the one bounce given to all players on foot. The tournament organizers would not make this accommodation; instead they offered to allow him to play in a novice league with footed players or to set up an actual wheelchair league if he could find other wheelchair players. Because they would not provide his requested accommodation, Kuketz sued the organizers, claiming that they discriminated against him in violation of Title III of the ADA.

In analyzing Kuketz’s claim, the Superior Court of Massachusetts also began by examining the Supreme Court’s Martin decision. Following Martin, and

\textsuperscript{218} Id. at 499.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id. at 500.
mirroring Cruz, this court also distilled the analysis down to three distinct issues: (1) whether the requested modification is reasonable, (2) whether the modification is necessary for the disabled individual, and (3) whether it would fundamentally alter the nature of the competition.244

The court made clear that "given Kuketz's ability as a racquetball player, he would be playing A League if he were not a paraplegic and could play on foot."245 Still, in order to participate at the A level, he needs to be given two bounces, and he needs to stay in a wheelchair. Both of these factors demonstrated that his requested modification was clearly "necessary" according to the second factor.246

The organizers contested that the modification still was not reasonable because it would pose a safety risk to other competitors to have one participant in a wheelchair, and it would fundamentally alter the nature of the competition to allow two bounces. Based on the record, the court could not measure the reasonableness of the modification itself.247 All of the other competitors who signed up for the league refused to play Kuketz, but the court could not assess whether this was due to ignorance or actual safety concerns. Moreover, testimony from supposed experts on racquetball were inconsistent as to whether the proposed safety concerns were real.

The court turned to what it termed the central issue in the case: whether the modification would fundamentally alter the nature of the competition. The court again followed Martin and its recognition of two types of fundamental alterations: (1) "a modification 'might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally'"248 and (2) "a less significant modification 'that has only a peripheral impact on the game itself might nevertheless give a disabled player . . . an advantage over others.'"249

The court looked at the Official Rules of Racquetball and found that they required the ball to be returned on the first bounce. The rules promulgated for wheelchair racquetball, while allowing for two bounces, also require that both participants actually be in wheelchairs. The court also looked to the Supreme Court's Martin analysis that while the essence of golf is hitting the ball, "how one traveled to the ball was not."250 Relying on its analysis of the rules and the

244 Id. at *4.
245 Id.
246 Id.
247 Id. at *5.
248 Id. at *6 (citing Martin, 121 S. Ct. at 1893).
249 Id.
250 Id. at *7.
Martin decision, the court determined that "[w]hile the essence of golf is hitting a stationary ball with a club, the essence of racquetball is hitting a moving ball before the second bounce with a racquet. Allowing one player two bounces fundamentally changes the nature of the game," fitting in the Supreme Court's first type of alteration in Martin. Moreover, "giving a wheelchair player two bounces and a footed player one bounce is a variation on the Official Rules of racquetball. The Club is certainly free to establish a league that plays this variation of racquetball but it is not required by the ADA to do so."252

The court also determined that the modification would still be unreasonable if it only had a peripheral impact on the game, according to the second type of alteration delineated in Martin. Even though the court could not make a factual determination of this possibility, the modification of a two-bounce rule for a disabled player might actually provide the disabled individual with an advantage over other players.253 "Stated differently, if Kuketz were allowed to compete in the A League as he requests and were to become champion of the league, no one could know whether he won because he was the superior player or because the allowance of two bounces more than offset his disadvantage in mobility."254

In the end, because Kuketz's requested modification would fundamentally alter the nature of the racquetball competition, the ADA would not required the organizers to change their rules.

C. Matthews v. National Collegiate Athletic Association255

The facts of the Matthews case were discussed earlier in this Article.256 After its initial holding that the NCAA is not amenable to the requirements of

251 Id. at *7–8.
252 Id. at *8–9.
253 Id. at *9.
254 Id.
255 179 F.2d 1209 (E.D. Wash. 2001). A similar case was decided in July 2001. In Pryor v. NCAA, 153 F. Supp. 2d 710 (E.D. Pa. 2001), a similar student athlete plaintiff could not meet the initial eligibility requirements allegedly due to her disabled status. She sought a waiver from the rules and was given partial qualifier status for her freshman year. Still, she sued the NCAA alleging that this decision was illegal discrimination prohibited by the ADA.

The court did not reach the merits of Pryor's ADA claim because immediately before she entered college, the NCAA instituted Bylaw 14.3.3.2, specifically granting learning disabled student-athletes five years to use their four years of athletic eligibility. Noting the decision in Bowers IV, the court determined that she could seek to win back the year of eligibility she missed due to her partial qualifier status; therefore, the court granted the NCAA's motion to dismiss her ADA complaint. Pryor, 153 F. Supp. 2d at 714–15.
256 See supra notes 96–113 and accompanying text.
Title III of the ADA, the parties moved for summary judgment. Then "[b]ased on the possibility that the Supreme Court's decision in the Martin case might affect" this case, the court stayed the summary judgment hearing until the Supreme Court issued its decision in Martin. The court also recognized that "many cases have evaluated Title III of the ADA, including its application to sports organizations generally and the NCAA specifically," and it used these cases in its analysis.

In assessing whether Title III applies to the NCAA, the court first addressed the definition of "public accommodation" under the ADA. The court followed the Ninth Circuit, and implicitly the Sixth and Third Circuit, noting, "some 'nexus' must exist between the physical place of public accommodation and the services or privileges denied in a discriminatory manner." It then looked to the Ninth Circuit and Supreme Court decisions in Martin.

Both of these decisions recognized that "control exerted over access to the field of play can subject a private entity to ADA requirements." The Ninth Circuit also provided strong evidence that it would hold that Title III applied to the NCAA as it cited with approval the Ganden, Tatum, and Bowers III decisions, all of which held that the NCAA was covered by the ADA. Specifically, the court noted that the Ganden court's in depth look into issue of whether the NCAA controlled access to the arenas used in competition, is the exact type of broad inquiry the Supreme Court pointed to as necessary in Martin.

The court also mentioned the Cole and Pryor decisions that implicitly assumed that Title III covers the NCAA, and the Butler case, in which the Ninth Circuit acknowledged that the U.S. Department of Justice found that the NCAA violated Title III. Together these cases led the court to reconsider its prior decision that the NCAA was not amenable to Title III.

The NCAA argued that the member institutions control athletic activities, and therefore, it is not an operator of a place of public accommodation covered by Title III. In addressing this argument the court pointed to the Supreme Court's decision in Martin which "made clear that the ADA applies not only to entities governing spectators' access to a sports facility but also to those entities


\[258\] Matthews II, 179 F. Supp. 2d at 1214.

\[259\] Id. at 1218.

\[260\] Id. at 1219.

\[261\] Id. at 1220.

\[262\] Id. at 1220–21.

\[263\] Id. at 1221.

\[264\] Id. at 1221–22.
governing athletes’ access to the competition itself. The NCAA controls which students may participate in athletics, thereby creating a “sufficient nexus with actual places to subject the association to the ADA.” In the end,

[The Ninth Circuit and Supreme Court analysis in the Martin case requires this Court to acknowledge that control over an athletic playing field does subject a private entity to Title III of the ADA. Recent decisions from courts in other circuits also support this finding. When considering the recent change in the law, in light of the record submitted in the instant case, the Court finds that Title III of the ADA does apply to the NCAA, based upon the large degree of control the NCAA exerts over which students may access the arena of competitive college football.

After finding that Title III applies to the NCAA, the court moved to an analysis of whether the plaintiff’s proposed modification of the NCAA’s rules would fundamentally alter the nature of NCAA athletics. The court initially noted that according to the Supreme Court’s decision in Martin, this analysis must “focus on the individual and may not generally evaluate whether a blanket waiver of a requirement would constitute a fundamental alteration.” As with the previous cases just discussed, it also noted that the Supreme Court recognized that fundamental alterations could be modifications that either affect an essential aspect that would be unacceptable even if all competitors were affected equally, or minor changes that somehow provide the disabled individual with an advantage.

The Cole and Bowers III courts found that requested waivers were fundamental alterations because one plaintiff’s scores were so low that he never would have met the NCAA’s eligibility requirements, while another sought to be exempted completely from the NCAA’s individualized waiver review process. In analyzing Matthews’ particular situation, the court disagreed with its earlier decision (as the Bowers III court had done) and emphasized that in the other cases mentioned, the NCAA had never granted the requested waiver, while in this case the NCAA had already given Matthews two waivers from its rules. In the end, it was “difficult, particularly in light of the individualized inquiry required by Martin, to see how granting a third waiver to Plaintiff would

265 Id. at 1223.
266 Id.
267 Id.
268 Id. at 1225.
269 Id. at 1225–26
fundamentally alter the NCAA’s purpose, when the first two waivers did not.\(^{271}\)

Therefore, following the *Martin* decision closely, the court found that although doing away with the NCAA’s academic eligibility requirements would be a fundamental alteration, waiving the particular rule contested in this case (the 75/25 rule), even for all athletes, “would not alter an essential aspect of the NCAA’s purpose to promote academics and athleticism.”\(^{272}\) In addition, the court found that Matthews would not gain any advantage; he would simply be given a “modification that would permit [him] access to competitive college football at WSU while he pursues his degree in an academic program tailored to his learning disability.”\(^{273}\)

D. The Sports World After *Martin*

These initial cases demonstrate that the outlandish results predicted by many after the Supreme Court decided *Martin* are not occurring. The cases that have followed *Martin* have simply refined the analysis that was already there.

As these cases demonstrate, the Supreme Court’s decision in *Martin* distilled the analysis down to a test of three factors: (1) whether the requested modification is reasonable; (2) whether it is necessary for the disabled individual; and (3) whether it would fundamentally alter the nature of the competition. In testing these factors the analysis must include an individualized assessment of the disabled individual involved and how the requested modification he individually proposes will affect the particular sport. Finally, the third factor will be met either if the modification alters an essential aspect of the particular sport so that it would be unacceptable to allow it even if it equally affects all competitors, or if the modification is less significant and only has a peripheral impact on the game itself but still gives the disabled individual an advantage over others.

In the interscholastic and intercollegiate cases such as *Bingham*, *Washington*, and *Bowers III*, courts were already making the necessary type of individualized assessment of the disabled student-athletes involved. The *Martin* decision merely clarifies that this assessment must be part of the process. These courts had also all analyzed whether a waiver of certain eligibility rules would fundamentally alter the nature of the athletic programs themselves; *Martin* merely adds to this analysis by delineating two tests for assessing whether this type of alteration has occurred. The fact-intensive nature of the analysis has not changed; rather, the focus on the individual disabled athlete and the test for

\(^{271}\) *Matthews II*, 179 F. Supp. 2d at 1226.

\(^{272}\) Id.

\(^{273}\) Id. at 1227.
understanding what would be a fundamental alteration has merely been clarified.

The recent cases also demonstrate that the results may not really have changed that much. Before Martin, the four cases discussed at the interscholastic level had reached different results. After making an individualized assessment, the Bingham and Washington courts determined that waivers of the eligibility rules involved would not fundamentally alter the nature of the sports programs offered. Oddly enough, the Stearns and Long cases both pointed to the Washington case as they reached different results. The difference seems to be that they did not undertake the individualized assessment required under the ADA and clarified in Martin. The recent Cruz case followed the Supreme Court’s mandate in Martin and undertook this individualized assessment in coming to the same result as the Bingham and Washington courts. Clearly the Supreme Court’s clarification of the ADA’s requirements did not cause the Cruz court to reach some unexpected result.

The intercollegiate cases are even less complicated. The best example can be found in the series of decisions in the Matthews case. In the initial decision in Matthews, the court held that the NCAA was not a public accommodation covered by Title III of the ADA. Most telling, the court also noted that the NCAA had already granted Matthews two waivers of its rules, and somehow a third waiver would be a fundamental alteration not mandated under the ADA. This specious reasoning was clarified after the Martin decision.

In its second look at the issues, the same court followed the Supreme Court’s directive to undertake an individualized inquiry of the disabled claimant and reasoned that if the NCAA had already granted two waivers, it could not then claim that granting a third waiver to the same individual would somehow fundamentally alter its rules. The court made clear that if the NCAA had never granted the waivers in the first place its decision might have changed.

The court also changed its mind about the nature of the NCAA under the ADA. In following Martin and earlier intercollegiate cases such as Tatum, Ganden, and Bowers III, the court easily determined that the NCAA was a public accommodation covered under Title III. This determination was nothing new was not dictated by the Supreme Court’s decision in Martin. Instead, the Martin case merely clarified what many courts had been hinting at before: The NCAA’s control over an operation of intercollegiate athletics, much like the PGA Tour’s control and operation of golf tournaments, brings the NCAA under the purview of the ADA.

CONCLUSION

Can participants in sports expect that the sports they know and love will be significantly different because of the Martin decision? The answer is yes and no.
If a sports organization does not allow for "reasonable" modifications of its rules for disabled athletes when such modifications will not change the fundamental nature of the sport itself, the organization can expect to be forced to undertake the modification by judicial mandate.

Yet, this result is not so outrageous or burdensome as to change the nature of sport itself. The Kuketz court made clear that the fear that this will happen is unjustified:

It is worthwhile to reflect upon what the sporting world would look like if the ADA were interpreted as Kuketz [the wheelchair racquetball player] proposes. In baseball, if a hitter in a wheelchair came to the plate, the ADA would require first base to be moved closer to home plate so that the hitter could reach first base in roughly the time it would take a footed player to run ninety feet. In golf tournaments, the ADA would require ‘wheelchair tees’ closer to the hole to compensate for the shorter distances that wheelchair golfers can generally hit their tee shot. In basketball, the ADA would require that wheelchair teams competing against footed teams be given a shorter basket to compensate for their greater difficulty in shooting a basketball without the use of their legs. It may be terrific for leagues and clubs to provide these opportunities so that wheelchair players can compete meaningfully against footed players, but the ADA does not require them to depart from the official rules whenever a wheelchair player or team wants to play a footed player or team. The law permits leagues and clubs to organize baseball, golf, and basketball leagues that play their respective games in accordance with the game's official rules without running afoul of the ADA.274

Still, many in the sports world seem to have double vision. Although Casey Martin has not been provided assistance that unfairly tilts the course in his favor, "observers see only that he has received some benefit not given to others. This double vision of the nature of the accommodation—objectionable in principle though it allows participation—reminds us that the ADA is a civil rights statute that prohibits the continuation of discrimination against an identifiable group."275

Casey Martin did not ask to have a disability that does not allow him to walk for great distances, just as the learning disabled students in high school or college did not ask to have to take special education courses or to be held back in school as a result of their disability. They merely ask that they be allowed to participate in a meaningful way at something they are qualified to do. They also ask that some peripheral aspect of the sport itself be changed because otherwise they cannot participate. The perception that providing any type of

275 Barnes, supra note 201, at 88.
accommodation at all for these individuals necessarily gives them a competitive advantage is uninformed and misguided.

It seems that the perception of those that do not wish to allow disabled individuals to participate in sports with able-bodied individuals unless they can meet what are presumed to be the requirements of the sport itself is really a misunderstanding of the nature of sport. As one commentator stated, "'[t]he Court clearly rejects the idea that identifying the healthiest, strongest and generally most capable competitor is the purpose of any specific sport. Rather, the sport is likely to be defined by its existing rules in order to identify by competition the person most capable at the specific activities fundamental to that sport."276

If sport is truly an endeavor to allow the most capable person to succeed at the sport’s particular activities, the Martin case and the other cases assessing the impact of the ADA on sport have merely implemented this goal. They have allowed those individuals that are gifted sports competitors despite their disabilities to participate. With this in mind, sport truly can exhibit the characteristics of athletic achievement, fair play, and the inclusive nature it should exemplify.

276 Id. at 13–14.