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When a Membership Organization Becomes a Public Accommodation: An Examination of what Constitutes a Sufficient Nexus under Title III of the Americans with Disability Act

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I. Introduction

The passage of the Americans with Disabilities Act of 1990 (ADA)[1] was a huge leap forward for the millions of disabled individuals who have struggled to fully enter the rich mosaic of the American mainstream.[2] Title III of the ADA (Title III)[3] prohibits discrimination against disabled individuals in "public accommodations."[4] This note will explore how the courts have broadened the definition of a "public accommodation" to not only encompass physical entities, but also organizations which the courts have deemed to have a sufficient nexus to a physical facility, thus themselves becoming "public accommodations" within the definition of Title III. Furthermore, this note will analyze what constitutes a sufficient nexus between a sporting event, the athletes and the physical field of play in order to allow Title III protections to be extended to sporting events. In examining the courts' classification of certain organizations as "public accommodations," this note will concentrate on sporting events and athletes and the impact that Title III has had on such events. This note will also briefly address how the courts' broad definition of "public accommodations" has led to modifications of the sporting events at issue.

Part II will explore the elements of a successful claim under Title III, the statutory definition of "public accommodation," and the infancy of the judicial interpretation of "public accommodations." Part III will focus on the Supreme Court decision of *PGA Tour, Inc. v. Martin*[5], including the expansion of Title III protections to competitors in professional sporting events. Part IV will focus on *Shepherd v. United States Olympic Commission*[6] and the court's

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[1] Americans with Disabilities Act of 1990 §§ 12101-12213, 42 U.S.C. §§ 12101-12213 (West 2009).
[2] Lainie Rutkow, Jon S. Vernick & Stephen P. Teret, *Banning Second-hand Smoke in Indoor Public Places Under the Americans with Disabilities Act: A Legal and Public Health Imperative*, 40 CONN. L. REV. 409, 414 (2007).
[3] 42 U.S.C. §§ 12181-12189.
[4] § 12182(a)-(b).
[5] PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).
[6] Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072 (D. Colo 2006).

refusal to extend Title III protections to sporting events which have high admission standards. Part V will present the conclusion.

II. The Americans with Disabilities Act: A Helping Hand to Independence for Disabled Individuals

The ADA was signed into law by then-President George H.W. Bush on July 26, 1990 and heralded as a "declaration of independence for people with disabilities."[7] In crafting the legislation, Congress meant to "invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[8] The Legislature granted the ADA a broad mandate intended "to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life."[9] The passage of the ADA was meant to ensure that disabled individuals were given the basic guarantees for which they had worked so long and so hard for, independence, freedom of choice, control of their lives and the opportunity to blend fully and equally into the rich mosaic of the American mainstream.[10]

There seems to be no doubt that Congress intended the ADA to offer sweeping remedial powers for a broad array of discrimination[11] as its aim was to ensure that the law was as strong an anti-discrimination statute as possible.[12] The ADA was created to ensure that disabled individuals enjoy the same access to the American mainstream as non-disabled individuals. [13]

A. Making a Claim Under Title III of the Americans with Disabilities Act

[7] Paul V. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1117 (1995).
[8] *Id.* § 12101(b).
[9] Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011).
[10] Rutkow, *supra* note 1, at 409.
[11] *See* § 12101.
[12] Rutkow, *supra* note 1, at 414.
[13] Judd v. Hogsten, 2006 U.S. Dist. LEXIS 51447, *5 (M.D. Pa. July 26, 2006)

The purpose of Title III "is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life."[14] A successful claim under the ADA must show that a disabled individual was discriminated against through an act or omission in a place of public accommodation.[15]

The ADA defines a disabled individual as an individual who has a physical or mental impairment which interferes with major life activities, has a record of possessing such impairment, and is perceived to have such impairment.[16]

The second element of a Title III claim has been defined broadly, in keeping with the legislative intent to afford disabled individuals sweeping protections against discrimination under the ADA, and may be met by either an action or an omission.[17] An omission may be categorized as a denial of participation, participation in unequal benefit or a separate benefit.[18] A denial of participation claim arises when a disabled individual is denied the right to participate in or take advantage of an entity or benefits provided by that entity.[19] A participation claim arises when a disabled individual is allowed to participate in or take advantage of an entity or benefits provided by that entity to an extent that is not equal to the benefits afforded to non-disabled individuals.[20] A separate benefit claim arises when a disabled individual is afforded a benefit that is different or

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[14] H.R. Rep. No. 101-485, pt. 2, at 99 (1990).
[15] 42 U.S.C.S. § 12182(a)-(b) (West 2009); *See e.g.* Ass'n for Disabled Ams., Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353, 1359-1360 (S.D. Fla. 2001).
[16] § 12102(a).
[17] *See generally Id.* § 12182(b).
[18] *Id.*
[19] *Id.* § 12182(b)(1)(A)(i) (Under a denial of participation claim, it is "discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.")
[20] *Id.* § 12182(b)(1)(A)(ii) (Under a participation in an unequal benefit claim, it is "discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.")

separate from that afforded to non-disabled individuals, unless such separation is necessary and is effective as that provided to non-disabled individuals. [21]

The third element of a Title III claim requires that the discriminatory act or omission occur in a place of "public accommodation."[22] In accordance with the legislative intent that the ADA expend protection for disabled individuals; private entities, in addition to governmental entities, may be the providers of "public accommodation" and thus fall under the purview of Title III.[23] Title III provides no definition of what constitutes a "public accommodation" and instead, relies on the cryptic pronouncement that a private entity is considered a "public accommodation," when it "own[s], lease[s], or lease[s] to, or operate[s] a place of public accommodation"[24] and "the operations of such entities [must] affect commerce."[25] Perhaps hoping to educate by example, Title III enumerates a broad swath of entities which would constitute "public accommodation" within the purview of Title III.[26] Most relevant to this note's topic are "places of exercise or recreation (e.g. gymnasiums, health spas, bowling alleys, golf courses)."[27] Thus, Title III provides that if an entity provides a "public accommodation," then the entity is prohibited from discriminating against disabled individuals under Title III and is obligated to make the "public accommodation" premises readily accessible to disabled individuals.[28]

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[21] *Id.* § 12182 12182(b)(1)(A)(iii) (Under a separate benefit claim, it is "discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.)

[22] *Id.* § 12182(a)-(b).

[23] Sullivan, *supra* note 5, at 1124.

[24] § 12182.

[25] *Id.* ("commerce is defined as "travel, trade, traffic, commerce, transportation, or communication (A) among the several States; (B) between any foreign country or any territory or possession and any State; or (C) between points in the same State but through another State or foreign country.)

[26] *See generally Id.* § 12181(7).

[27] *Id.* § 12181(7)(L).

[28] Sullivan, *supra* note 5, at 1124.

B. Judicial Interpretation and Application of Title III's "Public Accommodation" Requirement

In accordance with legislative intent in enacting the ADA, the Supreme Court has held that the phrase "public accommodation" "should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled."[29] The courts have broadly expanded the definition of "public accommodation" to include independent contractors in a public hospital,[30] a NCAA university's academic policy,[31] and a golf tournament.[32]

Menkowitz v. Pottstown Memorial Medical Center, centered on Eliot Menkowitz, an orthopedic surgeon who held an appointment at the Pottstown Memorial Medical Center.[33] Menkowitz alleged that, upon being diagnosed with attention-deficit disorder in July 1995, Pottstown Memorial summarily suspended his medical privileges without notice or hearing, in contravention of the hospital's own by-laws, and in the face of testimony from Menkowitz's clinical psychologist and treating physician stating that "the disorder would not affect his [Menkowitz's] ability to treat patients or properly interact with the hospital staff."[34] Menkowitz alleged that Pottstown Memorial discriminated against him because of his disability and was therefore in violation of Title III.[35]

The *Menkowitz* court determined that, as an independent contractor of Pottstown Memorial, deemed to be a place of "public accommodation," Menkowitz may assert a claim under Title III

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[29] PGA Tour, Inc. v. Martin, 532 U.S. 661, 676- 77 (2001) *quoting* S. Rep. No. 101-116, at 59 (1989) and H.R. Rep. No. 101-485, at 100 (1990).
[30] Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 122 (3d Cir. 1998).
[31] Matthews v. NCAA, 179 F. Supp. 2d 1209 (E.D. Wash. 2001).
[32] *PGA Tour, Inc.*, 532 U.S. at 667.
[33] *Menkowitz*, 154 F.3d at 115.
[34] *Id.*
[35] *Id.*

as "an individual who is denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[36] In finding that a disabled independent contractor working in a place of "public accommodation" may invoke the protections of Title III, the *Menkowitz* court reasoned that their decision furthered the legislative intent of applying the ADA broadly.[37] The court reflected that since independent contractors were not employees under Title I of the ADA, a failure to give them statutory protection under Title III when working in a "public accommodation" would immunize discrimination against them.[38] The *Menkowitz* court determined that such a result was contrary to the legislative intent of providing broad protections to disabled individuals when enacting the ADA.[39]

In *PGA Tour, Inc. v. Martin*,[40] the United States Supreme Court read "public accommodation" broadly when it determined that PGA Tournament golfers were customers within the scope of Title III as tournament entry was allowed to any member of the public who could meet nominal entrance requirements.[41] Although the petitioner had argued that their golf courses were not a "public accommodation" in the lower courts, the petitioner acquiesced that their golf courses constituted "public accommodation" at the time of their appeal to the Supreme Court.[42] Notwithstanding the petitioner's acquiescence, the *PGA Tour* Court nonetheless examined the issue.[43]

The *PGA Tour* Court determined that the golf courses do constitute "public accommodation" since "petitioner's golf courses and their qualifying rounds fit comfortably within the coverage

[36] *Id.* at 122 (internal quotation marks omitted).
[37] *Id.* at 123.
[38] *Id.*
[39] *Id.*
[40] Discussed *infra* at 10.
[41] PGA Tour, Inc. v. Martin, 532 U.S. 661, 680 (2001).
[42] *Id.* at 678.
[43] *Id.*

of Title III."[44] In determining that the petitioner's golf courses were "public accommodation," the Court noted that petitioner's events were hosted on golf courses and that golf courses were explicitly mentioned in the Title III text at § 12181(7)(L).[45] *PGA Tour* also confirmed that highly selective admission criteria for users of a facility did not automatically exclude the facility from being a "public accommodation."[46]

The *PGA Tour* Court determined that petitioners had two sets of customers, the spectators watching the tournament live and the athletes competing in the tournament.[47] The Court concluded that both sets of customers were protected under Title III. [48] The Court reasoned that as the golf tournament was open to participants from the public, so long as such participants qualified for the tournament, they were customers of the petitioner's "public accommodation."[49] The Court's rationale indicated that athletes in sporting events, so long as such events were accessible to the public in some way, would fall under Title III.

The *PGA Tour* Court examined petitioner's contention that the golfers were independent contractors and therefore fell outside Title III, but declined to issue a ruling on the matter[50] since such a determination was unnecessary to rule on the case. However, in the Court's view, the privilege of participating in the golf tournament is a "privilege that petitioner makes available to members of the general public."[51] The Court's language underscores its fundamental belief that, so long as the public has a chance to compete in the entities' athletic competition, the athletes themselves are a customer class protected by Title III.

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[44] *Id.* at 677.
[45] *Id.*
[46] *Id.* at 672-73.
[47] *PGA Tour*, 532 U.S. at 680.
[48] *Id.*
[49] *Id.* at 679.
[50] *Id.* at 680.
[51] *Id.*

The *PGA Tour* dissent emphatically disagreed with the majority, finding that the PGA Tour tournament athletes were independent contractors and therefore excluded from Title III protection.[52] The *PGA Tour* dissent's conclusion is therefore at odds with the *Menkowitz* court's holding that an independent contractor is entitled to Title III protection so long as the discrimination occurs in a "public accommodation."[53] The dissent likened the respondent golf tournament participant to an independent contractor rather than a customer because he was "not a customer *buying* recreation or entertainment; he was a professional athlete selling it."[54] Therefore, in the dissent's eyes, any professional athlete would be an independent contractor and thus not eligible for Title III protection, even if the athletes competed in a "public accommodation."

In *Matthews v. NCAA*, Anthony Matthews, who was diagnosed with a learning disability, alleged that the NCAA violated the ADA "when it declared [Matthews] academically ineligible to play intercollegiate football."[55] The NCAA sets standards that student-athletes of its member universities must meet; with one such standard known as the 75/25 Rule whereby "student-athletes [must] earn 75 percent of their annual required credit hours during the regular academic year."[56] Although NCAA granted Matthews a waiver of the 75/25 Rule for one year, the NCAA denied such a waiver the following year, stating that Matthews' academic woes were a result of a "lack of effort, [and not due] to his learning disability."[57]

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[52] *PGA Tour*, 532 U.S. at 694 (Scalia, J., dissenting) ("The only distinctive feature of places of public accommodation is that they accommodate the public, and Congress could have no conceivable reason for according the employees and independent contractors of such businesses protections that employees and independent contractors of other businesses do not enjoy.")
[53] *Id.* at 691 (Scalia, J., dissenting) ; Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 115 (3d Cir. 1998).
[54] *PGA Tour, Inc.* at 696 (Scalia, J., dissenting).
[55] Matthews v. NCAA, 179 F. Supp. 2d 1209, 1213 (E.D. Wash. 2001).
[56] *Id.* at 1215.
[57] *Id.* at 1216.

The *Matthews* court noted that while the NCAA "exercises little, if any, control over the operation of athletic facilities such as college football stadiums," the NCAA collects revenue from bowl games in which its member universities participate in.[58] Most relevant to the topic at hand, *Matthews* determined that the NCAA was a "public accommodation" within the meaning of Title III "based upon the large degree of control the NCAA exerts over which students may access the arena of competitive college football.[59] In determining that the NCAA is a "public accommodation" within the purview of Title III, the *Matthews* court looked to a "nexus" which must "exist between the physical place of public accommodation and the services or privileges denied in a discriminatory manner."[60]

In interpreting Title III's circular definition of "public accommodation,"[61] the courts have expended the definition to include not only those entities with a physical component but also organizations which have a "nexus" to a physical entity which would qualify as a "public accommodation."

III. *PGA Tour, Inc. v. Martin*: *Defining "Public Accommodations" to Reach Beyond Physical Premises*

PGA Tour quickly disabuses readers of the notion that athletic competitions fall outside Title III, noting while there is an explicit exemption of "'private clubs or establishments' and 'religious organizations or entities' from Title III's coverage, Congress made no such exemption for athletic competitions, much less did it give sports organizations carte-blanche authority to

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[58] *Id.* at 1214.
[59] *Id.* at 1223.
[60] *Id.* at 1219.
[61] 42 U.S.C.A. § 12182(a) (West 2009) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.")

exempt themselves from the fundamental alteration inquiry by deeming any rule, no matter how peripheral to the competition, to be essential."[62]

The defendant, PGA Tour, Inc., sponsors professional golf tournaments that are typically four day events held on courses that the company leases and operates.[63] The standard format of the tournament is that all participants compete over two days and only those players who qualify then play an additional two days and are awarded prize money based on their cumulative score from all four days of play.[64] PGA Tour's income from the golf tournaments is substantial with "revenues generated by television, admissions, concessions, and contributions from cosponsors amount[ing] to about $300 million a year, much of which is distributed in prize money."[65]

Golfers can gain entry onto the tour in two ways, through merit-based achievements or through a qualifying round.[66] The merit-based ways in which a golfer can gain entry onto the tour are multiple and include achievements such as being a top-15 money winner on the tour or playing three Nike Tour events per year.[67] The general public may also enter the Tour through the "Q-School," essentially a qualifying school for the Tour, by paying a $3,000 fee and submitting two letters of references.[68] Qualification for the tour through the "Q school" is the most common way of qualifying.[69]

The plaintiff, Casey Martin, is a disabled individual as defined by the ADA.[70] Martin suffers from Klippel-Trenaunay-Weber Syndrome, which obstructs blood flow between his heart and

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[62] PGA Tour, Inc. v. Martin, 532 U.S. 661, n.51 (2001).
[63] *Id.* at 665.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 667-68.

right leg and has caused atrophy of his right leg.[71] Martin is also an extremely gifted golfer.[72] As an amateur, Martin won 17 OregonGolf Association junior events, the state championship as a high school senior, and the 1994 NCAA championship while on the Stanford University golf team.[73] Martin also attained success as a professional, qualifying for the Nike Tour in 1998 and 1999 and the PGA Tour in 2000.[74] Martin enjoyed particular success in the 1999 season, entering 24 events, qualifying 13 times, and having 6 top-10 finishes, coming in second twice and third once.[75]

However, Martin's Klippel-Trenaunay-Weber Syndrome rendered him unable to walk the golf course.[76] Martin contended that walking the golf course, as required by PGA Tour in the latter rounds of the tournament, would have caused him "pain, fatigue, and anxiety, but also create[] a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required."[77] It is also notable that, while golf carts are prohibited in the last two rounds of the tournament, they are allowed in the first two rounds of the tournament as well as in competitions governed by the "rules of golf" such as the Ladies Professional Golf Association (LPGA).[78] When Martin's request for the use of a golf cart in the latter rounds of the PGA Tour tournament was denied, Martin sued for an injunction allowing him to use a golf cart in the tournament.[79]

PGA Tour disputed neither Martin's status as a disabled individual under the ADA nor Martin's contention that his disability would prevent him from walking the golf course as

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[71] *Id.* at 668.
[72] *Id.* at 667-68.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 668.
[78] *See Id.* at 666.
[79] *Id.* at 669.

mandated by the rules.[80] Initially, PGA Tour argued that it was exempt from coverage under Title III because it is a "private club or establishment," or in the alternative, that it was exempt from coverage under Title III because the Tour's areas of play did not constitute "public accommodation."[81] On appeal to the Supreme Court, PGA Tour further argued that the "competing golfers are not members of [a] class protected by Title III of the ADA."[82] PGA Tour contended that professional golfers are entertainers and are therefore not the *client* or *customer* of a "public accommodation" within the purview of Title III.[83] Therefore, Martin should not be afforded the protection of Title III of the ADA.[84]

The Supreme Court rejected PGA Tour's argument. The Court conceded that the tournaments provide the public watching the golfers with entertainment.[85] However, the Court found that PGA Tour also provided an opportunity to participate in the tournament via "Q-school" qualification to any member of the public who can pay the $3,000 fee and provide two letters of recommendations.[86] Furthermore, the Court noted that a golfer can advance to the later rounds of the tournament, where golf carts are not allowed, so long as the golfer qualified in the earlier rounds, where golf carts are allowed.[87]

PGA Tour established that a membership organization can become a place of public accommodation to the extent that it operates or leases a place of public accommodation.[88] In a case decided prior to *PGA Tour*, *Elitt v. U.S.A. Hockey,* the Eastern District of Missouri determined that a youth hockey league did not become a "public accommodation" under the

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[80] *Id.* at 670.
[81] *Id.* at 669.
[82] *Id.* at 678.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 679-80.
[87] *Id.* at 679.
[88] Staley v. Nat'l Capital Area Council, 2011 U.S. Dist. LEXIS 61986, *26 (D. Md. June 9, 2011).

ADA merely because the league's members met to practice in ice rinks, which are places of "public accommodation."[89] The *Elitt* court reasoned that a membership organization is not a "public accommodation" within the purview of Title III because the categories listed in § 12181(7) neither include nor are "sufficiently similar to any of the listed private entities in § 12181(7) to justify their inclusion as places of public accommodation."[90] The *Elitt* decision would seem to survive the Supreme Court's *PGA Tour* holding as the two cases are differentiated by the depth of the connection that the membership organizations had with the "public accommodations." While the *Elitt* youth hockey league merely practiced on a "public accommodation" rink, PGA Tour was more involved with the "public accommodation" golf course by selecting golfers for participation, allowing public participation contingent on the completion of relatively simple requirements, and profiting handsomely from the venture.

In a decision rendered after *PGA Tour*, a district court examined whether the Boy Scouts of America was a "public accommodation" and could therefore be held liable for not providing interpreter services to a disabled Boy Scout member in violation of Title III.[91] The *Staley v. National Capital Area Council* court reasoned that the mere fact that the Boy Scouts took trips to places of "public accommodation," such as public horseback riding, camping and skiing facilities, did not constitute a sufficient nexus to hold that the Boy Scout organization was a place of "public accommodation."[92] In looking to *PGA Tour* for guidance, the *Staley* court emphasized that the membership organization in *PGA Tour* was found to be a "public accommodation" because the membership organization actually leased and operated the "public

[89] Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996).
[90] *Id.*
[91] *Staley*, 2011 U.S. Dist. LEXIS 61986 at *3-5.
[92] *Id.* at *26.

accommodation" golf course.[93] The *Staley* court reasoned that "[a]n organization does not become an owner or operator of a place of public accommodation merely because a group of its members determines to visit that place of public accommodation."[94] Therefore, the *Staley* court reasoned that mere trips to places of "public accommodations" by the Boy Scouts is not enough to warrant finding that the Boy Scouts themselves are a place of "public accommodation."[95] Therefore *Staley* and *Elitt* both hold that mere trips to places of "public accommodations" are not sufficient to find that a membership organization has itself become a "public accommodation." This holding is in agreement with the *PGA Tour* Court which found that a membership organization must lease and operate a place of "public accommodation" in order to be considered a "public accommodation" within the purview of Title III.[96]

While it seems to be clear that mere patronage of a "public accommodation" by a membership organization does not constitute a sufficient nexus, the question remains as to what exactly the nexus between the "public accommodation" and the membership organization must be before the organization will be considered a "public accommodation" within the purview of Title III. One such aspect of the nexus was clarified through the *Martin* and *Matthews* line of cases. In looking for a nexus between an organization and a "public accommodation" the courts must not focus only on the organization's control over the spectator public's access to the "public accommodation," but must also look to the organization's control over the field of play and athletes.[97] By determining that Title III may be applied to the conditions of athletes participating in a field of play, the courts have inserted the protections of the ADA squarely into the field of competitive sports.

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[93] *Id.*
[94] *Id.* at *28.
[95] *Id.* at *26.
[96] *PGA Tour*, 532 U.S. at 677.
[97] Matthews v. NCAA, 179 F. Supp. 2d 1209, 1220 (E.D. Wash. 2001).

IV. *Shepherd v. United States Olympic Commission: Charting Answers Beyond PGA Tour, Inc. v. Martin*

Shepherd v. United States Olympics Commission addressed the issue that *PGA Tour* left unanswered, "whether 'places of public accommodation' to which the non-disabled *do not* have general access fall within the purview of Title III."[98] The *Shepherd* plaintiffs, a group of current and former Paralympic athletes, argued that the United States Olympics Committee (USOC) was a "public accommodation" and should fall within Title III.[99] The *Shepherd* plaintiffs reasoned that as the USOC-controlled training facilities constituted "public accommodation" and that the programming benefits offered by the USOC to athletes constituted "goods, services, facilities, privileges, advantages, or accommodations" of those places of "public accommodation."[100] Therefore, the USOC's denial of the programming benefits to the Paralympians constituted discrimination against the disabled Paralympian athletes.[101]

The *Shepherd* court rejected the plaintiffs' argument and held that *PGA Tour* does not apply "[a]bsent any allegation that the privileges and benefits afforded athletes at the U.S. Olympic Training Centers are available to members of the general public vying for a berth on the U.S. Olympic or Paralympic team."[102] The court reasoned that "there is something fundamentally different about the establishments and 'places of exercise and recreation' open to the non-disabled public generally -- which appear to be what the category at § 12181(7)(L) describe[s] -- and the United States' four Olympic Training Centers."[103] Unlike the golf tournaments at the heart of *PGA Tour,* which were open to the public upon payment of $3,000

[98] Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072, 1084 (D. Colo. 2006).
[99] *Id.* at 1081.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1083-84.
[103] *Id.* at 1083.

and production of two letters of recommendation,[104] the Olympic facilities overseen by the USOC were not open to the general public.[105] Rather, the USOC's Olympic facilities were open *only* to those "already selected by the national governing bodies to the Olympic, Pan-American or Paralympic teams in their individual sports and identified as elite, world-class athletes."[106]

In reviewing the case, the *Shepherd* court relied on their belief that the plaintiffs were not seeking to gain entry into the USOC's Olympic training facilities but rather to gain entry into the group of selected athletes which the country would put forth in competition, the Olympians.[107] The *Shepherd* court rationalized that the scope of the" public accommodation" within Title III could not be so greatly expanded so as to provide protection to disabled individuals seeking entry into a group which operated under its own selection criteria.[108]

Shepherd would subsequently be reviewed on appeal *sub nom Hollonbeck v. United States Olympic Commission.*[109] In *Hollonbeck*, the Tenth Circuit found that the USOC's practices were not discriminatory towards the Paralympians, in their role as representatives of disabled individuals, because there was "no fit between being an Olympic athlete and not being disabled."[110] "The requirement of being an Olympic athlete is not directed at an effect or manifestation of a handicap"[111] and there is simply nothing to suggest that by allowing the

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[104] PGA Tour, Inc. v. Martin, 532 U.S. 661, 679-80 (2001).
[105] *Shepherd*, 464 F. Supp. 2d at 1083.
[106] *Id.*
[107] *Id.*
[108] *Shepherd*, 464 F. Supp. 2d at 1083; *See* Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (denying a Title III claim of a cognitively disabled child against U.S. amateur hockey organization because plaintiff was challenging the denial of participation in the youth hockey league instead of denial of access to a place of accommodation, i.e. the ice rink.)
[109] Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191, 1193 (10th Cir. 2008).
[110] *Id.* at 1196.
[111] *Id.* at 1196-97.

USOC to exclusively fund the Olympians, that there was discrimination by proxy against the disabled.[112]

Ordinarily, if a court finds that a disabled individual is otherwise qualified, it will look to whether reasonable accommodations could be made so that the disabled individual could participate in the "public accommodation."[113] However, the *Hollonbeck* court did not examine the question of reasonable accommodations since the court could not make the determination of whether the Paralympians would otherwise qualify as Olympians.[114]

V. The Landscape of "Public Accommodation" After *Martin* and *Shepherd*

A. *The nexus between an organization and a "public accommodation"*

While a standard has not been fully articulated, the courts look to a "nexus" between the organization's activities and the facility in which the activities are conducted in order to determine whether an activity is a public accommodation.[115] In determining whether an entity is a "public accommodation," the courts look to whether the entity encompasses a physical accommodation, such as a movie theater which is not wheelchair accessible[116], or if the entity is an organization with no physical component, such as in the *Hollonbeck*[117] line of cases. If a physical accommodation entity is sued as discriminatory, the courts look to 42 USCS § 12181 to determine if the facility is a "public accommodation" within the scope of Title III.[118] If the

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[112] *Id.* at 1196.
[113] *Id.*
[114] *Id.*
[115] *See* Matthews v. NCAA, 179 F. Supp. 2d 1209, 1219 (E.D. Wash. 2001) ("Some 'nexus' must exist between physical place of public accommodation and the services or privileges denied in a discriminatory matter.").
[116] Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075 (9th Cir. 2004).
[117] Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008).
[118] 42 U.S.C.S. § 12181 (West 2009).

facility is determined to be a "public accommodation," the courts must then embark on an analysis of whether the requested modification is reasonable.[119]

The post-*PGA Tour* analysis is dependent on the type of entity being sued. The courts look to whether the entity is open to the public or closed to the public. Entities that are open to the public are those in which *hypothetically* anyone could join the organization. An example of an open entity is PGA Tour, the subject of the *PGA Tour* case, in which any player could participate in a golf tournament so long as the player paid an entry fee and was able to procure the necessary letters of recommendations.[120] Entities closed to the public are those to which entrance can only be obtained through an intensive selection process. An example of a closed entity is the USOC which granted access to the Olympic facilities only to the few, carefully selected Olympic athletes.[121] Entities which are deemed to be closed to the public are not "public accommodations" and thus do not fall under Title III. Allowing the protections afforded by Title III to be applied to entities closed to the public would allow an unfair advantage to disabled individuals by allowing them to claim the ADA's protection and, in essence, circumvent the intensive selection process that has to be undergone by all individuals seeking admission to an entity closed to the public.

Scholars have argued that *Hollonbeck* was decided incorrectly.[122] They argue that the *Hollonbeck* court should have looked not at whether disabled Paralympians can become Olympians but whether the Paralympians were "qualified to receive the same benefits and programs that the USOC provides to Olympic athletes.[123] Relying on statutory interpretation,

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[119] *Id.*
[120] PGA Tour, Inc. v. Martin, 532 U.S. 661, 679 (2001).
[121] *Shepherd,* 464 F. Supp. 2d at 1083.
[122] Jason Kroll, *Second Class Athletes: The USOC's Treatment of its Paralympians*, 23 CARDOZO ARTS & ENT L.J. 307, 338 (2005).
[123] *Id.*

scholars argue that it would be inconceivable that "the USOC emphasizes that since the ASA [Amateur Sports Act] provides for equitable treatment of women and prohibits discrimination on the basis of race, color, religion, sex, age, or national origin, Congress nevertheless intended to allow discrimination on the basis of disability."[124] These scholars argue that an individual athlete is "otherwise qualified" for the USOC's assistance when the athlete qualifies "as an Olympic athlete, a Paralympic athlete, or a Pan American athlete."[125]

Nonetheless, scholars have acknowledged that not every benefit and service offered by the USOC must be equally provided to Olympians and Paralympians due to differences between the two.[126] For example, the Olympics are a bigger and more prominent event than the Paralympics and therefore "the Olympics require more funding because of its size and prominence."[127] However, the USOC's failure to provide certain "benefits fundamentally interferes with the ability of disabled athletes to compete."[128] However, no guidance is given as to how to determine which benefits could be acceptably withheld as opposed to withholding of other benefits that would fundamentally interfere with the ability of Paralympic athletes' ability to compete.

In criticizing the *Hollonbeck* decision, the scholars' principal argument is that the Paralympians are a proxy for disabled individuals.[129] Thus, to declare Paralympians not qualified for benefits provided to the Olympic athletes is facially discriminatory behavior because the concept of qualified depends solely on disability as, with very rare exceptions, elite disabled athletes do not qualify for the Olympics.[130] Therefore, "when the USOC links the eligibility

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[124] *Id.* at 339 (internal citations and quotation marks omitted).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 339-40.
[130] *Id.*

criteria for the receipt of these benefits to being an Olympic athlete, it essentially says 'Disabled Athletes Need Not Apply'."[131]

The argument that the *Hollonbeck* case was decided incorrectly is flawed. The courts' adoption of such an argument would impermissibly broaden the protection of Title III in direct contradiction to the legislative intent in ratifying the ADA. The legislative intent for ratifying the ADA was to protect disabled individuals and ensure that disabled individuals may "blend fully and equally" into American society.[132] Legislative intent shows us that the law makers intended that disabled individuals become *equal to* able-bodied individuals. If the scholars' interpretation of *Hollonbeck* is embraced, different admission criteria would have to be adopted for disabled individuals as opposed to non-disabled individuals for entry into the same entities closed to the public. Such an outcome would make the two groups separate *but not equal*. The courts have even rejected the notion that accommodations could be made in instances where a disability hinders the individual but does not prevent them from partaking in the public accommodation entirely.[133]

B. Reasonably Modifying "Public Accommodations"

When examining whether an organization would be a public accommodation within the purview of Title III, the courts focus on the "nexus" between the entity and the public accommodation facility. Even in instances in which the entity was found to be a public accommodation within Title III, the courts have scrutinized the physical facility connected to the entity. The cases which extend Title III to include entities as "public accommodations" have

[131] *Id.* at 340.
[132] Rutkow, *supra* note 1, at 414.
[133] *See e.g.* Logan v. Am. Contract Bridge League, 173 F. App'x 113 (3d Cir. 2006) (special card of decks for visually impaired player not reasonable modification because he could see the cards although sometimes made mistakes as to the card).

been most successful when the requested modification has focused on the physical premises used by the organization.

Matthews[134] and *PGA Tour*[135] addressed the question of whether a modification requested by the disabled individual was reasonable within Title III. For places of "public accommodation," failure to reasonably modify "policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities" is considered discrimination within the context of Title III.[136] The ADA states that modifications are reasonable unless such modifications fundamentally alter the nature of the "public accommodation."[137]

Perhaps unsurprisingly, the courts have failed to articulate a standard for determining whether a requested modification to a public accommodation is considered reasonable.[138] The *PGA Tour* Court hinted at a standard while simultaneously emphasizing its fluidity. [139] The standard revolved around a three part analysis of reasonableness, necessity and fundamental alteration of the "public accommodation."[140]

The reasonableness of the modification requested is determined on a case by case basis. This fluid analysis "considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement

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[134] *See generally Matthews,* 179 F. Supp. 2d at 1225 (whether waiving the 75/25 Rule was a reasonable modification for Matthews).
[135] *See generally PGA Tour, Inc.*, 532 U.S. at 682 (whether allowing Martin to use a golf cart in violation of the PGA Tour rules would be a fundamental modification of the nature of the tournament).
[136] 42 U.S.C.S. § 12182(2)(A)(ii) (West 2009).

[137] *Id.* ("a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.")
[138] Rutkow, *supra* note 1, at 425.
[139] *Id.*
[140] *Id.*

it."[141] The rationale for finding a modification *unreasonable* can be broadly divided into two categories, economic or administrative.

In finding a modification to be economically unreasonable, the court must look to the cost of the modification.[142] If the cost would prevent the business from being financially viable due to a projected resulting decrease in revenue or the costs of the modification, the modification is economically unreasonable.[143] The modification may also be considered administratively unreasonable if the cost of implementing the modification imposes too high a burden on the entity.[144]

The *PGA Tour* Court also noted that a baseline requirement for an accommodation to be considered reasonable is that the proposed accommodation must be necessary as it ties into the *particular* plaintiff's disability.[145] In evaluating the necessity of the accommodation, the courts must look to the necessity of the accommodation in relation to the *particular* plaintiff's disability.[146] The courts' analysis looks to whether the modification, as presented, is necessary *for that individual plaintiff.* In *PGA Tour*, the plaintiff was unable to walk the distance of the golf course, therefore the requested accommodation of a golf court was a necessity and thus reasonable.[147] However, had the plaintiff been otherwise disabled but capable of walking the golf course, the golf cart would not have been a reasonable modification.[148]

The necessity of the modification to be tailored to the individual seeking it becomes clear when the facts of *PGA Tour* are compared to those of *Logan v. American Contract Bridge*

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[141] Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995).
[142] *See* Emery v. Caravan of Dreams, 879 F. Supp. 640, 644 (N.D. Tex. 1995), aff'd, 85 F.3d 622 (5th Cir. 1996).
[143] *Id.*
[144] *See Fortyune*, 364 F.3d at 1084.
[145] *See PGA Tour, Inc.*, 532 U.S. at 664-65.
[146] *Id.*
[147] *Id.* at 682.
[148] *Id.*

League.[149] In *Logan*, the plaintiff is a visually disabled life master, the highest rank a member may reach, of the American Contract Bridge League.[150] While the plaintiff's visual disability did not prevent his seeing the cards, the plaintiff sometimes confused standard playing cards due to his visual impairment.[151] The plaintiff requested that he be allowed to use a deck of cards especially designed for the visually impaired during bridge tournament play.[152] The Third Circuit rejected Logan's request to use a deck of cards especially designed for the visually impaired as an unreasonable modification.[153] The *Logan* court found that the pack of cards was not a reasonable modification because Logan's visual impairment allowed him to play bridge with a regular deck of cards, just not up to his full potential.[154]

Both *Logan* and *PGA Tour* concerned activities that could be considered recreational sports, with *Logan* involving bridge and *PGA Tour* involving golf tournaments. However, the disparate outcomes in the two cases can be explained by the fact that losing a bridge tournament would not constitute a life threatening event to the plaintiff in *Logan*, while walking in a golf tournament could potentially constitute a life threatening event for Martin as he had a high risk of blood clots due to his disability. However, both the plaintiff in *Logan* and Martin were highly accomplished players in their respective fields and the modifications requested by them would have merely enabled them to compete on the same level as their able bodied competitors. Therefore, such reasonable modifications should have been permissible under Title III. Furthermore, similar to the fact finding that was undertaken by the *PGA Tour* Court, allowing the plaintiff in *Logan* to

[149] Logan v. Am. Contract Bridge League, 173 F. App'x 113 (3d Cir. 2006).
[150] *Id.* at 114.
[151] *Id.* at 117.
[152] *Id.* at 115.
[153] *Id.*
[154] *Id.* at 117.

use a special deck of cards would not put the able-bodied bridge players at a disadvantage and therefore should have been allowed as a reasonable modification under Title III.

The last step of the analysis is whether the reasonable modification would 'fundamentally alter the nature of [the public accommodation]'.[155] The fundamental alteration of the nature of the public accommodation comes in a variety of forms.[156] The modification may fundamentally alter the very nature of the public accommodation for both disabled and non-disabled individuals alike – such as changing the diameter of the hole in golf.[157] The modification may fundamentally alter the nature of the services provided, such as forcing hospitals to provide oxygen for both patients and visitors.[158] The modification may fundamentally alter the public accommodation by giving a disabled individual an unfair advantage over the able bodied person.[159]

PGA Tour and *Elitt* give contrasting views as to what would entail a reasonable modification for an entity which is found to be a "public accommodation." In *PGA Tour*, although the entity was recognized as a "public accommodation," the modifications that were sought were to the tournament on the golf course itself.[160] *PGA Tour* must be contrasted with *Elitt.* In *Elitt*, while the hockey league played on a hockey rink which was indisputably a "public accommodation," the court found that the league itself did not constitute a "public accommodation."[161] The *Elitt* court determined that there was an insufficient nexus between the hockey rink and the hockey league as mere use of the "public accommodation" did not make the organization a public accommodation.[162] While the *Elitt* court determined that the hockey league was not a "public

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[155] *PGA Tour, Inc.*, 532 U.S. at 683.
[156] Rutkow, *supra* note 1, at 428.
[157] *Id. citing PGA Tour, Inc.*, 532 U.S. at 682-83.
[158] *Id. citing* Dryer v. Flower Hosp., 383 F. Supp. 2d 934, 940 (N.D. Ohio 2005).
[159] *Id.* at 429 *citing PGA Tour, Inc.* 532 U.S. at 690.
[160] *PGA Tour, Inc*, 532 U.S. at 670.
[161] *Elitt*, 922 F. Supp. at 223.
[162] *Id.*

accommodation," the court nonetheless examined whether the requested modifications would have been reasonable.[163]

There is only a fine line of distinction between the factual circumstances of *PGA Tour* and those found in *Elitt*. The organizations in both cases used public accommodations to stage their events. However, there was one key difference between the cases which led one court to find the modification reasonable and the other court to find the modification unreasonable. The requested modification in *PGA Tour* required a modification to the physical facility of the organization, a request to use a golf cart on a golf course.[164] In stark contrast, the requested modification in *Elitt* was to the entity itself, as the plaintiff requested modification which would allow him to play hockey with a younger age group.[165] Similar to *Hollonbeck*,[166] the requested modification in *Elitt* was to the entity itself, and the courts have been consistent in holding that Title III protection, and by extension reasonable modifications, cannot be extended in instances when such protections would undermine the selection criteria set forth by the entity. Therefore, while the courts have extended "public accommodations" to encompass entities which use public facilities, the extension is presently limited to reasonable modifications sought for the physical facility controlled by the entities but not for the selective criteria of the entities themselves.[167]

VI. Conclusion

This note has explored how the courts have broadened the definition of a "public accommodation" to not only encompass physical facilities, but also entities which the courts have deemed to have a sufficient nexus to a physical facility. In expanding "public

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[163] *Id.* at 224-25.
[164] *PGA Tour, Inc*, 532 U.S. at 669.
[165] *Elitt*, 922 F. Supp. at 220.
[166] Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008).
[167] *See also*, Tatum v. Nat'l Collegiate Athletic Ass'n, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (NCAA is a public accommodation due to the influence it exerts on the athletic facilities of its member-universities.)

accommodation," the courts have rationalized that their holdings are in keeping with the ADA's stated legislative intent of providing the broadest possible protections to disabled individuals. Therefore, it appears that the "nexus" between the organizational entity and the physical facility will become more tenuous as more organizational entities are brought under the purview of Title III. Additionally, in understanding the courts' expansion of "public accommodation," it is also important to consider the requested reasonable modification. It would appear that courts are wary of imposing the modifications on the organization's selection protocol, instead preferring to focus the judicial remedy of modification on physical entity with which the organization has a nexus.