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A Review of Post-*PGA Tour, Inc. v. Martin* Legal Developments Regarding the Participation Rights of Disabled Athletes

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Dr. Ted Fay proposes an inclusive model for maximizing the number of sports participation opportunities available to athletes with a disability, which are consistent with their respective individual performance capabilities. I strongly support this laudable objective, which is consistent with the National Collegiate Athletic Association (NCAA)'s Core Values for intercollegiate athletics.

Initially, I will summarize *PGA Tour, Inc. v. Martin* (2001), a landmark case in which the U.S. Supreme Court ruled that the Americans With Disabilities Act (ADA), a federal statute, requires a sports governing body to provide reasonable accommodations necessary to enable an athlete with the requisite physical ability and skills to participate in a sport or athletic competition despite his or her disability. Next I will survey several post-*Martin* ADA cases as well as a recent Olympic sports arbitration award resolving legal claims asserted by disabled athletes in an effort to gain access to sports competitions in which "able-bodied" athletes compete. I will conclude by noting that an inclusive NCAA philosophy that provides reasonable accommodations necessary to provide disabled athletes with access to intercollegiate sports participation opportunities may reduce its autonomy to establish the rules of the game and student-athlete eligibility requirements, but it will not undermine its legitimate authority to determine the fundamental nature of intercollegiate sports competition and to promote competitive equity and participating student-athletes' health and safety.

In *PGA Tour, Inc. v. Martin*, the Supreme Court ruled that, although the essence of sports is that everyone plays by the same rules, a sports governing body (including those that regulate professional sports at the highest level of competition) must make reasonable accommodations to provide a physically impaired athlete with an opportunity to compete in the subject sport. The PGA allowed all golfers to use carts during PGA Tour and Nike Tour qualifying rounds and Senior PGA Tour events, but was not willing to permit any individual golfer to use a cart during PGA Tour championship competition. The PGA refused to provide Casey Martin, a professional golfer with a circulatory disorder that inhibited his ability to walk, with an exception to its rule that all golfers must walk the course during tournament play because of its position that walking injected an element of fatigue into

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championship golf. This decision effectively precluded him from playing in any PGA tournaments, although his demonstrated golf skills qualified him to participate and the official rules of golf, which are jointly written by the United States Golf Association and Royal and Ancient Golf Club of Scotland, do not prohibit the use of golf carts at any time.

The Americans With Disabilities Act (ADA) requires covered entities, including most U.S. sports governing bodies such as the PGA, to make reasonable modifications to their rules when necessary to enable individuals with disabilities to have access to athletic competitions unless doing so would "fundamentally alter" their nature. It was undisputed that using a golf cart was a reasonable modification necessary to enable Martin to participate in PGA tournaments. When he was a member of Stanford University's golf team, both the Pacific 10 Conference and the NCAA waived their rules requiring all golfers to walk and carry their own clubs and permitted Martin to use a golf cart so he could compete in intercollegiate golf matches and tournaments.

The Supreme Court ruled that a waiver of the PGA's walking rule to allow Martin to use a cart did not fundamentally alter the nature of professional championship golf. According to the Court, the "essence of the game has been shotmaking," and the "walking rule . . . is not an essential attribute of the game itself." It recognized that "waiver of an essential rule of competition for anyone would fundamentally alter" the PGA's tournaments, but concluded that "the walking rule is at best peripheral to the nature of petitioner's athletic events, and thus it might be waived in individual cases without working a fundamental alteration."

Relying on undisputed trial court testimony that "Martin easily endures greater fatigue even with a cart than his able-bodied competitors do by walking," the Court held:

> The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires. As a result, Martin's request for a waiver of the walking rule should have been granted.

In a strong dissent joined by Justice Thomas, Justice Scalia expressed concern with a legal standard establishing "one set of rules that is 'fair with respect to the able-bodied' but 'individualized' rules, mandated by the ADA, for 'talented but disabled athletes.'" He cautioned "it should not be assumed that today's decent, tolerant, and progressive judgment will, in the long run, accrue to the benefit of sports competitors with disabilities." In his view, because the *Martin* majority's legal standard requires courts to determine which rules of a sport are "essential," sports governing bodies that "value their autonomy have every incentive to defend vigorously the necessity of every regulation" and "to make sure the same written rules are set forth for all levels of play and to never voluntarily grant any exceptions."

Contrary to Justice Scalia's prediction, in May 2007, the Ladies Professional Golfers Association (LPGA) allowed MacKinzie Kline, a 15-year-old golfer with a congenital heart condition that prevented her from walking long distances without

becoming fatigued, to ride in a cart and use an oxygen delivery system when necessary during an LPGA Tour event. Consistent with *Martin*, LPGA commissioner Carolyn Bivens determined that these accommodations would not provide her with an unfair competitive advantage.

In *Pistorius v. IAAF* (2008), an Olympic sport arbitration award, the Court of Arbitration for Sport (CAS) ruled that Oscar Pistorius, a South African athlete who is a double amputee, is eligible to run in track events sanctioned by the International Amateur Athletic Federation (IAAF) with ''Cheetah'' model prosthetic legs. He had both legs amputated below the knee when he was 11 months old because he was born without the fibula in his lower legs and had other defects in his feet. Running with prosthetics that touch only a few inches of ground—a pair of J-shaped carbon fiber blades attached to his knees—he easily won the 100- and 200-m sprints at the 2007 Paralympic World Cup. He has set world record performances for disabled athletes in the 100, 200, and 400 m, all of which would have won him gold medals in equivalent women's events at the 2004 Olympics.

An IAAF rule prohibited the use of ''any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device.'' At the time of the arbitration proceeding, there were limited biomechanical studies of amputee runners, and his speed on prosthetic legs cannot be compared with what his speed would be on natural legs. The CAS arbitration panel rejected the IAAF's argument that the use of a technical device providing an athlete ''with any *advantage*, however small, in any part of a competition. . . must render that athlete ineligible to compete regardless of any compensating disadvantages.'' Similar to *Martin*, it concluded that the use of a passive device such as the ''Cheetah'' prosthetic legs does not violate this rule ''without convincing scientific proof that it provides him with *an overall net advantage* over other athletes.'' The panel concluded that because scientific evidence did not prove that Pistorius obtained a metabolic or biomechanical advantage from using the ''Cheetah'' prosthetic legs, his exclusion would not further the rule's purpose of ensuring fair competition among athletes. Pistorius was unable to quality for the 2008 Beijing Olympics, but he won gold medals in the 100-, 200-, and 400-m races at the 2008 Paralympics, and his goal is to qualify for the 2012 Olympics.

Ironically, in contrast to *Martin* and *Pistorius* (which both facilitate elite level sports competition among disabled and able bodied professional and Olympic sport athletes), courts appear less willing to adopt a similar inclusive approach when applying the ADA to high school and recreational sports.

In *Badgett v. Alabama High School Athletic Ass'n* (2007), an Alabama federal district court refused to order a state high school athletics association to allow the state's only track and field wheelchair division athlete, who suffered from cerebral palsy, to compete against able-bodied runners in the state track and field championship based on its conclusion that her doing so "would raise legitimate competitive, fairness and administrative concerns" and fundamentally alter the sports of track and field. It also determined that her participation "would raise legitimate safety concerns that are inherent in having able-bodied athletes and wheelchair athletes compete in mixed heats." The court concluded that the establishment of a separate wheelchair division for track and field, whose competing athletes earned equivalent recognition and medals for state championship results, was a reasonable accommodation, which satisfied the requirements of the ADA.

In *McFadden v. Grasmick* (2007), a Maryland federal district court granted injunctive relief allowing a female high school student with spina bifida, who was a ''world class'' Olympic wheelchair racer, to compete in races alongside footed athletes in races within her local school district. The Maryland state high school athletic association permitted wheelchair athletes to compete and earn team points in state championship discus and shot put field events, but not track events. Relying on *Badgett*, it declined to require the state association to allow her to earn points in separate girls wheelchair division racing events, which she would be the only competitor, that would count in determining team track and field state champion.

Regarding *Martin*'s application to high sports, judicial decisions illustrate that student-athletes with the same disability (e.g., a learning disability) may not have the same athletic participation rights under the ADA. For example, in determining whether granting a waiver of a state high school athletic association eligibility rule (e.g., 19-year old maximum age rule) would fundamentally alter the nature of a sport by providing a competitive advantage or would adversely affect other participants' safety, the student-athlete's individual size, skills, and athletic prowess are the dispositive factors. This is a fact-specific inquiry; whether the ADA requires that a disabled student-athlete be given an opportunity to participate depends on the individual's physical characteristics and athletic abilities as well as the subject sport.

In *Cruz v. Pennsylvania Interscholastic Athletic, Ass'n* (2001), a Pennsylvania federal district court ruled that a 19-year-old public school special education student who was classified as "educable mentally retarded" could not be excluded from participation in any high school sports without an individualized evaluation of whether doing so was necessary prevent a threat to the health and safety of other participants or to prevent competitive unfairness. The court noted that he is five foot three inches tall and weighs 130 pounds and is not a ''star'' player in any of his interscholastic sports. Observing that there is a no "cut" policy for both teams, the court suggested he should be permitted to continue playing football because he is only "a marginal player" and participating in track because he "is not a fast runner." However, it implied that he could be excluded from wrestling because "he may have a competitive advantage based on his outstanding dual meet record."

Similarly, in *Baisden v. West Virginia Secondary Schools Activities Commission* (2002), the West Virginia Supreme Court stated:

> While we decide, through this opinion, that individualized assessments are required in cases of this nature and that reasonable accommodations may be made through waiver of the age nineteen rule under certain circumstances, we do not believe that the facts of this case justify waiver as an accommodation. Mr. Baisden turned nineteen on July 27, 2001. He is six feet four inches tall and weighs 280 pounds. He runs the forty-yard-dash in 5.3 seconds. His participation in high school football would permit him to compete in this contact sport against students approximately five years younger. The safety of younger, smaller, more inexperienced students would be unreasonably compromised. In our view, this would fundamentally alter the structure of the interscholastic athletic program, a result which is not required by reasonable accommodation standards in anti-discrimination law.

In *Kuketz v. Petronelli* (2005), the Massachusetts Supreme Court ruled that the ADA does not require that a wheelchair bound paraplegic, who is a nationally

ranked player in wheelchair racquetball competitions, be permitted to play in a health club's men's A-level league with footed players and be given two bounces to hit the ball. He was permitted in play in nonleague matches with footed racquetball players, but wanted to compete against the best footed players in league competition to prepare for an upcoming international wheelchair racquetball tournament. The official rules of racquetball require the ball to be returned on one bounce in a game between footed players, but allow for two bounces if both participants are playing in wheelchairs.

The court explained:

> Unlike the use of carts in golf, the allowance for more than one bounce in racquetball is 'inconsistent with the fundamental character of the game.' The essence of the game of racquetball, as expressly articulated in the rules, is the hitting of a moving ball with a racquet before the second bounce. Giving a wheelchair player two bounces and a footed player one bounce in head-to-head competition is a variation of the official rules that would 'alter such as essential aspect of the game . . . that it would be unacceptable even if it affected all competitors equally.' The modifications sought by [plaintiff] create a new game, with new strategies and new rules. The club certainly is free to establish or enter into a league that plays this variation of racquetball, but it is not required by the ADA to do so.

Courts have ruled that the ADA applies to the NCAA, but there are relatively few reported cases applying *Martin*'s reasonable accommodation/fundamental alteration legal framework to intercollegiate athletics. In *Matthews v. NCAA* (2001), a Washington federal district court held that the waiver of an NCAA rule requiring student-athletes to earn at least 75% of their annual required credit hours during the regular academic year would not fundamentally alter its academic eligibility requirements, but this case does not provide any in-depth consideration of the essential aspects of intercollegiate athletics or specifically identify the valid legal justifications for excluding a disabled student-athlete from participation.

Martin requires intercollegiate sports governing bodies, including the NCAA and athletic conferences, as well as its member colleges and universities to provide individualized consideration of a disabled student-athlete's request for waivers of the rules of the game and eligibility requirements. The NCAA and the Pacific 10 Conference are to be commended for satisfying this current legal requirement even before it was adopted by the U.S. Supreme Court by permitting Casey Martin to use a cart, which enabled him to participate in intercollegiate golf competitions. This voluntary, flexible approach increases disabled athletes' access to sports competition within their physical capabilities, unlike the PGA's rigid adherence to its rules without any consideration of whether a waiver or modification in an individual case would constitute a fundamental alteration by changing the essential nature of a sport, providing a net competitive advantage, or creating health and safety risks.

As Dr. Harry Edwards stated in his 2011 NCAA Scholarly Colloquium on College Sports keynote address titled "Developments at the Interface of Race, Sport and Society at the Outset of the Second Decade of the 21st Century," solutions are much easier to identify once we have identified the attendant costs. When the solution or objective is to increase access to sports participation opportunities for disabled intercollegiate athletes, the potential costs are largely reduced autonomy

to determine the rules of the game and student-athlete eligibility requirements. The NCAA's Core Values include "an inclusive culture that fosters equitable participation for student-athletes" and the "pursuit of excellence in both academics and athletics." A philosophy that affirmatively seeks to provide and enhance intercollegiate athletics participation opportunities for disabled student-athletes, as exemplified by the reasonable accommodation provided to Casey Martin, furthers the NCAA's inclusiveness and educational objectives. This inclusive philosophy would not, however, preclude individualized consideration of the effects of a student-athlete's requested modifications of game or eligibility rules on the changed nature of the sport, competitive equity, and all participants' health and safety, or their denial in appropriate cases.

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