PRIVATELY OWNED GOLF COURSES OPEN TO THE PUBLIC ARE REQUIRED BY THE AMERICANS WITH DISABILITIES ACT TO PROVIDE ACCESSIBLE GOLF CARS.

A. Accessible Golf Cars.

An accessible golf car is a golf car that can be used by a person with a mobility impairment. [1] It can be used on tees and greens as well as on any part of the course where regular golf cars are permitted. Accessible golf cars that can be used by the largest number of mobility impaired golfers have the following features:

- Hand controls for acceleration and braking.
- A seat that swivels so that a person can swing from a seated position.
- A seat that tilts when swiveled so that a person can swing from a semi-standing position.
- Can be operated by a person with the use of only one hand.
- Meets the stability safety standards for regular golf cars. [2]

Accessible golf cars are commercially available and in use at over 500 golf courses in the U.S.

B. The ADA Applies to Privately Owned Golf Courses Open to the Public.

The General Rule of the ADA states:

> No individual shall be discriminated against on the basis of disability in the **full and equal enjoyment** of the … services, facilities, privileges, advantages, … of any place of public accommodation by any person who owns, leases … or operates a place of public accommodation. (Emphasis added.) 42 U.S.C. § 12182(a)

The definition of a public accommodations states "a gymnasium, health spa, bowling alley, **golf course**, or other place of recreation." (Emphasis added.) 42 U.S.C. § 12181(7)(L) [3]

In very simple terms:

---

[1] An accessible golf car can just as easily be used by an able-bodied golfer.

[2] See ANSI/NGCMA Z130.1-2004.

[3] A privately owned golf course that is open to the public is a "public accommodation" that must comply with the ADA. Similarly, a privately owned management company that "operates" a golf course that is open to the public must also comply with the ADA. *Celano et al. v. Marriott Intern., Inc.*, 2008 WL 239306, 2008 U.S. Dist. LEXIS. In addition, a privately owned management company that "operates" a golf course owned by a public entity is also subject to the ADA. See Section H, infra.

- A person who cannot walk is a disabled person under the ADA and entitled to its protections.
- The only way a person who cannot walk can play golf is by the use of an accessible golf car.
- A public accommodation golf course that provides golf cars to its customers but does not provide an accessible golf car is discriminating against persons who cannot walk in violation of the ADA by excluding them from the "full and equal enjoyment" of the golf course.

C. Federal Courts Are Required to Follow Agency Regulations and Interpretations in Implementing the ADA.

In *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504,512 (1994), the Supreme Court stated, "The 'agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation'." See also, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), "… a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944), the Supreme Court relied on an amicus brief in that case. In *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998), the "administrative guidance" from DOJ that the Supreme Court relied on included a Response to an inquiry from a Congressman and another Response to an inquiry. In *Auer v. Robbins*, 519 U.S. 452, 462 (1997) the Supreme Court relied on an interpretation in an amicus brief from the Secretary of Labor. In *Thomas Jefferson Univ. v. Shalala*, the Supreme Court relied on an interpretation contained in the brief filed in the case by the Secretary of Health and Human Services. [4] In *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), the court relied on an amicus brief in that case for the DOJ's interpretation of its regulations.

D. The Department of Justice Regulations and Interpretations Require Accessible Golf Cars As a "Reasonable Modification."

On June 17, 2008, the Department of Justice, DOJ, filed a notice of proposed rulemaking (NPRM), 73 FR 34508, in which it announced that it would not be issuing a regulation specifically addressing accessible golf cars. The reason it gave was: "As with free standing-equipment, the existing regulation is adequate to address this issue." 73 FR 34518.

In its discussion of free-standing equipment, DOJ stated:

> Equipment has been covered under the Department's ADA regulation, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal, even though there is no provision specifically addressing equipment. See 28 CFR 36.302, 36.304. **If a person with a disability does**

4 *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 513-514.

> **not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration or would not be readily achievable."** 73 FR 34517. (Emphasis supplied.)

DOJ cited two regulations as applicable to free-standing equipment: 28 CFR 36.302 which requires reasonable modifications to accommodate individuals with disabilities and 28 CFR 36.304 which requires removal of architectural barriers. Of these two regulations, 28 CFR 36.302, reasonable modifications to accommodate individuals with disabilities, is most applicable to golf course access.

Section 302(b)(2)(A)(ii) of the ADA states:

> discrimination includes…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. [5]

The concomitant regulation is 28 CFR 36:302 which states:

> (a) General. A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

See also *Indep. Living Res. V. Or. Arena Corp.*, 982 F.Supp. 698, 733 ("[a]s a general rule, the objective of Title III is to provide persons with disabilities who utilize public accommodations *with an experience that is functionally equivalent to that of other patrons*, to the extent feasible given the limitations imposed by that person's disability") (emphasis added). A golf course with a policy that provides golf cars to the non-disabled but not to the mobility-impaired does not provide mobility-impaired golfers with an experience that is functionally equivalent to that of other non-disabled golfers.

To prove a reasonable modification claim, a disabled golfer need only introduce evidence that he or she requested a modification which is "reasonable in the general sense, that is, reasonable in the run of cases." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997). As the Court found in *Celano et al. v. Marriott Intern., Inc.*, 2008 WL 239306, 2008 U.S. Dist. LEXIS, "…the provision of accessible golf cart(s) … is both reasonable and necessary to accommodate plaintiffs' disabilities…"

---

[5] 42 U.S.C. §12182(b)(2)(A)(ii)

The only defense to a failure to make a reasonable modification is to prove that the modification would "fundamentally alter" the nature of the game of golf. [6] This defense is not applicable. The only difference between a standard golf car and an accessible golf car, from the golf course operator's standpoint, is that the accessible golf car accommodates one person and a regular golf car accommodates two people. The game of golf remains the same. Moreover, this issue was expressly decided in favor of disabled golfer Casey Martin in the seminal case of *PGA Tour Inc. v. Martin*, 532 U.S. 661 (2001).

E. <u>Administrative Interpretations Requiring Accessible Golf Cars at Public Entity Courses Must Be Followed.</u>

There are several instances of administrative action requiring accessible golf cars at Title II public entities where the regulation was similar to the Title III public accommodation regulation.

1. <u>The Department of Justice</u>. In a November 2002 Settlement Agreement with the City of Indianapolis, DOJ required the City, among other things, to purchase and maintain two accessible golf cars. [7]

2. <u>The Department of Interior</u>. The Department of the Interior (DOI) has been designated by regulation as the federal agency with authority to interpret Title II access to golf courses. 28 CFR 35:190(b)(5). For over a decade, DOI has stated that a public golf course that provides golf cars on a rental basis must also make accessible golf cars available for rent, stating that the provision of accessible golf cars is a required "reasonable modification."

The most recent example of this interpretation by DOI is the attached letter to Mobility Golf dated October 30, 2007.

> It is a reasonable modification to provide specialized golf carts for individual players with disabilities when carts are made available to other players without disabilities. … Unless it can be demonstrated that to do so would change the fundamental nature of the game of golf or cause an undue burden when the total resources of the entity are considered, we believe that public entities, which rent golf carts, must provide modified carts to golfers with disabilities for the same rental fee charged for conventional carts.

---

[6] If the requested modification is reasonable, "the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation. *Johnson v. Gambinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir.1997). See also, *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004), *Lentini v. California Ctr. for the Arts*, 370 F.3d 837 (9th Cir. 2004, *Mannick v. Kaiser Foundation Health Plan Inc.*, 2006 U.S. Dist. LEXIS 57173 (N.D.Cal.) at 12-17.

[7] www.usdoj.gov/crt/foia/indianapoliseaglecreek.html

3. The Department of Defense. In the "Report on DOD Access of Disabled Persons to Morale, Welfare, and Recreation (MWR) Facilities and Activities", which analyzed what military golf courses must do to comply with discrimination laws, the Secretary concluded that, "reasonable accommodation should be made for golfers with disabilities, including providing and/or allowing modified golf carts where they can be operated safely." The Report specifically states:

> We are of the opinion that MWR is legally required to ensure its golf courses are accessible to eligible patrons with disabilities by providing and/or allowing assistive devices, including, where appropriate, specialized golf carts, unless an undue burden would result, and/or golf course terrain would be altered in a manner that changes the fundamental nature of the courses.

Although these authorities address the requirements applicable to publicly-owned golf courses under Title II of the ADA, the regulatory framework for privately-run courses (Title III) is the same. [8] The courts routinely look to interpretations amongst the various titles of the ADA for guidance. *McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (Although Title II of the ADA uses the term "reasonable modification" rather than "reasonable accommodation," these terms create identical standards."; *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997) (the analysis of a Title I reasonable accommodations case is "easily transferable to the Title III reasonable modifications context" because "the language of both provisions is very similar…"; *Dahlberg v. Avis Rent A Car System, Inc.*, 92 F.Supp.2d 1091 (D.Colo.2000) (holding that the importation of the Title I analytical framework to Title III is "sensible and supported by the statutory language of both titles I and III," and noting the "salient provisions" are "quite similar").

The general anti-discrimination provisions of Title II and Title III are quite similar.

> Title II. "…, 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 any such entity." 42 U.S.C. 12132.

> Title III. " No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the … services, facilities, privileges, advantages, … of any place of public accommodation by any person who owns, leases … or operates a place of public accommodation." 42 U.S.C. § 12182(a)

The "reasonable modification" regulations under Title II and Title III are, likewise, nearly identical.

---

[8] Although DOD is governed by the Rehabilitation Act of 1973 and not Title II, Title II provides that it "shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to that title." 28 CFR 35.103.

> Title II (28 C.F.R. § 35.130.(b)(7)): A public entity shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.
>
> Title III (28 C.F.R. § 36.302): A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges advantages, or accomo-dations.

The applicable statutory and regulatory provisions of Title II and Title III are virtually the same. There are no practical differences between the needs of disabled golfers at public and private golf courses. Under the previously cited cases, a Court is required to follow the interpretations of DOJ, DOI, and DOD in finding that accessible golf cars are required.

F. <u>The Federal Courts Agree that Accessible Golf Cars are Required</u>.

The first case to consider the issue of the ADA and golf course access was *Dorsey v. American Golf Corporation*, 98 F.Supp. 812, 817 (E.D. Mich. 2000). There, the court found that a disabled golfer stated a valid claim of a violation of the ADA by a golf course management corporation "…that failed to provide specialized golf carts for disabled persons…" The case was then settled without a final judgment.

The next, and most recent, case is *Celano et al. v. Marriott Intern., Inc.*, 2008 WL 239306, 2008 U.S. Dist. LEXIS. In that case, three disabled golfers brought an ADA action against Marriott for its failure to provide accessible golf cars at four golf courses it owned as well at over 20 courses it managed. The findings of the Court include the following:

- The Court could act in the absence of a regulation specifically addressing accessible golf cars.
- Marriott's policy of not providing accessible golf cars "does not provide … mobility-impaired golfers with an experience that is functionally equivalent to that of other non-disabled golfers…and is discriminatory under the ADA."
- "…the provision of accessible golf cart(s) at Marriott's courses, is both reasonable and necessary to accommodate the plaintiff's disabilities…"
- Marriott violated 42 U.S.C. § 12182(b)(2)(A)(ii) by its "failure to make reasonable accommodations."
- Plaintiffs' were not required to visit all 26 of Marriott's courses. They just needed to establish that Marriott had a nationwide policy of not providing accessible golf cars.

- The Court could order Marriott to provide accessible golf cars at the 22 courses that Marriott managed, but did not own, without the owner of the courses being involved in the litigation.

G. Remedies Under The ADA.

A person who has been the subject of illegal discrimination under the ADA has two methods of getting relief. One is to file a lawsuit in federal court as was done in *Celano et.al. v. Marriott Intern. Inc.* [9] The other method is to file a complaint with DOJ and let it pursue the matter as was done in the City of Indianapolis case. [10]

If an individual brings a case in court, there are no damages. The relief would be an order directing the defendant to comply with the ADA, i.e., to provide an accessible golf car and an order to pay the attorneys fees of the disabled golfer. [11] If DOJ brings a case, in addition to obtaining a court order directing a course to provide an accessible golf car, it can request damages of $50,000 for a first violation and $100,000 for any subsequent violation. [12]

H. A Public Accommodation Can Be Liable Under Title III Even If The Golf Course Is Owned By A Public Entity.

Often golf courses are owned by a public entity and managed by a private management company. In such instances, both the Title II public entity and the Title III private management company will be held responsible for ADA violations. See, *Johanson v. Huizenga Holdings, Inc.,* 963 F.Supp. 1175 (S.D. Fla. 1997).

Similarly the "ADA Title II Technical Assistance Manual" contains the following discussion of this issue.

> II-1.3000 Relationship to title III. Public entities are not subject to title III of the ADA, which covers only private entities. Conversely, private entities are not subject to title II. In many situations, however, public entities have a close relationship to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles.
>
> ILLUSTRATION 1: A privately owned restaurant in a State park operates for the convenience of park users under a concession agreement with a State department of parks. As a public accommodation, the restaurant is subject to title III and must meet those obligations. The State department of parks, a public entity, is subject to title II. The parks department is obligated to ensure by contract that the restaurant is operated in a manner that enables the parks department to

[9] 42 U.S.C. §12188(a).
[10] 42 U.S.C. §12188(b)
[11] 42 U.S.C. §12188(a)(2).
[12] 42 U.S.C. §12188(b)(2)(C).

> meet its title II obligations, even though the restaurant is not directly subject to title II. [13]

Thus, where a private company manages or leases a golf course on property owned by a public entity and there is an ADA violation, the private entity is liable under Title III and the public entity is liable under Title II.

I. Conclusion.

In its June 17, 2008 NPRM, DOJ stated, "**If a person with a disability does not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration …."**

Since an accessible golf car does not fundamentally alter the game of golf, public accommodation golf courses are required to provide accessible golf cars.

This conclusion is consistent with numerous interpretations and enforcement activities of DOJ, DOI and DOD as well as with the only two federal courts that have addressed the issue. Accordingly, it is clear that privately owned or managed golf courses that are open to the public must provide accessible golf cars.

Richard Thesing, Esq.

---

[13] www.us-doj.gov/crt/ada/taman2.html.

QuickTime™ and a
decompressor
are needed to see this picture.

QuickTime™ and a
decompressor
are needed to see this picture.