PUBLIC ENTITY GOLF COURSES 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 safety standards for stability 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 Requires Public Entities to Make their Programs Accessible.

Section 202 of the ADA states: "…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…" [3]

In very simple terms:

- 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 entity 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 "benefits of the services, programs or activities" of the publicly owned golf course. [4]

There are a number of federal court cases that are instructive.

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[1] An accessible golf car can just as easily be used by an able-bodied golfer.
[2] See ANSI/NGCMA Z130.1-2004.
[3] 42 U.S.C. § 12132.
[4] There may also be situations where a course that has no golf cars is in violation of the ADA if it does not offer an accessible golf car. However, the purpose of this memo to focus on the vast majority of courses that do offer standard golf cars to their customers.

In *Chaffin v. Kansas State Fair Bd*., 348 F.3d 850 (10th Cir. 2003) several wheelchair users went to the State Fair to attend a concert and they were seated in the designated wheelchair section. They complained that they could not see over people who stood in front of them and they could not leave the wheelchair section during the performance to go to the bathroom because of crowded conditions. The State Fair argued that the ADA was complied with as long as the disabled persons had "access" to the fairgrounds and the concert grandstand.

The court held that the ADA requires more than physical access and that it "requires public entities to provide '*meaningful access'* to their programs and services." *Chaffin* at 857. See also, *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

A similar case is *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1996) where the court held that although a deaf inmate could physically attend prison activities, he did not have "meaningful access" without a sign language interpreter. See also, *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988).

Clearly a mobility-impaired golfer is not given "meaningful access" just by being able to reach the pro shop. There must be an accessible golf car provided in order for the mobility-impaired golfer to participate in the activity of golf.

C. Federal Courts Are Required to Follow Agency Regulations, Interpretations and Enforcement Activities 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. [5] 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.

In *Independent Living Resources*, the court stated, "Although DOJ has not issued any formal interpretive regulations regarding this issue, its position has been articulated through **enforcement activities…" [6]** (Emphasis added.)

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[5] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 513-514.

[6] *Independent Living Resources v. Oregon Arena Corp*, 982 F.Supp at 708, fn.9.

D. Federal Agencies have Interpreted Title II to Require Accessible Golf Cars.

On June 17, 2008, DOJ filed a notice of proposed rulemaking, 73 FR 34466, in which it announced that it would not be issuing a regulation specifically addressing accessible golf cars. The reason it gave was: "The existing regulation, which requires that entities operate each service, program, or activity so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities, subject to a defense of fundamental alteration or undue burden, will continue to govern this issue. 28 CFR 35.150(a)." [7]

> Section 35.150(a) states: "A public entity shall operate each service, program, or activity, when viewed in its entirety, is readily accessible to and **usable by individuals with disabilities**." [8] (Emphasis added.)

Obviously, a golf course is not usable by a person with a mobility impairment without the use of an accessible golf car.

There are several instances of administrative action requiring accessible golf cars at Title II public entities.

1. The Department of Justice. In a November 2002 Settlement Agreement with the City of Indianapolis, the DOJ required the City, among other things, to purchase and maintain two accessible golf cars. [9]

2. The Department of Interior. 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 informed the public that a public golf course which provides golf cars on a rental basis must also make accessible golf cars available for rent, stating that the provisions of accessible golf cars is a required "reasonable modification."

In response to a complaint that a municipal golf course of the city of Columbus, Ohio, DOI stated:

> 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. In fact, with recent design developments for modified and single rider golf carts, there may be less wear and tear on tees, fairways, and greens than that caused by conventional carts and tires. … 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. [10]

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[7] 73 FR 34475

[8] 28 CFR § 35:150(a).

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

[10] See attached letter dated, March 23, 2007.

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

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. [11]

F. The Federal Courts Agree that Accessible Golf Cars are Required.

There have been two cases that have determined that the ADA requires accessible golf cars. 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 most recent, case is *Celano et al. v. Marriott Intern., Inc.*, 2008 WL 239306, 2008 U.S. Dist. LEXIS. In that case, three disabled golfer 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."

Although these cases have involved Title III, they are still good authority. The regulatory framework for public entity courses, Title II, is the same and the courts routinely look to interpretations amongst the various titles of the ADA for guidance. *McGary v. City of*

[11] 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.

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.

> 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 accomodations.

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. Therefore, the two Title III cases requiring accessible golf cars should be considered as good authority for Title II cases.

G. <u>The Defenses Available Under Title II Are Not Applicable.</u>

The DOJ regulations specify that a public entity is not required to "take any action that it can demonstrate would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens." [12] The provision of an accessible golf car does not result in the fundamental alteration of the activity of the golf course. The only difference between an accessible golf car and the standard golf car, from a golf course operator's standpoint, is that one car accommodates one person and the other accommodates two.

With regard to an undue financial burden, the regulations state:

- The burden of proof is on the public entity.
- The decision that there is an undue financial burden must be made by the head of the public entity or his or her designee after considering all resources available.
- The decision must be accompanied by a written statement of the reasons for reaching the conclusion that there is an undue financial burden. [13]

The expense of an accessible golf car is minimal when compared to the revenue of a golf course or the revenue of the public entity. Moreover, if expense were a concern, the accessible golf car can be put in the regular golf car fleet rotation and rented to single players when it is not being used by mobility impaired golfers and thereby pay for itself.

H. 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*. and *Dorsey v. American Golf Corporation*. [14] 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. [15]

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. [16] 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. [17]

I. A Public Entity Can Be Liable Under Title II Even If The Golf Course Is Managed By A Private 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

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[12] 28 CFR § 35:150(a)(3).
[13] Id.
[14] 42 U.S.C. §12188(a).
[15] 42 U.S.C. §12188(b)
[16] 42 U.S.C. §12188(a)(2).
[17] 42 U.S.C. §12188(b)(2)(C).

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.
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> 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 meet its title II obligations, even though the restaurant is not directly subject to title II. [18]

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.

J. Conclusion.

In its June 17, 2008 NPRM, DOJ stated, "The existing regulation, which requires that entities operate each service, program, or activity so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities, subject to a defense of fundamental alteration or undue burden, will continue to govern this issue. 28 CFR 35.150(a)." [19] As we have shown, three federal agencies have interpreted this provision to require accessible golf cars. In addition, two federal courts have required accessible golf cars under a similar provision in Title III. Accordingly, a public entity golf course that does not provide accessible golf cars is excluding disabled golfers in violation of Section 202 or the ADA.

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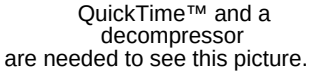
[18] www.us-doj.gov/crt/ada/taman2.html.

[19] 73 FR 34475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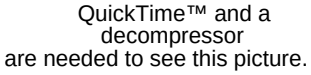
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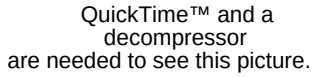
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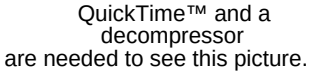
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