No. 99-2580

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FORD OLINGER,

Plaintiff-Appellant

v.

UNITED STATES GOLF ASSOCIATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331, 1343, and 42 U.S.C. 12188(a). The district court entered final judgment in favor of the defendant on May 20, 1999 (R. 73).[1/] Plaintiff filed a timely notice of appeal on June 18, 1999 (R. 81). The district court entered an amended judgment on June 18, 1999 (R. 80), and the plaintiff filed an amended notice of appeal on June 23, 1999 (R. 84). This Court has appellate jurisdiction under 28 U.S.C. 1291.

[1/] References to "R. __" are to docket numbers on the district court docket sheet. References to "Tr. __" are to page numbers in the trial transcript; reference to "P.I. Tr. __" are to page numbers in the transcript of the preliminary injunction hearing (see R. 9; see also Tr. 9 (incorporating record from preliminary injunction hearing as part of trial record)). References to "USGA Br. __" are to page numbers in the United States Golf Association's brief as appellee.

INTEREST OF THE UNITED STATES

Plaintiff is a professional golfer who seeks a modification of the United States Golf Association's (USGA) no-cart rule under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 et seq., to permit him to use a golf cart in the United States Open Golf tournament and its qualifying rounds. Plaintiff suffers from a degenerative hip disability that precludes him from walking an eighteen-hole golf course. Title III prohibits discrimination against persons with disabilities in places of public accommodation. Such discrimination includes a failure to make reasonable modifications to policies, practices, or procedures, unless doing so would "fundamentally alter" the nature of the services offered. 42 U.S.C. 12182(b)(2)(A)(ii).

The Department of Justice has substantial enforcement responsibilities under Title III. 42 U.S.C. 12188(b). Pursuant to 42 U.S.C. 12186(b) and 12206(c)(3), the Department has also issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. Pt. 36 (1999); The Americans with Disabilities Act Title III Technical Assistance Manual (November 1993). Because this appeal presents a fundamental question addressing the nature of a public accommodation as defined in 42 U.S.C. 12181(7), the Court's decision in this case could affect the Department's enforcement of Title III. In addition, in August 1998 the United Sates filed an amicus brief in a similar case raising the same issue. Martin v. PGA Tour, Inc., No. 98-35309 (9th Cir. argued May 3, 1999) (decision pending).

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the USGA operates a "place of public accommodation" subject to Title III of the ADA on the golf courses on which it conducts its tournaments for eligible golfers.

STATEMENT OF THE CASE

1. Ford Olinger is a professional golfer. He has a degenerative hip disability, bilateral avascular necrosis, that significantly impairs his ability to walk and precludes him from walking an eighteen-hole golf course. The USGA stipulated at trial that Olinger suffers from a disability within the meaning of the ADA (Tr. 17). See generally R. 72 (Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926 (N.D. Ind. 1999) (decision below)).

Defendant USGA is a private, non-profit association that is considered the governing body of golf within the United States. It conducts the United States Open, the tournament at issue in this case, and twelve other national championship golf tournaments each year. It also produces the official Rules of Golf. Olinger, 55 F. Supp. 2d at 929.

The USGA holds the United States Open and the local and sectional qualifying tournaments at different sites each year. Approximately one-third of the players in the United States Open are selected based on objective criteria, and thus are exempt from qualifying. The remainder of the players qualify through a two-step process of local and sectional qualifying tournaments.

Olinger, 55 F. Supp. 2d at 928. In 1998, local qualifying was conducted at 90 sites. Of the 6,881 players participating in the 18-hole local rounds, 750 advanced to sectional qualifying. Sectional qualifying was conducted at 12 sites around the country, and consists of 36 holes in a single day. The USGA prohibits the use of carts by participants in the United States Open and its qualifying rounds. Id. at 928-929.[2/]

The USGA occupies each site for a limited time before, during, and after each event. Over 95% of the 103 sites used in 1998 were private clubs. For the 1998 United States Open, the USGA leased the Olympic Club in San Francisco. Olinger, 55 F. Supp. 2d at 928-929. As the district court noted, "the USGA does not dispute that it supervises the play during the rounds of golf and determines who gets to play, what time they play, [and] with whom they play." Id. at 931 n.2. Further, "[t]he control exercised by the USGA over the Olympic Club during the championship extended to nearly every aspect of the club

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[2/]The general "Rules of Golf," promulgated by the USGA and the Royal and Ancient Golf Club of St. Andrews, Scotland (Tr. 127), do not require walking or prohibit the use of carts (Tr. 145). Rule 1-1 provides that "[t]he Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules." See Olinger, 55 F. Supp. 2d at 934 (referring to the Rules of Golf). The Rules of Golf recognize that a particular event or particular course condition may require rules in addition to the generally applicable rules. Ibid. Thus, pursuant to Rule 33-1, Appendix I sets forth topics on which there might be "Conditions of the Competition," i.e., conditions under which a particular competition is to be played. One topic relates to "Transportation," and provides that "[i]f it is desired to require players walk in a competition, the following condition is suggested: Players shall walk at all times during a stipulated round." Ibid.

operations except the snack bar operations in the club and club annex." Id. at 931 n.3.

2. In April 1998, Olinger submitted a written request to the USGA to be permitted to use a cart during the competition stages of the United States Open (R. 1 at 2). The USGA denied the request. On May 14, 1998, shortly before the beginning of the qualifying rounds for the 1998 United States Open, Olinger filed suit against the USGA seeking a permanent injunction requiring the USGA to allow him to use a golf cart in qualifying for (and, he hoped, competing in) the United States Open Golf Championship (R. 1). He asserted that he has a disability that substantially limits his ability to walk, and that the USGA violated Title III of the ADA by failing to reasonably modify its policies to permit him to use a golf cart to afford him equal participation in defendant's golf tournaments.

On the same day, Olinger filed a motion for a preliminary injunction (R. 2). On May 15, 1998, the court granted the motion to permit Olinger to use a cart four days later in his scheduled local qualifying round (R. 10). As a result, Olinger participated in the local qualifying round with the use of a cart (other golfers were also permitted to use a cart in the local qualifying round). His score was not low enough for him to advance to sectional qualifying. See Olinger, 55 F. Supp. 2d at 929.[3/]

[3/]At the same time that the USGA was opposing Olinger's efforts to use a cart in the 1998 United States Open and qualifying

(continued...)

In December 1998, the USGA filed a motion for summary judgment asserting, in part, that Title III did not apply because the USGA was not itself a public accommodation and did not own, lease, or operate a place of public accommodation (R. 31). Olinger opposed the motion (R. 42). On April 20, 1999, the district court denied the USGA's motion (R. 62).

A bench trial was held May 17-18, 1999 (R. 69, 71). On May 20, 1999, the district court entered judgment for the defendant USGA (R. 73), finding that it did not violate the reasonable modification provision of Title III of the ADA by refusing to permit Olinger to use a cart. The court first explained its earlier ruling (on summary judgment) that the USGA operated a place of public accommodation, and thus was subject to the nondiscrimination provisions of Title III. Olinger, 55 F. Supp. 2d at 930-933. The court stated that the "USGA exercises substantial control over the operations of the golf courses used in local and sectional qualifying rounds and the championship rounds. It operates the qualifying sites and leases and operates the championship site." Id. at 932. The court rejected the argument that those areas of the golf course "inside the ropes," and thus off limits to the "general public," were not covered under Title III as places of public accommodation. Id. at 932-933. On the merits, the court found that permitting Olinger to

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[3/](...continued)
rounds, it had agreed to allow Casey Martin to use a cart. The USGA's decision regarding Martin followed his successful lawsuit against the PGA (the USGA was not a party in that case), which was then (and remains) on appeal. See P.I. Tr. 50-56.

use a cart would "fundamentally alter" the nature of the golf competitions. See 42 U.S.C. 12182(b)(2)(A)(ii); Olinger, 55 F. Supp. 2d at 937.

On June 18, 1999, Olinger filed a timely notice of appeal (R. 81).[4/]

SUMMARY OF THE ARGUMENT

The USGA seeks affirmance on the alternate ground that Title III does not apply in these circumstances because the playing areas of the golf courses are not open to the general public and thus are not "places of public accommodation" under Title III. The district court correctly rejected this argument. That decision is in accord with the only other decision addressing this issue, Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998), appeal pending, No. 98-35309 (9th Cir. argued May 3, 1999).

Title III defines a place of public accommodation to include a golf course (as a "place of exercise or recreation"), as well as a stadium (as a "place of exhibition or entertainment"). Thus, even if the golf course is viewed as not being used for exercise and recreation during a golf tournament, it is certainly being used as a place of exhibition or stadium, and is covered as such. In either circumstance, there is no basis for carving out a "private" zone of a place of public accommodation that would

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[4/]Also on June 18, 1999, the district court entered an amended judgment (R. 80). On June 23, 1999, Olinger filed an amended notice of appeal (R. 84) making clear that his appeal also covered the amended judgment.

fall outside the coverage of Title III. There are no such "mixed use" facilities. Although facilities that are not generally a place of public accommodation may, in some of their operations, be subject to the statute (such as the public tours given by a factory), it does not work the other way. A place of public accommodation cannot create a zone that is exempt from the Act simply by imposing more restrictive admission or eligibility requirements for that area.

Moreover, the mere fact that access is strictly controlled does not mean that a facility is not a place of public accommodation. Many facilities that are not open to the general public but are open only to specific invitees are nevertheless places of public accommodation. For example, even the most selective private school -- with rigorous admissions criteria and limited openings -- is a place of public accommodation under the Act. And in this case, the fact that it is athletic skill, and not some other criteria, that restricts access to all but a very few does not mean that the playing areas of the golf course cannot be a place of public accommodation. The fact is, any golfer who meets the eligibility requirements can play in the local qualifying rounds for the United States Open, and nearly 7,000 golfers do each year. Indeed, the USGA's reliance on this argument in this case is particularly ironic since the United States Open, of all professional golf tournaments, is intended to be "open" to all golfers (amateurs as well as professionals) who

can qualify through the local and sectional qualifying tournaments.

Finally, if the USGA is correct and Title III does not apply to the playing areas of the golf course, the USGA could not only refuse to accommodate similar requests for reasonable modifications by disabled competitors, it could bar their participation altogether. For example, the USGA could bar golfers who are deaf or infected with asymptomatic HIV even if those disabilities have no bearing on the golfers' ability to compete in the tournament and do not affect other competitors. Such a result would clearly run afoul of Congress's intent in enacting the ADA to broadly ensure that individuals with disabilities participate fully in our society. See 42 U.S.C. 12101(a).

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE GOLF COURSES ON WHICH THE USGA CONDUCTS THE UNITED STATES OPEN AND QUALIFYING ROUNDS ARE PLACES OF "PUBLIC ACCOMMODATION" UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT

The USGA concedes that those areas on the golf courses accessed by the spectators are places of public accommodation subject to Title III of the ADA (see USGA Br. 26). The USGA argues, however, that the playing area of a course "inside the ropes" is not a place of public accommodation because access to that area is "tightly restricted and controlled" (USGA Br. 26). Thus, according to the USGA, during the tournaments the golf courses are "mixed use" facilities -- i.e., the golf course has two zones, one public and one private, and Title III does not

apply to the latter. There is no basis for this argument, which the district court correctly rejected.

1. Title III of the ADA proscribes discrimination by private entities in their operation of places of public accommodation. 42 U.S.C. 12182(a) provides that:

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

42 U.S.C. 12182(a). A "place of public accommodation" is a facility, operated by a private entity, whose operations affect commerce and fall within one of the 12 broad categories of facilities listed in the statute. See 42 U.S.C. 12181(7). These categories include such facilities as places of lodging, establishments serving food or drink, places of "exhibition or entertainment," and places of "exercise or recreation." See generally 28 C.F.R. Pt. 36, App. B at 622-623 (1999).[5/]

The golf courses at which the USGA conducts its tournaments fall squarely within the coverage of Title III. "[G]olf course[s]" are specifically listed as a "place of exercise or recreation" in the statutory definition of public accommodation.

[5/] The regulations define a "public accommodation" to be a private entity that owns, leases, or operates a "place of public accommodation." 28 C.F.R. 36.104 (1999). A "place of public accommodation" is the facility operated by a private entity that falls within one of the 12 listed categories. Ibid. Title III prohibits the "public accommodation" (the private entity) from discriminating in the management of a "place of public accommodation." See 28 C.F.R. Pt. 36, App. B at 616, 622 (1999).

42 U.S.C. 12181(7)(L). Alternatively, even if the golf course is not being used for exercise or recreation during a USGA tournament, it is certainly being used as a "place of exhibition," which is precisely analogous to a "stadium." 42 U.S.C. 12181(7)(C). Thus, the golf course must be a place of public accommodation under one of these provisions.[6/]

2. There is no dispute that the USGA is a private entity (see USGA Br. 4). In addition, the USGA does not press the argument it made below that it does not "own, lease, or operate" a place of public accommodation (se USGA Br. 25-26). The district court correctly rejected that argument, finding that the USGA "operates" the golf courses on which it conducts its tournaments. The regulations explain that the coverage of the "owns, leases, or operates" language is "quite extensive" and includes operation "even if the operation is only for a short time." 28 C.F.R. Pt. 36, App. B at 628 (1999). The court found that the USGA, for a day in May each year, "operates 90 golf courses for the local qualifying rounds and 12 golf courses for the sectional qualifying rounds." Olinger, 55 F. Supp. 2d at 931. The court stated that the USGA reserves the golf courses

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[6/] The USGA argued below that the United States Open golf championship is not a "public" event and thus cannot be a place of public accommodation. See Olinger, 55 F. Supp. 2d at 930. The district court correctly rejected this argument, explaining that it was not relevant whether the United States Open is a "public" event because a place of public accommodation is not an event or activity, it is a place. Id. at 930-931. In other words, as evidenced by the statute, Congress chose to list places, not events or activities, in defining a public accommodation.

exclusively for its use during these rounds: it "supervises the play, provides the rules, officiates the play, sets up the golf course, and determines the groupings of players and their tee times." Ibid. The court further noted for the United States Open Championship itself the USGA's control over the host golf course is even more extensive. For example, for the championship in 1998 the USGA obtained a lease granting it "nearly four years of some form of control" over the golf club. Ibid. Because the court found that the USGA "exercises substantial control over the operations of the golf courses" used in tournament and its qualifying rounds, the court concluded that it "operates the qualifying sites and leases and operates the championship site." Id. at 932.[7/]

3. The USGA's central argument is that the area "inside the ropes" on the golf course -- i.e., the part of the course where the golfers play -- is not a "place of public accommodation" subject to Title III because it is off limits to the general public (the spectators). The USGA argues (USGA Br. 26-32) that it is permissible to carve out a "restricted" area of a place of

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[7/]The USGA also does not press its argument, made below, that as a membership organization without a close connection to or affiliation with a particular facility it is not a place of public accommodation, citing Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1270-1271 (7th Cir. 1993); Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996). The district court explained that this argument was misdirected because Olinger does not seek admission to the USGA, but rather seeks access to the golf courses the USGA uses to conduct the United States Open and its qualifying tournaments. Olinger, 55 F. Supp. 2d at 931. For this reason, the relevant inquiry is whether the USGA "owns, leases, or operates" a golf course (the place of public accommodation). See 42 U.S.C. 12182(a).

public accommodation where Title III does not reach, and in so doing create a "mixed use" facility. The district court correctly rejected the notion that a private entity can create a "restricted" enclave in a place of public accommodation to which Title III does not apply.

a. First, Title III specifically defines covered "public accommodations." Thus, courts must construe that definition in applying the statute not, for example, what the word "public" might generally mean standing alone or in some other context. As noted above, the term "public accommodation" is specifically defined to include a golf course. The statute does not further limit the reach of that definition to golf courses (or other listed public accommodations) that are open to the public generally, as opposed to being open only to those members of the public who meet specific admission requirements. Nor does it provide that portions of a place of public accommodations may fall outside coverage if admission to those areas is restricted in some way.

The only limit in the statute on the public nature of a place of public accommodation is the exemption for genuine private clubs (and religious organizations). See 42 U.S.C. 12187.[8/] As the court in Martin noted, the argument that a golf course (or other place of public accommodation) is not a place of public accommodation in those areas not open to the public at

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[8/] Title III's private club exemption exempts private clubs or establishments that would be exempt from coverage under Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a(e).

large would render that exemption superfluous. Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1326 (D. Or. 1998) (initial decision on summary judgment).[9/] Under the USGA's rationale, a golf course or similar facility could avoid the mandate of Title III, even if it did not meet the private club exemption, so long as it limited public access in some way. Such a result would also be at odds with the ADA's broad remedial purpose and the well-settled rule that such statutes are interpreted expansively. See, e.g., Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1233 (9th Cir. 1998), rev'd, 119 S. Ct. 2162 (1999); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998).[10/]

b. Second, the fact that access to a facility may be strictly controlled, or that only a narrow group of individuals may be eligible for admission, has little bearing on whether it is a place of public accommodation under the Act. For example, in Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 759 (D. Or. 1997), the court held that the executive suites in a sports arena were places of public accommodation

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[9/]The USGA states (USGA Br. 27 n.5) that it believes that Martin was wrongly decided and that, in any event, the cases are different "in several important respects." Any differences between the cases, however, concern the merits, not the question whether the golf courses are places of public accommodation.

[10/]Moreover, a person need not be a member of the general public to be protected by Title III. 42 U.S.C. 12182(a), the anti-discrimination provision of Title III, applies to any "individual" who enjoys the "goods, services, facilities, privileges, advantages, or accommodations" of a place of public accommodation. See Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 121 (3d Cir. 1998) (rejecting view that Title III was intended to apply "only to members of the 'public,'" and noting that Title III "broadly uses the word 'individuals'").

under Title III of the ADA. The court stated that the "suites need not be open to every member of the public in order to be a public accommodation." Ibid. The court noted that "[m]any facilities that are classified as public accommodations are open only to specific invitees":

> For instance, a facility that specializes in hosting wedding receptions and private parties may be open only to invitees of the bride and groom, yet it clearly qualifies as a public accommodation. Attendance at a political convention is strictly controlled, yet the convention center is still a place of public accommodation. A gymnasium or golf course may be open only to authorized members and their guests, but that does not necessarily preclude it from being classified as a place of public accommodation. A private school may be open only to enrolled students, but it is still a place of public accommodation.

Ibid. (citations omitted). Indeed, the example of a private school -- specifically included among the 12 categories of facilities listed in the statute, 42 U.S.C. 12181(7)(J) -- makes particularly clear that because a facility limits admission to a select few does not mean that it is not a place of public accommodation. This conclusion is also supported by the Third Circuit's decision in Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113, 122 (3d Cir. 1998), which held that a physician who alleged that his staff privileges at a private hospital were suspended because of his disability stated a cause of action under Title III of the ADA. Staff privileges at a hospital are only open to a highly restricted group of people -- doctors with certain credentials -- not to the public at large.

See also Rothman v. Emory Univ., 828 F. Supp. 537, 541 (N.D. Ill. 1993) (private law school a place of public accommodation).

The cases holding that eligibility requirements to play high school or college sports are subject to Title III also support this conclusion. In these cases, the playing area of the place of public accommodation (e.g., the gymnasium or sports facility) is similarly open only to the athletes eligible to participate (and not the audience). See, e.g., Bowers v. NCAA, 9 F. Supp. 2d 460, 485-489 (D.N.J. 1998); Tatum v. NCAA, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998); Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 670 (D. Conn.), vacated as moot, 94 F.3d 96 (2d Cir. 1996); Ganden v. NCAA, No. 96-6953, 1996 WL 680000, at *8-*11 (N.D. Ill. Nov. 21, 1996); see also Anderson v. Little League Baseball, Inc., 794 F. Supp. 342 (D. Ariz. 1992) (no dispute that Title III applies to access to coaches box on baseball field). And although the USGA seeks to minimize the relevancy of these cases by suggesting that the notion of a "mixed use" facility was not raised (USGA Br. 26), the fact remains that these cases, like the instant case, involved disabled athletes seeking to participate "inside the ropes" in athletic facilities that had both "restricted" areas for the competitors and unrestricted areas for spectators.[11/]

[11/]As the court below explained, "[t]he athletes in these cases were the performers rather than the audience, just as the 6,881 golfers at the local qualifying events, the 750 golfers at the sectional qualifying events, and the 156 golfers at the championship were the performers." Olinger, 55 F. Supp. 2d at 932. The court correctly added that "[t]he courts in the NCAA (continued...)

Thus, in the instant case, the fact that the playing area of the golf course is open only to "specific invitees" -- i.e., those players who have satisfied the USGA's criteria either for exempt status or for participation in the qualifying rounds -- does not mean that it is not a place of public accommodation. And as a practical matter, although non-exempt prospective players must meet certain qualification standards -- anyone who does so can play in the local qualifying round (a number that approaches almost 7,000 golfers). Thus, the fact that it is athletic skill, and not some other criteria -- such as those restricting who may be admitted to a particular private school or to a political convention -- that restricts access to a relatively small percent of the public does not mean that the USGA does not operate the playing areas of the golf course as a place of public accommodation for purposes of Title III.

c. Finally, the USGA argues that its golf courses are "mixed use" facilities -- what it characterizes as a covered facility with a restricted area to which Title III does not apply -- and that such facilities are recognized in the Title III regulations and caselaw. This argument is not correct.

First, neither Title III nor its regulations contemplate that places of public accommodation may have public and private areas for purposes of ADA application, and the USGA misconstrues

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[11]/(...continued)
cases did not find Title III limited by the roped-off, competitive portion of the field, court, or pool, and nothing supports a finding that the USGA's barrier ropes limit Title III." Ibid.

the regulations in suggesting the contrary (USGA Br. 27). The regulations relied upon by the USGA address the opposite situation -- when facilities that are not otherwise covered by Title III are open to the public for a limited purpose. In that situation, they are subject to the requirements of Title III only with regard to the operations open to the public. For example, the regulations explain that where a factory or movie studio (that is a commercial facility not otherwise a place of public accommodation) offers tours of its facilities, the tour route is a place of public accommodation, but not other portions of the commercial facility. See 28 C.F.R. Pt. 36, App. B at 624 (1999). The regulations similarly explain that if a produce company operates a roadside stand, the roadside stand would be covered as a place of public accommodation, but not necessarily the remainder of the company's operations. Id. at 623. The conclusion in these circumstances -- where the starting point is that the facility is not covered as a place of public accommodation, but the regulations provide that some of the operations nevertheless may be -- is fully consistent with the broad reach of a remedial statute.[12/]

[12/] That conclusion is also consistent with the regulations governing the private club exemption, which provide that the exempt status of a private club does not extend to facilities of the club made available for use by nonmembers as a place of public accommodation. See 28 C.F.R. Pt. 36, App. B at 630 (1999); ADA Title III Technical Assistance Manual at III-1.6000. As the district court in Martin noted, the regulations limiting the private club exemption are "a far cry from the proposition that an operator of a place of public accommodation can create private enclaves within the facility of public accommodation and

(continued...)

By contrast, in the instant case the golf course is plainly covered as a place of public accommodation, but the USGA seeks to carve out a zone of the golf course that is not covered simply by imposing stricter admissions criteria for a particular area. There is no basis for doing so. The USGA cites (USGA Br. 27) a regulation providing that a private entity that is a public accommodation "could also own, lease, * * * or operate facilities that are not places of public accommodation." 28 C.F.R. Pt. 36, App. B at 616 (1999). The USGA also cites (USGA Br. 28) a statement in the ADA Title III Technical Assistance Manual providing that where a public accommodation operates "many different types of facilities," it has Title III obligations only "with respect to the operations of the places of public accommodation." ADA Title III Technical Assistance Manual at III-1.2000. The USGA correctly notes (USGA Br. 28) that these provisions mean that a private entity (the public accommodation) may simultaneously operate facilities that are places of public accommodation and places that are not. For example, an oil company may operate service stations that are places of public accommodations and refineries that are not (but which would be covered as commercial facilities). See ADA Title III Technical Assistance Manual at III-1.2000. It does not follow, however, as the USGA suggests (USGA Br. 27), that these regulations also mean that an operator of a place of public accommodation can create a

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[12/] (...continued)
thus relegate the ADA to hop-scotch areas." Martin, 984 F. Supp. at 1326-1327.

restricted enclave within the covered facility that would fall outside the reach of Title III. The regulations are clearly referring to separate facilities, not zones within a single facility.[13/]

The USGA also cites the discussion in the regulations providing that where there is a "mixed use" facility such as a "large hotel that has a separate residential apartment wing," the residential wing would not be covered by the ADA. 28 C.F.R. Pt. 36, App. B at 623 (1999). The USGA asserts (USGA Br. 28) that this example makes clear that there may be a private enclave in a place of public accommodation. But that circumstance is distinguishable -- the facility is really two separate entities, and these entities are not "zones" of a single place of public accommodation. Indeed, as the regulations make clear, the residential wing, if not covered by Title III, would be covered by the similar provisions of the Fair Housing Act. See 42 U.S.C. 3604(f)(3)(B) (requiring "reasonable accommodations" to afford handicapped persons equal opportunity to use and enjoy a dwelling). Thus, the focus of this discussion is whether Title III or the Fair Housing Act applies to the residential wing, not whether the residential wing is exempt from all coverage. In

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[13/] Thus, the USGA notion (USGA Br. 30 n.6) that a "primarily exempt facility with a limited public component and a primarily public facility with a limited private component are flip sides of the same coin" is wrong. As we have noted, the former situation is expressly contemplated by the Title III regulations, while the latter situation is not (i.e., the entire facility is a place of public accommodation if it falls within one of the 12 broad categories set forth in the statutory definition, 42 U.S.C. 12181(7)).

this regard, it bears emphasizing that the only references in the regulations to a "mixed use" facility concern facilities that may be covered by both the Fair Housing Act and the ADA, 28 C.F.R. Pt. 36, App. B at 623, 658, or the definition of a shopping center and shopping mall, 28 C.F.R. Pt. 36, App. B at 660. A "mixed use" facility, therefore, is not a term of art, as the USGA suggests, that applies whenever the operator of a place of public accommodation seeks to carve out restricted areas of a covered facility based on more selective admissions criteria.[14/]

Finally, the USGA cites the recent case of Jankey v. Twentieth Century Fox Film Corp., 14 F. Supp. 2d 1174 (C.D. Cal. 1998), to support the notion that there may be "exempt areas" in a place of public accommodation. In that case, the court held that a movie studio's production lot, its commissary and studio

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[14/]The USGA also relies (USGA Br. 29-30) on the notion that a place of public accommodation must be a facility that offers goods and services "available indiscriminately to other members of the general public," quoting Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 20 (1st Cir. 1994). In that case, the court was addressing whether benefits offered under a health plan were covered by Title III, and thus whether Title III was limited to actual physical structures. In holding that Title III was not so limited, the court was emphasizing the statute's broad reach; it was not suggesting that only facilities whose goods and services are offered "indiscriminately" to members of the general public are covered. If that were the case, selective private schools and other facilities with selective admissions criteria would not be covered which, as we have noted, is clearly not the case. For this reason, the USGA's emphasis (USGA Br. 30) that only players, caddies, and officials, but not the "general public," are permitted "inside the ropes," is immaterial. The area inside the ropes is simply a portion of a place of public accommodation (the golf course) that has more restrictive admissions criteria, but which is nevertheless open to any member of the public who meets that criteria. See pages 3-4, supra (discussing qualifications to play in the United States Open and its qualifying rounds).

store, and an automated teller machine (ATM) located in an office building at the studio were not places of public accommodation under Title III. The court explained that the lot was only open to employees, the commissary and ATM were provided as benefits to the employees, and the ATM machine was located in an office building that did not offer services to the general public. Id. at 1180-1184. In reaching this conclusion, the court recognized that in some circumstances there may be a portion of an exempt facility that is covered by Title III (citing the example in the regulations of a public tour of a commercial facility),[15/] and that "[c]onversely, a public accommodation may contain within itself a portion which is an 'exempt area.'" Id. at 1179. The USGA seizes on the latter statement (USGA Br. 29-30) to support its argument that it can create exempt areas of the golf courses that are not open to the general public.

It is unclear what the court meant by this statement, which was not relevant to the disposition of that case.[16/] If the statement was intended to mean that the operator of a place of public accommodation can create a zone within a covered facility

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[15/]The court found that notion inapplicable to the commissary, store, and ATM at the production lot because these amenities, like the lot itself, served only the employees of the company. Jankey, 14 F. Supp. 2d at 1180-1184.

[16/]The only authority the court cited for that statement was Independent Living Resources, 982 F. Supp. at 758-760, discussed above. In that case, the court held that the executive suites in the sports arena were covered as places of public accommodation. There is nothing in that court's discussion of this issue that supports the notion that there may be exempt enclaves within a place of public accommodation, except perhaps that the court considered the issue at all.

that is exempt from Title III by restricting admission to certain invitees -- which is what the USGA seeks to do with its golf courses -- it is wrong. As we have stated, nothing in the ADA or regulations provides that portions of a covered facility may be "exempt" from coverage. And even if the statement was intended to mean only that there may be portions of a covered facility where, as a practical matter, members of the public are not permitted, that still does not mean that the entire facility is not covered as a place of public accommodation. Indeed, the Technical Assistance manual specifically provides, as an example, that "[i]f patients receive medical services in the same building where administrative offices are located, the entire building is a place of public accommodation, even if one or more floors are reserved for the exclusive use of employees." ADA Title III Technical Assistance Manual at III-1.2000 (emphasis added).[17/]

In sum, although the regulations provide that portions of a non-covered entity may be covered by Title III, no such regulations provide that portions of a covered entity may be

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[17/]The USGA also argues (USGA Br. 31 n.7) that because a fan who ran onto the playing area of the golf course (or onto the performance area of a theater) could be arrested for trespassing, that area cannot be covered as part of a place of public accommodation. That suggestion, however, is just another version of the argument that since a facility (or portion of a facility) is limited to specific invitees, it is not a place of public accommodation. For example, a member of the general public cannot wander into a private school building anytime he pleases (or anywhere in the school he pleases), but that does not change the fact that the private school is a place of public accommodation. See also ADA Accessibility Guideline 4.33.5, addressing access to performing areas, including stages and arena floors, 28 C.F.R. Pt. 36, App. A at 584 (1999).

exempt from coverage. Thus, the district court correctly concluded that the "regulations do not provide * * * for a private enclave in a public accommodation." Olinger, 55 F. Supp. 2d at 932; cf. United States v. Lansdowne Swim Club, 713 F. Supp. 785, 791 (E.D. Pa. 1989) (under Title II of the Civil Rights Act of 1964, "[o]nce an establishment is determined to be a place of entertainment, the entire facility is identified as such") (citing cases), aff'd, 894 F.2d 83 (3d Cir. 1990).[18/]

[18/]Although the legislative history of Title III does not address the application of the statute to the competition areas of professional sports, that does not undermine the district court's decision. The Supreme Court, in rejecting the similar argument that Title II of the ADA (addressing public entities) does not apply to state prisons, stated that the fact that the statute's statement of findings and purpose did not mention prisons and prisoners was of no moment "in the context of the unambiguous statutory text." Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1955-1956 (1998). The Court emphasized that "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Id. at 1956 (internal quotation marks omitted); see also Daniel v. Paul, 395 U.S. 298, 307 (1969) (scope of public accommodation provision of Civil Rights Act of 1964 should not "be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage"). Here, as we have noted, the statute squarely includes golf courses as a place of public accommodation.

CONCLUSION

For the foregoing reasons, the district court correctly held that the USGA operates a place of public accommodation under Title III of the ADA on the golf courses on which it conducts its tournaments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached Brief for the United States as Amicus Curiae is monospaced, has 10.5 characters per inch, and contains 6,963 words.

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