# MAKE WAY FOR SEGWAYS: MOBILITY DISABILITIES, SEGWAYS, AND PUBLIC ACCOMMODATIONS

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## INTRODUCTION

"Segways at Disneyland? Could happen."[1] So sayeth Chief Judge Alex Kozinski of the Ninth Circuit. But, before anyone gets too excited, let us take a step back and really assess the possibility that we will see individuals cruising on Segways all over Disneyland, Disney World, or even your local mall.

The question boils down to: Should Segways be treated like wheelchairs? And, if not, why not?

The answer lies in 28 C.F.R. § 36.111—the U.S. Department of Justice's ("DOJ") newly revised regulation under Title III of the Americans with Disabilities Act ("ADA") as applied to mobility devices for persons with mobility disabilities. And this answer really matters to certain individuals with particular mobility conditions, such as multiple sclerosis and Parkinson's disease, who might prefer to use a Segway as a means of mobility in public places like malls or amusement parks, instead of a traditional wheelchair or scooter.

Recently, the Ninth and Eleventh Circuits struggled with the application of this regulation, and while these two decisions are not necessarily in conflict with each other, they implicate some issues that help make sense of this interesting question. In Part I, this Essay sets forth the applicable law and examines the questions that courts, the DOJ, and places of public accommodation must answer in order to decide whether they can ban devices like Segways. Part II examines the two recent decisions involving Segways in the courts of appeals. Finally, Part III analyzes the particular case of Segways at Disneyland and whether the courts (and Disney) reached the correct decision.

## I. DOJ'S NEW ADA REGULATION ON MOBILITY DEVICES

Congress enacted the ADA in 1990 to remedy and combat widespread "discrimination against individuals with disabilities."[2] Title III of the ADA

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[1] Baughman v. Walt Disney World Co., 685 F.3d 1131, 1132 (9th Cir. 2012).

[2] Prohibition of Discrimination by Public Accommodations, 42 U.S.C. § 12101(b)(2) (2006).

applies to places of public accommodation—like amusement parks, shopping malls, movie theaters, restaurants, and so on[3]—and 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."[4] Discrimination is defined in part as "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."[5]

Congress charged DOJ with issuing regulations to carry out the nontransportation provisions of Title III.[6] To this end, DOJ has recently issued a revised ADA regulation under Title III, which includes a specific provision about mobility devices for individuals with disabilities.[7]

### A. *28 C.F.R. § 36.311—Mobility Devices*

DOJ's revised Title III regulation was published on September 15, 2010, and took effect on March 15, 2011.[8] One of the revisions created a new regulatory provision entitled "Mobility [D]evices."[9] This provision involves a two-tiered approach to mobility devices, where "wheelchairs" are treated differently than "other power-driven mobility devices" ("OPDMD").[10] With respect to wheelchairs,

> [a] public accommodation shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.[11]

This requirement essentially means that a public accommodation must allow anyone using a wheelchair or manually powered mobility aid to use his or her device in any areas where pedestrians are allowed—no questions asked.

OPDMDs are treated a bit differently. Under the new provision,

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3 *Id.* § 12181(7).

4 *Id.* § 12182(a).

5 *Id.* § 12182(b)(2)(A)(ii).

6 *Id.* § 12186(b).

7 *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,255-56 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36).

8 *See id.* at 56,237.

9 *Id.* at 56,255-56.

10 *Id.*

11 28 C.F.R. § 36.311(a) (2011).

> [a] public accommodation shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public accommodation can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b).[12]

Unlike wheelchairs, which public accommodations must allow in all instances, public accommodations must make an assessment whether their policies, practices, or procedures can be reasonably modified to allow an OPDMD into their place of establishment.[13] The provision then sets forth five factors a public accommodation must consider in determining whether an OPDMD can be allowed into a specific facility. These factors include: (1) "[t]he type, size, weight, dimensions, and speed of the device"; (2) the "volume of pedestrian traffic" (and any variation in such volume that may occur during a day, week, month, or year); (3) the "design and operational characteristics" of the facility; (4) whether legitimate safety restrictions and rules can be established to ensure safe operation of the device in the specific facility; and (5) whether the use of the "device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources" or conflicts with federal land management.[14] If a public accommodation can show that a class of device creates a safety risk, it need not permit any individual's use of that device. However, if the public accommodation can modify its policies and establish legitimate safety requirements that would allow that class of device to be used in its facilities, then it must do so.

If a public accommodation determines that allowing a specific class of OPDMDs into its facilities is reasonable under the five-factor analysis, it may then ask a person using the OPDMD for a credible assurance that the mobility device is required because of the person's disability.[15] This can be established by showing a state-issued disability parking placard or disability identification card, or by providing verbal assurance that the device is needed because of a mobility disability, as long as that verbal assurance is "not contradicted by observable fact."[16] A public accommodation, however, is prohibited from asking the individual about the nature and extent of his or her disability.[17]

As you can see, wheelchairs are granted greater access than OPDMDs, and proponents of greater Segway access would certainly prefer the former categorization to the latter. So which is it: Is a Segway a wheelchair or an OPDMD?

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12 *Id.* § 36.311(b)(1).
13 *Id.* § 36.311(b)(2).
14 *Id.* § 36.311(b)(2)(i)-(v).
15 *Id.* § 36.311(c)(2).
16 *Id.*
17 28 C.F.R. § 36.311(c)(1).

### B. *What Is the Difference Between a Wheelchair and an OPDMD?*

To examine how Segways fit into these two categories, we first need to understand that Segways belong to a larger category of devices known as electronic personal assistance mobility devices ("EPAMD"). The Segway itself "is a two-wheeled, gyroscopically-stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle."[18] Thanks to innovation and advances in technology, more types of mobility devices have become available on the market. Many EPAMDs, like the Segway, are not designed primarily for use by individuals with mobility disabilities. However, many individuals with mobility disabilities, because of their specific disability, have found that some EPAMDs, especially Segways, provide better and more comfortable mobility than traditional mobility devices such as wheelchairs or scooters.[19]

When DOJ issued its first regulation implementing Title III in 1991, there was no specific definition of "wheelchair" or "other power-driven mobility device" because, at that time, "relatively few individuals with disabilities were using nontraditional mobility devices."[20] However, with the design and development of new and different types of mobility devices, including EPAMDs, DOJ felt it was time to categorize the different types of mobility devices and create requirements for each category.[21] As mentioned above, DOJ chose a two-tiered approach, separating out "wheelchair" from "other power-driven mobility devices."[22]

The definition for wheelchair is as follows:

> *Wheelchair* means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion.[23]

Breaking this down, the two main questions are: (1) Is the device designed primarily for individuals with mobility disabilities; and (2) Is the device designed for indoor or both indoor and outdoor locomotion? If, and only if, you can answer "yes" to both questions, then the device is considered a

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18 Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,262 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36).

19 *Id.*

20 *Id.* at 56,259.

21 *Id.* at 56,260.

22 *See supra* note 10 and accompanying text.

23 28 C.F.R. § 36.104 (2011).

"wheelchair." This definition encompasses traditional types of mobility devices such as wheelchairs and motorized scooters.[24]

This definition also allows for innovation and advances in technology and would cover newer types of mobility devices, as long as they meet the two-part inquiry under this definition. For example, the TEK Robotic Mobilization Device by AMS Mekatronic is a revolutionary device designed for individuals with spinal cord injuries or illnesses that enables the user to stand during locomotion and provides much more versatility, comfort, and freedom than a conventional wheelchair.[25] The device somewhat resembles a Segway, but is designed specifically for individuals with mobility disabilities to be used for both indoor and outdoor locomotion, thus meeting the two-part inquiry under the definition of wheelchair.

Now for OPDMDs. The definition states:

> *Other power-driven mobility device* means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section.[26]

Going back to the definition for "wheelchair," you first ask: Is the mobility device designed primarily for use by individuals with disabilities? If you answer "no" to this question, the device is not a wheelchair but an OPDMD. Segways, while used by individuals with disabilities, were not designed primarily for them; they were designed primarily for recreational users.[27] Although Segways can be operated both indoor and outdoor, because they were not designed primarily for individuals with mobility disabilities, they cannot be treated as a wheelchair and must be categorized as an OPDMD. In fact, as you can see, the definition itself specifically identifies Segways as belonging in the OPDMD category.

Additionally, even if you answer "yes" to question one, the device might still be an OPDMD if you answer "yes" to the following question: Is this device designed to operate in areas without defined pedestrian routes? A device designed primarily for use by individuals with mobility disabilities can still be considered an OPDMD if it is designed to operate in areas without defined pedestrian routes. An example of such a device is the Tank

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24 75 Fed. Reg. at 56,263.

25 *What Is Tek RMD*, TEKRMD.COM, http://tekrmd.com/what-is-tek-rmd (last visited Nov. 9, 2012); *see also* Carrie Gann, *Robotic Device Helps Paraplegics Stand Tall*, ABC NEWS (Mar. 22, 2012, 7:00 AM), http://abcnews.go.com/blogs/health/2012/03/22/robotic-device-helps-paraplegics-stand-tall.

26 28 C.F.R. § 36.104.

27 75 Fed. Reg. at 56,263.

Chair.[28] The Tank Chair is an off-road mobility device designed to traverse rough terrain such as beaches, trails, snow, and anywhere a traditional wheelchair would have trouble navigating.[29] Thus, although the Tank Chair is designed primarily for individuals with disabilities, because it is designed for off-road use and other places without defined pedestrian routes, it is categorized as an OPDMD.

Once a device has been designated an OPDMD, the public accommodation's next step is to determine whether a particular OPDMD must be allowed into its facilities pursuant to the five factors set out in 28 C.F.R. § 36.311(b)(2). This is done by considering the attributes of the device, the volume of foot traffic in the facility, the "design and operational characteristics" of the facility, whether safety restrictions on the use of the device can mitigate its danger, and whether operation of the device will harm the environment.[30] If the OPDMD can be allowed after assessing these factors, then the public accommodation must modify its policies, practices, and procedures to allow this device to be used in its facility by persons with mobility disabilities who use that particular device. However, this does not mean the public accommodation must allow the device in all instances. Even if the five factors weigh in favor of permitting OPDMDs, the public accommodation may determine, using the same five-factor assessment, that it is necessary to impose reasonable time, place, and operational restrictions on OPDMD use to ensure safe operation within the facility.[31]

So what does this mean in application? Next we examine two recent decisions that apply this new two-tiered approach to mobility devices in the setting of amusement parks.

## II. RECENT NINTH AND ELEVENTH CIRCUIT OPINIONS ANALYZING SEGWAYS AS MOBILITY DEVICES UNDER THE ADA

### A. Baughman v. Walt Disney World Co. *(Ninth Circuit)*

In the first of these two cases, Chief Judge Kozinski wrote the majority opinion for the Ninth Circuit in *Baughman v. Walt Disney World Co*.[32] The plaintiff, Ms. Tina Baughman, suffered from girdle muscular dystrophy,

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28 *The Tank Chair*, TANKCHAIR.NET, http://tankchair.net/store/tank-chair-store (last visited Nov. 9, 2012).

29 *Id.*

30 28 C.F.R. § 36.311(b)(2).

31 *See* 75 Fed. Reg. at 56,299 ("A public accommodation that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted.").

32 685 F.3d 1131 (9th Cir. 2012).

which makes it difficult for her to walk or to stand from a seated position.[33] Ms. Baughman uses a Segway for mobility because the device allows her the greatest mobility with the least amount of pain and discomfort.[34] In planning to take her daughter to Disneyland for her eighth birthday, Ms. Baughman reached out to the amusement park to explain her physical limitation and requested permission to use a Segway while visiting the park.[35] Disney has a policy that allows wheelchairs and motorized scooters, but bans two-wheel devices, like bicycles and Segways.[36] Disney refused to modify its policy to allow Ms. Baughman to use her Segway while visiting the park.[37]

Ms. Baughman brought suit in state court alleging that Disney had violated Title III of the ADA and various state statutes by failing to permit her to use her Segway. Disney removed the case to federal court. On cross-motions for summary judgment, Disney argued that modification of its Segway ban was not necessary because the company allowed wheelchairs and motorized scooters to be used in its facilities.[38] These were adequate alternatives for Ms. Baughman, Disney argued, regardless of the fact that using the Segway was her preferred method for mobility and that using a wheelchair or scooter would cause more pain and discomfort, diminishing her enjoyment of Disney's facilities. Specifically, Disney cited to Title III's reasonable modification provision, which reads:

> [D]iscrimination [under Title III] 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.[39]

Disney emphasized that use of the Segway was not *necessary* for Ms. Baughman to use the facilities because she could still use the facilities in a Disney-approved wheelchair or scooter, even if it was uncomfortable or painful.[40]

The district court denied Ms. Baughman's motion for summary judgment, holding, *inter alia*, that "[f]or a requested modification to be neces-

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33 *Id.* at 1132.

34 *Id.* at 1135-36.

35 *Id.* at 1132.

36 *Id.*

37 *Id.*

38 Baughman v. Walt Disney World Co., 691 F. Supp. 2d 1092, 1095 (C.D. Cal. 2010), *rev'd*, 685 F.3d 1131 (9th Cir. 2011).

39 Prohibition of Discrimination by Public Accommodations, 42 U.S.C. § 12182(b)(2)(A) (2006) (emphasis added).

40 *Baughman*, 685 F.3d at 1134.

sary [under the reasonable modifications requirement of 42 U.S.C. § 12182(b)(2)(A)(ii)], a plaintiff must show that she would be effectively excluded from the public accommodation without the modification."[41] According to the district court, because Ms. Baughman could use one of Disney's approved mobility devices, she was not excluded from the public accommodation's facilities, and therefore her ADA claim fails.

Chief Judge Kozinski, writing for the Ninth Circuit, strongly disagreed with Disney's and the district court's position on this issue. According to Chief Judge Kozinski, the statutory language makes clear that Title III does not just guarantee individuals with disabilities *access* to a public accommodation.[42] When reading Title III's reasonable modification provision in conjunction with its general antidiscrimination provision, the reasonable modification requirement must be construed in light of Title III's overarching goal of ensuring that people with disabilities have "'full and equal enjoyment'" of the public accommodation.[43] According to Chief Judge Kozinski, taking Disney's argument to its logical conclusion would mean "the ADA would require very few accommodations indeed. After all, a paraplegic *can* enter a courthouse by dragging himself up the front steps, so lifts and ramps would not be 'necessary' under Disney's reading of the term."[44] Chief Judge Kozinski concluded that "[t]he ADA guarantees the disabled more than mere access to public facilities; it guarantees them 'full and equal enjoyment.'"[45]

Turning next to the application of DOJ's new regulation on mobility devices, Chief Judge Kozinski emphasized that public accommodations must make reasonable modifications to permit the use of Segways or other OPDMDs, "unless it can demonstrate that the device can't be operated 'in accordance with legitimate safety requirements.'"[46] Chief Judge Kozinski noted that the regulation is entitled to deference and rejected Disney's argument that the regulation conflicts with Supreme Court precedent.[47]

Chief Judge Kozinski did not hold that Disney must permit Segways at its theme parks. Instead, he noted that Disney may be able to exclude them if it can show that Segways cannot be operated safely in its parks when it applies the five factors listed in 28 C.F.R. § 36.311(b)(2).[48] However, Chief Judge Kozinski emphasized that DOJ's interpretive guidance concluded that in applying the regulations, public accommodations should allow the

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41 *Baughman*, 691 F. Supp. 2d at 1095.

42 *Baughman*, 685 F.3d at 1135.

43 *Id.* (quoting 42 U.S.C. § 12182(a)).

44 *Id.* at 1134 (citation omitted).

45 *Id.* at 1135(quoting 42 U.S.C. § 12182(a)).

46 *Id.* at 1136 (quoting 28 C.F.R. § 36.311(b)(1)).

47 *Id.* at 1136-37.

48 *Baughman*, 685 F.3d at 1137.

use of Segways "'in the vast majority of circumstances,'"[49] and any safety requirement an entity imposes "'must be based on actual risks and not on mere speculation, stereotypes, or generalizations.'"[50] For example, Disney might allow the use of Segways for persons with mobility disabilities, but restrict them from traveling any faster than a motorized wheelchair could.[51]

Chief Judge Kozinski found that Disney had failed to apply the appropriate analysis in this case and reversed and remanded the case for further consideration.[52]

### B. Ault v. Walt Disney World Co. *(Eleventh Circuit)*

In *Ault v. Walt Disney World Co.*,[53] the Eleventh Circuit addressed the district court's approval of a class settlement agreement that allowed Disney to continue its ban on Segway use at its Disney World and Disneyland resorts by all guests, including those individuals with mobility disabilities who use Segways for mobility.[54] Under the agreement, Disney will develop and provide wheeled, electronic stand-up vehicles for their guests to use instead of their own Segways.[55] Additionally, the settlement required class members to forego any future claim for injunctive relief regarding the Segway ban.[56]

Despite objections from the United States, one hundred class members, twenty-three state attorneys general, and several nonprofit organizations, the district court ultimately approved the settlement as fair and concluded that plaintiffs' likelihood of success at trial was questionable.[57] The district court also concluded that DOJ's new regulation on mobility devices was not entitled to deference because it conflicted with the plain language of Title III, which required that the requested modification be "necessary" for an individual with a disability to be afforded the goods or services of a public accommodation[58]—a position Chief Judge Kozinski specifically rejected in the Ninth Circuit. Finally, the district court stated that even if the court gave deference to the regulations, Disney would likely be able to

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49 *Id.* at 1136 (quoting Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,263 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36)).

50 *Id.* at 1137 (quoting 28 C.F.R. § 36.301(b)).

51 *Id.*

52 *Id.* at 1135, 1137.

53 692 F.3d 1212 (11th Cir. 2012).

54 *Id.* at 1214.

55 *Id.* at 1215.

56 *Id.*

57 *Id.*

58 *Id.* at 1215-16; Ault v. Walt Disney World Co., No. 6:07-cv-1785-Orl-31KRS, 2011 WL 1460181, at *3 (M.D. Fla. Apr. 4, 2011), *aff'd*, 692 F.3d 1212 (11th Cir. 2012).

maintain its ban on Segways in light of its legitimate safety concerns.[59] The district court based this finding on the testimony of Disney's Chief Safety Officer that allowing individuals with disabilities to use Segways in Disney's parks would pose a significant safety risk to other guests.[60] Despite rebuttals presented from the settlement objectors, the district court ultimately agreed with Disney.[61]

On appeal, the Eleventh Circuit concluded that in approving the settlement, the district court did not abuse its discretion in finding that Disney was the party most likely to prevail if the case went to trial.[62] The Eleventh Circuit also "conclude[d] that the district court's finding that the settlement results in a 'fair, adequate, and reasonable' remedy within the range of possible recoveries is also not an abuse of discretion" because if the case did go to trial and Disney prevailed, the class would be left with no remedy at all.[63] According to the Eleventh Circuit, the settlement agreement avoids "such a Draconian result" and provides class members with the opportunity to use a stand-up mobility device at Disney's resorts, albeit one that Disney approves and provides.[64]

In affirming the settlement agreement, the Eleventh Circuit did not need to reach the question of whether DOJ's regulation was entitled to deference and thus deferred answering this question.[65]

## III. WHERE DO SEGWAYS GO FROM HERE?

We started out with the question, "Should Segways be treated like wheelchairs?" Under the current law, the answer is clearly "no." As the regulatory provision on mobility devices states, Segways are not wheelchairs and will not be given carte blanche access to places of public accommodation for individuals with disabilities. However, Segways cannot be flatly denied access either. As we see through both the Ninth and Eleventh Circuit opinions, public accommodations must weigh the five factors provided for in the regulations to determine whether and to what extent Segways should be permitted access.

Disney attempts to maintain its ban on Segways by showing that use of Segways in Disney's facilities creates a safety risk to guests. According to the DOJ's interpretive guidance, a public accommodation bears "the burden of proof to demonstrate that [a Segway] cannot be operated in accord-

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59 *Ault*, 692 F.3d at 1216.

60 *Id.* at 1215.

61 *Id.*

62 *Id.* at 1218.

63 *Id.*

64 *Id.*

65 *Ault*, 692 F.3d at 1217 n.3.

ance with legitimate safety requirements."[66] The Title III regulation allows public accommodations to "impose legitimate safety requirements that are necessary for safe operation," but these "requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities."[67]

Is Disney's conclusion that use of Segways creates a safety risk to guests correct? In the Eleventh Circuit, the court concluded that there was enough evidence below to determine that the district court did not abuse its discretion in finding that, under the regulation, Disney could properly exclude Segways from its facilities. In the Ninth Circuit, however, Chief Judge Kozinski found that Disney failed to perform the analysis mandated by the regulation and remanded the case to the district court to make this determination. Whether Disney's assertion that Segways create a safety risk to guests is correct depends on whether Disney (or any place of public accommodation) is making a reasoned and accurate analysis under the regulation.

First, a place of public accommodation must make a facility-specific analysis of the safety issue. As the regulation states, the proper inquiry is "[w]hether legitimate safety requirements can be established to permit the safe operation of the [Segway] in the *specific* facility."[68] For Disney or any public accommodation to exclude Segways, they need to make a facility-by-facility determination. What might be a safety risk at one facility within the Disney empire might not be a safety risk at another facility. Disney operates many types of facilities, including amusement parks, hotels, restaurants, stores, and shopping areas. Disney's outright ban in all of its facilities thus appears to be overbroad in that the company has not correctly applied the facility-specific analysis required by the regulation. If Disney wants to maintain its safety defense, it must show that the safety risks it asserts exist at all its facilities at all times. So far, Disney has failed to do this. And the Eleventh Circuit's approval of the class settlement agreement may mean that Disney never has to make this assessment.

Next, a public accommodation must determine if there are any legitimate safety requirements that can be established that would allow the restricted use of Segways in its facilities.[69] This means that the facility must determine if the Segway could be allowed in a facility if it adopts reasonable time, place, or operational restrictions to ensure the Segways' safe operation.[70] For instance, under the regulations, the public accommodation can impose speed limit restrictions on the use of the Segway. The public ac-

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66 Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,260 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36).

67 28 C.F.R. § 36.301(b) (2011).

68 *Id.* § 36.311(b)(2)(iv) (emphasis added).

69 *Id.*

70 *Id.* § 36.311(b)(2); 75 Fed. Reg. at 56,299.

commodation should not base its determination on how fast the Segway can travel, but should look at the Segway's range of speeds and determine if setting a specific speed limit may mitigate any safety concern.[71] In addition to concerns over the speed of the device, the public accommodation might determine that the Segway cannot be operated in certain parts of the facilities—such as escalators and areas specially designated for children to play—but could be operated in other parts. Or a public accommodation might determine that during periods of heavy pedestrian congestion, it might need to temporarily suspend the use of Segways.

Essentially, there are many factors a public accommodation must consider and many legitimate safety requirements it can establish that would still allow individuals with mobility disabilities to use their Segways, while still giving the public accommodations the freedom to ensure safety at their facilities. For example, one shopping mall requires individuals with mobility disabilities that use Segways to abide by the following rules and restrictions:

> (1) the [Segway] cannot be operated faster than normal walking speed, which is approximately 2 to 3 miles per hour; (2) the [Segway] is not permitted on escalators, stairs or steps, but is allowed on elevators; (3) the [Segway] must yield to pedestrian traffic; (4) must strictly observe and adhere to applicable safety rules and regulations governing operation and use of the [Segway] as published by the manufacturer of the unit; (5) must remain with the [Segway] at all times; (6) must remain in control of the [Segway] at all times; (7) may not use a cell phone while operating the [Segway]; (8) use of a[] [Segway] may be temporarily prohibited in all or any part of the mall during periods of congestion and until the congestion is cleared; (9) the [Segway] may not be operated side-by-side with other [Segways]; (10) must check in with Guest Services each time the mall is visited; and (11) the registration card issued must be prominently displayed on the [Segway] or the user at all times.[72]

Rules and restrictions such as these are specifically contemplated by the regulation and its accompanying interpretive guidance. In either case, it does not appear that Disney contemplated whether it could adopt any such safety requirements that would allow the use of Segways by individuals with mobility disabilities in even limited instances.

As DOJ's interpretive guidance suggests, correctly applying the analysis required by the regulation will likely lead to Segways being allowed in most instances,[73] even if subject to specific restrictions on their use. The Segway offers many benefits to its users with particular mobility conditions, such as multiple sclerosis, Parkinson's disease, spinal cord injuries, and other neurological conditions.[74] In many instances, the Segway provides individuals with specific mobility disabilities benefits not provided by

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71 75 Fed. Reg. at 56,299.

72 McElroy v. Simon Prop. Grp., Inc., No. 08-4041-RDR, 2008 WL 4277716, at *5 (D. Kan. Sept. 15, 2008).

73 75 Fed. Reg. at 56,263.

74 *Id.* at 56,262.

wheelchairs or scooters, including the Segway's intuitive response to body movement, the ability to operate the device with less coordination and dexterity, and a smaller turning radius.[75] Those individuals that use the Segway for their mobility disability are also going to be more adept at safely operating the device than someone that occasionally uses it for recreational use.

The regulation's two-tiered approach is meant to give public accommodations greater flexibility in determining whether Segways and other OPDMDs can be safely operated on their facilities. However, as the interpretive guidance emphasizes, the regulatory provision is one of inclusion, not exclusion: "In other words, public accommodations are by default required to permit the use of [OPDMDs]; the burden is on them to prove the existence of a *valid* exception."[76]

Thus, in most instances, Segways should be allowed, but the public accommodation is free to devise legitimate safety requirements that will ensure the Segway's safe operation within its facility. But, remember, "[i]n order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated."[77] So, in the end, you should start seeing Segways coming to an amusement park or shopping mall near you.

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75 *Id.*

76 *Id.* at 56,298 (emphasis added).

77 *Id.* at 56,299.