ESSAY

THE AMERICANS WITH DISABILITIES ACT AND DISABILITY BENEFIT PLANS

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I. Introduction

The Americans with Disabilities Act[1] (ADA) was enacted in 1990 with the purpose[2] of eliminating discrimination[3] against dis-

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[1] *See* 42 U.S.C. §§ 12101- 12213 (1997).

[2] *See id.* § 12101(b)(1). The stated purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ." *Id.*

abled persons.[4] The ADA was Congress' response to the perceived

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[3] *See* 42 U.S.C. § 12112(b). "Discriminate" is defined in the statute as being:
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
(3) utilizing standards, criteria, or methods of administration —
(a) that have the effect of discrimination on the basis of disability; or
(b) that perpetuate the discrimination of others who are subject to common administrative control;
(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a common relationship or association;
(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or . . .
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the applicant or employee;
(6) using qualification standards, employment test or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id. The fact that the term is defined in this way indicates that it should not be interpreted as being restricted to only the items enumerated, but that they should be regarded as being examples of what is considered to be discriminatory rather than constituting an all-inclusive list.

[4] *See* 42 U.S.C. § 12102(2). "Disability" means, with respect to an individual —
(A) a physical or mental impairment that substantially limits one or more

problem that disabled people did not enjoy the advantages generally available to non-disabled people. The ADA attempts to level the playing field in at least three general areas: 1) employment; 2) public transportation; and 3) public accommodations[5] and services provided by private entities.[6]

Additionally, the drafters of the ADA specifically addressed

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of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

Id.

[5] *See* 42 U.S.C. § 12181(7). A "public accommodation" is defined to include a large number of operations which affect commerce such as hotels, stations used for public transportation and, for purposes of this article, "insurance office(s)." *See id.* This subsection reads:

(A) The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce —
an inn, motel, hotel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
(B) a restaurant, bar, or other establishment serving food or drink;
(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(D) an auditorium, convention center, lecture hall, or other place of public gathering;
(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id.

[6] *See, e.g.*, Title I, 42 U.S.C. § 12111 (addressing employment-related issues); Title II, 42 U.S.C. § 12161 (discussing public transportation issues); Title III, 42 U.S.C. § 12181 (highlighting public accommodations and services provided by private entities). Public transportation issues are beyond the scope of this article.

the area of insurance;[7] however, the handling of this issue has been ambiguous.[8] In order to serve the competing interests of disabled persons and the insurance industry, the drafters forged a legislative scheme that has probably created more questions and litigation than actually assisting the individuals that its provisions were designed to protect.[9]

A majority of the ADA cases have dealt with two issues: whether a particular person falls within the definition of a "qualified individual with a disability,"[10] so that the individual has standing to bring a suit;[11] and what "reasonable accommodation" an employer has to make in order to comply with the law's requirements.[12] However, more recently, courts have begun to deal with cases that interpret benefit plans and the insurance policies used to provide those benefits. More specifically, courts have begun to focus on the ADA's effect as to the terms and conditions of those policies relating to specific disabilities.

This article addresses the questions raised by the insurance industry's practice of providing different levels of benefits, includ-

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[7] *See* Title IV, 42 U.S.C. § 12201(c) (dealing with "Miscellaneous Provisions").

[8] *See generally* H. Miriam Farber, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-provided Health Care Plans Violate the Americans with Disabilities Act?*, 69 N.Y.U. L. REV. 850 (1994).

[9] Though the federal Equal Employment Opportunity Commission (EEOC) has issued Guidance Reports in the years since the ADA's enactment, they may have created confusion instead of providing guidance. The EEOC is the agency responsible for the enforcement of the ADA with respect to employment-related issues, including the provisions of the benefit plans covering employees. In June 1993, the agency issued a report addressing health insurance benefits. Additionally, another report was issued in April of 1997, dealing with employers' providing "reasonable accommodations" for employees with mental illness.

[10] *See* 42 U.S.C. § 12111(8). A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires." *Id.*

[11] *See, e.g.*, Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995) (holding that the employer was not required under the ADA to reduce its production standards for grocery selector who was unable to satisfy the employer's new, collectively bargained standards because of alleged disabilities); Stewart v. County of Brown, 86 F.3d 107 (7th Cir. 1996) (positing that the county sheriff did not violate the ADA because it restructured a courthouse's security room to accommodate the head, neck and back disability of a department employee). *See also* PART IV(A) of this article (discussing cases dealing with who comes within the definition of a "qualified individual with a disability").

[12] *See generally Milton*, 53 F.3d at 1118.

ing disability benefits, based on whether the cause of an insured's disability was physical or mental in nature.[13] In particular, this article focuses on the recent case of *Parker v. Metro. Life Ins. Co.*,[14] and the resulting implications for insureds, insurers and employers.[15]

II. The Americans With Disabilities Act

A. *Background*

Prior to the enactment of the ADA, it was generally perceived that disabled people did not have the same opportunities in the workplace that non-disabled people had.[16] The ADA sought to

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[13] *See infra* Parts II, III.

[14] Parker v. Metro. Life Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995), rev'd, 99 F.3d 181 (6th Cir. 1996), rev'd en banc 121 F.3d 1006 (6th Cir. 1997).

[15] *See infra* Part IV(D).

[16] *See* 42 U.S.C. § 12101. Section (a) of § 12101 sets forth the findings and purpose of the law in stating that:

Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who

correct these historical inequities by requiring the business community to make "reasonable accommodations" to the disabled in order to equalize their employment opportunities.[17] At the same time, the ADA recognized that additional costs would have to be incurred when implementing the changes necessitated by the law. Therefore, the ADA's requirements were phased in over a period of several years and were made prospective only. Specifically, the ADA became effective for employers[18] with twenty-five or more employees two years after the date it was signed into law, and four

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have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id. President Bush himself unequivocally stated while signing the ADA into law:

> (I)ndividuals with disabilities . . . have faced persistent discrimination in the workplace and barriers imposed by inaccessible public transportation, public accommodations, transportation, and telecommunications. . . . [The ADA] . . . signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.

Statement by President George Bush upon signing S. 933, July 30, 1990.

[17] *See* 42 U.S.C. § 12112(a). This provision generally prohibits employer-related discrimination. *See id.* The term "discriminate" is defined in subsection (b) of § 12112 to include, among other things:

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

Id. § 12112(b)(5)(a).

[18] *See* U.S.C. 12111(5)(A). An "employer" is generally defined to be "... a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." *See id.* However, there are exceptions for the federal government and corporations wholly owned by it, Indian tribes and bona fide private membership clubs that meet certain tax requirements. *See* 42 U.S.C. § 12111(5)(B).

years for employers with fifteen to twenty-five employees.[19]

Included in its provisions, Title I of the ADA prohibits discrimination by employers when providing fringe benefits to "qualified individuals with a disability."[20] Title I further prohibits discrimination with regard to an employer's application, hiring and advancement practices, or the discharge of employees based on a disability.[21] Furthermore, Title III of the ADA, which deals with public accommodations and services operated by private entities, also prohibits discrimination on the basis of an individual's disability.[22] This language can also be interpreted as prohibiting discrimination in the products offered by insurance companies. However, it is unclear if Congress contemplated this result or intended that the prohibition extend only to discrimination against disabled persons in the facilities owned by the insurers.

Finally, Title IV of the ADA, which deals with miscellaneous provisions, specifically mentions insurance because of the industry's strong lobby.[23] These provisions are commonly referred to as

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[19] *See id.* § 12111 (5)(A).

[20] *See id.* § 12111. More specifically, Title I defines a covered entity as being, "an employer, employment agency, labor organization, or joint labor-management committee." *See id.* § 12112(a). "No covered entity (which includes employers of fifteen or more employees) shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

[21] *See* CYNTHIA M. COMBE & GERALD J. TALBOT, EMPLOYEE BENEFITS ANSWER BOOK 10-1 (3d ed. 1994). The phrase, "other terms, conditions, and privileges of employment" is significant in that it clearly encompasses the fringe benefits an employer provides its employees. These include such benefits as insurance benefits, including disability benefits.

[22] *See* U.S.C. § 12182(a). Title III reads:

> No 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.

Id.

[23] *See id.* § 12201(c). In relevant part, Title IV states that Titles I and III:

shall not be construed to prohibit or restrict —

> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
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> (2) a person or organization covered by (the ADA) from establishing,

"safe-harbor" provisions and reflect the drafters' intent to accommodate long-standing practices in the insurance industry. However, the "safe harbor" provisions may not be used as a subterfuge in order to evade the purposes of Titles I and III.[24] A subterfuge entails a disability-based distinction which is not justified by the costs or risks linked to a disability.[25]

B. *The ADA Regulations*

The Equal Employment Opportunity Commission (EEOC) has primary jurisdiction to administer and enforce employment related practices governed by the ADA.[26] Pursuant to that jurisdiction, the EEOC has promulgated regulations dealing with the law's equal employment provisions and the complaints that individuals file claiming unfair treatment under the law.[27] Although the regulations define physical or mental impairment, they fail to explain what are acceptable and prohibited practices dealing with mental problems.[28] In April 1997, the EEOC issued an Interpreta-

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> sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law . . . .

Id. A third paragraph in subsection (c) is designed to similarly protect long-standing practices with respect to employers that self-fund their benefit programs. It provides that Titles I and III " . . . shall not be construed to prohibit or restrict . . . (3) a person or organization covered by (the ADA) from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan *that is not subject to State laws that regulate insurance.*" *Id.* (emphasis added). While this language clearly encompasses self-funded plans of most private employers, it also encompasses church and governmental plans regardless of whether they are insured or self-funded, the two major categories of plans which are excluded from ERISA's requirements but not the ADA's.

[24] *See id.* Specifically, subsection (c) states that "Paragraphs (1), (2) and (3) shall not be used as a subterfuge to evade the purposes of subchapter(s) [sic] I and III of this chapter." *Id.*

[25] *See* EEOC Interim Enforcement Guidance on the Application of the ADA to Disability-Based Distinctions in Employer Provided Health Insurance, EEOC COMPLIANCE MANUAL #205.001 (June 8, 1993).

[26] *See* 29 CFR § 1630 (dealing with the implementation of the equal employment provisions of the Americans with Disabilities Act), and § 1640 (dealing with the handling of complaints as to charges of employment discrimination based on disability under the Americans with Disabilities Act).

[27] *See id.*

[28] *See* 29 CFR § 1630.2(h) (defining "[p]hysical or mental impairment as being . . . [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities").

tive Guidance Report which defined mental illness and suggested methods that employers might implement in order to accommodate qualified employees with mental disabilities.[29] However, to date, there are no regulations in place.

III. Disability Insurance Policies

A. *History*

Most employees in the United States are provided life insurance and health benefits by plans established or sponsored by their employers.[30] Indeed, employee welfare benefits are often cited as being a major factor in attracting and retaining employees.[31] These benefit plans mushroomed after the Second World War as employers, constrained in the salaries they could offer employees by wage and price guidelines, sought alternative inducements to monetary compensation. Concurrently, the courts were in the process of ruling that employee benefits are a proper sub-

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Other than defining a "mental impairment," the regulations do not yet deal with specific problems that employers and/or their disabled employees may face.

[29] *See* Robert Pear, *Employers Told to Accommodate the Mentally Ill,* N.Y. TIMES, Apr. 30, 1997, at A6. The EEOC had issued a guidance the previous day with respect to mental illness and their workers.

> The Government told employers today that they may not discriminate against qualified workers with mental illness, may not ask job applicants if they have a history of mental illness and must take reasonable steps to accommodate employees with psychiatric or emotional problems.

Id.

[30] Indeed, as part of the recent national debate over the enactment of an overhaul to the nation's health care system, consideration was given to requiring all employers to provide medical care benefits to their employees. Any such requirement was strenuously opposed by the business community, but particularly by small employers who argued it would make them less competitive. Though incremental changes have since been made to the nation's system of providing health care to its people, no requirement that employers pay for it has been enacted as yet.

[31] *See, e.g.,* COMBE & TALBOT, *supra* note 21. In response to the question, "Why do employers provide employee welfare benefits?", the authors' response was:

> 1. To achieve and maintain a competitive edge in the job market, particularly in the employer's specific industry or geographic location;
> 2. To provide employees with security and peace of mind to help enhance their job performance;
> 3. To retain employees who possess valuable knowledge, skills, and experience.

Id.

ject of collective bargaining.[32] As a result, employee benefits quickly became an integral part of an employee's overall compensation package.

Additional compensation in the form of disability benefits was included in this phenomenon. Significantly, disability benefits are a type of wage replacement and, therefore, different from medical benefits, which reimburse employees for the cost of medical services.[33] However, both medical and disability benefits often differ based on whether the cause of the individual's condition is mental or physical. Whether or not the difference is actuarially justifiable is a major issue with respect to ADA protections.

B. *Regulatory Structure*

By its passage of the McCarran-Ferguson Act in 1945, Congress left the regulation of insurance to the states.[34] Historically,

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[32] *See, e.g.*, Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); NLRB v. General Motors Corp., 179 F.2d 221 (2nd Cir. 1950).

[33] *See* COMBE & TALBOT, *supra* note 21. Disability income plans are employer plans, some mandated by state law, which provide partial income replacement for employees who become disabled. *See id.* Disability income plans:

> Provide[s] income-replacement benefits to employees who are unable to work because of illness or accident. This type of plan does what its name implies; it "replaces" a portion of the income or compensation lost while the employee is disabled. Thus, the level of benefits generally is dependent upon the employee's pre-disability income level, not on the nature and extent of his or her particular disability.

Id.

[34] *See* 15 U.S.C. §§ 1011 -1015 (1997). The McCarran-Ferguson Act was a direct result of the decision in the case of *United States v. South-Eastern Underwriters Assn.* which held that, inasmuch as insurance is interstate commerce, it is subject to federal regulation. Congress immediately reacted to the decision by passing the McCarran-Ferguson Act. *See generally* United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944). Section 1 of the McCarran Act reads:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (1997). Essentially, the law was Congress' recognition of the fact that the federal government had neither the expertise nor the inclination to assume an area that had been completely regulated by the States up to that point in time. *South-Eastern Underwriters* held that the nature of the insurance business had become interstate in nature. *See South-Eastern Underwriters*, 322 U.S. at 550. Subsection 2(a) of the McCarran Act simply read, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1011.

however, few states have enacted statutes that apply to disability insurance policies issued in their jurisdictions. Since the early 1970s, states have passed laws requiring medical care policies to provide coverage for various types of policies or services.[35] However, the same has not been true with respect to disability insurance policies.[36] The reason for this discrepancy is because disability insurance policies are wage replacement policies, which indemnify the insured for a specified dollar amount resulting from her disability, as opposed to the service coverage of a medical care policy. Regardless, state legislatures have not seen fit to regulate the provisions of these kinds of policies.

The same is not true with insurance departments, which are the state regulatory bodies that have jurisdiction to regulate and approve disability insurance policies. Therefore, it is not unusual for insurance departments to either promulgate regulations governing the contents of such policies, or regulate the structure of the provisions of disability insurance policies.[37]

However, insurance departments continue to approve policies with different benefits based on an insured's mental, as opposed to physical disability. This fact leads to some obvious concerns, particularly in the context of the ADA provisions dealing with insurance issues. For example, there are questions as to how much deference, if any, should be granted to an insurer who pays benefits in accordance with the policy that has secured prior approval of the appropriate regulators. Similarly, it is debatable as to what protection, if any, should be given to an employer who has purchased such a policy.[38]

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[35] *See, e.g.*, ARIZ. REV. STAT. § 20-1402A(4)(b); N.J. STAT. ANN. §§ 17B:27-51.2–51.7.

[36] *See, e.g.*, N.J. STAT. ANN. § 17B:27-51.1; N.Y. INS. LAW § 4235(f)(4)(F) (McKinney 1997); PA. STAT. ANN. tit. 40, § 1511 (West 1997).

[37] A review of the Insurance Regulations in the States of New Jersey, New York and Pennsylvania has uncovered no regulations dealing specifically with the subject of disability policies issued in those jurisdictions. However, most, if not all, states have enacted laws which prohibit unfair methods of competition and/or unfair and deceptive acts and practices in the business of insurance. *See, e.g.*, N.J. STAT. ANN. §§ 17B:30-1-22. Based on these kinds of laws, the states can regulate the content of the disability insurance policies submitted to them to approve prior to their being marketed in their jurisdictions.

[38] Further questions that may need to be addressed include: Does it make any difference that an insurance department which approved a policy having this kind of distinction may have made no judgment about whether or not the distinction was

The situation is further complicated because of the broad preemption provisions in the Employee Retirement Income Security Act (ERISA).[39] Specifically, state insurance departments do not have jurisdiction over self-funded plans, including those that provide disability benefits. Since ERISA does not regulate the substance of welfare plans, which includes disability benefits, there is a significant void in their regulation.[40] Nonetheless, the provisions of the ADA are applicable to self-funded plans.[41]

C. *State Mental Illness Laws*

Recent laws mandating certain types of coverage include, among other benefits, coverage for mental and nervous conditions. In fact, a majority of states have laws that require such coverage in group medical care insurance policies issued in their jurisdictions.[42]

The structure of these statutory enactments can vary. For example, a law might require that a policy delivered in a particular state provide coverage for inpatient treatment of mental and

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actuarially justifiable? Should insurance departments have the responsibility for making those kinds of judgments? Do they want that responsibility? Even if they do, do they have adequate staffing and/or funding to make them?

[39] *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1997).

[40] *See* ERISA § 514, 29 U.S.C. § 1144. This section is a broad preemption provision of all laws as they "relate to" a plan that is subject to ERISA. "Relate to" is a term which has been interpreted as being very broad by the Supreme Court. *See Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983) (holding that a state law "relates to" an employee benefit plan if it has a connection with or reference to the plan). The two major types of plans that are not subject to ERISA are church and governmental plans. The only exceptions are for laws relating to banking, securities and insurance. Accordingly, self-funded or self-insured plans are not subject to regulation by the States. *See, e.g.*, Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (holding that ERISA does not preempt the applicability to a partially self-funded plan of the Massachusetts law requiring insurers to provide coverage for mental illness in outpatient facilities).

[41] *See, e.g.*, Carparts Distrib. Ctr., Inc., v. Auto Wholesaler's Assoc. of New England, 826 F. Supp. 583 (D.N.H. 1993), *rev'd* 37 F.3d 12 (1st Cir. 1994) (discussed in detail at Part IV(C) of this article). While the statute may not explicitly say this, it should be apparent from the number of cases involving the ADA and self-insured or self-funded plans that its provisions are, in fact, applicable to such plans.

[42] All States have now enacted laws that require group medical care insurance policies issued in their jurisdictions to provide coverage for different kinds of services. More than half have now done so with respect to benefits for mental illness. A compilation of all such laws is reproduced in the Group Insurance and Group Annuity Compliance Service of the American Council of Life Insurance.

nervous disorders.[43] Alternatively, a law may require that coverage be provided up to a specified dollar amount for either a calendar year, the lifetime of the insured, or both.[44] However, these requirements often allow the insurer to provide a lower level of coverage for mental and nervous problems than it may otherwise provide. Typically, these lower levels of coverage resulted from the lobbying efforts of employers and insurers who believe that benefits for these conditions should be limited. Given the nature of this type of illness, patients often receive psychological or psychiatric treatment for many years. This fact appears to have persuaded state legislatures into believing that the insurer's liability for such coverage should not be open-ended.[45]

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[43] *See, e.g.*, N.Y. INS. LAW § 3221(l)(5) (McKinney's 1997).

[44] *See, e.g.*, OHIO REV. CODE ANN. § 3923.28 (requiring any group policy of accident and sickness insurance which provides hospital, medical or surgical coverage for other than specified diseases to provide outpatient coverage for mental illness at least equal to $550 for any calendar year or twelve month period).

[45] *See, e.g.*, FLA. STAT. ANN. § 627.668 (West 1997) (for a good example of a statute which permits employers and their insurers to design different levels of benefits for mental illness, subject to the statute's minimums). This statute states in pertinent part that:

> (1) Every insurer, health maintenance organization, and nonprofit hospital and medical service plan corporation transacting group health insurance or providing prepaid health care in this state shall make available to the policyholder . . . for an appropriate additional premium . . . the benefits or level of benefits specified in subsection (2) for the necessary care and treatment of mental and nervous disorders . . . subject to the right of the applicant for a group policy or contract to select any alternative benefits or level of benefits as may be offered by the insurer, health maintenance organization, or service plan corporation, provided that, if alternate inpatient, outpatient or partial hospitalization benefits are selected, such benefits shall not be less than the level of benefits required (under the relevant paragraph of subsection (2)).
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> (2) Under group policies or contracts, inpatient hospital benefits, partial hospitalization benefits, and outpatient benefits consisting of durational limits, dollar amounts, deductibles, and coinsurance factors shall not be less favorable than for illness generally, except that:
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> > (a) In patient benefits may be limited to not less than 30 days per benefit year as defined in the policy or contract. If inpatient hospital benefits are provided beyond 30 days per benefit year, the durational limits, dollar amounts, and coinsurance factors thereto need not be the same as applicable to physical illness generally.
> >
> > (b) Outpatient benefits may be limited to $1,000 for consultations with a licensed physician, a psychologist . . . , a mental health counselor . . . , a marriage and family therapist . . . , and a clinical social worker . . . . If benefits are provided beyond $1,000 per benefit year,

D. *The Federal Mental Health Parity Act*

Congress recently enacted the Mental Health Parity Act (MHPA) that may shed additional light on congressional intent as to the very complicated issues presented by the ADA and the substance of benefit plans covering employees. The purpose of the MHPA is to require equal benefits for conditions resulting from mental problems as opposed to those from physical conditions. However, the MHPA does *not* mandate mental health coverage; instead, it only requires parity if a plan provides mental health benefits. Furthermore, the MHPA does not apply to all kinds of coverage, but only to group health plans that provide medical and surgical benefits.[46] Therefore, by its terms, it does not apply to plans providing disability benefits, whether insured or self-funded.

In addition, the MHPA requires parity only as to the annual and lifetime limits group medical and surgical plans provide persons covered by those plans, and not with respect to other cost-saving features.[47] Interestingly, in the event a plan provides differ-

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> the durational limits, dollar amounts, and coinsurance factors thereof need not be the same as applicable to physical illness generally.
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> (c) In any benefit year, if partial hospitalization services or a combination of inpatient and partial hospitalization are utilized, the total benefits paid for all such services shall not exceed the cost of 30 days of inpatient hospitalization for psychiatric services, including physician fees, which prevail in the community in which the partial hospitalization services are rendered.

Id.

[46] *See* 29 U.S.C. § 1185a. The MHPA's requirements are only applicable to "a[ny] group health plan (or health insurance coverage offered in connection with such a plan) that provides both medical and surgical benefits *and* mental health benefits." *Id.*

[47] *See also* 29 U.S.C. §§ 1185a(a)(1)(A), (B) and (2)(A), (B) (requiring parity in the lifetime and annual limits a plan may contain, if it provides mental health benefits). In addition, however, subsection (b) of the law, again dealing with construction, specifically states, in relevant part:

> Nothing in this section shall be construed — . . .
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> (3) in the case of a group health plan (or health insurance coverage offered in connection with such a plan) that provides mental health benefits, as affecting the terms and conditions (including cost sharing, limits on numbers of visits or days of coverage, and requirements relating to medical necessity), relating to the amount, duration, or scope of mental health benefits under the plan or coverage, except as specifically provided in subsection (a) of this section (in regard to parity in the imposition of aggregate lifetime limits and annual limits for mental health benefits).

ent levels of benefits for different kinds of conditions, an actuarial equivalent must be provided if the condition results from mental causes.[48] Exceptions are also made for small employers' plans, defined to be plans covering two to fifty employees, and plans that can demonstrate that the cost of providing parity in benefits would exceed one percent in overall plan costs.[49] Finally, the MHPA will sunset as to benefits provided after September 30, 2001.[50]

Thus, despite its name, the MHPA does not require that benefits for mental health be provided in all instances or to the same extent provided for other types of treatment. Exceptions were made to the law's requirements because of the added costs those requirements might impose on small employers and to any plan that could demonstrate that the additional costs would amount to more than Congress felt were financially acceptable. Although the MHPA suggests that Congress would like to see parity in benefits regarding mental health, it has not gone so far as to require equality in all instances due to financial considerations.

Interestingly, the states have responded to the enactment of the MHPA by passing their own versions of mental health parity laws. To date, fifteen states have passed such laws and legislation is pending in eighteen others.[51] Clearly, there is a trend to enact such laws,[52] and advocates for parity in the area of mental health

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Id.

[48] *See* 29 U.S.C. § 1185a. Subsections (1)(C) and (2)(C) require actuarial equivalents in the event a plan has different limits as to the benefits it provides for different types of services. *See id.*

[49] *See* 29 U.S.C. § 1185a. Subsection (c)(1) of this statute provides the small employer exemption and subsection (c)(2) provides the increased cost exemption. *See id.* It reads as follows:

> This section shall not apply with respect to a group health plan (or health insurance coverage offered in connection with a group health plan) if the application of this section to such plan (or to such coverage) results in an increase in the cost under the plan (or for such coverage) of at least [one] percent.

Id. Recent studies have attempted to quantify the additional costs to a plan of providing mental health benefits.

[50] *See* 29 U.S.C. § 1185a(f). Subsection (f) of the law simply states that, "[t]his section shall not apply to benefits for services furnished on or after September 30, 2001." *Id.*

[51] See *Parity Laws Progress in the States*, NATIONAL UNDERWRITER, Life & Health Edition, Jan. 19, 1998, at 34.

[52] *See BI Best Bets for 1998*, BUSINESS INS., Jan. 5, 1998, at 8.

In the tradition of the Oracle at Delphi, the Great Karnak and the Psychic

benefits continue to be active in pursuing their agendas. [53]

IV. Case Law

A. *Qualified Individuals with Disabilities*

Even though the ADA has been in effect for less than ten years, there have been numerous cases involving the question of when an employee falls within the definition of a "qualified individual with a disability" so that she has standing to bring an action against an employer. Based on those decisions, three factors must exist: 1) the individual must have a disability, but still be able to perform the essential functions of the job with no more than reasonable accommodations;[54] 2) the individual must have suffered some kind of adverse employment action, whether it be the loss of the job or some other kind of alleged discrimination; and 3) there must be a causal connection between the individual's disability and the adverse action.[55]

Often, plaintiffs have established the existence of a disability and demonstrated that, with minimum accommodations, the disability did not prevent the employee from performing the essential functions of the job. Notably, the disability in some of these cases involved a mental illness. For example, in *Esfahani v. Medical College of Pennsylvania*, the plaintiff suffered from a bipolar affec-

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Connection Hotline, Business Insurance again presents its annual list of what will be "in" and "out" in the worlds of risk management, employee benefits and commercial insurance for the next twelve months.

Id. Number one on their lists of "IN" items was "Mental health benefit parity."

[53] Proposed interim rules with respect to the MHPA were promulgated by the regulators last December. Comments were to have been submitted by March 23, 1998, even though the MHPA went into effect on January 1, 1998, as to services provided by plans subject to the law on and after that date.

[54] *See, e.g.*, McDonald v. State of Kansas Dep't of Corrections, 880 F. Supp. 1416 (D. Kans. 1995) (holding that a correction officer's request, because of a heart condition, to be permitted to rotate among positions in facility in which he would have little contact with inmates and no occasion to use physical exertion deemed to be more than a reasonable accommodation); Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794 (D. Colo. 1995) (stating that employer's offer to let employee work a split shift or have a cashier's position thereby letting her sit periodically was a reasonable accommodation to her chronic tendonitis condition).

[55] *See* Stradley v. Lafourche Communications, Inc., 869 F. Supp. 442 (E.D. La. 1994); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996); Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758 (5th Cir. 1996).

tive disorder and was found to have a valid ADA claim under the employer's long-term disability plan.[56] Significantly, this was prior to the time the plaintiff's condition progressed to a point where it debilitated him so that he could no longer perform his job. However, in other cases, the plaintiff was not able to establish that she fell within the definition, usually because the disability was so severe that it prevented the individual from performing her job satisfactorily. For instance, in *Tyndall v. Nat'l Educ. Ctrs.*, the court found that an employee who missed an excessive amount of time from work as a result of her lupus condition was not a qualified individual for purposes of an ADA claim.[57]

The EEOC has argued that individuals who become incapable of performing their job due to a disability should, nonetheless, be entitled to bring an action under the law. However, the courts considering the issue have rejected this position.[58]

B. *Title I Cases*

Title I of the ADA deals with employment-related violations, as opposed to those occurring in public accommodations. Many cases decided thus far have been directed specifically at an employer and the alleged adverse action taken because of the complainant's disability.[59] Notably, in suits brought against individuals

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[56] 919 F. Supp. 832 (E.D. Pa. 1996). *See also* Susie v. Apple Tree Preschool and Child Care Ctr., Inc., 866 F. Supp. 390 (N.D. Iowa) (teacher with epilepsy established that she could perform the job so long as she was given absences for her epilepsy).

[57] 31 F.3d 209 (4th Cir. 1994); *see also* Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (insulin-dependent diabetic bus driver was not a qualified individual with a disability because his condition presented a substantial risk of danger to himself and passengers). *But see* Sarsycki v. United Parcel Service, 862 F. Supp. 336 (W.D. Okla. 1994) (insulin-dependent diabetic delivery driver was a qualified individual with a disability when he showed that his diabetes was under control).

[58] The District Court in the *Parker* case addressed this issue and stated that:

> it may seem undesirable and perhaps unpalatable that a totally disabled individual is not entitled to relief under . . . the ADA. However, the plain language of the Act clearly indicates that the ADA was designed to afford relief only to those individuals with disabilities who can perform the essential functions of the job that they hold or seek.

Parker, 875 F. Supp. at 1326.

[59] Of course, the ADA also applies to applicants for jobs. Therefore, persons who feel they are qualified for a position but did not get it simply because of a disability may have a cause of action under the law. *See, e.g.*, West v. Russell Corp., 868 F. Supp.

other than employers, no violations have been found. In fact, the relief under the ADA has been available under Title I only against an employer and not against particular individuals who may act on behalf of an employer. [60] Nonetheless, if the individual in question implements the policies of the employer, liability can be found.[61] The key to this determination is whether the person or committee who implemented the policy had a decision-making role in the adverse action affecting the complainant.

Similarly, cases are now being brought alleging that an employer discriminated against an employee in violation of Title I by either purchasing an insurance policy or having a benefit plan that had different coverage depending on the underlying nature of the disability. Generally, the plaintiff's theory in these suits is that a benefit plan is an extension of an employer; thus, if the benefit plan results in different benefits based solely on the underlying nature of the disability, the employer has discriminated against the individual in violation of Title I.

For instance, in *EEOC v. CNA Insurance Co.*, the agency alleged that different benefits based on the insured's disability violated Title I of the ADA.[62] The EEOC challenged the provision in the defendant's policy whereby benefits would be provided for twenty-four months if the insured's disability resulted from a mental illness, but up to age sixty-five if the disability resulted from a physical cause. The court of appeals did not reach the merits of the distinction in the policies because it found that the individual complainant's disability prevented him from performing the essential functions of his job and, therefore, he did not have standing to bring an action under the ADA. However, the court noted that legislation must address the disparity among benefits provided for physical versus mental disabilities. Despite the holding, suits continue to be brought alleging Title I violations by employ-

313 (M.D. Ala. 1994) (holding that a plaintiff may show a cause of action under the ADA if he can show he was qualified and that a non-disabled person got the job instead of him because of his disability).

[60] *See, e.g.*, Fernandez v. Community Asphalt, Inc., 934 F. Supp. 418 (S.D. Fla. 1996) (stating that relief under the ADA is against the employer, not individuals whose actions might constitute violations).

[61] *See, e.g.*, Braverman v. Penobscot Shoe Co., 859 F. Supp. 596 (D. Me. 1994) (holding that liability is imputed to the president of a company for the actions of his employee for purposes of ADA).

[62] 96 F.3d 1039 (7th Cir. 1996).

ers who purchase insurance policies containing differences of this type.[63]

C. *Title III cases*

Thus far, few courts have addressed whether benefit plans have violated Title III of the ADA. When the issue has been presented, the general conclusion is that Title III simply does not extend to benefit plans provided by an employer. In such instances, courts have been persuaded that Title III's prohibitions only extend to the physical premises of the entity involved, and not to the content of the goods and services those entities sold or made available.

For example, in *Pappas v. Bethesda Hospital Assoc.*, a registered nurse sued her employer and its insurance administrator for their refusal to provide her family with medical insurance coverage.[64] In dismissing the plaintiff's Title III claim against the hospital association, the court noted that neither the Supreme Court nor the Sixth Circuit have allowed a Title III action based on an insurance plan provided by a defendant and held that Title III is applicable only to the physical use of public places.[65] In contrast, other courts have reached the opposite conclusion that Title III does extend to the contents of the goods and services sold by public accommodations, including insurance companies. For instance, in *Doukas v. Metro. Life Ins. Co.*, a violation of Title III was found when the insurer denied the plaintiff's application for mortgage disability insurance on the basis of a mental illness.[66] Similarly, in *Kotev v. First Colony Life Ins. Co.*, a violation of Title III was found when an in-

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[63] In addition to the recent suits brought by the EEOC, a similar distinction in a long-term disability plan was at issue in *Esfahani* and the distinction in benefits as between plan participants afflicted with AIDS and other benefits has been the subject of other suits.

[64] 861 F. Supp. 616 (S.D. Ohio 1994). The basis for the refusal was her husband's hypertension, hyper-lipidemia and her son's paraplegic condition. *See id.* at 619.

[65] *See id.* at 620.

[66] 950 F. Supp. 422 (D.N.H. 1996). Interestingly, in following the decision in *Carparts*, the court specifically held that Title III extends to the substance or contents of an insurance policy. *See id.* at 425. It went on to consider the "safe-harbor" and "subterfuge" provisions of Title IV and held that, though anticipated experience by an insurer may be a sufficient basis for coming within the safe-harbor, underwriting practices in existence before the enactment of the ADA can constitute a subterfuge to evade the purposes of that law. *See id.*

surer denied the plaintiff's application for a life insurance policy because his wife was infected with HIV.[67] In cases of this nature, it is questioned whether the "safe harbor" provisions established for the insurance industry, shield the product from potential liability or, as seems more logical in view of the subterfuge language in the statute, whether an actuarial analysis is needed to establish the validity of any distinction being made in the policy.

Notably, the First Circuit's decision in *Carparts Distrib. Ctr, Inc. v. Automotive Wholesaler's Assoc. of New England,* is vital to the analysis of Title III issues.[68] In that case, the benefit plan offered was self-funded and was made available to many employers through a multiple employer welfare arrangement.[69] This arrangement consisted of an employer making the plan's benefits available to its employees and pooled the company's contributions with those of other similarly situated employers.[70] The pooled funds were used to pay valid claims of employees and no insurance companies were required to fund the benefits.[71]

In the case of this particular employer, the offered plan had been amended to contain a cap of $25,000 in lifetime benefits for those with AIDS related illnesses after the decedent had been diagnosed as being HIV positive.[72] Conversely, the plan's lifetime cap for any other illness was $1,000,000. The executors of a decedent's estate had brought suit against the employer concerning its health benefits plan and the sponsor of that plan.[73] The plaintiffs claimed a violation of Title III, but the district court rejected the

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[67] 927 F. Supp. 1316, 1321 (C.D. Cal. 1996). In reaching the conclusion that Title III had been violated, the court expressed the view that both the *Pappas* court and the District Court in *Parker*:

> interpreted Title III more narrowly than the plain language of the statute warrants. In their interpretation of Title III, First Colony could have discriminated against Kotev only if it had impeded or prevented his entry into a First Colony office. The plain language of Title III and the ADA demonstrates that Title III is not limited to prohibiting only the denial of physical access to persons with disabilities.

Id.

[68] 826 F. Supp. 583 (D.N.H. 1993), *rev'd* 37 F.3d 12 (1st Cir. 1994).

[69] *See id.* at 584.

[70] *See id.* at 585.

[71] *See id.* at 584.

[72] *See id.* at 585.

[73] *See Carparts,* 826 F. Supp. at 584.

claim since the defendants were not places of public accommodation.[74]

However, the appellate court reversed and remanded the case based on its conclusion that the plan itself constituted a public accommodation for purposes of Title III.[75] It noted that the language of Title III was ambiguous with its treatment of insurance.[76] The court also noted that many goods and services are sold over the phone and through the mail; thus, if Title III were limited to the physical structures of public accommodations, Congress' purpose in enacting the ADA would be frustrated.[77] However, the court did not specifically hold that the provisions of the self-funded benefit plan violated the ADA.[78] Instead, it remanded the case to the district court for further proceedings in light of its findings.

D. *Parker v. MetLife*

In addition to the cases already mentioned, *Parker v. Metro. Life Ins. Co.*, discussed several theories of liability under the ADA.[79] In *Parker*, Metropolitan Life Insurance Company (MetLife) issued a group long-term disability (LTD) insurance policy to the Schering-Plough Company prior to the time Ms. Parker became an employee in 1981. Ms. Parker became disabled in 1990 because of severe depression. She received LTD benefits the following year

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[74] *See id.* at 587.

[75] *See Carparts*, 37 F.3d at 21. In reversing as to the Title III issue, the court of appeals felt that to restrict the statute's applicability to an actual physical structure would be too restrictive an interpretation. *See id.* at 19. Specifically, the court held that "it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Id.* at 19.

[76] *See id.* at 19.

[77] *See id.* at 20. It, therefore, concluded:

> To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.

Id.

[78] *See id.* at 21.

[79] 875 F. Supp. 1321.

and continued to receive them for twenty-four months; the amount of time an employee was entitled to receive benefits for a mental condition. However, the policy provided that an insured who became disabled because of a physical condition could receive benefits until the age of sixty-five. Among other things, Ms. Parker claimed that the LTD policy violated the ADA because it provided unequal benefits for employees who become mentally disabled.

However, the district court held that since Ms. Parker was not able to perform her job at the time of her discrimination claim, she was not considered a "qualified person with a disability" within the ambit of the ADA.[80] Therefore, the court found that Ms. Parker lacked standing to bring a suit under Title I of the ADA.[81] Moreover, the court stated that there was no violation of the ADA's Title III since the terms and provisions of the LTD policy were not considered a public accommodation.[82] In other words, the court interpreted Title III to extend only to the physical premises of a public accommodation, and not to the goods and services that they sell.[83] Finally, the court held that MetLife, Schering-Plough and the Schering-Plough LTD plan had not violated ERISA in their handling of Ms. Parker's benefits.[84] Accordingly, the district court ruled in favor of the defendants on all counts.[85]

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[80] *See id.* at 1326 (1995).

[81] *See id.*

[82] *See id.* at 1328.

[83] *See id.*

[84] *See Carparts*, 875 F. Supp. at 1328.

[85] *See id.* at 1333. The ERISA issue was really a rather straightforward one. Section 502 of ERISA allows a plan participant or beneficiary to bring a civil action to enforce rights under an ERISA plan. *See* 29 U.S.C. § 1132. Different standards are used to evaluate whether or not a plan fiduciary's handling of a claim was proper depending on how much discretion the fiduciary had with respect to claims handling matters. *See id.* Mrs. Parker claimed that the defendants had not handled her claim properly. *See Parker*, 875 F. Supp. at 1328. The defendants argued that, based on the discretion as to claims handling granted to MetLife by the terms of the policy, its decision could not be overturned unless it could be shown that it was arbitrary and capricious rather than the *de novo* standard that would have been applicable in the absence of a delegation of discretionary authority. *See id.* at 1329. The policy contained a specific provision which said that the determination of MetLife was to be given full force and effect, unless it can be shown that the determination was arbitrary and capricious. *See id.* Since the court felt the determination was in accord with the plain terms of the policy, it felt *MetLife's* decision had not been arbitrary and capricious. *See id.* Accordingly, summary judgment as to this issue was granted to the

The Sixth Circuit Court of Appeals reconsidered all three issues. The findings of the lower court were affirmed as to the ERISA claim and the Title I claim of the ADA, but the case was remanded to the district court concerning the Title III claim.[86] In fact, the court of appeals held that Title III prohibited discrimination in the goods and services sold by insurance companies, and was not restricted to the premises where a person could physically walk in and purchase insurance coverage.[87] The court felt that because so many goods and services can be obtained through the mail or by telephone, it would be anomalous to limit Title III's scope solely to an insurance company's offices.[88] Therefore, the

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defendants. *See id.* at 1332.

[86] *See id.*, 99 F.3d 181, 183 (6th Cir. 1996). One other issue was mentioned in one or more of the opinions in *Parker* that is worthy of note. That issue was whether Ms. Parker's condition was mental or based on underlying physical conditions, an issue LTD insurers have been faced with in recent years. *See id.* Presumably, if they had been physical in nature, she would have been entitled to benefits beyond the two-year period applicable to conditions based on mental conditions. *See id.* Evidence was introduced describing her condition as "a chemical disorder of a deep-seated nature." *Id.* at 184. If, in fact, it were proven that her condition was essentially physical in nature, she might have established a claim to additional benefits. *See id.* at 185. However, for some unmentioned reason, the underlying nature of her condition was not pursued on appeal.

[87] *See id.* at 188.

[88] *See Parker*, 99 F.3d at 187, 188. Specifically, after citing the general prohibition in Title III and noting that the words "goods" and "services" are included in the statute, the court said:

> Statutory language must be given its common and ordinary meaning. . . . Bearing in mind this important principle, we find that Title III of the Disabilities Act prohibits discrimination on the basis of disability in the contents of insurance products. Insurance products clearly fall within the common and ordinary meaning of the term "goods," and the provision of insurance coverage clearly falls within the common and ordinary meaning of the term "service." In addition, the statute specifically includes "insurance office" within the definition of "public accommodation" if the entity's operations affect commerce. . . .
>
> To say that the Disabilities Act prohibits discrimination only as to "physical access" to places of "public accommodation" would write the terms "goods" and "services" out of the statute. In addition, we note that, even if the language were not so clear, remedial statutes are to be interpreted broadly, in a manner consistent with their stated goal. ... The Disabilities Act was intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." ... The meaning we ascribe to the provisions today is much more in keeping with this broad goal than the constricted interpretation suggested by Defendants.

Id.

court remanded the case for a determination as to whether the distinction in benefits based on the underlying cause of an individual's disabling condition constituted a subterfuge to evade the purposes of the ADA.[89] In other words, the distinction must be actuarially justified.

A rehearing *en banc* was granted because of the importance of *Parker's* Title III issue.[90] On August 1, 1997, in an eight to five decision, the majority affirmed the district court's decision and specifically held that Title III of the ADA does not apply to the contents of the policies sold by insurers to employers.[91] Therefore, the court held that Title III's application is restricted only to insurance companies' physical premises.[92] Thus, as the dissent noted, this decision is in direct conflict with the First Circuit's decision in *Carparts*.[93]

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[89] *See id.* at 194.

[90] *See Parker*, 107 F.3d 359 (6th Cir. 1997).

[91] *See Parker*, 121 F.3d 1006, 1010-12 (6th Cir. 1997). The court said:

> Title III specifically prohibits, *inter alia*, the provision of unequal or separate benefits by a place of public accommodation. . . . While we agree that an insurance office is a public accommodation . . . plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation. . . .
>
> Similarly, the good that plaintiff seeks is not offered by a place of public accommodation. The public cannot enter the office of MetLife or Schering-Plough and obtain the long-term disability policy that plaintiff obtained. Parker did not access her policy from MetLife's insurance office. Rather, she obtained her benefits through her employer. There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office. . . .
>
> Furthermore, Title III does not govern the content of a long-term disability (insurance) policy offered by an employer. The applicable regulations clearly set forth that Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation.

Id.

[92] *See id.* at 1014. It was mentioned in the majority opinion of the Sixth Circuit *en banc* in, *Parker*, that the enactment of the MHPA by Congress suggests that differences in benefits are permissible. *See Parker*, 121 F.3d at 1006.

[93] *See id.* at 1019 (Boyce, J., dissenting).

E. *Discussion*

Based on the case law to date, it appears that a disabled individual who is no longer capable of performing her job does not have standing to claim a Title I violation against her employer for violating the ADA. This is true regardless of whether the alleged discrimination is in the form of the employee's discharge or in the benefits she may be afforded by the employer. The EEOC has taken the position that this is unfair to people who were capable of doing their jobs when they were hired but are no longer able to do so because of their disabilities. This result seems harsh and has the effect of unequal or unfair treatment based solely on the underlying cause of an individual's disability. Nevertheless, courts have consistently held that, in order to be able to claim an ADA violation, the plaintiff must be capable of performing the job at the time of the alleged violation.[94] If there is to be any change in this regard, it will be up to Congress to amend the law.[95]

As for Title III of the ADA, cases are addressing whether this provision applies to the substance of insurance policies, as opposed to the mere physical premises where insurance is purchased.[96] The dissenting opinion in *Parker* correctly pointed out that the general public simply can not buy the kind of LTD policy that covered Ms. Parker in an insurance company's office. Instead, an employer would have to purchase it through some other means.[97] While the original opinion of the Sixth Circuit would

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[94] *See* text accompanying note 54 and the cases mentioned therein.

[95] *See, e.g., Esfahani*, 919 F. Supp. at 832; *Parker*, 875 F. Supp. at 1321; *see also* text accompanying notes 79 and 85. In point of fact, this conclusion seems to have been assumed in a number of other cases decided thus far. *See, e.g.*, Reigel v. Kaiser Found. Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994) (holding that a physician collecting disability payments was not a "qualified individual"); Dutton v. Johnson County Bd. Of County Comm'rs, 859 F. Supp. 498 (D. Kan. 1994) (requiring that to prevail on an ADA claim, the plaintiff has to prove he is a "qualified individual").

[96] *See, e.g., Pappas v. Bethesda Hosp. Assoc.*, 861 F. Supp. 616 (1994).

[97] *See* 121 F.3d at 1020 n.4, 9 (explaining how employer-purchased insurance coverage like disability policies is purchased). Interestingly, Judge Merritt correctly pointed out in her dissenting opinion that the:

> [c]ourt's decision that the Disabilities Act does not cover employer-sponsored plans flies in the face of § 501(c) of the Act. It provides a "safe harbor" for insurance companies in certain respects. If Title III does not cover the millions of employees covered by health and disability insurance policies, as our court has held, it is difficult to see why Congress

have remanded the case to the district court for a finding as to whether the distinction in the policy between disabilities based on mental conditions and those based on physical ones was actuarially justifiable. The subsequent decision of the Sixth Circuit obviated the need for the remand since the court specifically held that an insured LTD plan obtained through an employer is not a public accommodation under Title III.[98] Notably, subsequent cases have followed the reasoning in *Parker* in addressing whether Title III extends to the contents of the policies sold by insurers.[99] Furthermore, the court did not express an opinion as to whether Title I covers employer-sponsored benefit plans that would have triggered the safe-harbor provision in Title IV.[100]

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would provide a qualified exemption for insurance companies.

It is strange, indeed that Congress would put § 501(c) in the Act and write committee reports if Congress did not include employer-sponsored health and disability insurance in the prohibition against discrimination based on disability. It boggles the mind to think that Congress would include only few people who walk into an insurance office to buy health insurance but not the millions who get such insurance at work. This distinction drawn by the court produces an absurd result.

Id. at 1020-21 (Merritt, J., dissenting).

[98] As noted previously, other district courts did follow the *Carparts* reasoning that the interpretation of the language of Title III should not be restricted to just the goods and services sold in those facilities. To do otherwise, the courts felt, would restrict the ability of disabled persons to the full enjoyment of the things available to the non-disabled.

[99] *See, e.g.*, Ford v. Schering-Plough Corp., Civ. No. 96, 1991 (DRD) (D. N.J. 1996) (holding that there is no relationship between plaintiff's alleged discrimination and her ability to make physical use of the insurer's services); Leonard v. Israel Discount Bank of New York, 967 F. Supp. 802 (S.D.N.Y. 1997) (holding that plaintiff's Title III claim was defeated by the Safe Harbor provision of the ADA because the ADA does not regulate the insurance industry); Brewster v. Cooley Assoc., No. 97-0058, 1997 U.S. Dist. LEXIS 21434, at * 1 (D. N. Mex. Nov. 25, 1997) (indicating that the safe harbor provision's legislative history clearly demonstrated Congress' intent that the substance of insurance policies should not be subjected to ADA regulation). *But see* Lewis v. Aetna Life Insurance Co., 982 F. Supp. 1158 (E.D. Va. 1997) (positing that a distinction between physical and mental disabilities can survive scrutiny under the ADA if the defendant shows factual or actuarial evidence supporting the distinction). Except for *Lewis* the weight of authority stands for the proposition that the ADA was not intended to regulate the substance of policies.

[100] *See also* Krauel v. Iowa Methodist Medical Ctr., 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996) (exclusion for infertility treatments is not a subterfuge); *Doukas*, 950 F. Supp. 422 (holding that a denial of coverage based on a history of bipolar disorder could be a subterfuge).

V. Conclusion

In light of the inconsistencies in the most recent decisions of *Carparts* and *Parker*, the issue of whether Title III applies to the contents of a disability insurance policy is likely to be resolved in the Supreme Court. Until it does, confusion as to the scope of Title III will continue to exist.

Clearly, an alternative to a Supreme Court decision would be a clarification by Congress. However, by its enactment of the Mental Health Parity Act, Congress is aware of the continuing disparities in the benefits available to disabled persons, including those afflicted with mental illness as they exist in the insurance industry. By its very terms, the MHPA permits differences in benefits if the resulting cost to an employer are one percent more than they would otherwise be if the same benefits are provided for mental illness as for other disabilities. To date, the few actuarial studies on this point suggest that the costs involved do not amount to an additional one percent.[101] And with the promulgation of the interim rules, the EEOC has, in effect, taken the position that the same benefits must be provided for a period of six months before any showing of increased costs will be permitted.[102] In any event, what does seem clear is that employers are making changes to their benefit plans. Some employers have provided enhanced benefits and some have eliminated them entirely. Since the MHPA only became effective on January 1, 1998, Congress may decide to wait and see its impact before altering the current legislative scheme.

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[101] *See Mental Care Coverage Costs Little*, N.Y. TIMES, Nov. 12, 1997, at A1. It was reported that, in a study of 24 public-employer health plans with more than 140,000 enrollees, removing the typical $25,000 cap on mental health benefits would, on the average, raise the employers' costs by about $1/yr./enrollee. *See id.*

[102] *See, e.g.*, 29 CFR § 2590.712(f)(2). The EEOC's interim rules were published in the Federal Register on December 22, 1997. One provision of the rules would permit an employer to demonstrate that its costs for providing mental health benefits in compliance with the new law's provisions exceed one percent of its total benefit plan costs. However, to do so it would have to follow a formula, one element of which is the actual claims cost to the plan during a base period defined to be a period of at least six consecutive months from the first day of the plan year.