IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE AND RICHARD SMITH	)	
	)	
Plaintiffs	)	Case No. 98 C 0325
v.	)	
	)	Judge Conlon
MUTUAL OF OMAHA INSURANCE	)	
COMPANY,	)	Magistrate Judge Guzman
	)	
Defendant	)	

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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FACTS

This case concerns terms and conditions in certain health insurance policies offered by Mutual of Omaha Insurance Company (Mutual) to members of the public. Specifically, the complaint alleges that Mutual sells policies that contain two terms and conditions that single out persons with AIDS or AIDS-Related Conditions (ARC) and provide them with a lower level of coverage than is provided to others. First, Mutual's policies contain a maximum lifetime benefit cap for expenses incurred for AIDS and ARC; the lifetime maximum is $25,000 or $100,000, depending upon the Mutual policy (hereinafter "AIDS Cap"). In virtually all other situations, Mutual provides benefits to a lifetime maximum of $1,000,000.[1] Second, Mutual will not reinstate benefits for AIDS or ARC related treatment once an individual with AIDS or ARC has reached the maximum benefit cap. By contrast, other than for persons with AIDS or ARC related expenses, Mutual will restore the lifetime maximum benefit cap for an insured person when the insured person does not incur any expenses for two consecutive calendar years.

SUMMARY OF ARGUMENT

Defendant has filed a motion to dismiss Plaintiffs' complaint, arguing that title III of the ADA does not cover the content of insurance policies. Defendant also has asked this Court to find that Defendant's AIDS Caps do not constitute

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[1] Mutual also imposes a lower lifetime maximum benefit cap for treatment of alcoholism and drug addiction.

discrimination on the basis of disability. Defendant's motion should properly be denied.

Plaintiffs have alleged facts sufficient to support a prima facie case of discrimination under title III of the ADA. The plain language and underlying purposes of Title III make clear that the statute covers the terms and conditions of insurance coverage. Further, the Department of Justice has consistently interpreted Title III of the ADA to prohibit unjustified disability-based discrimination in the terms and conditions of insurance policies. Because Congress has expressly delegated authority to the Attorney General to issue regulations interpreting Title III, the Department's reading of the statute is controlling unless it is arbitrary, capricious or clearly contrary to the statutory language. This Court should defer to the Department's interpretation because it comports with the plain language, legislative history and underlying purposes of Title III. Section 501(c) of the ADA confirms that Title III's broad language reaches discrimination in the terms and conditions of insurance policies. The Department's Interpretation of title III does not conflict with the McCarran-Ferguson Act.

Terms or conditions in a health insurance policy that deny, because of disability, benefits and privileges that are available to others, discriminate on the basis of disability in violation of title the ADA. The Americans with Disabilities Act prohibits unjustified disability-based discrimination in insurance against

individuals who have AIDS or ARC, all of whom have a disability covered by the ADA. Plaintiffs have alleged that, on the basis of disability, they, as individuals with AIDS or ARC, are being denied the opportunity to receive benefits up to $1,000,000 that Mutual provides to other insured persons. Plaintiffs have also alleged that, on the basis of their disability, Mutual will not reinstate benefits for AIDS or ARC related treatment once they, as individuals with AIDS or ARC, have reached the AIDS cap. Plaintiffs' complaint is sufficient to state a claim pursuant to title III of the ADA, and Defendant's motion to dismiss should properly be denied.

ARGUMENT

In ruling on this motion to dismiss, this Court should accept the factual allegations in the Complaint as true. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1983). The court must then determine if those factual allegations, or any set of facts that are consistent with those allegations and might be developed during the discovery process, could justify a court granting relief. Id. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

I

THE TERMS AND CONDITIONS UNDER WHICH INSURANCE COVERAGE IS OFFERED ARE SUBJECT TO TITLE III'S BAN ON DISABILITY-BASED DISCRIMINATION

Title III of the ADA prohibits unjustified disability-based discrimination in the terms and conditions of insurance. This interpretation is consistent with the plain language, legislative history and underlying purpose of the statue. Further, several courts have correctly held that Title III reaches disability-based discrimination in the terms and conditions of insurance coverage. World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207-1209 (N.D. Ga. 1997); Cloutier v. Prudential Ins. Co. of America, 964 F. Supp. 299, 301-302 (N.D. Cal. 1997); Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, at 425-426 (D. N.H. 1996); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321-1323 (C.D. Cal. 1996); Attar v. Unum Life Ins. Co., No. CA3-96-CV-0367-R, 1997 WL 446439 at *10-*12 (N.D. Tex. July 19, 1997); Baker v. Hartford Life Ins. Co., 1995 WL 573430 at *3, No. 94-C-4416 (N.D. Ill. Sept. 28, 1995).[2] See also

[2] But see Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997), cert denied 118 S. Ct. 871 (1998); Leonard F. v. Israel Discount Bank of New York, 967 F. Supp. 802, 805 (S.D.N.Y. 1997). The Court in Parker held that title III does not govern the content of a long-term disability policy offered by an employer; however, in dicta the court distinguished insurance purchased from a public accommodation, as is the case presented here, from employer-provided long-term disability benefits. "While Title IV (sic) of the ADA, 42 U.S.C. § 12201(c), may address the contents of insurance policies provided by a public accommodation, Title IV (sic) does not address the

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Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, at 20 (1st Cir. 1994) (instructing district court to consider plaintiff's Title III challenge to insurance plan's limitation on health benefits for AIDS-related illnesses).

A. The Plain Language of the Statute Supports the Position that Title III Covers Discrimination in the Terms and Conditions of Insurance

The general prohibition of discrimination in Title III provides, in relevant part, that

> 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.

42 U.S.C. § 12182(a).

It is well settled that remedial statutes are to be interpreted broadly to further their underlying purposes. Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 460 U.S. 150, 159 (1983); Gomez v. Toledo, 446 U.S. 635, 639 (1980). This rule of statutory construction applies with special force here in view of the sweeping goals that Congress announced when it enacted the ADA. See City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (giving "'generous construction'" to the

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[2](...continued)
contents of a long-term disability plan offered by an employer because it is not place of public accommodation." Id. at 1012.

Fair Housing Act in light of the "'broad and inclusive'" goals of that statute). See also Arnold v. United Parcel Service 1998 WL 63505 *7 (1st Cir., Feb. 20, 1998) (interpreting the ADA in light of Congress' broad remedial purposes). Congress stated that the ADA was designed to "invoke the sweep of Congressional authority * * * in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. § 12101(b)(4), and that its purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The legislative history confirms that Title III is designed "to bring individuals with disabilities into the economic and social mainstream of American life." H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess (1990).

Title III's prohibition of discrimination applies with respect to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation * * *." 42 U.S.C. § 12182(a). The statute defines "public accommodation" to include an "insurance office" whose operations affect commerce. 42 U.S.C. § 12181(7). An insurance policy is one of the "goods, services, * * * privileges, [or] advantages" offered by an insurance office. See Doukas v. Metropolitan Life Ins. Co., 950 F. Supp. 422, at 426 (D. N.H. 1996). Therefore, discrimination on the basis of disability in the terms or conditions of an insurance policy

constitutes denial of "the full and equal enjoyment of the goods, services, * * * privileges, [or] advantages" of a "place of public accommodation" within the plain meaning of 42 U.S.C. § 12182(a).

Insurance discrimination falls within the plain language of at least three subsections of Title III. Section 302(b) provides, in part, that:

> It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability, * * * with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(1)(A)(ii). An insurance provider who offers an individual with a disability less favorable insurance coverage than that offered to other customers is plainly providing that person with a "good [or] service" that is "not equal to that afforded to other individuals." Ibid. In addition, outright rejection of a person with a disability for insurance coverage would constitute a "denial of the opportunity" to "benefit from the goods [or] services" of a public accommodation, within the meaning of 42 U.S.C. § 12182(b)(1)(A)(i). Moreover, an insurance company that has a policy of excluding persons with particular disabilities from insurance coverage would be using "eligibility criteria that screen out" individuals "from fully and equally enjoying" the "goods [and services" of a public accommodation. 42 U.S.C. § 12182(b)(2)(A)(i).

Section 501(c) of the ADA confirms that Title III's broad language reaches discrimination in the terms and conditions of insurance policies. That section, entitled "Insurance," creates a limited exception for certain insurance practices that would otherwise violate Titles I, II, and III of the ADA. Section 501(c) states, in part, that:

> Subchapters I through III [i.e., Titles I through III of the ADA] * * * shall not be construed to prohibit or restrict * * * an insurer * * * or any agent, or entity that administers benefit plans * * * from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

42 U.S.C. § 12201(c) (emphasis added). See also 28 C.F.R. 36.212. If the broad language of Title III did not otherwise cover insurance policies, there would have been no need for Congress to emphasize in Section 501(c) that certain insurance practices were excepted from the scope of Title III. Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, at 1322 (C.D. Cal. 1996), accord, Chabner v. United of Omaha Life Insurance Co. 1998 WL 37750 (N.D. Cal. Jan. 16, 1998).

Although Section 501(c) creates a limited exemption for certain practices, it does not completely nullify Title III's prohibitions against discrimination in the terms and conditions of insurance policies. Section 501(c) states that the this section "shall not be used as a subterfuge to evade the purposes of subchapter I and III [Titles I and III of the ADA]." 42 U.S.C. § 12201(c). See also 28 C.F.R. § 36.212(b). And as we

explain below, the legislative history of Section 501(c) makes clear that, despite the limited exemption provided for certain practices, the ADA prohibits insurance companies from discriminating against individuals with disabilities in insurance coverage unless such differential treatment is justified. Section 501(c) thus confirms that Congress understood Title III to prohibit certain types of disability-based discrimination in the terms and conditions of insurance policies.

B. The Department Of Justice Has Consistently Interpreted Title III To Cover Unjustified Disability-Based Discrimination In The Terms And Conditions Of Insurance Policies

In the commentary to its Title III regulation, the Department emphasized that the statute "reach[es] insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified." Preamble To Regulation On Nondiscrimination On The Basis Of Disability In Public Accommodations And In Commercial Facilities (July 26, 1991), reprinted at 28 C.F.R. Ch. 1, pt. 36, App. B at 619 (1996). The Department's commentary further emphasized that Title III covers "unjustified discrimination in all types of insurance provided by public accommodations." Id. at 620.[3] The Department adopted the

[3] Mutual attempts to rely upon 28 C.F.R. 36.307(a), which states that a public accommodation is not required "to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." See also 28 C.F.R. Ch. 1, pt. 36, App. B at 630-

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same interpretation of the statute in its Technical Assistance Manual:

> Insurance offices are places of public accommodation and, as such, may not discriminate on the basis of disability in the sale of insurance contracts or in the terms or conditions of the insurance contracts they offer.

Title III Technical Assistance Manual § III-3.11000 (Nov. 1993).[4]

C. The Department Of Justice's Interpretation Of Title III Is Entitled To Controlling Weight

Congress expressly delegated authority to the Department of Justice to promulgate binding regulations interpreting Title III, 42 U.S.C. § 12186(b), and to issue a technical assistance manual providing guidance about the statute's requirements. See 42 U.S.C. § 12206(c)(3). The Attorney General is also the only federal official with authority to enforce the provisions of Title III. See 42 U.S.C. § 12188(b)(1)(B). In view of Congress's delegation, the Department of Justice's regulations must be given "legislative and hence controlling weight unless

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[3](...continued)
631 (1996). But that regulation is perfectly consistent with the Department's interpretation of Title III as reaching discrimination in the terms and conditions of insurance policies. For example, an insurance company that traditionally sells only life insurance need not change the scope of its business by also offering disability insurance policies, even though persons with disabilities may have a great need for such coverage. However, once a company decides to sell disability insurance, it must avoid unjustified discrimination in deciding which customers it will cover and the conditions under which it will offer such coverage to persons with disabilities.

[4] Section III-3.11000 of the Technical Assistance Manual is reproduced in the addendum to this brief.

they are arbitrary, capricious, or clearly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984); accord ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994), citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The same is true of the preamble or commentary accompanying the regulations since both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45 (1993); see also Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). The Department of Justice's Technical Assistance Manual is also entitled to substantial deference. See Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 n.8 (2d Cir. 1997); Ferguson v. City of Phoenix, 931 F. Supp. 688, 694-696 (D. Ariz. 1996); Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36-37 n.4 (D.D.C. 1994). Cf. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997) (Technical Assistance Manual represents "authoritative departmental position").

D. The Department Of Justice's Interpretation Of Title III Is Consistent With The Legislative History Of The ADA

The Department of Justice's interpretation of Title III is also supported by the legislative history of the ADA. Various committee reports and floor debates make clear that Title III prohibits insurance companies from discriminating against individuals with disabilities in insurance coverage unless such

differential treatment is justified. For example, committee reports from both the House of Representatives and the Senate emphasize that, under Titles I through III of the ADA, "a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks." H.R. Rep. No. 485, pt. 2, supra, at 136; S. Rep. No. 116, supra, at 84.

E. The Department's Interpretation Of Title III Does Not Conflict With The McCarran-Ferguson Act

Defendants suggest that the McCarran-Ferguson Act, 15 U.S.C. §§ 1012 et seq., precludes interpreting Title III to prohibit discrimination in the terms and conditions of insurance policies. That argument is meritless.

The McCarran-Ferguson Act provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). That statute does not preclude the Department's interpretation of Title III for two independent reasons. First, the ADA expressly states that insurance underwriting practices shall not be used to evade the purposes of Title III. 42 U.S.C. § 12201(c). The ADA therefore "specifically relates to the business of insurance," 15 U.S.C. § 1012(b), and is not covered

by the McCarran-Ferguson Act. See Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1111-1113 (1996). Second, even if the ADA did not specifically relate to the insurance business, McCarran-Ferguson would not support Defendant's position because Defendant has failed to identify any state law that our interpretation of Title III would "invalidate, impair, or supersede." The mere fact that a state has adopted a scheme for regulating insurance practices "does not show that any particular state law would be invalidated, impaired or superseded" by the federal statute. Mackey v. Nationwide Ins. Co., 724 F.2d 419, 421 (4th Cir. 1984); accord Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir. 1995), cert. denied, 116 S. Ct. 973 (1996). Rather, there must be a showing of a specific conflict between some particular state law and the federal statute at issue. See Merchants Home Delivery Serv., Inc., v. Frank B. Hall & Co. 50 F.3d 1486, 1491-1493 (9th Cir.), cert. denied, 116 S. Ct. 418 (1995); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 295-297 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993). Mutual has failed to identify any state law that would either authorize or require it to discriminate against persons with AIDS or ARC in issuing insurance policies.

II

PLAINTIFFS HAVE ALLEGED FACTS SUFFICIENT TO SUPPORT A CLAIM OF DISCRIMINATION UNDER TITLE III OF THE ADA BY ALLEGING THAT TERMS AND CONDITIONS IN MUTUAL'S POLICIES DENY THEM, BECAUSE OF A DISABILITY, AIDS OR ARC, PRIVILEGES OR BENEFITS AVAILABLE TO OTHERS

Plaintiffs have stated a prima facie case of discrimination under title III of the ADA. First, Defendant is a public accommodation covered by title III of the ADA.[5] Second, Plaintiffs have alleged that they are "disabled" within the meaning of the ADA because they are infected with the human immunodeficiency virus ("HIV"); and, for purposes of this motion, Defendant has assumed that the Plaintiffs are disabled within the meaning of the ADA. [6] Third, Plaintiffs have alleged that Mutual's policies include terms and conditions that discriminate on the basis of disability, AIDS, by imposing a lower maximum benefit limit on treatment for AIDS and related conditions than

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[5] The statute defines "public accommodation" to include an "insurance office" whose operations affect commerce. 42 U.S.C. § 12181(7). See discussion supra, beginning at p. 8.

[6] See Mutual's Memorandum of Law In Support of Its Motion to Dismiss fn. 2. (hereafter Defendant's Memorandum). It is also the position of the Department of Justice that AIDS, ARC and asymptomatic HIV infection are disabilities under the ADA, either because these conditions substantially limit a major life activity of infected individuals or because these individuals are "regarded as" having a disability and included in the third prong of the ADA's definition of disability. 42 U.S.C. § 12102 (2)(C). See also, Sidney Abbott, et al. v. Randon Bragdon, 107 F.3d 934, (1st Cir. 1997), cert granted, 118 S. Ct. 554.

for virtually all other conditions.[7] Plaintiffs have also alleged that Mutual's policies provide its insureds, but not individuals with AIDS or ARC, the benefit of restoration of the maximum lifetime cap after two years of no claims experience. Mutual's AIDS caps single out persons with AIDS and deny them benefits afforded to others because of AIDS, a disability. Defendant admits the existence of the challenged AIDS Caps.[8] Accordingly, Plaintiffs have stated a prima facie case of disability-based discrimination under title III of the ADA and Defendant's Motion to Dismiss should properly be denied.[9]

Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of the privileges of a place of public accommodation. 42 U.S.C. § 12182(a). The title III regulation makes clear that the ADA reaches "insurance practices by prohibiting differential treatment of individuals

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[7] See footnote 1, supra.

[8] "The policies issued by Mutual to Plaintiffs contain provisions that limit benefits associated with Acquired Immune Deficiency Syndrome ("AIDS") or AIDS-Related Conditions ("ARC"). Specifically, the policy issued to Doe limits benefits to a lifetime maximum of $100,000 while the policy issued to Smith limits benefits to a lifetime maximum of $25,000. The policies limit benefits for other, but not all, medical conditions to a lifetime maximum of $1,000,000." Defendant's Memorandum p. 1-2, emphasis added.

[9] Defendant will of course have an opportunity, at a later point in these proceedings, to present evidence to support a defense that its AIDS Caps are justified or otherwise permitted under the ADA.

with disabilities in insurance offered by public accommodations unless the differences are justified." Preamble To Regulation On Nondiscrimination On The Basis Of Disability In Public Accommodations And In Commercial Facilities (July 26, 1991), reprinted at 28 C.F.R. Ch. 1, pt. 36, App. B at 619 (1996). This application of the statute is consistent with the legislative history, which makes clear that an insurer, such as Mutual, may not "limit the amount, extent, or kind of coverage available to an individual, ... solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonable anticipated experience." H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. 71 (1990); S. Rep. No. 116, supra, at 85 (emphasis added). See also 136 Cong. Rec. H4623 (July 12, 1990) (Rep. Owens); 136 Cong. Rec. H4624-4625 (July 12, 1990) (Rep. Edwards); 136 Cong. Rec. S9697 (July 13, 1990) (Sen. Kennedy). See also 28 CFR § 36.212. Further, terms and conditions in a health insurance policy may not "be used as a subterfuge to evade the purposes of subchapters I and III [Titles I and III of the ADA]." 42 U.S.C. § 12201(c). See also 28 C.F.R. § 36.212(b). Mutual's AIDS caps limit the amount and extent and kind of coverage available to individuals because of disability.

By definition, Mutual's AIDS Caps are disability-based discrimination because they provide less favorable coverage to

individuals with a disability, AIDS, than to others without a disability.[10] This Court should not dismiss Plaintiffs' complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson , 355 U.S. 41, 45-46 (1957). Plaintiffs should be allowed to show that, because of disability, Mutual's AIDS Caps treat one group of individuals — those with AIDS — differently than another group — all others. For example, Plaintiffs may be able to show that under Mutual's policy an individual with AIDS, who has incurred $25,000 worth of expenses for AIDS related treatment and has reached Mutual's AIDS Cap, could be refused coverage for treatment for a particular type of cancer because his cancer is related to, or "associated with", AIDS or is considered one of these opportunistic illnesses. However, an individual covered by the same policy who does not have AIDS would be covered for treatment for that identical type of cancer because in his case, the cancer was not related to or associated with AIDS. Under these circumstances, Mutual's AIDS Cap dictates disparate treatment based upon AIDS.

In support of its contention that the AIDS Cap is not discrimination on the basis of disability, Defendant relies

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[10] In accord, See EEOC: Interim Guidance on Application of ADA to Health Insurance, 8 F.E.P. Manual (BNA) 405 (June 8, 1993).

primarily upon cases concerning employer provided long-term disability benefits. EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996)(finding that a former employee lacked standing under Title I of the ADA to challenge his former employer's long-term disability plan which provided benefits to age 65 for physical problems and for two years if the problem was mental or nervous); and Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997)(holding that title III does not govern the content of a long-term disability policy provided by an employer). Even assuming that those cases are correctly reasoned and decided, they are of little assistance to Defendant because the Plaintiffs in those cases challenged discrimination between two categories of individuals with disabilities -- those with physical disabilities and those with mental or nervous disabilities -- not discrimination between persons with and without disabilities.[11] By stark contrast, the AIDS Caps challenged by plaintiffs treat individuals with a single disability differently from others without a disability. AIDS Caps do not provide different levels of benefits to different categories of persons with disabilities; they provide different levels of benefits to persons with AIDS

[11] In fact in EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996), this Circuit distinguished the facts before it from a situation where an insurer would choose to "vary the terms of its plan depending on whether the employee was disabled." Id. at 1045. Mutual does just that. All individuals with AIDS who seek to purchase a health insurance policy from Mutual will receive less desirable terms and conditions of coverage because of disability, AIDS.

than to persons without disabilities. All individuals with AIDS who seek to purchase a policy from Mutual will be subject to less favorable terms and conditions of coverage.

Defendant also will find little support in Modderno v. King, 82 F.3d 1059 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 771 (1997) (rejecting a challenge under Section 504 of the Rehabilitation Act to a $75,000 limit on mental health benefits where there was no similar limit on other health benefits) because that case concerned a limit on mental health coverage that applied to participants both with and without disabilities. In Modderno, each participant was entitled to only $75,000 in mental health benefits regardless of whether he or she had a disability. By contrast, Mutual defines its Cap specifically in terms of disability; it applies only to individuals who have a disability, AIDS.

CONCLUSION

This Court should deny Mutual's motion to dismiss and find that: 1) the terms and conditions under which insurance coverage is offered are subject to Title III's ban on discrimination and 2) Plaintiffs can establish a prima facie case of discrimination if they show the allegations in the complaint to be true.

Respectfully Submitted,

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