IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANGELA HIGGINS,	)	
	)	
Plaintiff,	)	
and	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
vs.	)	Civil No. 99-114-DRH
	)	
WARRIOR INSURANCE GROUP, a/k/a d/b/a GALLANT INSURANCE COMPANY, a/k/a d/b/a VALOR INSURANCE COMPANY,	)	
	)	
Defendant.	)	

PLAINTIFF-INTERVENOR UNITED STATES OF AMERICA'S TRIAL BRIEF

Comes now the United States of America, by and through its attorneys, W. Charles Grace, United States Attorney for the Southern District of Illinois, Mark R. Niemeyer, Assistant United States Attorney, and Heather A. Wydra, Trial Attorney for the U.S. Department of Justice, and for its trial brief, states the following:

INTRODUCTION

This action will be proceeding to trial based upon plaintiff-intervenor United States of America's amended complaint. The amended complaint is filed pursuant to Title III of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq. The United States has alleged that defendant sold Angela Higgins an automobile insurance policy and, then, based on its belief that Ms. Higgins has a mental disability, completely rescinded the insurance policy and

refused to insure her, in violation of the ADA.

In October of 1998, Angela Higgins applied for and initially received automobile insurance with defendant. In November of 1998, Ms. Higgins' automobile was stolen, and she made a claim with defendant. During the course of the claims investigation, defendant received information from Ms. Higgins and certain records suggesting that Ms. Higgins has a mental disability.[1] Based upon that information, the defendant regarded Ms. Higgins as substantially limited in one or more major life activities; i.e. defendant regarded her as disabled under the ADA.[2] Defendant, then, completely rescinded Ms. Higgins' policy (and did not pay her claim).

In rescinding Ms. Higgins' policy, the defendant acted contrary to its stated policies. Defendant states that, if an applicant for insurance (with a disability) provides a report from a physician attesting to the applicant's ability to drive safely, defendant would not refuse to insure said individual or charge that individual higher rates. Ms. Higgins can drive safely and provided defendant with a physician's report so indicating. Even so, defendant rescinded Ms. Higgins' policy on the basis that she had failed to disclosure her mental impairment and had, therefore, made a material misrepresentation. The United States will show that Ms. Higgins made no misrepresentation, and if she did, it was not material; as such, the true reason for defendant's rescission was discrimination based upon Ms. Higgins' disability.

The United States will also show that, after the lawsuit was underway, defendant, again,

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1 The defendant received information that Ms. Higgins had a learning disability and mild mental retardation. Defendant received additional information that Ms. Higgins was not working, and was receiving SSI benefits.

2 Defendant regarded Ms. Higgins as unable to drive, learn, work, read, think and/or care for herself, based upon her mental disability.

acted upon its perception of Ms. Higgins' disability and attempted to take advantage of it and settle this case for a small amount, behind her attorney's back; defendant attempted to stop any further participation in this matter by Ms. Higgins.

In its amended complaint, the United States has alleged that Ms. Higgins has a mental disability, has a record of a mental disability, and/or defendant regarded her as having a mental disability, as defined by the ADA. At trial, the United States will proceed only on the theory that the defendant regarded Ms. Higgins as having a mental disability, as defined by the ADA. The United States elects not to proceed and prove that Ms. Higgins has an actual mental disability or a record of such. While Ms. Higgins does have a mental impairment, the United States believes that proceeding upon and proving such other theories, in addition to the "regarded as" theory, would over-complicate this case; the important issues in this case are defendant's knowledge, perceptions and actions. The United States having made such an election, any evidence which the defendant seeks to admit regarding the lack of or absence of an actual disability on the part of Ms. Higgins is irrelevant and immaterial; the United States objects to the admission of same. The only evidence now relevant to Ms. Higgins' disability is evidence as to whether defendant regarded Ms. Higgins as having a disability.

The United States submits this trial brief to discuss the following legal and factual issues: the "regarded as" theory under the ADA; the fact that the United States will not be proceeding on an actual disability theory and, therefore, evidence as to Ms. Higgins' lack of actual disability is irrelevant and inadmissible; the definition of "substantially limited in a major life activity;" the question as to whether a public accommodation is involved; the United States' theories of

discrimination; the merits of defendant's "material misrepresentation" explanation; and the awarding of relief, including damages.

I. Title III Overview

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." See 42 U.S.C. § 12101(b)(1). The ADA contains three titles, which prohibit discrimination in employment (Title I, §§ 12111-12117), public services (Title II, §§ 12131-12182 12165), and public accommodations (Title III, §§ 12181-12189). This action arises under Title III, which prohibits discrimination by public accommodations. Specifically, Title III provides:

> 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). The United States intervened in this Title III action to further the ADA's purpose "to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

To succeed in its Title III claim, the United States must show three things. First, the United States must show that Ms. Higgins has a "disability" as defined by the ADA. The statute defines "disability" as (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; 2) "a record of such an impairment"; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2). The United States will show at trial that Ms. Higgins satisfies the third prong of that definition.

Second, the United States must show that defendant is a "public accommodation" as defined in Title III. Because defendant is an insurance company offering its goods and services (i.e., insurance coverage) to the public, it is a "public accommodation." See 42 U.S.C. § 12181(7)(F); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999), cert. denied, 2000 WL 12573 (Jan 10, 2000).

Finally, the United States must show that defendant discriminated against Ms. Higgins on the basis of disability in the full and equal enjoyment of defendant's insurance coverage. See 42 U.S.C. § 12182(a). At trial, the United States will show that in rescinding Ms. Higgins' policy because of her disability, defendant discriminated against Ms. Higgins in the following ways:[3]

- Defendant denied Ms. Higgins "the opportunity . . . to participate in or benefit from" its goods and services. See 42 U.S.C. § 12182(b)(1)(A)(i); 28 C.F.R. § 36.202(a).
- Defendant afforded Ms. Higgins "the opportunity to participate in or benefit from" goods and services that were "not equal to that afforded to other individuals." See 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 36.202(b).
- Defendant "impos[ed] or appli[ed] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying" its goods and services. See 42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301(a).
- Defendant "utilize[d] standards or criteria or methods of administration (i) that have

3 The United States will show that the defendant's attempt at a surreptitious, unreasonable settlement constitutes discrimination based upon the same methods.

the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control." See 42 U.S.C. § 12182(b)(1)(D); 28 C.F.R. § 36.204.

II. Ms. Higgins Is an "Individual with a Disability" as Defined by the ADA.

As mentioned, the United States must, first, show that Ms. Higgins has a disability as defined by the ADA. The United States need only prove that Ms. Higgins satisfies one of the three prongs of the ADA's disability definition. The United States will show that Ms. Higgins is covered by the third prong of the disability definition: defendant regarded her as having a mental impairment that substantially limits one or more major life activities. The United States has chosen not to show that Ms. Higgins has an actual disability or a record of disability and will focus on defendant's knowledge and perceptions, as well as its actions based upon said knowledge and perceptions, without having to delve into Ms. Higgins' mental history. The United States having made such an election, any evidence that defendant seeks to admit regarding the lack of or absence of an actual disability on the part of Ms. Higgins is irrelevant and immaterial; the United States objects to the admission of same. The only evidence now relevant to Ms. Higgins' disability is evidence as to whether Ms. Higgins was regarded as having a disability by defendant.

A. Definition of Disability Under the ADA.

To be covered under the ADA, a plaintiff must show that she has (or, in this case, was regarded as having) (1) "a physical or mental impairment" that (2) "substantially limits" (3) one or more "major life activities." See 42 U.S.C. § 12102(2). The terms Congress used in this definition are broad. The ADA does not expressly define the phrases "physical or mental impairment,"

"substantially limits," and "major life activities." Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 327 (2nd Cir. 1998), overturned on other grounds, 119 S. Ct. 2388 (1999). We have guidance as to the meaning of these terms, however, from the regulations promulgated by the Department of Justice and the EEOC, as well as from courts interpreting the ADA.[4]

1. Mental Impairment

Generally speaking, "impair" means "to decrease in strength, value, amount or quality." Webster's Third New International Dictionary of the English Language (1994). Regulations promulgated by the Department of Justice define "mental impairment" as "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional and mental illness, and specific learning disabilities." Bartlett, 156 F.3d at 328; 28 C.F.R. § 36.104. Defendant regarded Ms. Higgins as having both mental retardation and a learning disability. Therefore, this Court should find that she was regarded as suffering from a mental impairment.

2. Substantially Limits

The Department of Justice's regulations do not define the phrase "substantially limits." Bartlett, 156 F.3d at 328. The Preamble to those regulations, however, explains that a substantial limitation occurs "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 28 C.F.R.

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4 Congress authorized the Department of Justice to issue regulations addressing discrimination in both public and private service organizations under Titles II and III of the ADA. See Bartlett, 156 F.3d at 327. The EEOC, on the other hand, was authorized to issue regulations defining workplace discrimination under Title I of the ADA. See id. "The Department [of Justice's] regulations interpreting the Americans with Disabilities Act are entitled to Chevron deference." Doe, 179 F.3d at 563 (citation omitted).

Pt. 36, App. B, 600-601 (1997). Similarly, under Title I, "substantially limits" is defined as "significantly restricts as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity." 29 C.F.R. § 1630.2(j)(1)(ii). Substantial limitations need not rise to the level of utter inabilities. See Bragdon v. Abbott, 118 S. Ct. 2196, 2206 (1998); Taylor v. Phoenixville Sch. District, 184 F.3d 296, 307 (3rd Cir. 1999). EEOC guidelines under Title I state that whether an impairment substantially limits a major life activity is determined in light of: 1) the nature and severity of the impairment, 2) its duration or expected duration, and 3) its permanent or expected permanent or long term impact. See Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995).

The Seventh Circuit has observed that in some cases the terms "substantially limited" and "major life activity" (discussed in the next section) are interrelated and should not be treated as two separate criteria. See United States v. Happy Time Day Care Center, 6 F. Supp. 2d 1073, 1080 (W.D. Wis. 1998). This is particularly the case when the major life activity implicated encompasses a broad range of lesser activities. For example, as will be discussed below, caring for one's self is a major life activity that includes a wide range of lesser activities. Therefore, a determination as to whether an individual is substantially limited in caring for one's self requires a determination based upon the cumulative effect of overall impairment. See id. at 1081; see also Vande Zande v. Wisconsin Department of Administration, 44 F. 3d 538, 544 (7th Cir. 1995).

3. Major Life Activities

The Department of Justice's regulations do not expressly define "major life activities," but

they do provide a list of illustrative, but not exhaustive, examples of major life activities: "major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 36.104. The range of activities Congress sought to include in this definition is extremely broad: as one court of appeals reasoned, the "plain meaning of the word 'major' denotes comparative importance" or "significance," and the term "life" is "notable for its breadth." Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1997), cert. granted, 118 S. Ct. 554 (1997); see also Doe v. Kohn, Nast & Graf, 862 F. Supp. 1310,1320 (E.D. Pa. 1994) (holding that "the term 'major life activities' *** encompasses a lot [and includes] the various major activities embraced within the full scope of one's life").

In addition to the examples listed in the regulations, there are several other activities that courts have held to be "major life activities under the ADA." These include thinking, see Taylor v. Phoenixville School District, 184 F.3d 296, 307 (3rd Cir. 1999); DeMar v. Car-Freshener Corp., 49 F.Supp. 2d 84, 89 (N.D.N.Y. 1999), and reading, see Bartlett, 156 F.3d at 328-29.

Some major life activities, such as "caring for one's self" and working, encompass numerous, overlapping daily activities. For example, as the Second Circuit Court of Appeals has explained, "[c]aring for one's self" encompasses normal activities of daily living including feeding one's self, driving, grooming, and cleaning the home. See Ryan v. Grae & Rybacki, P.C., 135 F.3d 867, 871 (2nd Cir. 1998); see also Bilodeau v. Mega Industries, 50 F. Supp. 2d 27, 36 (D. Me. 1999) (one who has difficulty sleeping, eating, concentrating, and who is severely emotional can be considered substantially limited in the major life activity of caring for one's self). Many courts look to numerous daily activities to determine whether an individual is "substantially limited in a major

life activity"; driving is often included as one of those daily activities. See, e.g., Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (plaintiff not substantially limited in performance of normal daily activities because she could "feed herself, drive a car, attend to her grooming, carry groceries, wash dishes, vacuum, and pick up trash"); Hoppes v. Pennsylvania Fish and Boat Commission, 32 F. Supp. 2d 770 (M.D. Pa. 1998) (plaintiff was able to perform the major life activities of driving, working, caring for himself and his family, communicating and performing other tasks of daily living); Carlson v. Inacom Corp., 885 F. Supp. 1314 (D. Neb.1995) (plaintiff found to be disabled due to her inability to care for her infant son, drive a car, or concentrate on work when suffering from migraine headaches); see also Perez v. Philadelphia Hous. Auth., 677 F. Supp. 357 (E.D. Pa. 1987) (plaintiff found to be disabled under the Rehabilitation Act where she was substantially limited in her ability, inter alia, to drive). Additionally, one court has held that being unable to drive in general, or having a record of such, constitutes a substantial limitation in the major life activity of working, when the job in question required driving. See Stensrud v. Szabo Contracting Co., 1999 WL 592110, *5 (N.D.Ill. August 2, 1999).

The law as to the major life activity of working has been developed to a greater extent than any other major life activity. An individual is substantially limited in working if he or she is "significantly restricted in the ability to perform [i] either a class of jobs or [ii] a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. 1630.2(j)(3)(i) (1995). Thus, there are two alternative means for a plaintiff to prove that the defendant regarded her as substantially limited in working. First, the plaintiff can show that she was perceived as significantly restricted in the ability to perform "a class of jobs." Id.

Alternatively, the plaintiff can demonstrate she was perceived as having a significant restriction in the ability to perform "a broad range of jobs in various classes." Id. Either showing is sufficient to establish a substantial limitation. Because defendant regarded Ms. Higgins as unable to work, in general, she will be able to satisfy either means.

In sum, the Court should determine that learning, working, reading, thinking, caring for one's self, and the ability to perform daily activities (including driving), are all major life activities, and the Court should instruct the jury as such.

B. Defendant Regarded Ms. Higgins as an Individual with a Disability.

The third prong of the ADA's definition of disability ("being regarded as having such an impairment") may be satisfied when a person has a mental impairment "that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation." 28 C.F.R. § 36.104 subpart (4)(i). Additionally, this third prong of the disability definition is satisfied where a person has an impairment that substantially limits major life activities only "as a result of the attitudes of others toward such impairment." 28 C.F.R. § 36.104 subpart (4)(ii). Under these tests, it is immaterial whether an impairment in fact limits a person's major life activities. See Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (affirming dismissal of claim based on failure to satisfy first prong of disability definition but reversing dismissal of "regarded as" claim because evidence would support finding that employer believed plaintiff to have a disabling impairment).

In the case at bar, the United States will show that defendant received information that Ms. Higgins was not working and was receiving SSI benefits. It will further show that, based on this

information, defendant believed that Ms. Higgins was substantially limited in the major life activity of working. In addition, the United States will show that defendant received information that Ms. Higgins had a learning disability and mild mental retardation and, in fact, generated its own records stating that Ms. Higgins had a learning disability and/or mental retardation. The United States will further show that, based on this information, defendant believed Ms. Higgins to be substantially limited in the major life activities of learning, see 28 C.F.R. Part 36, Appendix B at p. 584 (1994) ("A person who is mentally retarded is substantially limited in the major life activity of learning."), as well as thinking, working, driving, reading, and caring for herself.

Finally, the United States will show that defendant rescinded Ms. Higgins' automobile insurance policy and refused to pay her claim because they regarded her as having a disability, in violation of Title III of the ADA. The defendant also tried to persuade Ms. Higgins to settle this case for a small amount, without her attorney, based on its perception of her disability.

The ADA provision protecting individuals who are "regarded as" disabled was taken from an identical provision in the Rehabilitation Act. See Chandler v. City of Dallas, 2 F.3d 1385, 1391 & n.18 (5th Cir. 1993). While this case does not involve a decision regarding employment, Congress' reasoning regarding employment decisions is applicable. As Congress explained, the "rationale for [the "regarded as" test] was clearly articulated" by the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), where the Court addressed the similar provision of the Rehabilitation Act . S. Rep. No. 101- 116, at 23. The Court stated that under the "regarded as" test, "an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of

others to the impairment." Arline, 480 U.S. at 283. The Court therefore concluded that "[a]llowing discrimination based on the . . . effects of a[n] . . . impairment would be inconsistent with the basic purpose of [the Rehabilitation Act], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." Id. The Supreme Court explained Congress's purpose in adding the "regarded as" protection: "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id. at 284.

In passing the ADA, Congress reaffirmed Arline's holding that "discrimination on the basis of mythology" was "precisely the type of injury [the "regarded as" provision] sought to prevent." Id. at 285; see, e.g., H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 53 (1990); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 30 (1990). Moreover, the Preamble to the Title III regulations counsels that "[a] person would be covered under [the regarded as] test if a restaurant refused to serve that person because of a fear of 'negative reactions' of others to that person." 28 C.F.R. Pt. 36, App. B, at 612 (1997).

The ADA "is premised on the obligation of [entities] to consider people with disabilities as individuals and to avoid prejudging what an [individual] can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a preconceived and often erroneous judgment about an individual's capabilities based on `labeling' of that person as having a particular kind of disability." H.R. Rep. No. 485, Pt. 2, supra, at 58. An entity who refuses goods or services to an individual because of an untested assumption about the limitations imposed by the individual's physical or mental impairment is violating the central command to treat

individuals based on their individual abilities. Such a refusal is sufficient to demonstrate that the entity "regarded" the applicant as disabled and to subject the employment decision to coverage under the ADA.

In order to satisfy the "regarded as" prong of the ADA's disability definition, the defendant must believe that the plaintiff has a substantially limiting impairment. See Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2149-50 (1999). The plaintiff must show that the defendant knew of or believed she had an impairment and believed that she was substantially limited because of it. Id.; Skorup v. Modern Door Corp., 153 F.3d 512, 515 (7th Cir. 1998); see Johnson v. American Chamber of Commerce Publishers, Inc., 108 F.3d 818, 819 (7th Cir. 1997); Winslow v. IDS Life Insurance Co., 29 F. Supp. 2d 557, 560 (D. Minn. 1998). A proper jury instruction pertaining to the "regarded as" prong is: "disability" means, with respect to an individual, that an individual is regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual. Riemer v. Illinois Department of Transportation, 148 F.3d 800, 804 (7th Cir. 1998).

Under the regarded as prong, a plaintiff need not show she is actually disabled. The ADA forbids discrimination against a person who has a record of, or is regarded as having, an impairment, but who may, at present, have no actual incapacity at all. See Johnson, 108 F.3d at 819; Winslow, 29 F. Supp. 2d at 560. The plaintiff need not establish any actual impairment to found a claim on 42 U.S.C. § 12102(2)(B) or (C). See id.

The question of whether defendant has regarded a plaintiff as disabled under the ADA is for the jury, and the jury is allowed to draw inferences from the defendant's knowledge and actions; the

plaintiff need not show that the defendant affirmatively stated that it regarded her as disabled if the plaintiff can present evidence that defendant acted as if it did. See Olson v. General Electric Astrospace, 101 F.3d 947, 954 (3rd Cir. 1996) (a jury could conclude that defendant perceived plaintiff to be disabled where defendant knew of plaintiff's health problem and made a decision adverse to plaintiff); Katz v. City Metal Co., Inc., 87 F.3d 26, 32-33 (1st Cir. 1996) (a jury could conclude that defendant perceived plaintiff to be disabled where plaintiff informed defendant of his impairment and the defendant made a decision adverse to plaintiff); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996) (defendant's receipt of doctor's reports describing plaintiff's diagnoses supported a reasonable inference drawn by a jury that the defendant regarded the plaintiff as suffering from a disabling mental condition that substantially limited his major life activity); Olbrot v. Denny's, Inc., 1998 WL 525174, *2 (N.D.Ill. August 19, 1998) (plaintiff's testimony regarding statements she made to defendant about her disability and plaintiff's testimony regarding defendant's responses indicating she was not doing a good job sufficiently support the allegation that defendant regarded plaintiff as disabled under the ADA); U. S. Equal Employment Opportunity Commission v. Williams Electronics Games, Inc., 1997 W.L. 201584, *1 (N.D. Ill. 1997) (Defendant's use of a physical exam report in its decision adverse to plaintiff supports the inference that defendant regarded plaintiff as having a significant impairment of a major life activity); see also Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir. 1997).

For example, one court has found an insurance company's refusal to grant long-term disability insurance to an individual based on that individual's mental impairment to be conclusive evidence that the insurance company implicitly considered that plaintiff to be substantially limited

in the major life activity of working. See Winslow, 29 F. Supp. 2d at 560. In the Winslow case, the court found that, because the only logical criteria upon which insurance was denied was the insurance company's perceptions regarding the applicant's future inability to work, those facts, and nothing more, supported the allegation that defendant regarded the plaintiff as substantially limited in a major life activity. Id. The court went on to state that ADA protection extends to cover perception of a possible future disability. Id. at 561.

III. Title III Applies to Insurance Companies Offering Insurance Polices to the Public.

Title III provides, in relevant part, that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods [or] services . . . of any place of public accommodation." The statute defines a "public accommodation" to include an "insurance office" whose operations affect commerce. 42 U.S.C. § 12181(7)(F). Because defendant is selling insurance policies to members of the public, it is a "public accommodation" covered by Title III. Further, insurance coverage is one of the "goods" or "services" offered by defendant. Therefore, under the plain language of 42 U.S.C. § 12182(a), defendant cannot discriminate on the basis of disability in its provision of insurance coverage.[5]

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5 That Ms. Higgins bought her particular policy at Cress Insurance Agency, instead of at one of defendant's sales offices, does not change the fact that defendant is a "public accommodation" under Title III. Defendant concedes that Ms. Higgins purchased its insurance policy; there is no requirement that Ms. Higgins physically enter defendant's sales offices for Title III to apply. See Doe, 179 F.3d at 559 (noting that Title III applies "whether in physical space or electronic space"); see also Pallozzi v. Allstate Life Ins. Co., No. 98-7552, 1999 WL 1079973, at *4 (7th Cir. Dec. 1, 1999) ("We believe that an entity covered by Title III is not only obligated by statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of their disability."); Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (rejecting argument that

The Seventh Circuit's decision in Doe v. Mutual of Omaha Insurance Company, 179 F.3d 557 (7th Cir. 1999), cert. denied, 2000 WL 12573 (Jan 10, 2000), is controlling. In Doe, the Seventh Circuit held that Title III applies to insurance companies offering insurance policies to the public. See id. at 559. The Court stated:

> The core meaning of this provision, plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do. The owner or operator of, say, a camera store can neither bar the door to the disabled nor let them in but refuse to sell its cameras to them on the same terms as to other customers. *** [A]nd an insurance company cannot *** refuse to sell an insurance policy to a person with [a disability].

179 F.3d at 559 (emphasis added) (citations omitted).

Defendant has argued, however, that Title III does not apply where, as here, the insurance company allows the plaintiff to purchase an insurance policy. (See Defendant's Motion to Dismiss Plaintiff-Intervener United States of America's Complaint ("Def.'s Motion to Dismiss") at 4.) Defendant reasons that such a person is provided the access required by the ADA. (See id.) That argument, however, rests on an overly simplistic view of the goods or services offered by an insurance company. The most important good or service provided by insurance companies is not the ability to purchase an insurance policy per se, but rather, the benefits available under that policy. If an insurance company makes its policies available to everyone but later rescinds certain policies based on the policy holders' disability, then the access initially provided by the insurance company

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Title III should be limited to access to physical structures). In addition, defendant contracted with Cress to sell its insurance policies. Title III prohibits discrimination on the basis of disability "directly, or through contractual, licensing, or other arrangements." 42 U.S.C. § 12182(b)(1)(A)(i)-(iii).

is illusory. In truth, the company is depriving disabled individuals of the "full and equal enjoyment" of its goods and services as if the company had refused to sell the policy in the first place.

Defendant has also argued that, pursuant to the Seventh Circuit's decision in Doe, Title III does not extend to the content of insurance policies. (See, e.g., Def.'s Motion to Dismiss at 4.) In Doe, the Seventh Circuit considered whether an insurance company could cap medical benefits for AIDS or AIDS-related conditions at a lower limit than the cap for other conditions. See 179 F.3d at 558. The Court held that Title III does not require an insurance company "to alter its product to make it equally valuable to the disabled and to the nondisabled." Id. at 563. Unlike the plaintiffs in Doe, however, Ms. Higgins does not seek to have defendant alter the content of its insurance policy. Rather, this case involves defendant's outright refusal to provide Ms. Higgins access to its goods and services because of her perceived disability. Under Doe, Title III squarely applies in this context. See 179 F.3d at 559 (holding that an insurance company cannot refuse to sell an insurance policy to an individual with a disability); see also Pallozzi v. Allstate Life Ins. Co., No. 98-7552, 1999 WL 1079973, at *3 (7th Cir. Dec. 1, 1999) (holding that Title III prohibits an insurance company from refusing to offer its policies to disabled individuals); Wai v. Allstate Ins. Co., No. CIV. A. 97-01551 (HHK), 1999 WL 966284, at *9 (D.D.C. Sept. 30, 1999) (holding that plaintiff stated a claim under Title III where "plaintiffs allege not that their insurance coverage would have been capped at a certain limit, but rather that defendants refused to sell them an insurance policy at all").

In sum, this Court should conclude as a matter of law that defendant is covered by Title III.

IV. Defendant's Material Misrepresentation Argument Fails.

In its letter rescinding Ms. Higgins' insurance policy, defendant stated that the reason for rescission was Ms. Higgins' misrepresentation as to Question No. 7 on the application. Question No. 7 on the application asked: "Has any driver been treated for diabetes, heart disease, or any nervous condition in the past 3 years, or does any driver have a medical disability? If yes, submit a complete Physician's Report." Ms. Higgins' application was answered "No."[6]

The United States will show that Ms. Higgins' policy was rescinded because she was regarded as an individual with a disability. Nevertheless, defendant may attempt to make a material misrepresentation argument. Defendant's argument will fail for the following reasons: 1) Ms. Higgins made no misrepresentation; Question No. 7 was vague, and it was reasonable for Ms. Higgins to conclude that she did not need to disclose a condition such as mental retardation or learning disability, especially when an employee was filling out the application after Ms. Higgins said she had a learning disability; and, 2) Even if Ms. Higgins made a misrepresentation, it was not material.

Under Illinois Law, a misrepresentation in an application for insurance is not by itself grounds for denial of coverage. Methodist Medical Center of Illinois v. American Medical Security, Inc., 38 F.3d 316, 319 (7th Cir. 1994); Rivera v. Benefit Trust Life Insurance Co., 921 F.2d 692, 695

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6 Ms. Higgins informed the insurance agency employee that she had difficulty reading due to a learning disability, so the insurance application was filled out by the employee who read Ms. Higgins the questions. The employee led Ms. Higgins to believe that Question No. 7 was only asking about medical conditions such as heart disease and that a learning disability would not qualify. Ms. Higgins signed the application.

(7th Cir. 1991); Ratliff v. Safeway Insurance Co., 628 N.E. 2d, 937, 942 (Ill. App. 1993); Roberts v. National Liberty Group of Companies, 512 N.E. 2d, 792, 794 (Ill. App. 1987). An insurance company may deny coverage because of a misrepresentation in an application if the misrepresentation "shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company." Methodist Medical Center, 38 F.3d at 319 (quoting 215 ILCS 5/154).

Before a court may determine if a misrepresentation was made with actual intent to deceive or was material, the court must find that a misrepresentation was made. Id. at 319; Rivera, 921 F.2d at 695. A misrepresentation in an application for insurance is "a statement of something as a fact which is untrue and affects the risk undertaken by the insurer". Methodist Medical Center, 38 F.3d at 319; Ratcliffe v. International Surplus Lines Insurance Co., 550 N.E. 2d 1052, 1057 (Ill. App. 1990); Roberts, 512 N.E. 2d at 794. In the case of application questions which are not clearly stated and are, therefore, ambiguous, an applicant should not be held to have made a misrepresentation. See Ratliff, 628 N.E. 2d at 943. Therefore, under the circumstances, Ms. Higgins did not even make a misrepresentation. Further, Question No. 7 on the insurance application was vague as to mental disability; it asked about nervous condition and medical disability with no indication of what types of conditions were covered.[7]

If somehow it is determined that Ms. Higgins did make a misrepresentation, it was not a material one. A misrepresentation is material if reasonably careful and intelligent persons would

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7 Defendant has since clarified Question No. 7 to read, "Does any driver have a medical, physical or mental disability?"

regard the facts as stated to substantially increase the chances of the event insured against, so as to cause a rejection of the application. Methodist Medical Center, 38 F.3d at 320; Ratliff, 628 N.E. 2d at 942; Roberts, 512 N.E. 2d at 794; Knysak v. Shelter Life Insurance Co., 652 N.E. 2d 832, 835 (Ill. App. 1995). The relevant question is: was plaintiff's condition such that it was of such a nature as to warrant plaintiff to have responded "yes" to a question on the application form, and, if so, was plaintiff's failure to do so a material misrepresentation sufficient to void the insurance contract? To determine materiality, the fact finder should look to underwriting guidelines and practices. See Methodist Medical Center, 38 F.3d at 320-21. Finally, it should be considered that the application signed by the plaintiff in this case contains language drafted by the defendant and that the plaintiff declares the information true to the best of her knowledge and belief. See Knysak, 652 N.E. 2d at 838.

Defendant states that, if an applicant for insurance (with a disability) provides a report from a physician attesting to the applicant's ability to drive safely, defendant would not refuse to insure said individual or charge that individual higher rates. Ms. Higgins can drive safely and provided defendant with a physician's report so indicating. As a result, disclosing her retardation would not have affected defendant's assessment of Ms. Higgins' risk, and, therefore, the "misrepresentation" was not material.

Therefore, Ms. Higgins made no misrepresentation and, certainly, no material misrepresentation. The United States argues that the defendant should not be allowed to utilize such a pretextual argument to disguise its discrimination; the United States objects to the use of such an argument.

V. Relief

In an action in which the United States is a plaintiff, Section 308 of the ADA authorizes the court: (A) to grant equitable relief; (B) to award monetary damages as requested by the Attorney General; and (C) to assess a civil penalty. See 42 U.S.C. § 12188(b)(2)(A)-(C). Liability and monetary damages are determined by the jury, see United States v. Balistrieri, 981 F.2d 916, 928 (7th Cir. 1992),[8] and injunctive relief and the civil penalty are determined by the court, see Tull v. United States, 481 U.S. 412, 425 (1987) (civil penalty); Dairy Queen v. Wood, 369 U.S. 469, 479 (1962) (injunctive relief).

In view of Section 308, the United States asks the Court for declaratory and injunctive relief as set forth in its amended complaint. (See Plaintiff-Intervenor United States of America's Amended Complaint, Prayer for Relief.)

The United States also seeks monetary damages to compensate Ms. Higgins for her injuries resulting from defendant's violation of Title III. See Balistrieri, 981 F.2d at 928 (defining "monetary damages" to connote "payment in money for a plaintiff's losses caused by a defendant's breach of duty, . . . something different from equitable restitution"). Ms. Higgins is entitled to judgment for all compensatory damages awarded to her by the jury. See Curtis v. Loether, 415 U.S. 189, 197 (1974).

Finally, the United States asks the Court to assess the maximum civil penalty of $50,000 for

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8 In Balistrieri, the Seventh Circuit interpreted the enforcement provision of the Fair Housing Act, 42 U.S.C. § 3614. That provision parallels the enforcement provision of the ADA. Compare 42 U.S.C. § 3614(d)(1)(A)-(C) with 42 U.S.C. 12188(b)(2)(A)-(C).

each of defendant's violations of Title III of the ADA. See 42 U.S.C. 12188(b)(2)(C)(i).[9]

Respectfully submitted,

W. CHARLES GRACE
United States Attorney

MARK R. NIEMEYER
Assistant U. S. Attorney
Nine Executive Dr., Suite 300
Fairview Heights, IL 62208
(618) 628-3700

BILL LANN LEE
Acting Assistant Attorney General
Civil Rights
JOHN L. WODATCH
Chief, Disability Rights Section
L. IRENE BOWEN
Deputy Chief, Disability Rights Section
HEATHER A. WYDRA
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-1061

9 In addition to the foregoing relief, the ADA also entitles Ms. Higgins to attorney's fees and costs. See 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.505.