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UNCHARTED GROUND: THE EXTENT OF INSURANCE COVERAGE UNDER THE AMERICANS WITH DISABILITIES ACT

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This article does not address the philosophical aspects of the Americans with Disabilities Act[1] ("ADA"), but instead focuses on the practical application of the ADA as it is being reviewed and examined in a very active fashion in the courts[2] and by commentators.[3]

When a claim is brought for a violation of the ADA against an employer or anyone else, the first question the defendant will ask is "do I have insurance for this?" That question is asked because most people think insurance should cover such a claim. The answer is still undetermined, but will become the source for a vast amount of litigation.[4]

It is standard business practice for employers to purchase several types of insurance. First, they purchase workers' compensation or employers' liability coverage because if someone is injured on the job, these types of insurance will provide coverage and ben-

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1 Pub. L. No. 101-336, 104 Stat. 328 (as codified at 42 U.S.C. §§ 12101-213 (Supp. V 1993)).

2 *See* Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D. Cal. 1993); Wooten v. City of Columbus, Division of Water, 632 N.E.2d 605, 610-11 (Ohio App. 1993); Langridge v. Oakland Unified Sch. Dist., 31 Cal. Rptr.2d 34, 37 (1994).

3 *See* Katrina Grider, *Workers' Comp. and the ADA: To Ask or Not To Ask*, 55 TEX. B.J. 818, 818-19 (1992); Robert Perkovich, *Does* Gilmer v. Interstate/Johnson Lane Corp. *Compel the Consideration of External Law in Labor Arbitration?: An Analysis of the Influence of the Americans With Disabilities Act on Arbitral Decision Making*, 25 STETSON L. REV. 53, 65 (1995).

4 *See* Cynthia L. Pike, *Assessing the Impact: The 1990 Amendments to the Michigan Handicapper's Civil Rights Act and the Americans with Disabilities Act*, 37 WAYNE L. REV. 1903, 1918-19 (1991); *see also* Lizzette Palmer, Comment, *ERISA Preemption and Its Efforts on Capping the Health Benefits of Individuals with AIDS: A Demonstration of Why the United States Health and Insurance Systems Require Substantial Reform*, 30 HOUS. L. REV. 1347, 1378 (1993).

efits.[5] On the other hand, people can become disabled on the job and consequently be eligible to file an action or pursue a claim under the ADA.[6] Thus, the question is raised how a temporary injury relates to a disabling one, and how a workers' compensation claim relates to a claim brought under the ADA.

Second, employers also buy comprehensive general liability or commercial general liability ("CGL") policies. Many employers who obtain such policies reason that if their workers' compensation coverage does not take care of a disability claim, then their CGL policy definitely should cover such a claim.[7] But the reality with this new legislation is that there are no clear cut answers to the breadth of coverage under these insurance policies. A determination of the existence of insurance coverage for claims brought under the ADA will have to await judicial examination of this newly implemented legislation.

The workers' compensation policy can be fairly excluded as a possible source of insurance coverage for such claims brought under the ADA. A worker's compensation carrier would not defend such a case or provide the employer with indemnity. Workers' compensation insurance is designed merely to cover violations of a state's workers' compensation act.[8] Thus, the policies are uniquely crafted to cover specific problems and are probably not broad enough to cover violations of the ADA.

Parenthetically, workers' compensation policies also contain a "part Two coverage" which covers employer liability for bodily injuries or other claims that might not be covered under workers' compensation, but still involve a workman or employee.[9] However, these policies customarily include an exclusion for discriminatory conduct, the kind of conduct that the ADA seeks to prevent.

[5] *See* N.Y. WORK. COMP. LAW §§ 2, 53 (McKinney 1992 & 1994); Cardinal v. State, 200 Misc. 574, 578, 102 N.Y.S.2d 895, 900 (Ct. Cl. 1951), *modified*, 279 A.D. 326, 109 N.Y.S.2d 818 (3d Dep't), *modified*, 304 N.Y. 732, 107 N.E.2d 569 (1952), *cert. denied*, 345 U.S. 917 (1953).

[6] *See* Laura Hartman, *The Disabled Employee and Reasonable Accommodation Under the Minnesota Human Rights Act: Where does Absenteeism Attributable to the Disability Fit into the Law?*, 19 WM. MITCHELL L. REV. 905, 912 (1993).

[7] *See* Town of Moreau v. Orkin Exterminating Co., Inc., 165 A.D.2d 415, 415-16, 568 N.Y.S.2d 466, 468 (3d Dep't 1991).

[8] *See* N.Y. WORK. COMP. LAW § 2 (McKinney 1992).

[9] *See* id.; *see also In re* Liquidation of Consol. Mut. Ins. Co., 60 N.Y.2d 1, 11, 453 N.E.2d 1080, 1084, 466 N.Y.S.2d 663, 668 (1983) (causing legislature to react by amending Insurance Law to extend protection of Property and Liability Insurance Security Fund to employer's liability section of workers' compensation).

Even though a workers' compensation policy may not expressly provide a solution to the question of coverage for a claim under the ADA, coverage for some aspects of the claim could result from vague policy language. For instance, an employee could become disabled as a result of a work related injury.[10] In such case, the ADA requires that reasonable accommodation be undertaken to accommodate the disabled person.[11] The cost of such accommodation could be covered by workers' compensation because statutes provide for rehabilitation and other similar allowances.[12] This gray area could develop into a broader scope of coverage, but it will require judicial determination and interpretation of the specific policies at issue to determine the range of coverage.

The CGL policy, however, provides the most likely possibility for finding coverage for claims brought under the ADA. To determine whether coverage exists, one must first examine the policy itself. Some policies will specifically address this situation, describing what items are included or excluded. For instance, some insurance policies expressly cover discrimination. For example, the policy may state that the definition of bodily injury includes discrimination. Such a clause could open the door for insurance coverage. Conversely, some policies expressly exclude discriminatory conduct and under such a policy, it is not likely that there will be coverage.

As an important initial step then, one must read the policy very closely to find out whether the claim is included or excluded from coverage. Once again, a gray area could exist that might work to the benefit of the insured because courts traditionally rule in favor of the insured when a policy is unclear. The inquiry does not end here, even if helpful language exists in the policy that could possibly provide coverage for acts of discrimination.

As in other areas of discriminatory conduct, considerations of public policy must be addressed in the examination of a claim brought under the ADA. This consideration concerns the validity of permitting people or employers, as a matter of public policy, to

[10] *See* Louis Pechman, *Mental Disabilities in the Work Place*, 211 N.Y. L.J. 1, 1 (1994).

[11] *See* Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1439 (1991).

[12] *See* Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMPL. & LAB. L. 201, 225 (1993).

insure themselves against this form of discrimination.[13] In considering this issue, it should be noted that case law, directly addressing the question of whether insurance coverage exists for a violation of the ADA, does not yet exist.[14] However, because the remedies and damages under the ADA include those available under Title VII, decisions involving other anti-discrimination statutes and interpretations of insurance coverage issues can provide a hypothesis for future judicial decisions.[15]

As a caveat, though, these cases cover the spectrum. When someone attempts to secure coverage for a discriminatory violation under the ADA, that determination is generally based upon a specific factual analysis. Unfortunately, there has been no trend in the civil rights area, housing discrimination, or in other similar areas to suggest a definitive decision on this form of discrimination coverage.

Even within individual jurisdictions, varying results have occurred. In *Boston Housing Authority v. Atlantic International Insurance Co.*,[16] involving racial housing discrimination, the United States District Court for the District of Massachusetts emphatically stated that racial discrimination is an inherent evil.[17] The court stated it would be horrible to provide insurance coverage for an entity that discriminates against a racial minority.[18] However, the court noted that this issue contrasts sharply with the isolated instance of age discrimination[19] which was at issue before the United States Court of Appeals for the First Circuit in *Andover Newton Theological School v. Continental Casualty*.[20] Thus, courts have contemporaneously held that they will not find insurance coverage for intentional discrimination, whereas coverage

[13] *See In re* Rubenstein, 637 A.2d 1131, 1137 (Del. 1994) (noting purpose of ADA was to place disabled persons on equal ground and not give them unfair advantage).

[14] *See* Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993) (stating that ADA is remedial statute designed to eliminate disability discrimination in all facets of society so ADA should be broadly construed to accomplish this goal).

[15] *See generally* Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1056 (1993) (noting generous interpretation of civil rights statute consistent with remedial purpose).

[16] 781 F. Supp. 80, 80 (D. Mass. 1992).

[17] *Id.* at 83.

[18] *See id.* (citing Andover Newton Theological School v. Continental Casualty, 930 F.2d 89, 95 (1st Cir. 1991)).

[19] *Boston Housing Authority*, 781 F. Supp. at 84.

[20] 930 F.2d 89, 93 (1st Cir. 1991) (holding that finding of wilfulness under Age Discrimination in Employment Act based on finding of reckless disregard is not finding of deliberate or intentional wrongdoing as to preclude indemnification of employer by insurer).

might exist for actions closer to negligent or even reckless conduct.[21]

In sum, when examining whether a discriminatory action will be covered by insurance, the determination will be based on a fact specific analysis until there is a larger body of case law which will serve as precedential. Until then, many claimants may file declaratory judgment actions to assist in the resolution of this issue. The courts will carefully examine the nature of the charges of discriminatory conduct, and where the charges are deemed serious or egregious enough to shock the conscience of the court, it is less likely that grant insurance coverage will be found.

However, the plaintiffs' bar, in filing these claims, may come to realize artful methods for drafting complaints that could help to bring such claims within the scope of insurance coverage. Such has been seen in various personal injury actions involving intentional conduct which is somehow woven into a negligence theory so that insurance coverage will be available.[22] The ADA prohibits intentional acts of discrimination. The finding of intent is generally the basis for excluding a claim from coverage.[23] However, violations which are more akin to negligence or involve conduct that is less egregious are the ones for which courts will probably find the existence of insurance coverage.

[21] *Id.* at 93.

[22] *See, e.g.*, John D. Blackburn et al., *Invasion of Privacy: Refocusing the Tort in Private Sector Employment*, 6 DEPAUL BUS. L.J. 41, 60-61 (1993).

[23] *See* 42 U.S.C. § 12101(a)(5) (Supp. V 1993).