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## NOTES

### ***IS THERE A CEILING CAP ON YOUR HEALTH CARE? LIFE AFTER DOE V. MUTUAL OF OMAHA***

*Maura K. Frickel\**

#### INTRODUCTION

Two individuals hold health insurance policies with the same insurance company. The same two individuals catch pneumonia, see a doctor for treatment, and submit their claims to the insurance company for payment. One of the individuals receives payment on his claim. The second individual receives a denial of his claim stating that he has exhausted his \$25,000 lifetime payment cap. The second individual is infected with the Acquired Immune Deficiency Syndrome (AIDS) and, as a result, his insurance company has placed an artificially low lifetime cap on his policy for the treatment of AIDS and any AIDS related condition (ARC). AIDS, by its definition, is a debilitation of the immune system caused by Human Immunodeficiency Virus (HIV), thus making common ailments ARCs. The second individual is forced to forgo state-of-the-art, life-sustaining medical treatment because his insurance company will not cover the treatment.

The United States Court of Appeals for the Seventh Circuit recently handed down a troubling opinion. In *Doe v. Mutual of Omaha*, the divided court ruled that the Americans with Disabilities Act (ADA)<sup>1</sup> does not apply to the content of insurance policies.<sup>2</sup> The Seventh Circuit held that the ADA does not prohibit a business from offering a disabled person inferior services so long as that business does not exclude disabled persons altogether.<sup>3</sup> In the words of the court, “[the ADA] does not require a seller to alter his product to make it equally valuable to the

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1. 42 U.S.C. § 12101 et seq. (1994).

2. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

3. *Id.* at 563.

disabled and to the non-disabled.”<sup>4</sup> The appellant petitioned for a rehearing en banc and was denied by a six to five vote of the active members of the court.<sup>5</sup> The final decision of the court was appealed to the Supreme Court and in early 2000 the Court declined to review the case.<sup>6</sup>

A brief examination is warranted to better understand the impact this decision had and will continue to have on persons with AIDS. The foundational purposes for the introduction and passage of the ADA merit explanation to provide an understanding of the statute and its purported goals. In 1986, the National Council on Disability (NCD)<sup>7</sup> issued a report examining incentives and disincentives for increasing the independence and full integration of people with disabilities into our society.<sup>8</sup> The Council concluded there was insufficient civil rights coverage for people with disabilities.<sup>9</sup> Although great strides toward the integration of racial and ethnic minorities had been made in recent decades,<sup>10</sup> civil rights for the disabled were not being actively protected. The report clearly

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4. *Id.*

5. *Doe v. Mutual of Omaha Ins. Co.*, 1999 U.S. App. LEXIS 18360 (Hon. Joel T. Flaum, Hon. Kenneth F. Ripple, Hon. Ilana Diamond Rovner, Hon. Diane P. Wood and Hon. Terrence T. Evans voted to grant the petition for rehearing en banc. There are 11 active members of the court).

6. *Doe v. Mutual of Omaha Ins. Co.*, \_\_\_ U.S. \_\_\_, 120 S. Ct. 845 (2000).

7. The National Council on Disability (NCD) is an independent federal agency making recommendations to the President and Congress on issues affecting 54 million Americans with disabilities. NCD is composed of fifteen members appointed by the President and confirmed by the U.S. Senate. NCD's overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society, at <http://www.ncd.gov> (last visited Feb. 19, 2000).

8. National Council on Disability, *Toward Independence* (Washington, D.C. 1986).

9. *Id.*

10. Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 et seq. (Supp. IV 1999) (establishing comprehensive programs of vocational rehabilitation and independent living, prohibiting discrimination in employment by the federal government's executive branch and requiring affirmative action in hiring people with disabilities by federal agencies and contractors); *see also*, Education of All Handicapped Children Act of 1974, *amended by*, 20 U.S.C. § 1401 et seq. (Supp. IV 1999) (mandating an end to separate and unequal educational opportunities by requiring that all children with disabilities be afforded a free, appropriate public education); The Fair Housing Act of 1968, *amended by*, Pub. L. No. 100-430 (amended in 1988 to add protection for people with disabilities).

articulated a critical need for far-reaching civil rights legislation for disabled persons. As a result, the ADA was signed into law by President George Bush in July of 1990 for the express purpose of combating discrimination against disabled persons. Its stated goal was to ban discrimination in the areas of employment, public accommodation, public services, transportation, and telecommunications.<sup>11</sup> To the credit of the NCD and others involved in the promulgation and enactment of the ADA, the statute has been implemented and proven effective in a whole host of scenarios battling discrimination against the disabled. As *Doe* exemplifies, however, the statute has yet to be interpreted to the fullest extent of its intended purpose.

*Doe* involves two plaintiffs, identified as “John Doe” and “Richard Smith,” both infected with HIV.<sup>12</sup> Doe and Smith each held insurance policies of differing values with Mutual of Omaha Insurance Company (Mutual of Omaha). Mutual of Omaha placed a lifetime maximum claim cap of \$100,000 and \$25,000 respectively for Doe and Smith for HIV-related care. By contrast, the company offers lifetime ceiling caps of \$1 million for cancer, heart disease and most other serious illnesses. Moreover, Mutual provided additional coverage above and beyond the \$1 million cap if the holder made no new claim for two consecutive years, another benefit not available to Doe and Smith. Doe and Smith sued Mutual of Omaha claiming that HIV was a disability and that the artificially-low caps amounted to impermissible discrimination under the ADA.<sup>13</sup>

The landmark 1998 Supreme Court decision of *Bragdon v. Abbott*<sup>14</sup> marked the first recognition of asymptomatic HIV as a disability under the ADA. The Court stated “HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.”<sup>15</sup> Notably, the *Bragdon* Court held: (1) asymptomatic HIV disease constitutes a physical impairment from the moment of infection;<sup>16</sup> (2) reproduction is considered a major life activity for the purposes of the ADA;<sup>17</sup> and (3) HIV substantially limits an infected person’s ability to

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11. National Council on Disability, *Toward Independence* (Washington, D.C. 1986).

12. For the purposes of this note, the terms HIV and AIDS will be used interchangeably and should be construed to have the same meaning.

13. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999).

14. 524 U.S. 624 (1998).

15. *Id.* at 637.

16. *Id.*

17. *Id.*

reproduce.<sup>18</sup> Collectively, the Court concluded HIV, and subsequently AIDS, are disabilities under the ADA.<sup>19</sup>

This Note will address the Seventh Circuit opinion in *Doe* and the implications of this decision for persons living with AIDS. The case itself touches upon a host of issues, primarily involving statutory interpretation of the ADA. Specifically, four aspects of interpretation will be discussed. Part I addresses the prior case law dealing with whether the protections of the ADA extend to and regulate the content of insurance policies. Part II discusses the unsound affect of the *Doe* decision with several subsections addressing the component parts of the opinion. Subsection A speaks to the amount of deference that should be given to an administrative agency's interpretation of Congressionally enacted statutes. Subsection B analyzes the application of the "safe harbor" provision of Title IV of the ADA when invoked by an insurance company. Subsection C examines the function of the McCarran-Ferguson Act as it relates to the interpretation and implementation of the ADA. The sum of the aforementioned analysis leads to the ultimate conclusion that the Seventh Circuit erred in its holding in the *Doe* case. The proper interpretation of the ADA mandates zero-tolerance of discrimination against disabled persons. The ADA is designed to protect against discriminatory behavior provided the target of such behavior meets the statutory definition of disabled. *Doe* and *Smith* satisfactorily met the definition of disabled and *Mutual of Omaha* engaged in discriminatory conduct. It is this scenario precisely that the ADA was enacted to protect against.

#### I. PRIOR CASE LAW – PRECEDENTIAL VALUE OR DISTINGUISHABLE?

There is scant prior case law in any jurisdiction that paralleled the question presented to the district court in the Northern District of Illinois and the Seventh Circuit Court of Appeals. The district court opinion recognized the threshold issue as one of first impression.<sup>20</sup> As framed by the district court, the question presented was whether or not the ADA's Title III prohibition against unlawful discrimination extends to the content of insurance policies offered directly by an insurance company to an insured.<sup>21</sup> Title III bars discrimination against any disabled person in the "full and equal enjoyment of the goods, services, facilities, privileges,

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18. *Id.* at 639.

19. *Id.*

20. *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1191 (N.D. Ill. 1998).

21. *Id.* at 1191.

advantages, or accommodations of any place of public accommodation.”<sup>22</sup>

At the district court level, each party relied on two distinct sets of cases. Mutual of Omaha relied heavily on a set of cases that narrowly interpret the scope of Title III, but never reach the issue presented in *Doe*. Whereas, the plaintiffs offered the court contrasting precedent that broadly interprets Title III as applicable to the content of insurance policies. Mutual of Omaha relied on *Parker v. Metropolitan Life Insurance Co.*,<sup>23</sup> and *Leonard F. v. Israel Discount Bank of New York*.<sup>24</sup> In *Parker*, the Sixth Circuit addressed whether Title III of the ADA prohibits an employer from providing a long-term disability plan that distinguishes between mental and physical disorders in the amount of available benefits.<sup>25</sup> Ouida Sue Parker, the disabled plaintiff, was plagued with severe depression.<sup>26</sup> Schering-Plough Health Care Products, Inc. (Schering-Plough), Parker’s employer, offered a long-term disability plan to its employees, which was issued by Metropolitan Life Insurance Company (MetLife).<sup>27</sup> The plan offered diminished care for mentally disabled persons as compared to the care offered to physically disabled persons. Policyholders prevented from working due to mental incapacitation were limited to a benefits period of twenty-four months, while benefits to the physically incapacitated policyholder were valid from the time of disability until age sixty-five.<sup>28</sup> Parker challenged the long-term disability plan because it offered substantially less benefits to mentally disabled persons than it did to physically disabled persons.<sup>29</sup> The Sixth Circuit held that “[t]he provision of a long-term disability plan by an employer does not fall within the purview of Title III.”<sup>30</sup> The court further explained the difference between accessing an insurance policy vis-à-vis the company’s office of business as opposed to accessing a policy through an employer.<sup>31</sup>

The rationale of the court in *Parker* is noteworthy to distinguish from *Doe*. First, when *Parker* was initially heard by the Sixth Circuit, the panel ruled that “Title III prohibits discrimination in the contents of the goods and services offered at places of public accommodation, rather than just

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22. 42 U.S.C. § 12182(a) (1994).

23. 121 F.3d 1006 (6<sup>th</sup> Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998).

24. 967 F. Supp. 802 (S.D.N.Y. 1997).

25. *Parker*, 121 F.3d at 1008.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1014.

31. *Id.* at 1011.

discrimination in terms of physical access to places of public accommodation.”<sup>32</sup> The court granted a rehearing *en banc*<sup>33</sup> and concluded that Title III does not prohibit discrimination in a benefit plan offered by an employer.<sup>34</sup> In the words of the court, “while we agree that an insurance office is a public accommodation as expressly set forth in § 12181(7), 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.”<sup>35</sup> The *Parker* court determined the benefit plan was not covered under the scope of Title III. However, the determination was made on an independent basis from that argued by Mutual of Omaha in *Doe*. The cases are distinct from one another and the source from which the insurance policy is provided is the key to determining whether or not the policy’s content is regulated by the ADA. In *Parker*, the policy was provided by a private employer,<sup>36</sup> while in *Doe* the policy was offered directly by the insurance carrier, the place of public accommodation.<sup>37</sup> Accordingly, the district court gave little weight to *Parker* because the circumstances were distinct from those of *Doe*.<sup>38</sup> The Seventh Circuit did not address *Parker* other than to say that its conclusion is consistent with the Sixth Circuit’s conclusion.<sup>39</sup>

Mutual of Omaha placed equal emphasis on *Leonard F.* from the Southern District of New York. The Israel Discount Bank of New York (the Bank) employed Leonard F. as an Assistant Vice-President.<sup>40</sup> The Bank provided short and long-term disability insurance coverage to Leonard F. as a benefit of his employment.<sup>41</sup> The insurance plan was offered through MetLife.<sup>42</sup> In 1994, Leonard F. became disabled as a result of depression, a mental disorder within the terms of the MetLife policy.<sup>43</sup> He received short-term disability benefits from the policy, the

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32. *Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181, 187 (6th Cir. 1996).

33. *Parker v. Metropolitan Life Ins. Co.*, 107 F.3d 359 (6th Cir. 1997).

34. *Parker*, 121 F.3d at 1010.

35. *Id.*

36. *Id.*

37. *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1190 (N.D. Ill. 1998); *see also*, *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

38. *See Doe*, 999 F. Supp. at 1193 (finding the *Parker* court’s limitation on the scope of Article III neither controlling nor persuasive).

39. *Doe*, 179 F.3d at 563 (7th Cir. 1999).

40. *Leonard F. v. Israel Discount Bank of New York*, 967 F. Supp. 802, 803 (S.D.N.Y. 1997).

41. *Id.*

42. *Id.*

43. *Id.*

receipt of which was a condition precedent to the eligibility for long-term disability benefits.<sup>44</sup> Subsequently, Leonard F. applied for and received long-term benefits covering the same disability for the two-year period of 1994 to 1996.<sup>45</sup> However, in 1996 the disability benefits for Leonard F. were terminated consistent with the MetLife policy.<sup>46</sup> The policy had in place a long-term disability cap of two years for mental disabilities.<sup>47</sup> Thus, the question presented in the case was virtually identical to the question in *Parker*.<sup>48</sup> Leonard F. argued that the two-year cap for mental disorders provided by his employer's disability insurance plan was discriminatory and violative of the ADA.<sup>49</sup> The court concluded that Title III of the ADA is not applicable to employee benefits.<sup>50</sup> Again, as in *Parker*, the decision reached by the court is not analogous to the issue involved in *Doe*. Nowhere in the *Leonard F.* opinion does the court say that if the plaintiff were suing the insurance company, and the policy had been directly provided by the insurance company, the outcome would be the same.<sup>51</sup> Mutual of Omaha relied heavily on the above-mentioned cases, yet neither of them were factually consistent with *Doe*.

The plaintiffs, Doe and Smith, relied on two categorically different cases as their source of authority.<sup>52</sup> In *Chabner v. United Mutual of Omaha Life Insurance Co.*,<sup>53</sup> the plaintiff alleged discrimination under the ADA because his life insurance policy cost was nearly double the rate charged to non-disabled individuals during the same period of time.<sup>54</sup> Chabner, a thirty-five year old man physically disabled with fascioscapulohumeral (FSH) muscular dystrophy (MD) and bound to a wheelchair,<sup>55</sup> obtained a policy from United of Omaha costing him \$305.44 for one year.<sup>56</sup> By contrast, coverage for a non-smoking man of the same age without FSH and MD would have cost \$155.44 for the same one-year

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1192 (N.D. Ill. 1998).

49. *Leonard F.*, 967 F. Supp. at 803.

50. *Id.* at 806.

51. *Id.* at 803.

52. See generally *Chabner v. United Mutual of Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Cal. 1998); *World Ins. Co., v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997).

53. 994 F. Supp. 1185 (N.D. Cal. 1998).

54. *Id.* at 1187.

55. *Id.*

56. *Id.*



period.<sup>57</sup> The court discarded the insurance company's argument that the scope of Title III covers only discrimination in the physical access of goods and services.<sup>58</sup> Instead, the court interpreted the plain language of Title III and the legislative history of the statute to extend Title III to the underwriting practices of insurance companies.<sup>59</sup> The court reasoned that but for such an interpretation of Title III, the provision "providing for equal access to goods and services, . . . and requiring 'reasonable modifications in policies, practices, or procedures . . . necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities' would be rendered superfluous."<sup>60</sup> Under this interpretation, there is no other analysis that could be possible without rendering the provisions of Title III impotent.

The plaintiffs also relied on *World Insurance Co. v. Branch*,<sup>61</sup> the case that most closely parallels *Doe*. Ralph Branch held an insurance policy with Security General Life Insurance Company (Security General), whose obligations were later wholly assumed by World Insurance Company.<sup>62</sup> The court framed the issue as "whether an insurer who limits health care benefits for AIDS-related treatment to a specific amount has engaged in disability-based discrimination in violation of Title III."<sup>63</sup> The court's analysis began with three unyielding conclusions: (1) an individual with AIDS is indisputably a disabled person under the ADA;<sup>64</sup> (2) as an insurer whose operations affect commerce, the insurance company is a place of public accommodation;<sup>65</sup> and (3) the scope of Title III of the ADA extends beyond the mere denial of physical access to places of public accommodation.<sup>66</sup> Having established these three tenets, the court was left to determine whether the actions of the insurance company were discriminatory.<sup>67</sup> The opinion quickly noted that the answer to this question was not found in the plain language of the statute.<sup>68</sup>

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57. *Id.*

58. *Id.* at 1191.

59. *Id.* at 1192.

60. *Id.* at 1192-93.

61. 966 F. Supp. 1203 (N.D. Ga. 1997).

62. *Id.* at 1204.

63. *Id.* at 1207.

64. *Id.*

65. *Id.* at 1207 (relying on 42 U.S.C. § 12181(7)(f)).

66. *Id.* at 1207 (citing *Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that places of public accommodation are not limited to actual physical structures)).

67. 966 F. Supp. at 1207.

68. *Id.*

The California Court surveyed numerous factors in determining whether or not Title III prohibitions applied to insurance company practices.<sup>69</sup> Other district court opinions dealing with the same or ancillary issues were looked at first. The court noted that § 12201(c)<sup>70</sup> has been interpreted as explicitly allowing insurers to draw some disability-based distinctions and to create certain classifications with respect to disabilities in insurance policies.<sup>71</sup> The *Anderson* court stated “it may be possible to provide certain coverage exclusions to individuals with disabilities if the risks of those disabilities so warrant and those risks are treated like other similar risks not associated with disabilities.”<sup>72</sup> *Doe* presented no evidence to suggest that Mutual of Omaha treated insured persons with terminal diseases or other debilitating disabilities with the same severe policy caps. Likewise, evidence of similar treatment of like policy-holders failed to exist in *World Ins. Co.*. Ultimately, the *Anderson* court concluded that the ADA “puts the burden on those actors classifying risks to show both their rationality and their permissibility.”<sup>73</sup>

The District Court for the Northern District of Illinois stated this rule succinctly in *Baker v. Hartford Life Ins. Co.*<sup>74</sup> Based on § 12201(c),<sup>75</sup> an

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69. *Id.*

70. 42 U.S.C. § 12201(c) provides that Title III “shall not be construed to prohibit or restrict . . . an insurer . . . 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) (1994). This section has commonly been referred to as the Safe Harbor Provision.

71. *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 779 (E.D. Tex. 1996).

72. *Id.* at 780.

73. *Id.* at 779.

74. 1995 U.S. Dist. LEXIS 14103 (N.D. Ill. 1995).

75. 42 U.S.C. § 12201(c) (1994).

Insurance. Subtitles I through III of this Act shall not be construed to prohibit or restrict—

- (1) an insurer . . . 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
- (2) a person or organization covered by this Chapter from establishing, 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; or
- (3) a person or organization covered by this Chapter 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.*

insurer may decide not to insure an individual without violating the ADA if “the decision not to insure constituted underwriting or classifying risk.”<sup>76</sup> Conversely, the court noted the natural inverse of the above when it stated, “an individual who is disabled may be entitled to recovery under the ADA if the decision to deny that individual coverage ‘was not based on considerations of underwriting or classifying risks.’”<sup>77</sup> The *Baker* court focused on one more case, *Doukas v. Metropolitan Life Insurance Co.*<sup>78</sup> This decision held that “while insurers retain the ability to follow practices consistent with insurance risk classification accepted under state law, these methods must still be based on sound actuarial principles or related to actual or reasonably anticipated experience.”<sup>79</sup> In *Doe*, Mutual of Omaha conceded it was unable to show that policy caps for holders with AIDS were consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification or state law.<sup>80</sup>

The *World Insurance Co.* court used all of these cases collectively to conclude no evidence could explain why the insurance company capped an insured person’s lifetime benefits for AIDS at \$5000.<sup>81</sup> The court further noted “that the underwriting risks associated with the treatment of AIDS cannot be so different from the treatment of innumerable other disabilities, which are capped under the policy at \$2,000,000.”<sup>82</sup> The lack of foundation and explanation for such a discrepancy, 400 fold, caused the *World Insurance Co.* court to find in favor of the insured and allow recovery under Title III of the ADA.<sup>83</sup>

Collectively, the cases cited by Mutual of Omaha and by the plaintiffs, support the proposition that an insurance carrier/office is a place of public accommodation within the meaning of the ADA. Further, the insurance office may exercise their underwriting practices so long as they stay within the confines of sound actuarial practices of the industry and bona fide classification risks. Based on the four main cases cited to by both parties in *Doe*, the following unmistakable principles can be extracted: In situations where an insurance policy is issued to an employee through his/her employer, as was the case in *Parker* and *Leonard F.*, the protections of the ADA are not triggered. The employer is viewed as a

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76. *Baker*, 1995 U.S. Dist. LEXIS 14103 at 9.

77. *Id.*

78. 950 F. Supp. 422 (D.N.H. 1996).

79. *Id.* at 432.

80. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d at 558 (7th Cir. 1999).

81. *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. at 1209 (N.D. Ill. 1998).

82. *Id.* at 1209.

83. *Id.*

“middle-man” in the arrangement between the insurer and the insured. In such a situation, it becomes increasingly difficult to classify the insurance company as a place of public accommodation, since the benefits received by the insured employee are employment benefits. By contrast, where the insurance policy is purchased directly from the company, as in *Chabner* and *World Ins. Co.*, the insurance company is a place of public accommodation and cannot discriminate by providing inferior coverage to individuals with a particular disability, such as HIV, as compared to non-HIV positive individuals.

In a post-Doe Circuit decision handed down in December of 1999, the Second Circuit ruled Title III of the ADA does regulate the underwriting practices of insurance companies.<sup>84</sup> In *Pallozzi v. Allstate Ins. Co.*, the court reasoned that Title III’s mandate that disabled persons be afforded the “full and equal enjoyment of the goods, and services . . . of any place of public accommodation”<sup>85</sup> suggested that the statute intended to guarantee disabled persons more than physical access.<sup>86</sup> To conclude otherwise, as did the Seventh Circuit in *Doe*, would frustrate Congressional intent.<sup>87</sup> In the wake of this past year, clear discrepancies amongst the Circuits have arisen with regard to whether or not the ADA is applicable to the practices of insurance companies.<sup>88</sup>

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84. *Pallozzi v. Allstate Ins. Co.*, 198 F.3d 28, 31 (2nd Cir. 1999) (although the case is factually dissimilar, arguably the ruling would extend to *Doe*-like situations). *Pallozzi* also ruled on another issue presented in *Doe*, see *infra* notes 167-174 and accompanying text.

85. 42 U.S.C. § 12182(a) (1994).

86. *Pallozzi*, 198 F.3d at 32.

87. *Id.*

88. In the past twelve months six of the twelve circuits have ruled on this issue. See *Pallozzi*, 198 F.3d 28, 31 (2<sup>nd</sup> Cir. 1999); *Doe*, 179 F.3d 557, 558 (7th Cir. 1999); *Lewis v. Kmart Corp.*, 180 F.3d 166 (4th Cir. 1999) (the court rejected an ADA Title I challenge to an insurance policy distinction in long-term disability plans: two years for mental disabilities and benefits to age sixty-five for physical disabilities); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000) (upholding insurance distinctions in the face of ADA challenges); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3rd Cir. 1999), *cert. denied*, 119 S.Ct. 850 (1999) (ruling that a disparity between disability benefits for mental and physical disabilities does not violate the ADA); *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999) (holding the ADA does not prohibit different benefit levels for physical and mental disabilities). Only the first case cited ruled that the ADA does regulate the underwriting practices of insurance companies. While the latter five ruled the opposite, it is distinguishable that each of the latter five cases, like *Parker*, dealt with insurance as a benefit of employment.

## II. THE SEVENTH CIRCUIT – REVERSIBLE ERROR OR GOOD LAW?

A discrepancy exists between the majority and dissenting opinion in *Doe* as to what question the court was being asked to answer. The majority framed the issue as whether or not the federal courts may regulate the content of insurance policies, a task strictly prohibited by other federal legislation.<sup>89</sup> The dissent construed the question as whether an insurer can discriminate against people with AIDS by refusing to pay the same expenses it would pay if they did not have AIDS.<sup>90</sup>

In his powerful dissent, Judge Evans recognized that the stark discrimination against policyholders with AIDS was based on several premises. Namely, both parties stipulated that the same suffering, such as pneumonia, may be both AIDS-related and non-AIDS-related, and in such cases, coverage depends solely on whether or not the patient was diagnosed with AIDS.<sup>91</sup> In addition, Judge Evans discussed the sound goals the ADA was intended to achieve. Employing language directly from the statute itself, he observed that the discrimination exhibited by Mutual of Omaha was precisely the type the ADA was designed to eradicate.<sup>92</sup>

The majority opinion analogized the insurance company to a camera store that would be forced to carry cameras specially designed for disabled clientele.<sup>93</sup> Further buttressing its decision, the majority definitively stated that the ADA mandates no such burdens be placed on a proprietor.<sup>94</sup> The dissent, while agreeing that the ADA makes no such mandates on a proprietor, countered that a more accurate analogy would be to liken the insurance company to a camera store which allows disabled customers in the door, but then refuses to sell them anything but inferior cameras.<sup>95</sup> Under this analogy the protection of the ADA would be incited to bar the bigoted behavior of Mutual of Omaha from offering inferior coverage to AIDS patients or a camera store that sold disabled customers inferior products.

The district court opinion in *Doe* was not only more thorough with

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89. *Doe*, 179 F.3d at 565.

90. *Id.*

91. *Id.*

92. *Id.* (The ADA is supposed to signal a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” see 42 U.S.C. § 12101(b)(1). Judge Evans proceeded to say that he would use the statute to right the wrong committed by Mutual of Omaha.) See 179 F.3d at 566.

93. *Id.* at 560.

94. *Id.*

95. *Id.* at 565.

respect to the discrimination issue, but was also better supported by authority. The court began by addressing Doe and Smith's allegation that Mutual of Omaha's policy caps on AIDS and ARC benefits violate Title III of the ADA. The court immediately examined the statutory language of Title III, quoting: "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 . . ."<sup>96</sup> After looking to the statutory language, the court articulated each party's proposed interpretation of the language.<sup>97</sup> Mutual of Omaha maintained that the language of the statute polices only access to goods and services offered by places of public accommodation, rather than the content of the goods and services themselves.<sup>98</sup> The fact that the plaintiffs unquestionably enjoyed access to insurance policies from Mutual of Omaha, through the company, was dispositive of the plaintiffs' claim failing.<sup>99</sup>

The court then entertained Doe and Smith's interpretation of the ADA as well as the intended scope of Title III.<sup>100</sup> According to the plaintiffs, Mutual of Omaha's reading of the statute renders the requirements of § 302(a)<sup>101</sup> of the ADA hollow.<sup>102</sup> The statute mandates that disabled persons be afforded the "full and equal enjoyment of facilities, goods, services, privileges, or advantages of public accommodations."<sup>103</sup> In accordance with Doe and Smith's reading of the statute, full and equal enjoyment of facilities, goods, services, privileges or advantages of public accommodation can be gained only after access; that is, access is only the starting point.<sup>104</sup> In essence, Doe and Smith's argument that "mere access" is not enough finds its basis in the fact that under any other interpretation the words "full" and "equal" would be meaningless.

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96. 42 U.S.C. § 12182 (a) (1994).

97. *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1191 (N.D. Ill. 1998).

98. *Id.*

99. *Id.*

100. *Id.*

101. "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 operates a place of public accommodation." 42 U.S.C. §§ 12181 - 12189 (1994).

102. *Doe*, 999 F. Supp. at 1191.

103. *Id.* at 1191 (*quoting* § 302(a)). Insurance offices are included in Title III's list of "private entities [that] are considered public accommodation" 42 U.S.C. § 12181 (7)(F) (1994).

104. *See Doe*, 999 F. Supp. at 1191.

Mutual of Omaha's contention that the plaintiffs' claim fails because an insurance company is merely required to allow Doe and Smith access to an insurance policy issued by their company is as distressing as it is tenuous. It is akin to arguing that a five story building owner satisfies the requirements of the ADA by providing a wheelchair ramp to the front door, while the only way to get to floors two through five is by stairs. Mutual of Omaha's assertion that so long as they have provided their customers with equal access to their policies they are free to discriminate on groundless and arbitrary bases is violative of the ADA. Doe and Smith further explored the statutory language to secure additional support for their interpretation. Section 302(b) of Title III states in pertinent part:

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individuals or class . . . 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.<sup>105</sup>

It is this language the plaintiffs relied on to try to negate Mutual of Omaha's interpretation of the statute.<sup>106</sup> The district agreed Doe and Smith's interpretation was the appropriate one to be applied.<sup>107</sup>

*A. Department of Justice – Deserving of Deference or Contempt?*

In both the district court proceedings and the appeal to the Seventh Circuit, the Department of Justice (DOJ) filed *amicus* briefs<sup>108</sup> and shared Doe and Smith's interpretation of Title III of the ADA.<sup>109</sup> Each court addressed the DOJ's interest in the case at bar and the deference the DOJ deserves in matters in which it chooses to become involved. Ultimately, however, each court treated the issue uniquely.

The district court opinion addressed the DOJ's involvement on two separate grounds: (1) the Department's involvement in the case by way of its filed *amicus* brief, and (2) the Department's Technical Assistance Manual (Manual) issued to offer guidance to courts interpreting the ADA.<sup>110</sup> The DOJ's policy is to file *amicus* briefs in selected ADA cases

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105. 42 U.S.C. § 12182(b)(1)(A)(ii) (1994).

106. *Doe*, 999 F. Supp. at 1192.

107. *Id.*

108. *Id.* at 1190; *see also* *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

109. *Doe*, 999 F. Supp. at 1192, n.4; *see also* *Doe*, 179 F.3d at 563.

110. *Doe*, 999 F. Supp. at 1194.

in order to guide courts in interpreting the statute.<sup>111</sup>

The DOJ's involvement stems from its congressionally delegated power to promulgate binding regulations concerning the ADA<sup>112</sup> and to fashion a Manual providing guidance concerning the requirements of the ADA.<sup>113</sup> The Manual presents the ADA's Title III requirements in a format that will be useful to the widest possible audience.<sup>114</sup> The guidance provided in the Department's regulations and accompanying preambles has been carefully reorganized to provide a focused, systematic description of the ADA's requirements.<sup>115</sup>

The district court gave the DOJ great deference in accordance with Supreme Court mandate.<sup>116</sup> In a 1984 decision, the Court stated that DOJ regulations, due to the express delegation of authority from Congress, must be given "legislative and hence controlling weight, unless they are arbitrary, capricious, or plainly contrary to the statute."<sup>117</sup> This type of deference has been termed *Chevron* deference, after the landmark case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>118</sup>

The Supreme Court formulated a two-step test to govern what deference, if any, a court should accord an agency's interpretation of a statute.<sup>119</sup> Step one requires the court to inquire, employing traditional tools of statutory construction,<sup>120</sup> "[whether] Congress has directly spoken to the precise question at issue."<sup>121</sup> In the event that Congress has in fact spoken pointedly to the "question at issue," the court must "give effect to the unambiguously expressed intent of Congress."<sup>122</sup> If, conversely, the determination of the court is that "the statute is silent or ambiguous with

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111. Enforcing the ADA: A Status Report from the Department of Justice, (January – March 1999) at [www.usdoj.gov/crt/ada/janmar99.htm](http://www.usdoj.gov/crt/ada/janmar99.htm) (last visited Nov. 1, 1999).

112. 42 U.S.C. § 12186(b) (1994).

113. 42 U.S.C. § 12206(c)(3) (1994).

114. Americans with Disabilities Act: ADA Title III Technical Assistance Manual available at <http://www.usdoj.gov/crt/ada/taman3/htm> (last visited Feb. 21, 2000).

115. *Id.* The Manual attempts to avoid an overly legalistic style without sacrificing completeness. In order to promote readability and understanding, the text makes liberal use of questions and answers and illustrations.

116. *See generally* *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

117. *United States v. Morton*, 467 U.S. 822, 834 (1984).

118. *See generally* *Chevron*, 467 U.S. 837.

119. *Id.* at 842-44.

120. *Id.* at 843.

121. *Id.* at 842.

122. *Id.*



respect to the specific issue," the court must advance its analysis to step two of the test.<sup>123</sup> The second step requires the interpreting court to defer to "any reasonable interpretation" made by the agency.<sup>124</sup>

The Supreme Court articulated the two standards by which administrative agencies are given deference. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."<sup>125</sup> In an explicit situation, the agency's regulations are to be given controlling weight.<sup>126</sup> In situations where the legislative delegation to an agency is implicit, the Supreme Court stated that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency."<sup>127</sup>

The *Doe* district court not only looked for guidance from the DOJ regulations and Manual, but also gave the agency *Chevron* deference.<sup>128</sup> In the DOJ regulations, the agency concluded that the scope of the ADA covers "insurance practices by prohibiting differential treatment of individuals with disabilities in insurance offered by public accommodations unless the differences are justified."<sup>129</sup> The court also took into consideration the DOJ Manual which states in pertinent part "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."<sup>130</sup> The district court, like the DOJ, concluded that the ADA has consistently been applied to insurance policies.<sup>131</sup>

Upon further appeal, the Seventh Circuit Court of Appeals reached quite the opposite conclusion of that reached by the DOJ and the district court. The Court of Appeals neatly skirted the issue by disagreeing with the DOJ and its purported authority to promulgate regulations and assistance manuals. The majority opinion cited Seventh Circuit

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123. *Id.* at 843; see generally, *A Pragmatic Approach to Chevron*, 112 HARV. L. REV. 1723 (1999).

124. *Chevron*, 467 U.S. at 843-44.

125. *Id.*

126. *Id.*

127. *Id.*

128. See *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1194 (N.D. Ill. 1998).

129. 28 C.F.R. ch.1, pt. 36, App. B at 619 (1996).

130. Department of Justice, Civil Rights Division, *The Americans with Disabilities Act: Title III Technical Assistance Manual* § III-3.11000 (Nov. 1993).

131. *Doe*, 999 F. Supp. at 1194.

precedent<sup>132</sup> noting that it is unsettled how much *Chevron* deference should be given to an agency's informal policy pronouncements.<sup>133</sup> The court also expressed its hesitation to show deference to both the DOJ's *amicus* brief<sup>134</sup> and to the Manual.<sup>135</sup> The majority opinion held that an agency's *amicus* brief cannot be entitled to great deference "when it is the brief of an agency that has, and has exercised, rulemaking powers yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance."<sup>136</sup> According to the Seventh Circuit, the DOJ displaced the regulation of the insurance industry to the federal courts,<sup>137</sup> whereas traditionally the insurance industry has been an organ of the state. The court makes little mention of the assistance manual or the regulations, and instead focuses on the *amicus* brief.<sup>138</sup> While the *amicus* briefs of administrative agencies certainly command deference, the assistance Manual and regulations promulgated by Congress itself seemingly would be entitled to a higher level of respect and observance. The court observed that a brief on behalf of one of the parties can hardly be hailed for its "democratic legitimacy" over Congress' intent to exclude insurance companies from the purview of the ADA.<sup>139</sup> The Seventh Circuit vilified the issue overall stating, "the common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated."<sup>140</sup> This simplistic interpretation of the ADA is one that not all courts share.<sup>141</sup>

### B. Safe Harbor

Section 501(c) of Title IV of the ADA has been termed the "safe harbor" provision.<sup>142</sup> The section states "subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or

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132. *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 874-75 (7th Cir. 1999).

133. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999).

134. *Id.*; The court noted in its opinion that the Supreme Court ruled the agency's *amicus* brief is entitled to some deference. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

135. *Doe*, 179 F.3d at 563.

136. *Id.*

137. *Id.*

138. *Doe*, 179 F.3d at 562-63.

139. *Id.* at 563.

140. *Id.* at 560.

141. *See generally* *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997); *see also* *Chabner v. United Mutual of Omaha Life Ins. Co.*, 944 F. Supp. 1185 (N.D. Cal. 1998); *Palozzi v. Allstate Ins. Co.*, 198 F.3d 28, 31 (2nd Cir. 1999).

142. *Doe*, 179 F.3d at 562.

restrict an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law . . . .”<sup>143</sup> However, the statute maintains that § 501(c) shall not be used by an insurance company as a subterfuge to evade the purposes of subchapter I and III.<sup>144</sup> Mutual of Omaha, as might be expected of any insurance company, argued § 501(c) establishes a rule of construction, exhibiting Congress’ intent to prohibit any interpretation of Title III that would impose an affirmative obligation on insurance companies to design policies in a certain way.<sup>145</sup> Doe and Smith argued that the inclusion of § 501(c) only buttresses the conclusion that Title III reaches the policies of insurance companies.<sup>146</sup> Section 501(c) will be construed as a safe harbor provision for insurance companies only if their practices are in accord with “sound actuarial principles, reasonably anticipated experience, or bona fide risk classification.”<sup>147</sup> If an insurance company evades the purposes of the ADA it will fall outside the protections of the “safe harbor” provision.<sup>148</sup>

Section 501(c), as interpreted by the district court in *Doe*, does not signal Congress’ intent to broadly exempt insurance companies from the reach of Title III.<sup>149</sup> Rather, the court construed § 501(c)’s “safe harbor” provision as a manifestation of Congress’ intent to subject insurance companies to the full scope of the ADA’s anti-discrimination prohibitions.<sup>150</sup> The section acts as a protection for companies that function in conformity with the law. The legislative history is clear: insurers may continue to sell to and underwrite individuals applying for life, health or other insurance, so long as the standards used are based on sound actuarial data and not on speculation.<sup>151</sup>

The Seventh Circuit treated § 501(c) in a somewhat convoluted

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143. 42 U.S.C. § 12201 (1994).

144. *Id.*

145. *Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1195 (N.D. Ill. 1998).

146. *Id.*

147. *World Ins. Co. v. Branch*, 966 F. Supp. 1203, 1208-09 (N.D. Ga. 1997); *see also Doe*, 999 F. Supp at 1195.

148. *Worlds Ins. Co.*, 966 F. Supp. at 1207.

149. *Doe*, 999 F. Supp. at 1195.

150. *Id.* (Furthermore, one House Report explains that the ADA assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 137-38 and pt. 3 at 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 303, 445).

151. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 137-38 and pt. 3 at 70 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 303, 445).

manner. The court inferred from § 501(c) that § 302(a) forbids an insurer from turning down an applicant merely because he/she is disabled.<sup>152</sup> Because the Seventh Circuit did not recognize Title III as extending to the content of insurance policies, it likewise, did not recognize the application of § 501(c). The court joined the § 501(c) analysis to the application of the McCarran-Ferguson Act.<sup>153</sup> The step-by-step analysis of the court is as follows: if the court were to recognize the protections of the ADA as applicable to the content of insurance companies, the insurance company would only be able to justify its seemingly discriminatory actions, such as caps, by invoking the protections of the safe harbor provision. The coupling of the § 501(c) analysis with the application of the McCarran-Ferguson Act appears in the court's conclusion that if a judicial body was called upon to determine the correct application of the safe harbor provision, it would inevitably be regulating the health insurance industry. Regulation of the health insurance industry has been strictly the province of the states and the McCarran-Ferguson Act, ostensibly, prohibits courts from engaging in such regulation. If the ADA were fully applicable to insurance companies, which the Seventh Circuit ruled it is not, Mutual of Omaha would have had to defend its AIDS caps by reference to § 501(c).<sup>154</sup> If the company could have proven that its implementation of AIDS caps were in accord with sound actuarial principles, the company would have been protected by the safe harbor provision of Title IV. In the opinion of the Seventh Circuit, the application of § 501(c) would have placed the court in a position to regulate the health insurance industry, a practice the McCarran-Ferguson Act prohibits.<sup>155</sup> By the very plain language of the statutory construction, it would seem obvious that there would be no need for the "safe harbor" provision unless Title III applied to the content of insurance policies.<sup>156</sup>

The Seventh Circuit backed itself into a corner. Without recognizing that Title III applies to the content of insurance policies, the "safe harbor" provision could never come into play. In order to attach importance to § 501(c), it could be said that it is a prerequisite to acknowledge Title III's application to the content of insurance policies. Worthy of mention is the fact that "Mutual of Omaha has stipulated that it has not shown and

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152. Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 564 (7th Cir. 1999).

153. 179 F.3d at 564; *see also infra* Subsection C; *see also* 15 U.S.C. § 1012(b).

154. Doe, 179 F.3d at 564.

155. *Id.*

156. Doe v. Mutual of Omaha Ins. Co., 999 F. Supp. 1188, 1190-91 (N.D. Ill. 1998) (the safe harbor provision of the ADA for insurers would be rendered meaningless if the court did not hold that Title III applied to insurance underwriting practices.)

cannot show that its AIDS caps are or ever have been consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification, or state law.”<sup>157</sup> According to the dissent and the district court opinion, by its concession, Mutual of Omaha disqualified itself from the protection of the “safe harbor” provision.<sup>158</sup> These opinions concluded that without sound actuarial basis for its caps (and thus no “safe harbor” to take shelter in), Mutual of Omaha engaged in discriminatory practices violative of the ADA. The Seventh Circuit, by resorting to the McCarran-Ferguson Act, eliminates the need for this analysis.<sup>159</sup> Having so said, the Seventh Circuit seemingly implied that the “safe harbor” provision of the ADA and the McCarran-Ferguson Act are at odds with one another.

*C. The McCarran-Ferguson Act – Applicable to the ADA?*

The McCarran-Ferguson Act provides in pertinent part “no 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.”<sup>160</sup> In determining whether the Act relates to the business of insurance, a court must ask whether the ADA contains sufficient specific references to the insurance industry.<sup>161</sup> This question can be best answered by looking to the language of the statute itself. Section 501(c) explicitly provides that insurance underwriting practices shall not be used to evade the purposes of Title III.<sup>162</sup> The title and language of § 501(c), coupled with the reference to “insurance office”<sup>163</sup> in Title III, yields a statute that “specifically relates to the business of insurance” for the purposes of the McCarran-Ferguson Act.<sup>164</sup> Additionally, so as not to trigger the application of the McCarran-Ferguson Act, Title III must be proven not to “invalidate, impair, or supersede”<sup>165</sup> any state law.<sup>166</sup> According to the Seventh Circuit, to trigger the prohibition of the McCarran-Ferguson Act, the interpretation of the statute need only

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157. *Doe*, 179 F.3d at 558.

158. *Id.* at 565.

159. *See* 15 U.S.C. § 1012 et seq. (2000).

160. 15 U.S.C. § 1012(b).

161. *Doe*, 999 F. Supp. at 1195.

162. *Id.*

163. 42 U.S.C. § 12181(7)(f) (1994).

164. *Doe*, 999 F. Supp. at 1195 (*citing* 15 U.S.C. § 1012(b) (1994)).

165. 15 U.S.C. § 1012(b).

166. *Doe*, 999 F. Supp. at 1195.

“interfere with a State’s administrative regime.”<sup>167</sup>

The Second Circuit recently handed down an opinion reaching an opposite conclusion than that reached by the Seventh.<sup>168</sup> The Second Circuit court resolved that the McCarran-Ferguson Act does not bar the application of Title III to the insurance industry.<sup>169</sup> The court followed a four-step analysis articulated by the Supreme Court in *Barnett Bank v. Nelson*.<sup>170</sup> First, a reviewing court must determine that the statute in question relates to the insurance business.<sup>171</sup> Second, the statute must be deemed to “specifically” relate to the insurance business.<sup>172</sup> Third, it must be established whether the statute specifically relates to the “business of insurance”.<sup>173</sup> Fourth, a reviewing court must consider the statute in light of the McCarran-Ferguson Act’s purposes, placing emphasis on the fact that the Act was promulgated to “protect state [insurance] regulation primarily against inadvertent federal intrusion.”<sup>174</sup> Applying each step to the ADA, the Second Circuit concluded “the ADA clearly relates to the insurance business, insofar as Title III defines an ‘insurance office’ as a place of ‘public accommodation’, . . . and § 501(c), which is labeled ‘Insurance,’ subjects insurance underwriting to the regulatory scope of the ADA under specified circumstances.”<sup>175</sup> The court further concluded that decisions granting or denying insurance to disabled persons are sufficiently within the “business of insurance” to satisfy the third step of the *Barnett Bank* analysis.<sup>176</sup> Finally, the Second Circuit stated that the specific references to the insurance industry in the ADA, as stated and discussed above, are evidence that “any intrusion by the ADA on state insurance regulation was not ‘inadvertent.’”<sup>177</sup>

The *Barnett Bank* Court further explained that neither the McCarran-Ferguson Act’s language nor purpose requires that the federal statute in

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167. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563, *citing* *Humana Inc. v. Forsyth*, 119 S. Ct. 710, 717 (1999).

168. *See* *Pallozzi v. Allstate Ins. Co.*, 198 F.3d 28 (2nd Cir. 1999).

169. *Id.* at 35. Although the facts are distinguishable, the ruling with respect to the applicability of the McCarran-Ferguson Act would be applicable to a factual situation similar to *Doe*.

170. 517 U.S. 25 (1996).

171. *Id.* at 38.

172. *Id.*

173. *Id.* at 39.

174. *Id.*

175. *Pallozzi v. Allstate Ins. Co.*, 198 F.3d 28, 34 (2nd Cir. 1999).

176. *Id.* at 35.

177. *Id.* (*citing* *Barnett Bank*, 517 U.S. at 39).

question predominantly relate to insurance.<sup>178</sup> Conversely, the *Barnett* Court pointed out, “specific detailed references to the insurance industry in proposed legislation normally will achieve the McCarran-Ferguson Act’s objectives.”<sup>179</sup> According to the Supreme Court, Congress will call the proposed legislation to the attention of the interested parties, and subsequently will guarantee normally, should the proposal become law, that Congress will have focused upon its insurance-related effects.<sup>180</sup>

The majority opinion of the Seventh Circuit questionably concluded that if Title III were interpreted to include the practices of insurance companies, a state’s administrative regime would be disturbed.<sup>181</sup> Federal courts would then be charged with the task of determining whether caps on disabling conditions are actuarially sound and consistent with principles of state law. According to the court, this would essentially displace the authority given to state insurance commissioners.<sup>182</sup> The McCarran-Ferguson Act does not bar the application of the ADA to the insurance industry. The ADA can be judged to be sufficiently related to the business of insurance so as not to invoke the bar of the McCarran-Ferguson Act. The Seventh Circuit ultimately concluded Title III does not require a seller to alter his product to make it equally valuable to the disabled and to the non-disabled.<sup>183</sup> The majority opinion held that if the conclusion reached by the court is wrong, “the suit must fail anyway, because it is barred by the McCarran-Ferguson Act.”<sup>184</sup> Essentially, the Seventh Circuit reasoned that the suit would fail under any analysis it entertained.<sup>185</sup>

The court did offer Doe and Smith an alternative method of recovery. According to the panel, if the AIDS caps in Mutual of Omaha’s policies were not consistent with state law and sound actuarial practices, Doe and Smith could have obtained all the relief to which they were entitled from the state commissioners who regulate the insurance business.<sup>186</sup> The court even noted that Mutual of Omaha could be bound by its stipulation that it did not and could not show its AIDS caps were consistent with sound

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178. *Barnett Bank*, 517 U.S. at 41.

179. *Id.*

180. *Id.*

181. See *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563-64 (7th Cir. 1999).

182. *Id.*

183. *Id.* at 563.

184. *Id.*

185. See *id.* at 557.

186. *Id.* at 565.

principles, bona fide risk classifications, or state law.<sup>187</sup> The Seventh Circuit, however, adamantly stated that the regulation of the insurance industry does not properly lie within the province of the federal court system.<sup>188</sup>

#### CONCLUSION

In *Doe v. Mutual of Omaha* the Seventh Circuit committed reversible error. The court made an unfounded ruling on statutory interpretation inconsistent with the legislative intent of Congress,<sup>189</sup> the Department of Justice regulations,<sup>190</sup> the Technical Assistance Manual<sup>191</sup> and the *amicus curiae* brief.<sup>192</sup> Indeed, *Doe* is inconsistent with the very *raison d'être* of the ADA.<sup>193</sup> As case law demonstrates, the ADA is applicable to the content of insurance policies when the policy is issued to the holder directly by the insurance company, the place of public accommodation.<sup>194</sup> The proper interpretation of the ADA with respect to the insurance industry would be to allow the provisions of the anti-discrimination statute to apply to the industry as it applies to all other similarly situated entities. An insurance company would be permitted to invoke the protection of the "safe harbor" provision of the statute provided the company has acted within the reasonable confines set out by the statute. The ADA can be amply construed to be related to the business of insurance so as to clear the bar that would be invoked by the application of the McCarran-Ferguson Act. Finally, invoking the ADA does not frustrate any state law. Although the Seventh Circuit claims Title III need

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187. *Id.*

188. *Id.*

189. *See Doe v. Mutual of Omaha Ins. Co.*, 999 F. Supp. 1188, 1193 (N.D. Ill. 1998) (The legislative history of the ADA confirms the applicability of Title III to the substance of insurance policies); *see also* H.R. Rep. No.101-485, pt.2, at 136-37 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 419-20 (an insurance plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment).

190. 28 C.F.R. ch.1, pt. 36, App. B at 619 (1996).

191. *See* Americans with Disabilities Act: ADA Title III Technical Assistance Manual § III-3.11000 (Nov. 1993).

192. *Doe*, 999 F. Supp. at 1192.

193. *See generally*, 42 U.S.C. § 12101 et seq. (1994).

194. *See generally* *Parker v. Metropolitan Life Ins. Co.*, 999 F.3d 181 (6th Cir. 1996); *Leonard F. v. Israel Discount Bank of New York*, 967 F. Supp. 802 (S.D.N.Y. 1997); *Chabner v. United Mutual of Omaha Life Ins. Co.*, 994 F. Supp. 1185 (N.D. Cal. 1998); *World Ins. Co. v. Branch*, 966 F. Supp. 1203 (N.D. Ga. 1997).



only “interfere with a State’s administrative regime,” for the McCarran-Ferguson Act to be triggered; in fact the provision of the ADA must “invalidate, impair, or supersede” a state law. Congressional intent has been frustrated, the language of the statute is clear, and the threshold is high. While the Supreme Court has declined to review the case, counsel for Doe and Smith aptly stated “the Court did not give a green light to the practice, . . . in declining to review, the Justices merely indicated they are not ready to rule at this time.”<sup>195</sup>

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195. U.S. Supreme Court Declines to Hear HIV Insurance Caps Case, at <http://www.lambda.org> (last visited Feb. 8, 2000).